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Limiting Prisoner Disenfranchisement: the High Court Decision in *Roach v Electoral Commissioner*

Australia has, since 1902, had a consistent history of some form of prisoner disenfranchisement at the federal level.

*In August 2007, in *Roach v Electoral Commissioner* [2007] HCA 43, the High Court upheld a challenge to the validity of a 2006 amendment to the Commonwealth Electoral Act 1918 (Cth) ('**the Electoral Act**') which disqualified all prisoners serving a sentence of imprisonment from voting. In doing so, the High Court also held as valid the previous provision which denied the vote to prisoners serving sentences of three years or more.*

This Research Brief provides:

- *information on the relevant provisions of the Electoral Act, including the history of prisoner disenfranchisement in Australia and commentary on the invalid provision;*
- *recent statistical information on prisoners in Australia;*
- *in-depth analysis of the decision of the High Court in *Roach*;*
and
- *a discussion of prisoner disenfranchisement in other jurisdictions.*

Renee Gastaldon

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EXECUTIVE SUMMARY

Australia has, since 1902, had a consistent history of some form of prisoner disenfranchisement at the federal level.

In August 2007, in *Roach v Electoral Commissioner* [2007] HCA 43, the High Court upheld a challenge to the validity of a 2006 amendment to the *Commonwealth Electoral Act 1918* (Cth) ('**the Electoral Act**') which disqualified all prisoners serving a sentence of imprisonment from voting. In doing so, the High Court also held as valid the previous provision which denied the vote to prisoners serving sentences of three years or more.

Chief Justice Gleeson and Justices Gummow, Kirby and Crennan were in the majority. Justices Hayne and Heydon dissented.

This Research Brief provides:

- an outline of the provisions of the Electoral Act considered in *Roach* (**pages 2-3**), including:
 - a brief history of prisoner disenfranchisement in Australia (**page 3**);
 - information on other exclusions from voting under the Electoral Act (**pages 3-4**);
 - a selection of extracts from the parliamentary debate on the provision held invalid by the High Court, both for (**pages 4-6**) and against its introduction (**pages 6-9**); and
 - other discussion of the provision in the community, including by various academics (**pages 10-16**);
- recent statistical information on prisoners in Australia (**pages 16-17**); and
- detailed analysis of the High Court's decision in *Roach*, including:
 - information on the plaintiff (**pages 17-19**);
 - the basis of the plaintiff's challenge (**page 19**);
 - the decisions of the majority (**pages 21-26**) and minority judges (**pages 27-30**); and
 - a selection of commentary on the perceived consequences of the decision (**pages 30-34**); and
 - discussion of prisoner disenfranchisement in selected other jurisdictions, including Australian states and territories (**page 35**), leading international cases on prisoner voting rights (**pages 36-43**), and the position regarding prisoner voting in the United States of America (**pages 43-45**).

1 INTRODUCTION

In August 2007, in *Roach v Electoral Commissioner*,¹ the High Court of Australia upheld a challenge to the validity of a 2006 amendment to the *Commonwealth Electoral Act 1918 (Cth)* ('**the Electoral Act**') which disqualified all prisoners serving a sentence of imprisonment from voting. In doing so, the High Court also held as valid the previous provision which denied the vote to prisoners serving sentences of three years or more.

This Research Brief² provides:

- an outline of the provisions of the Electoral Act considered in *Roach*, including:
 - a brief history of prisoner disenfranchisement in Australia;
 - information on other exclusions from voting under the Electoral Act;
 - a selection of extracts from the parliamentary debate on the provision held invalid by the High Court, both for and against its introduction; and
 - other discussion of the provision in the community, including by various academics;
- recent statistical information on prisoners in Australia;
- detailed analysis of the High Court's decision in *Roach*, including:
 - information on the plaintiff;
 - the basis of the plaintiff's challenge;
 - the decisions of the majority and minority judges; and
 - a selection of commentary on the perceived consequences of the decision; and
- discussion of prisoner disenfranchisement in selected other jurisdictions, including Australian states and territories, leading international cases on prisoner voting rights, and the position regarding prisoner voting in the United States of America.

¹ *Roach v Electoral Commissioner* [2007] HCA 43, downloaded from <http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html> on 23 September 2008 ('*Roach*').

² Prisoner disenfranchisement has been considered in a publication of the Australian Parliamentary Library. See Australian Parliamentary Library (Jerome Davidson), 'Inside outcasts: prisoners and the right to vote in Australia', *Current Issues Brief*, No 12 of 2003-04, 24 May 2004, downloaded from <http://www.apl.gov.au/Library/pubs/CIB/2003-04/04cib12.pdf> on 8 October 2008.

2 RELEVANT PROVISIONS OF THE COMMONWEALTH ELECTORAL ACT 1918 (CTH)

2.1 BLANKET BAN ON ALL SENTENCED PRISONERS

The issue for determination by the High Court in *Roach* was the validity of an amendment to the Electoral Act by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) ('**amending Act**').

The relevant provision, section 93(8AA) of the Electoral Act, commenced on 22 June 2006 and stated:

A person who is serving a sentence of imprisonment for an offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any Senate election or House of Representative election.

In this Research Brief, the prohibition resulting from section 93(8AA) is referred to as the '**blanket ban**'.

As to who is 'serving a sentence of imprisonment', section 4(1A) of the Electoral Act provides:

[A] person is serving a sentence of imprisonment only if:

- (a) the person is in detention on a full-time basis for an offence against a law of the Commonwealth or a State or Territory; and*
- (b) that detention is attributable to the sentence of imprisonment concerned.*

When the Bill for the amending Act was introduced into the House of Representatives in December 2005,³ it was explained that the blanket ban would:

... amend the voting entitlement provisions so that all prisoners serving a sentence of full-time detention will not be entitled to vote but may remain on the roll or, if not enrolled, apply for enrolment. Those serving alternative sentences such as periodic or home detention, as well as those serving a non-custodial sentence or released on parole, will still be eligible to enrol and vote...⁴

³ Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 (Cth). Note that the Bill is referred to in House of Representatives Hansard as a 2005 Bill and in Senate Hansard as a 2006 Bill.

⁴ Hon Dr S Stone MP, Parliamentary Secretary to the Minister for Finance and Administration, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 (Cth), Second Reading Speech, *Parliamentary Debates*, House of Representatives, 8 December 2005, pp 19-22, at p 21.

Accordingly, the blanket ban did not extend to ‘unsentenced’ prisoners such as those in custody while awaiting the outcome of their trial, those convicted but awaiting sentence, or those awaiting deportation.

2.2 PREVIOUS BAN ON PRISONERS SENTENCED TO AT LEAST THREE YEARS

Prior to the passage of the amending Act, section 93(8)(b) of the Electoral Act stated:

A person who is serving a sentence of 3 years or longer for an offence against the law of the Commonwealth or of a State or Territory is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election.

This Research Brief refers to the earlier prohibition as the ‘**three year ban**’.

2.3 HISTORY OF PRISONER DISENFRANCHISEMENT IN AUSTRALIA

Since 1902, federal legislation has always provided some restriction on voting by prisoners. A brief summary of this history is as follows:⁵

- | | |
|-----------------|---|
| • 1902 to 1983- | convicted persons under sentence or subject to be sentenced for an offence punishable for one year or longer. |
| • 1983 to 1995- | convicted persons under sentence or subject to be sentenced for an offence punishable for five years or longer. |
| • 1995 to 2004- | persons serving a sentence of five years or longer. |
| • 2004 to 2006- | persons serving a sentence of three years or longer. |
| • 2006- | persons serving any sentence of imprisonment against the law of the Commonwealth or of a State or Territory. |

2.4 OTHER EXCLUSIONS FROM VOTING UNDER THE ELECTORAL ACT

Section 93(8) of the Electoral Act also excludes the following persons from voting at a federal election:

A person who:

⁵ This summary is prepared from information in the judgment of Chief Justice Gleeson in *Roach v Electoral Commissioner*, para 9.

(a) *by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting; or*

...

(c) *has been convicted of treason or treachery and has not been pardoned; is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election.*

2.5 PARLIAMENTARY DEBATE ON THE PROPOSED BLANKET BAN

Reproduced below is a selection of extracts from the parliamentary debate on the Bill introducing the proposed blanket ban. The selection is divided between those parliamentarians supporting the proposed blanket ban, and those opposed to it.⁶

2.5.1 Arguments supporting the proposed blanket ban

Mr Michael Johnson MP (Qld, Lib)⁷

It is the view of [this] government that people who commit serious offences against society, against the community, should forfeit their right to vote; that if their actions, their conduct and their crime against their fellow Australians or against their society warrant a prison term then it should follow that their entitlement to vote should not continue. I think most Australians would agree with the government on this point. I think many Australians would feel astounded to think that someone who has committed a crime ... and has forfeited their freedom ... would still have the same voting entitlements as other, law-abiding citizens.

Mr Michael Keenan MP (WA, Lib)⁸

If a court of law has judged that you have wronged society in such a way that you are to be denied your freedom then I certainly think it follows that you should be denied your right to participate in the democratic process. I do not doubt that the majority of Australians would agree that it is high time that people who have lost their freedom also lose the right to participate in our democracy. When you have committed an offence that is serious enough to be punishable by imprisonment then surely your views on the governance of the country should no longer be required for the period that you are incarcerated.

⁶ The parliamentarians quoted in this section are referred to by their title at the time of the debate. Quotes are listed according to whether the speaker supported or opposed the proposed blanket ban, and the order in which the debate took place.

⁷ Mr M Johnson MP, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 (Cth), *Parliamentary Debates*, House of Representatives, 30 March 2006, pp 51-55, at pp 54-55.

⁸ Mr M Keenan MP, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 (Cth), *Parliamentary Debates*, House of Representatives, 10 May 2006, pp 8-13, at pp 12-13.

Sen Brett Mason (Qld, Lib)⁹

The government believes [the three year ban] sends mixed signals to prisoners and would-be offenders. Imprisonment is intended to deny offenders a range of liberties and entitlements in order to provide a disincentive to reoffend. Permitting some prisoners to vote undermines that disincentive and is contradictory. Removing the entitlement of all prisoners to vote sends a clear message that breaking the law and reoffending come at a high price for those who do.

Concerns that this measure will be detrimental to prisoner rehabilitation appear to me to be emotive and rather overblown. This measure in no way affects the ability of prisoners to access the rehabilitation programs that they currently enjoy while incarcerated.

Sen the Hon Eric Abetz (Tas, Lib)¹⁰

There are those who are now suggesting that everybody should be entitled to vote, including prisoners, and that this is somehow a fundamental right. It has long been the case in Australia, especially in state jurisdictions, that, if you are serving a period of imprisonment, you do not get the vote. We as a government happen to believe that if through the judicial system you have been sentenced to a period of incarceration – in other words, you have been removed from society by society through the judicial system – then, during that period of your removal from society, you forfeit the right to vote. ...

The concern of citizens is their removal from society by the judicial system because they have so offended against the rules and laws of our society that they are deemed to be unworthy to walk the streets. I know some academic said that I put it deliciously simply by saying that chances are that, if you are unfit to walk the streets, you are unfit to vote. I suppose the reason they say that is deliciously simple is because there is no argument in principle against that proposition. If you are removed from society then chances are that you should not be entitled to vote.

Sen the Hon Eric Abetz (Tas, Lib)¹¹

When people are sentenced to a period of imprisonment their liberty is taken away from them You can quite properly assert that they do not stop being citizens whilst they are in prison. ... People that are not allowed to vote because of being under the age of 18 and those that are seen as having a mental illness or deficiency do not lose their right to be citizens either, but they do not have a right to vote. In the prison system the right to visit and talk to your family as much and as often as you want is taken away from you. In fairness, what do you think is more important: that you have proper family relationships or the right to vote?

... The number of telephone calls you are allowed to make as a prisoner – limited. The number of letters you can write, the clothing that you wear, things that you

⁹ Sen B Mason, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 (Cth), *Parliamentary Debates*, Senate, 16 June 2006, pp 14-18, at p 17.

¹⁰ Sen the Hon E Abetz, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 (Cth), *Parliamentary Debates*, Senate, 19 June 2006, pp 87-91, at p 89.

¹¹ Sen the Hon E Abetz, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006, *Parliamentary Debates (In Committee)*, Senate, 19 June 2006, pp 97-99, at pp 97-98.

would normally expect – all restricted. ...

I fully agree ... that as a society we do need to be forgiving and also accepting of rehabilitation. ... I do not subscribe to [the position in some states of the United States whereby you lose your right to vote if you have ever served any period of imprisonment] But during the period in which you are in jail I think that society has a right to expect that your removal from society will also remove you from casting a vote.

2.5.2 Arguments opposing the proposed blanket ban

Mr Alan Griffin MP (Vic, ALP)¹²

[Labor believes] the current arrangement whereby prisoners serving a full-time sentence of three years or less retain the right to vote in federal elections is adequate, for the simple reason that, as these people may well re-enter society during a government's term, they should have their democratic say in who will be in government at that time.

Mr Warren Snowdon MP (NT, ALP)¹³

This bill will be particularly discriminatory to Indigenous people in incarceration.

...

Regardless of what ... people have been sent to prison for, they are being targeted by this legislation. They will be denied the opportunity to participate in the democratic processes. This, in my view, is an absolute denial of their fundamental rights as Australians and in breach of our obligations under [article 25 of the International Covenant on Civil and Political Rights].¹⁴

¹² Mr A Griffin MP, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 (Cth), *Parliamentary Debates*, House of Representatives, 29 March 2006, pp 137-146, at pp 142-143.

¹³ Mr W Snowdon MP, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 (Cth), *Parliamentary Debates*, House of Representatives, 30 March 2006, pp 46-51, at pp 50-51.

¹⁴ For the wording of article 25 of the *International Covenant on Civil and Political Rights* see http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (downloaded on 10 October 2008).

Ms Kate Ellis MP (SA, ALP)¹⁵

It is clear ... that these provisions will exclude another section of the Australian community There is, of course, an argument that prisoners, upon committing a crime, have already made the decision to exclude themselves from our community and therefore the right to participate in our democracy.

I think that it is important for this House to also consider the best interests of the community in this matter, though. Our criminal justice system aims to punish criminals and to rehabilitate them. One must question whether further excluding prisoners, removing them even further from the society that they are soon to rejoin, will in fact aid their rehabilitation. The prisoners who are disenfranchised by this legislation are the very prisoners who will be rejoining our communities in less than three years time. At a time when we ideally should be encouraging prisoners upon their release to become active, community minded individuals who are keen to make amends for their crimes, is it really wise to be cutting them off further from society and ensuring that they cannot play any role in our civic responsibilities?

In addition to these philosophical arguments there are some strong legal points that must be considered in this debate. [Reference was made to some of the cases considered in part 5 of this Research Brief, and to article 25 of the International Covenant on Civil and Political Rights.] ...

... This parliament must also be mindful of the Australian Constitution, which states that members of the Australian parliament will be 'chosen by the people'.

Ms Sharon Grierson MP (NSW, ALP)¹⁶

I would have thought that [the current three year ban] was enough punishment. ... While prisoners are obviously being punished for their crimes with a loss of liberty, should we really be punishing them by removing their democratic rights completely? Even if you are in prison, you are still part of our society; you are part of the system. ... Basic principles of human rights would suggest that you should be able to help determine how that system is run. ... Rehabilitation should always be the goal of imprisonment. We do not take away the citizenship of people when we imprison them. We should not be taking away their right to vote. ...

[The statistics for prisoners in 2005 paint] a picture of people who are already disadvantaged, who have lost their liberty through imprisonment, who will now be further disenfranchised

We should be including, not excluding, as many people as we can in the democratic process.

¹⁵ Ms K Ellis MP, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 (Cth), *Parliamentary Debates*, House of Representatives, 10 May 2006, pp 46-51, at pp 49-50.

¹⁶ Ms S Grierson MP, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 (Cth), *Parliamentary Debates*, House of Representatives, 10 May 2006, pp 51-56, at p 55.

Sen Andrew Murray (WA, Dem)¹⁷

[The Democrats] continue to hold our position that the Electoral Act should be amended to give all those imprisoned – except those convicted of treason or those who are of unsound mind – the right to vote. It is an essential right of citizenship. ... Although prisoners are deprived of their liberty while they serve their time, they do remain citizens. To disenfranchise them by removing their citizenship rights is to add an extra judicial penalty.

To complicate this further, there is no uniformity amongst the states, or between the states and the Commonwealth, as to what constitutes an offence punishable by imprisonment. ... On this ground alone, this provision is on very shaky ground and therefore untenable.

Sen Anne McEwen (SA, ALP)¹⁸

Regardless of what people have been sent to prison for, they are targeted by this legislation. ... What class of Australians will be the next to be disenfranchised ...? Will it be whomsoever the government of the day deems to be unworthy?

Sen Kerry Nettle (NSW, Greens)¹⁹

The whole basis of respect for the rule of law rests on the participation of citizens through the democratic selection of their representatives who then make the law that they are asked to abide by. How can prisoners be subjected to this feudal concept of 'civil death'? How can they be expected to have respect for the law if they are banned from participating in its formation? How does this bill reconcile with the importance of rehabilitation that is at the heart of any enlightened prison system? ...

Surely losing the right to vote would not be the first thing in somebody's mind that would stop them if they intended to commit a crime. ... With the length of sentences increased at every election, people's freedoms removed and people being removed from their families, their friends and their jobs and locked up often for 20 hours or more a day in a cell, surely the right to vote is not at the front of the mind of a would-be law breaker. ...

¹⁷ Sen A Murray, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 (Cth), *Parliamentary Debates*, Senate, 16 June 2006, pp 5-11, at p 9.

¹⁸ Sen A McEwen, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 (Cth), *Parliamentary Debates*, Senate, 16 June 2006, pp 41-46, at p 44.

¹⁹ Sen K Nettle, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 (Cth), *Parliamentary Debates*, Senate, 16 June 2006, pp 87-92, at pp 90-91.

Sen Andrew Bartlett (Qld, Dem)²⁰

However simple the measure, if it is saying that it is appropriate to disenfranchise people because they are in jail, what is to say that the next step will not be to disenfranchise people because they were once in jail and so they are not of proper character and should lose their right to vote? Where does it stop once we accept that some people, who are citizens, should nonetheless have their right to vote removed from them? It is a very dangerous precedent that is being extended substantially in this legislation

Sen Andrew Murray (WA, Dem)²¹

We oppose the government's intention to repeal the existing voting rights of prisoners on civil and human rights grounds and on basic principles of justice. We are informed by our reading of and our support for the International Covenant on Civil and Political Rights, ... by jurisprudence in other parts of the world and by our view as to how the process of judicial punishment should operate.

... [W]e Democrats are of the opinion that the removal of prisoner voting rights is an extrajudicial penalty and, over and above that, is an abuse of an inalienable birthright which belongs to every citizen – and that is the fundamental right to vote. We regard terms of imprisonment as having a couple of main planks to them. The first plank is of course that of punishment The second purpose ... is to encourage rehabilitation. ... The third aspect, which in polite circles people tend to conceal a little, is the aspect of vengeance. It is society taking judicial vengeance on someone for hurting or harming one of their members.

Taking liberty away from a person is a major punishment, but we have not said in this country that if you are imprisoned you become a noncitizen or an alien. ...

... It is a bit difficult to automatically assume that everyone in prison is an evil rogue worthy of the very worst treatment. Whilst evil does find its expression in prisoners, many prisoners ... are simply people who made bad mistakes. ...

This provision ... not only removes a fundamental right recognised under article 25 of the International Covenant on Civil and Political Rights but also is inconsistent with recognition by influential courts overseas that prisoners should retain their right to vote. Even on constitutional grounds there is also an argument against prisoner disenfranchisement. Constitutionally the requirement is that the government be elected by the people. The only problem with that argument is that I cannot see prisoners banding together to argue that case before the High Court. ...

... [W]e believe that if you want the right to vote to be a question attached to imprisonment then that removal should be a judicial penalty. It should be made by a judge and it should not be imposed as a general provision in law. ...

...[T]his is in a sense a sentence to civic death

²⁰ Sen A Bartlett, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 (Qld), *Parliamentary Debates*, Senate, 19 June 2006, pp 19-24, at p 22.

²¹ Sen A Murray, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 (Cth), *Parliamentary Debates (In Committee)*, Senate, 19 June 2006, pp 92-95, at pp 93-94.

2.6 OTHER DISCUSSION ON THE BLANKET BAN

A selection of other discussion on the blanket ban, prior to the High Court's decision in *Roach*, is set out below. It includes:

- comment by various academics;
- comment by various community groups and an independent statutory organisation; and
- the Commonwealth's submissions to the High Court in *Roach* regarding the reasons for the blanket ban.

2.6.1 Academic comment

*Journal article by Daniel Guttman*²²

The following extracts are drawn from a comprehensive article by Daniel Guttman on the blanket ban and the impending challenge to its validity in the High Court:²³

*It is difficult to discern what the Commonwealth's purpose for the enactment of the blanket ban on prisoner voting was. Essentially, the justification ... seems to boil down to the argument that those who commit offences do not deserve the right to vote.*²⁴

...

[Senator Abetz, in his debate on the bill] seems to be relying on the 'social contract' argument that 'those who do not obey the laws of the land are barred from receiving the benefits of society including the right to vote'. However, there is no explanation

²² Daniel Guttman, 'Before the High Court: *Roach v Commonwealth*: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?', *Sydney Law Review*, vol 29(2), June 2007, pp 297-319, downloaded from http://www.law.usyd.edu.au/slr/slr29_2/Guttman.pdf on 9 October 2008. Daniel Guttman has been counsel at the Constitutional Law Branch of the Ministry of the Attorney General of Ontario in Toronto, Ontario, Canada.

²³ The article considers a number of issues: (1) whether a freedom entitling all citizens to vote, subject to reasonable limitations, can be implied from the text and structure of the Constitution; (2) whether legislation that removes the ability of some citizens to vote burdens the implied right to freedom of political communication already recognised by the High Court; and (3) whether the burden on the implied freedom of political communication or any implied freedom to vote is reasonably 'appropriated and adapted' to a legitimate government aim. The article also discusses prisoner voting rights in other jurisdictions in the context of leading cases from Canada, South Africa and the European Court of Human Rights. These cases are discussed in part 5 of this Research Brief.

²⁴ Daniel Guttman, 'Before the High Court: *Roach v Commonwealth*: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?', pp 316-317.

why this should be the case and Senator Abetz does not address the philosophical frailties of this position. His position ignores the fact that modern constitutional systems are not based on a social contract but on the fundamental human rights concept that all people, including prisoners, have rights simply by virtue of being human. ... Moreover, 'prisoners retain the link they have with society by serving their sentences. To disregard their right to vote is a fundamental breach of the social contract'.

Finally, Senator Abetz does not comment on the relationship between the blanket ban and the rehabilitation of an offender If the goal of the legislation is ... to prevent those who are not morally entitled to vote from voting, the means employed by s 93(8AA) seem arbitrary at best.²⁵

...

... [T]here is no convincing reason in my view, beyond imposing additional punishment, to remove the vote from convicted prisoners. This additional sanction is not in keeping with the idea that the punishment of imprisonment is limited to the deprivation of liberty and therefore prisoners do not forfeit their other fundamental rights save in so far as this is necessitated by, for example, considerations of security. Prisoners, as all citizens, have an interest in political issues and should be entitled to express their views. The Commonwealth prisoner ban appears to be simply concerned with moral judgement. It is unacceptable for the right to vote to be made subject to the moral judgments imposed by persons who have been elected; in other words, it is unacceptable for the elected to choose the electorate.²⁶

...

[T]here is a strong argument that [the blanket ban] is not proportionate. ... [T]he effect of the ban is arbitrary and not tailored to individual cases.²⁷

Newspaper comment by George Williams²⁸

The change goes against the trend over the past century to widen the federal franchise.

It is a step backwards now to narrow the franchise. It is also inconsistent with the recognition in other nations such as Canada and in Europe that prisoners should be

²⁵ Daniel Guttman, 'Before the High Court: *Roach v Commonwealth*: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?', pp 317-318.

²⁶ Daniel Guttman, 'Before the High Court: *Roach v Commonwealth*: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?', p 318.

²⁷ Daniel Guttman, 'Before the High Court: *Roach v Commonwealth*: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?', p 318.

²⁸ George Williams, 'Reform rolling in the wrong direction', *Courier Mail*, 21 June 2006, p 31. George Williams is the Anthony Mason Professor and was the foundation director of the Gilbert + Tobin Centre of Public Law at the University of New South Wales.

able to vote. As a matter of principle, all citizens ought to be able to vote in federal elections. This is part of what it means to be a citizen in a free, democratic country.

In any event, denying the vote to prisoners may be legally invalid. The Constitution says that the House of Representatives and the Senate must be “directly chosen by the people”.

If prisoners are part of the “people”, their right to vote may be guaranteed, something that could still be tested in the High Court.

Newspaper comment by Colin Hughes and Brian Costar²⁹

Contrary to popular opinion, neither the right to enrol nor the right to vote are enshrined in the Australian constitution, which gives Parliament wide discretion over how its members are to be elected. Since Australian citizens have limited access to judicial protection in electoral matters, great care should be exercised before anyone is deprived of their vote by the Parliament. ...

Denying the vote to prisoners runs counter to sensible rehabilitative penology. It is also highly discriminatory since the prison population is skewed: 94 per cent are male, 56 per cent are aged between 20 and 35 and the rate of Aboriginal imprisonment is 15 times the national average.

The enthusiasm for disenfranchising prisoners may derive from practice in the United States, which is notorious for the practice. Currently nearly 5 million convicted felons are denied the vote (some of them forever), which is more than enough to swing elections. ...

*[The article then referred to an impending decision of the European Court of Human Rights in *Hirst v United Kingdom (No 2)* and a decision of the Canadian Supreme Court in *Sauvé v Canada (Chief Electoral Officer)* which are discussed in part 5 of this Research Brief]. Yet Australia is on the verge of enacting similar, discriminatory legislation.*

An inclusive franchise is basic for modern democracy.

Newspaper comment by Graeme Orr³⁰

As it was making it harder to enrol, the Government also erased the federal voting rights of prisoners.

²⁹ Colin Hughes and Brian Costar, ‘Fiddling the ballot books’, *Age*, 3 November 2005. Colin Hughes is Emeritus Professor, School of Political Science and International Studies at The University of Queensland, and was the Australian Electoral Commissioner from 1984 to 1989. Brian Costar is Professor of Victorian State Parliamentary Democracy at Swinburne University of Technology, Victoria.

³⁰ Graeme Orr, ‘Roll up for your right’, *Courier Mail*, 26 July 2007, p 33. Graeme Orr is an Associate Professor in electoral law at the TC Beirne School of Law, University of Queensland.

This was not unpopular. But disenfranchisement needs to be based on compelling principle.

The High Court will soon rule on the matter, in a case brought by Vicki Roach. Roach, an Aboriginal woman, is serving six years. Having completed a masters degree, she obviously has the capacity to vote. Almost certainly, a conservative High Court will defer to Parliament.

Just as likely, the Court will work contortions to avoid saying the vote is a mere privilege which Parliament can remove at will.

The Constitution does say Parliament must be "chosen by the people". The Court may well reason that while women and racial minorities cannot be denied the vote (as they once were) prisoners have temporarily excluded themselves from "the people".

Other comment by Graeme Orr³¹

Today there remains one significant group of citizens who are in large part excluded from voting, though under no intellectual or physical disability. They are persons under sentence of imprisonment. ...

As a matter of ancient history, conviction of a serious wrong often carried loss of communal status beyond any physical or pecuniary punishment. Roman law, for instance, applied the concept of infamy to deny both rights of suffrage and honour (eg to hold office).

But as incarceration took on the primary means of punishment, crude notions of 'civil death', for example property forfeiture on a felony conviction, were whittled away. Deprivation of liberty, through imprisonment, is meant to serve inter-related goals: deterrence through punishment by banishment and rehabilitation through control and re-education. Since the recording of the conviction itself is meant to mark the social stigma of sentencing, questions arise as to why a secondary legal consequence, such as disenfranchisement, is justified.

...

Today, supporters of disenfranchisement tend to argue that criminals have deliberately broken 'the social contract', such that the majority can legitimately disenfranchise them as a symbolic measure. ...

³¹ Graeme Orr, 'Ghosts of the Civil Dead: Prisoner Disenfranchisement', *Democratic Audit of Australia Audit Paper*, May 2003, downloaded from http://democratic.audit.anu.edu.au/papers/20030509_orr.pdf on 8 October 2008. This comment was made prior to the blanket ban, when prisoners serving a sentence of five years or more were disenfranchised.

2.6.2 Comment by community groups and an independent statutory organisation

Justice Action group

The *Justice Action* group, a community-based organisation comprising criminal justice and prison reform activists,³² has conducted a campaign on prisoner voting rights. In an information flyer³³ regarding the blanket ban, the group makes the following statements:

There is no evidence that disenfranchising prisoners deters crime or assists in rehabilitation. It is more likely to increase alienation and disengagement from mainstream society and any sense of civic responsibility.

...

Removing prisoners' political voice means politicians can now officially ignore prisons and prisoners. They have sentenced them to civic death.

Australian Lawyers for Human Rights

In a February 2006 media release,³⁴ Australian Lawyers for Human Rights said:

No evidence has been put forward that removing the right to vote will ... reduce crime. Exercising that democratic right is probably the last thing on a criminal's mind.

However it is important for the reformation and social rehabilitation of a prisoner that they be taught the value of democratic rights and social responsibility.

These changes to the Electoral Act are likely to isolate prisoners, and will undermine respect for law and democracy.

Human Rights Law Resource Centre

Philip Lynch, director of the Human Rights Law Resource Centre,³⁵ was quoted as saying:³⁶

³² See <http://www.justiceaction.org.au>, 'About JA'.

³³ <http://www.justiceaction.org.au/images/stories/CmpgnPDFs/prisonersvote.pdf>, downloaded on 26 September 2008.

³⁴ Australian Lawyers for Human Rights, 'Australian government removes the right to vote of Australian prisoners', *Media Release*, 8 February 2006, downloaded from <http://www.alhr.asn.au/html/main/documents/Pressrelease-Prisonersrighttovote.pdf> on 9 October 2008.

³⁵ The role of the Human Rights Law Resource Centre in *Roach* is mentioned in part 4.1 of this Research Brief.

³⁶ ABC Online, 'Prisoners call for voting rights', *Transcript of PM program*, 11 June 2007.

Clearly prisoners, as a result of their incarceration, lose certain rights and freedoms, and that's appropriate.

What is a fundamental principle of human rights law, however, and also a fundamental principle of commonsense, is that prisoners shouldn't be subject to deprivations of freedom of liberty beyond those which are necessarily connected with the deprivation of liberty itself.

One very good commonsensical reason for that is that the overwhelming majority of prisoners ... will at some stage re-enter the community. Most people aren't serving life terms, and it's absolutely critical, therefore, that policies and practices pertaining to prisons and prisoners be directed predominantly towards rehabilitation and promoting social reintegration, and not to excluding people from the very society into which they're expected to enter, participate and contribute.

Australian Human Rights Commission

In its March 2006 submission to the Senate Finance and Public Administration Committee regarding the proposed blanket ban,³⁷ the Australian Human Rights Commission³⁸ stated:

There is no distinction between prisoners on the basis of either the type of offence leading to imprisonment, nor the length of sentence imposed. Those serving alternative sentences such as periodic or home detention, as well as those serving a non-custodial sentence or released on parole, will still be eligible to enrol and vote.

...

The Commission is concerned that neither the Explanatory Memorandum nor the Second Reading Speech contains any explanation of the purpose of the proposed ban on the right to vote for all those serving full-time custodial sentences on the day an election writ is issued. It is therefore not possible to conclude that there is a legitimate aim to this aspect of the Bill sufficient to justify the restrictions on political participation.

Furthermore, the Commission is of the view that this aspect of the Bill will breach article 25 of the ICCPR because it will be disproportionate to any legitimate aim and arbitrary in its application.

...

The Commission is also concerned that the provisions may be discriminatory in their application to Indigenous people, people with a mental illness and people with intellectual disability

³⁷ Australian Human Rights Commission, *Submission to the Senate Finance and Public Administration Committee regarding the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005*, 9 March 2006, downloaded from <http://www.humanrights.gov.au/legal/submissions/electoral20060309.html> on 9 October 2008.

³⁸ Previously known as the Human Rights and Equal Opportunity Commission.

2.6.3 The Commonwealth's submissions in *Roach*

The Commonwealth's submissions in *Roach* regarding reasons for the introduction of the blanket ban were to:

- *support civic responsibility by preventing persons who have broken the social compact by committing a serious breach of a law of the Commonwealth or a State or Territory from voting in a federal election or referendum;*
- *support respect for, and obedience to, the law ...;*
- *support an important aspect of representative democracy, namely acceptance of, respect for and obedience to the laws enacted by Australia's elected representative institutions ...;*
- *encourage recognition that the rights and obligations of community participation are correlative;*
- *support the integrity of the electoral system by excluding from voting ... persons who by reason of their full-time detention, are less able to participate in political communications and political matters.*³⁹

3 STATISTICS ON PRISONERS IN AUSTRALIA

A publication of the Australian Bureau of Statistics, *4517.0 – Prisoners in Australia*,⁴⁰ provides the following snapshot on prisoners in Australian prisons as at 30 June 2007:

- there were 27,224 prisoners, sentenced and unsentenced;⁴¹
- unsentenced prisoners comprised 22% (6,096) of the prison population;
- 7% (1,984) of prisoners were female;
- the imprisonment rate was 169 persons per 100,000 of the adult population, representing 24 prisoners per 100,000 of the adult female population and 320 prisoners per 100,000 of the adult male population;
- 24% (6,630) of prisoners were Indigenous. The age standardised imprisonment rate for Indigenous people was 1,787 prisoners per 1,000 of the adult

³⁹ David Brown, 'The disenfranchisement of prisoners – *Roach v Electoral Commissioner & Anor* – modernity and feudalism', *Alternative Law Journal*, vol 32(3), September 2007, pp 132-137, at p 136.

⁴⁰ Australian Bureau of Statistics, *4517.0 - Prisoners in Australia, 2007*, downloaded from [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/2BA146126F0385C8CA2573AF0014C036/\\$File/45170_2007.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/2BA146126F0385C8CA2573AF0014C036/$File/45170_2007.pdf) on 1 October 2008.

⁴¹ Unsentenced prisoners include those in custody who are unconvicted but awaiting the outcome of their trial, convicted but awaiting sentence, or awaiting deportation from Australia.

Indigenous population, with Indigenous people being 13 times more likely than non-Indigenous people to be in prison;

- the median age of prisoners was 33 years, and was the same for males and females. Just under 70% of prisoners were aged between 20 and 39 years, with the highest proportion of non-Indigenous prisoners being aged 25 to 29 years (19%) and the highest proportion of Indigenous prisoners being aged 20 to 24 years (22%);
- 57% of prisoners had served a sentence in an adult prison before their current imprisonment;
- 79% of prisoners were born in Australia;
- the median aggregate sentence length⁴² for all prisoners was three years, excluding those with indeterminate, life term and periodic detention sentences (two years for Indigenous prisoners and three and a half years for non-Indigenous prisoners);
- the most prevalent offences/charges for prisoners, either sentenced or unsentenced, were: acts intended to cause injury (19%), unlawful entry with intent (12%), sexual assault (11%), homicide (10%), illicit drug offences (10%) and robbery and extortion (9%);
- of sentenced prisoners, 5% (1,045) were serving a life term or other indeterminate sentence. Of the remaining sentenced prisoners, 23% had an aggregate sentence length of two to less than five years, 21% had an aggregate sentence length of five to less than ten years and more than 34% (7,276) had an aggregate sentence length of less than two years. Periodic detention accounted for 4% of all sentenced prisoners.

The final point above, regarding the proportions of prisoners serving various aggregate sentence lengths, provides valuable information about the numbers of prisoners who would be affected under differing schemes for the disenfranchisement of prisoners according to the length of their sentence.

4 ROACH v ELECTORAL COMMISSIONER

4.1 THE PLAINTIFF

The plaintiff, Vickie Lee Roach, an Indigenous Victorian prisoner in her late 40s, was serving a sentence of six years' imprisonment following her conviction in 2004 for various robbery and driving-related offences under the *Crimes Act 1958*

⁴² 'Aggregate sentence' is defined to mean the longest period that the convicted prisoner may be detained for the current sentenced offences in the current period.

(Vic). At the time of the High Court's decision in late August 2007, Ms Roach had completed a master's degree in professional writing and was studying for a PhD in creative writing.⁴³

The effect of the blanket ban was that Ms Roach was prohibited from voting at any federal election while serving a term of imprisonment.

Ms Roach challenged the blanket ban, arguing that constraints derived from the *Commonwealth Constitution* ('**Constitution**') rendered it invalid.

It was reported that Ms Roach "was not chosen by activists to be a figurehead for the push [to challenge the validity of the blanket ban] but initiated it herself". Her solicitor was quoted as saying "she chose us rather than us choosing her. Vickie came to us through the prisoner advocacy networks as a woman with an interest in and commitment to human rights and freedoms and, in particular, her rights as a prisoner".⁴⁴

Proceedings were commenced in the High Court seeking a declaration that the blanket ban was invalid.

The case was run through the Victorian Human Rights Law Resource Centre, with assistance from a team of lawyers who acted pro-bono.

At the time of her challenge, the plaintiff was quoted as saying:

For most of us, re-entry to society will come sooner rather than later. ... Excluding us from the democratic process while we are in prison, however short our stay might be, implies we have forfeited our right to political participation, not just for the duration of our term of imprisonment, but for however long it might be until any subsequent election. I believe this serves only to further alienate us from society and ensures that the exiting prisoner feels no connection, commitment, or loyalty to his or her community, and may therefore not feel bound to respect its laws or social mores.

If we exclude prisoners from society by taking away their basic right to political communication, and condemn them as undesirables, how many other sections of society could become similarly marginalised? Any how many other rights could then be eroded on the same precept?

As an Indigenous woman and a survivor of the stolen generation, I also believe the issue of voting rights is especially important to the Aboriginal community. ... [W]ith

⁴³ For more information on the plaintiff see, for example, Karen Kissane, 'Former delinquent takes on Government and wins', *Age*, 31 August 2007. A detailed discussion of the plaintiff's criminal history appears in the decision of the Victorian Court of Appeal in *R v Roach* [2005] VSCA 162, downloaded from <http://www.austlii.edu.au/au/cases/vic/VSCA/2005/162.html>, on 1 October 2008.

⁴⁴ Karen Kissane, 'Former delinquent takes on Government and wins'.

*those of us in prison being a large proportion of our total number, taking away our right to vote effectively silences yet again the political voice of Aboriginal people. ... Who cares if prisoners have the right to vote? We all should.*⁴⁵

4.2 BASIS OF THE CHALLENGE

The plaintiff challenged the validity of the blanket ban on the grounds that it was:

- contrary to sections 7 and 24 of the Constitution, which require the House of Representatives and the Senate to be ‘directly chosen by the people’ (that is, the blanket ban was inconsistent with the Constitutional system of representative government;
- beyond the legislative powers of the Commonwealth conferred by sections 51(xxxvi) and 30 of the Constitution;
- incompatible with chapter III of the Constitution as it amounted to an additional punishment on prisoners; and
- contrary to the implied freedoms of political communication and political participation.

The High Court made a finding in relation to the first ground listed above. Consequently, it was unnecessary for it to make a finding in respect of the other grounds.

Relevant extracts of sections 7 and 24 of the Constitution are reproduced below.

Section 7 The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate (emphasis added).

Section 24 Constitution of the House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators (emphasis added).

⁴⁵ ABC, ‘Should prisoners be allowed to vote?’, *Transcript of the ‘Law Report’ on Radio National*, 12 June 2007, downloaded from <http://www.abc.net.au/rn/lawreport/stories/2007/1945622.htm> on 1 October 2008. For comments later made by the plaintiff, in March 2008 after the High Court’s decision, see Vickie Roach, ‘Judge not – lest ye be judged’, *Alternative Law Journal*, 33(1), March 2008, pp 2-4.

4.3 SUMMARY OF THE DECISION

By a 4:2 majority, the High Court upheld the plaintiff's challenge to the validity of the blanket ban.

The majority judges were Chief Justice Gleeson and Justices Gummow, Kirby and Crennan.⁴⁶ Justices Hayne and Heydon dissented.⁴⁷

4.3.1 Majority judges

The majority held that sections 7 and 24 of the Constitution were a constitutional protection of the right to vote that could only be limited for a 'substantial reason'. Any limitation had to be 'appropriate and adapted' (or 'proportionate') to the reason.

The majority judges decided that the blanket ban was invalid as it was based on a proposition that simply serving a sentence of imprisonment identified serious criminal conduct warranting disenfranchisement, without any regard being had to the nature of the offence committed or the length of the sentence. Reference was made to short-term prisoners, non-custodial sentencing options and the circumstances preventing some prisoners from undertaking a non-custodial sentence.

The disenfranchisement of prisoners serving sentences of at least three years, which applied prior to the introduction of the blanket ban, was held to be valid.

4.3.2 Dissenting judges

The dissenting judges upheld the blanket ban as valid on the basis of section 30 of the Constitution, which states:

Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State ... (emphasis added).

The dissenting judges considered that section 30 provided the Parliament with broad power to determine the franchise upon which it was elected, and accordingly the words 'directly chosen by the people' in sections 7 and 24 of the Constitution were words of generality only, not universality.

⁴⁶ Justices Gummow, Kirby and Crennan delivered a joint judgment.

⁴⁷ Justice Heydon concurred with the reasoning of Justice Hayne.

4.4 THE MAJORITY DECISIONS

4.4.1 Chief Justice Gleeson

Universal adult suffrage in Australia

Chief Justice Gleeson pointed to a requirement of universal adult suffrage in Australia, relying on sections 7 and 24 of the Constitution.⁴⁸ His Honour said that Australia had reached a stage in the evolution of representative government which meant these provisions had become a constitutional protection of the right to vote.⁴⁹

Exceptions to universal adult suffrage

Chief Justice Gleeson stated that universal suffrage did not exclude the possibility of some exceptions.⁵⁰ His Honour said that the Constitution left it to Parliament to define any exceptions, however its power to do so was not unconstrained.⁵¹

A 'substantial reason' is needed for disenfranchisement

Chief Justice Gleeson said that the disenfranchisement of any group of adult citizens for other than a 'substantial reason' would not be consistent with 'choice by the people'.⁵²

Any exclusion would require a 'rational connection' between the excluded class or group and their:

- identification of community membership; or
- capacity to exercise free choice.⁵³

⁴⁸ *Roach v Electoral Commissioner*, para 6.

⁴⁹ *Roach v Electoral Commissioner*, para 7.

⁵⁰ *Roach v Electoral Commissioner*, para 6.

⁵¹ *Roach v Electoral Commissioner*, para 7.

⁵² *Roach v Electoral Commissioner*, para 7.

⁵³ *Roach v Electoral Commissioner*, para 8.

Rationale for the exclusion of prisoners serving a sentence of imprisonment

In considering the disenfranchisement of prisoners, Chief Justice Gleeson said that the rationale for such exclusion could not be based on:

- the mere fact of imprisonment, as there was nothing inherently inconsistent between being in custody and voting. For example, a considerable proportion of the prison population consists of unsentenced persons who are awaiting sentence and who are not excluded from voting;
- simply having been convicted of a criminal offence, because not all persons convicted of criminal offences were excluded (such as those serving a non-custodial sentence or those subject to a pecuniary penalty); or
- a notion that the exclusion served as a form of additional punishment, as there would be serious constitutional difficulty associated with such an argument.⁵⁴

His Honours said:

*The rational connection between such exclusion and the identification of community membership for the purpose of the franchise might be found in conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right.*⁵⁵

His Honour stated that the rationale for the exclusion of prisoners who had been convicted and who were serving sentences had to “lie in the significance of the combined facts of offending and imprisonment, as related to the right to participate in political membership of the community”.⁵⁶

Since it is only offences that attract a custodial sentence that are involved, this must be because of a view that the seriousness of the offence is relevant, and a custodial sentence is at least a method, albeit imperfect, of discriminating between offences for the purpose of marking off those whose offending is so serious as to warrant this form of exclusion from the political rights of citizenship. ...

*[T]he rationale for the exclusion must be that serious offending represents such a form of civic irresponsibility that it is appropriate for Parliament to mark such behaviour as anti-social and to direct that physical separation from the community will be accompanied by symbolic separation in the form of loss of a fundamental political right.*⁵⁷

⁵⁴ *Roach v Electoral Commissioner*, paras 10 and 11.

⁵⁵ *Roach v Electoral Commissioner*, para 8.

⁵⁶ *Roach v Electoral Commissioner*, para 11. Emphasis added.

⁵⁷ *Roach v Electoral Commissioner*, paras 11-12.

Noting the disqualification of parliamentarians under section 44 of the Constitution

Chief Justice Gleeson noted section 44(ii) of the Constitution, which provides:

Any person who ... has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer, shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

His Honour considered there was “an incongruity in the fact that the [blanket ban] ... imposes stricter standards upon eligibility to be a voter than the Constitution imposes upon eligibility to be a senator or member of the House of Representatives”.⁵⁸

The blanket ban is invalid

Chief Justice Gleeson said the following in finding the blanket ban invalid:

The adoption of the criterion of serving a sentence of imprisonment as the method of identifying serious criminal conduct for the purpose of satisfying the rationale for treating serious offenders as having severed their link with the community, a severance reflected in temporary disenfranchisement, breaks down at the level of short-term prisoners. They include a not insubstantial number of people who, by reason of their personal characteristics (such as poverty, homelessness, or mental problems), or geographical circumstances, do not qualify for, or, do not qualify for a full range of, non-custodial sentencing options. At this level, the method of discriminating between offences, for the purpose of deciding which are so serious as to warrant disenfranchisement and which are not, becomes arbitrary.

The step that was taken by Parliament in 2006 of abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people.⁵⁹

Previous ban on prisoners sentenced for at least three years was valid

Chief Justice Gleeson upheld the validity of the previous ban disenfranchising prisoners serving sentences of at least three years. His Honour said:

It is consistent with our constitutional concept of choice by the people for Parliament to treat those who have been imprisoned for serious criminal offences as having suffered a temporary suspension of their connection with the community, reflected at

⁵⁸ *Roach v Electoral Commissioner*, para 20.

⁵⁹ *Roach v Electoral Commissioner*, paras 23-24.

*the physical level in incarceration, and reflected also in temporary deprivation of the right to participate by voting It is also for Parliament, consistently with the rationale for exclusion, to decide the basis upon which to identify incarcerated offenders whose serious criminal wrongdoing warrants temporary suspension of a right of citizenship. I have no doubt that the disenfranchisement of prisoners serving three-year sentences was valid, and I do not suggest that disenfranchisement of prisoners serving sentences of some specified lesser term would necessarily be invalid.*⁶⁰

4.4.2 Justices Gummow, Kirby and Crennan (joint judgment)

Importance of the franchise to the system of representative government under the Constitution

Justices Gummow, Kirby and Crennan said:

Voting in elections for the Parliament lies at the very heart of the system of government for which the Constitution provides. This central concept is reflected in the detailed provisions for the election of the parliament of the Commonwealth in what is otherwise a comparatively brief constitutional text.

...

*[The] proposition [that the phrase ‘chosen by the people’ admits a requirement of universal adult suffrage unless there is a substantial reason for disenfranchisement] reflects the understanding that representative government as that notion is understood in the Australian constitutional context comprehends not only the bringing of concerns and grievances to the attention of legislators but also the presence of a voice in the selection of those legislators. ... In this way, the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic.*⁶¹

Their Honours said that these notions were not extinguished by the ‘mere fact of imprisonment’.⁶²

Disenfranchisement must be ‘reasonably appropriate and adapted’ (proportionate) to maintaining the system of representative government

The joint majority judges stated the test for the acceptability of disenfranchisement as follows:

⁶⁰ *Roach v Electoral Commissioner*, para 19.

⁶¹ *Roach v Electoral Commissioner*, paras 81 and 83.

⁶² *Roach v Electoral Commissioner*, para 84.

Is the disqualification for a “substantial” reason? A reason will answer that description if it be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government. When used here the phrase “reasonably appropriate and adapted” does not mean “essential” or “unavoidable”. Rather, ... in this context there is little difference between what is conveyed by that phrase and the notion of “proportionality”. What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power.⁶³

The blanket ban is invalid

In applying the test of whether the disenfranchisement under the blanket ban was reasonably appropriate and adapted (or proportionate) to maintaining a system of representative government in Australia, the joint majority judges said:

The end served by [the blanket ban] is further to stigmatise this particular class of prisoner by denying them during the period of imprisonment the exercise of the civic right and responsibility entailed in the franchise. The measurement of that end against the maintenance of the system of representative government ... requires a closer examination of the particular class of prisoner which has been singled out in this way.

[The blanket ban] operates without regard to the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender. ... [T]here is long established law and custom ... whereby disqualification of electors ... was based upon a view that conviction for certain descriptions of offence evinced an incompatible culpability which rendered those electors unfit ... to participate in the electoral process. That tradition is broken by [the blanket ban] as it has no regard to culpability. ...

[Their Honours then refer to contemporary penal policy, the proportion of prisoners serving a short term of imprisonment, non-custodial sentences and the personal circumstances of some offenders that can limit the range of sentencing options available to them.]

The [blanket ban] treats indifferently imprisonment for a token period of days, mandatory sentences, and sentences for offences of strict liability. It does not reflect any assessment of any degree of culpability other than that which can be attributed to prisoners in general as a section of society. ...

The legislative pursuit of an end which stigmatises offenders by imposing a civil disability during any term of imprisonment takes [the blanket ban] beyond what is reasonably appropriate and adapted (or “proportionate”) to the maintenance of representative government. The net of disqualification is cast too wide⁶⁴

⁶³ *Roach v Electoral Commissioner*, para 85.

⁶⁴ *Roach v Electoral Commissioner*, paras 89-91, 93, 95.

Disharmony between blanket ban and section 44 of the Constitution

Justices Gummow, Kirby and Crennan noted that the disqualification of sentenced prisoners under the blanket ban operated “more stringently” than that imposed under section 44(ii) of the Constitution on persons who are, or who are seeking to become, parliamentarians. Their Honours said that this was the case “even though the latter seek, or are subject to, unique responsibilities as legislators which are different in kind to those of electors. The disharmony between [these provisions] is plain”.⁶⁵

Previous three year ban was valid

The joint majority judges upheld the validity of the previous provision disenfranchising prisoners serving a sentence of at least three years:

[The three year ban] operate[s] to deny the existence of the franchise during one normal electoral cycle but [does] not operate without regard to the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process. In that way the three year provisions are reflective of long established law and custom, preceding the adoption of the Constitution, whereby legislative disqualification of electors has been made on the basis of such culpability beyond the bare fact of imprisonment. ...

[The question] is whether the [three year ban] is appropriate and adapted to serve an end consistent or compatible with the maintenance of the prescribed system of representative government. The end is the placing of a civil disability upon those serving a sentence of three years or longer for an offence, the disability to continue whilst the sentence is being served.

... [I]t cannot be said that at federation such a system was necessarily incompatible or disproportionate in the relevant sense. Further, in light of the legislative development of representative government since federation such an inconsistency or incompatibility has not arisen by reason of subsequent events. ... [S]uch a criterion does distinguish between serious lawlessness and less serious but still reprehensible conduct. It reflects the primacy of the electoral cycle for which the constitution itself provides There is ... a permissible area in such matters for legislative choice between various criteria for disqualification. The [three year ban] fell within that area and the attack on its validity fails.⁶⁶

⁶⁵ *Roach v Electoral Commissioner*, para 90.

⁶⁶ *Roach v Electoral Commissioner*, paras 98, 101-102.

4.5 THE DISSENTING DECISIONS

4.5.1 Justice Hayne (with whom Justice Heydon concurred)

‘Directly chosen by the people’ are words of generality, not universality

Justice Hayne upheld the validity of the blanket ban by reference to section 30 of the Constitution.⁶⁷ Of particular relevance in that provision were the words ‘until the Parliament otherwise provides’.

His Honour questioned the limitation sections 7 and 24 of the Constitution, notably the words ‘directly chosen by the people’, had on the power given to the Parliament under section 30 of the Constitution to provide for the qualification of electors.⁶⁸

His Honour said:

The drafting history of what became section 30 shows that the Parliament’s power under that section was given so that the Parliament itself could determine the franchise upon which it was elected. That is, the purpose of the conferral of legislative power under s 30 was to provide the Parliament with the power to determine which groups should be given the franchise.

Once that is recognised, it follows that the words “directly chosen by the people” are to be understood as an expression of generality, not as an expression of universality. Because the power to delineate the franchise was given to the Parliament, the ambit of exceptions to or qualifications from the franchise was a matter for the Parliament itself, so long always as the generality of “directly chosen by the people” was preserved.

The scope, or content, of that “generality” cannot be chartered by precise metes and bounds. The nature of its content, however, is indicated by the range of provisions made by the several State laws that were “picked up”, at federation, by s 30. All of those laws disqualified some prisoners from voting. Excepting prisoners from the franchise did not and does not deny the generality required by “directly chosen by the people”.⁶⁹

⁶⁷ The relevant extract from section 30 of the Constitution is reproduced in part 4.3.2 of this Research Brief.

⁶⁸ *Roach v Electoral Commissioner*, para 110.

⁶⁹ *Roach v Electoral Commissioner*, paras 111-113.

The history of section 30

Justice Hayne reached the above conclusion by examining the history of section 30 of the Constitution. His Honour said:

The validity of the [blanket ban] turns ultimately upon the content that is to be given to the expression “directly chosen by the people” It is that expression that which is relied on as limiting the evidently general provision of s 30 that the Parliament may provide for the qualification of electors of members of the House of Representatives. ...

The drafting history of the provision that became s 30 provides the most important indication of both the place that the provision has in the constitutional arrangements governing the federal Parliament and the breadth of the relevant legislative power given to the Parliament. ...

[His Honour then considered that drafting history in some detail.]

These matters of history point unambiguously to the conclusions expressed at the outset of these reasons. That is, the words “directly chosen by the people” must be understood as words of generality, not as words of universality. The words were not intended to convey a requirement for universal adult suffrage.⁷⁰

Additional textual indications and State legislation at federation

Justice Hayne also referred to “additional textual indications” in the Constitution that “point in the same direction”,⁷¹ together with the various state legislation that existed at federation specifying the enfranchisement of prisoners at that time.⁷²

Despite difference between the states, all excluded some prisoners from voting. Most importantly, His Honour noted that New South Wales excluded “every person who ... is in prison under any conviction”.⁷³ His Honour said:

This being the state of the law picked up by s 30, persons in prison under sentence were, and now can be, excluded from voting without denying the Houses that are thus elected the constitutional description of “directly chosen by the people”.

Moreover, this being the state of the law picked up by s 30, no more refined or precise proposition, whether hinged about length of sentence, quality of offence or otherwise, can now be identified as controlling the content of “directly chosen by the people” in its application to the subject of prisoners voting. The diversity of the relevant State provisions denies that a proposition of that kind can be identified as

⁷⁰ *Roach v Electoral Commissioner*, paras 121-127.

⁷¹ *Roach v Electoral Commissioner*, paras 128-133.

⁷² *Roach v Electoral Commissioner*, paras 134-139.

⁷³ *Roach v Electoral Commissioner*, para 138.

*informing the Constitutional adoption and application of those State laws. ... The differences between the provisions are not to be ignored in favour of now devising, a priori, a criterion drawn either by reference to a particular length of sentence (whether actually imposed or available) or by reference to some quality of the offence for which the person has been imprisoned.*⁷⁴

In relation to the form of representative democracy provided for by the Constitution, Justice Hayne said:

*Moreover, the Constitution does not establish a form of representative democracy in which the limits to the legislative power of the Parliament with respect to the franchise are to be found in a democratic theory which exists and has its content independent of the Constitutional text. The form of representative democracy for which the Constitution provides was established with British and American models at the forefront of the framers' consideration. But neither of those models was adopted. The Constitution provided its own form of government: a form of government in which there are elements that evidently draw on the experience of others but which, taken as a whole, is unique. To impose upon the text and structure that was adopted a priori assumptions about what is now thought to be a desirable form of government or would conform to a pleasingly symmetrical theory of government is to do no more than assert the desirability of a particular answer to the issue that now arises.*⁷⁵

The content of 'directly chosen by the people' does not change over time

Justice Hayne stated the following in making the point that the meaning of 'directly chosen by the people' does not change over time:

Is "directly chosen by the people" to be understood by reference to "the common understanding of the time"? That is, do what might be called "generally accepted Australian standards" provide a valid premise for consideration of the issues presented in this matter?

There are at least two reasons to reject reference to "common understanding" or "generally accepted Australian standards" as informing the content that is to be given to "directly chosen by the people". First, there is the obvious difficulty of determining what those standards are, and to what extent they are "generally accepted". Does it suffice that they are standards that are reflected in legislation which, by hypothesis, has been passed by a majority of popularly elected representatives in the two Houses of the federal Parliament? If that is sufficient, the limitation has no content; the Parliament may do as it chooses. If that is not sufficient, what is it that will demonstrate either the content of the asserted understanding or its common or general acceptance?

⁷⁴ *Roach v Electoral Commissioner*, paras 139-140.

⁷⁵ *Roach v Electoral Commissioner*, para 142.

Secondly, and more fundamentally, it is not to be supposed that the ambit of the relevant constitutional power (as distinct from the political capacity to exercise the power) is constrained by what may, from time to time, be identified as politically accepted or acceptable limits to the qualifications that may be made to what now is an otherwise universal adult suffrage. Political acceptance and political acceptability find no footing in accepted doctrines of constitutional construction. The meaning of constitutional standards does not vary with the level of popular acceptance that particular applications of the power might enjoy. ...

Further, although it is not necessary to decide the point, it may greatly be doubted that the content of the expression “directly chosen by the people” changes over time. “[D]irectly chosen by the people” expresses a standard. It is not an expression that has a relatively different application as facts change. The standard expressed is unvarying. It describes an important characteristic that each of the Houses of the Parliament must have. That the meaning of “directly chosen by the people” cannot be charted by metes and bounds does not entail that the meaning changes over time.⁷⁶

4.6 CONSEQUENCES OF THE DECISION

The two obvious consequences of the High Court’s decision in *Roach* are:

- the blanket ban was invalid; and
- the previous three year ban was valid.

Set out below is a selection of some of the commentary that followed the decision.

4.6.1 Justice Michael Kirby

In an address given by Justice Michael Kirby, *Defining Australian Identity*, at a graduation ceremony at Southern Cross University in late September 2007,⁷⁷ His Honour said:

...[I]n our country, by the wisdom of the constitution, no parliament is completely “sovereign”. It is only the people who are sovereign. The people express their will in the constitutional text. ... [T]he Constitution spells out a democratic form of government. ...

⁷⁶ *Roach v Electoral Commissioner*, paras 157-159, 161.

⁷⁷ Hon Justice Michael Kirby, *Defining Australian Identity*, speech given to graduation ceremony at Southern Cross University, 29 September 2007, downloaded from http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_29sep07.pdf on 9 October 2008. An extract of the speech was reported in Justice Michael Kirby, ‘Prisoners’ vote is the Australian way’, *Australian Financial Review*, 5 October 2007, p 57.

The Australian Constitution expressly provides that a person may not be elected to Parliament [if] sentenced to imprisonment one year or longer. If a member of Parliament, with those higher duties, could serve despite such a sentence, it would be paradoxical to exclude altogether prisoners with their much less onerous obligations of being voters. ...

Some, of course, will say that we should not worry about prisoners. Take away their civil rights. Throw away the key. We all know the usual suspects who are of this persuasion. However it has not been the temperate tradition of Australia. ... Prisoners must be able to “live it down”. As for those serving shorter sentences, they remain entitled to choose their rulers.

That is why the decision of the High Court ... is such an important one. It is part of the mosaic of law that defines the identity of the Australian community. ... Unlike the United States, Australia would never have tolerated excluding millions (or thousands) of citizens from the vote because of past convictions. It is always vigilant against alteration of voting rights for partisan political advantage. It celebrates democracy and representative government as a core feature of what it is to be an Australian.

When we go to vote in the federal election in a few weeks time, stand in the queue proudly as a citizen. Reflect on the importance of the moment and on your constitutional right to choose your governors. And think of how the High Court protects that right and guards it as a constitutional entitlement that can only be taken away in the most serious and justifiable of circumstances.

4.6.2 Allens Arthur Robinson

A publication of *Allens Arthur Robinson*,⁷⁸ a law firm which represented the plaintiff, stated that the decision had important consequences not only for those prisoners who would consequently be able to vote in the forthcoming (November 2007) federal election, but also for the “significant addition” it made to “the jurisprudence concerning the system of representative government mandated by the Constitution”. It states:

The Commonwealth’s power to make laws affecting the extent of the franchise, as with laws affecting other fundamentals of our system of representative government, are subject to limitations. The majority decision in this case supports a view that these limitations, though derived from the text and structure of the Constitution, are themselves capable of evolution.

⁷⁸ Allens Arthur Robinson, ‘High Court strikes down Commonwealth legislation disqualifying prisoners from voting’, *Focus: Commercial Litigation*, October 2007, downloaded from <http://www.aar.com.au/pubs/pdf/ldr/focloct07.pdf> on 3 October 2008.

4.6.3 Kim Rubenstein

Kim Rubenstein commented shortly after the High Court's decision in *Roach* as follows:⁷⁹

The High Court's order ... prevents the Commonwealth from universally disenfranchising all prisoners on election day. But all that does is return matters to where they were, with categories of prisoners still unable to vote and no firm guarantees that voting rights on the part of all citizens cannot be abridged.

This is because there is no clear statement in the Constitution about Australian citizens' right to vote. Indeed, there is nothing in the Australian Constitution about Australian citizenship, let alone rights that flow from citizenship.

No doubt the High Court's reasons will shed important light on the jurisprudence of voting (we only have the order at this stage, not the reasoning) but there is still next to nothing in the Constitution the Court can fix upon to make citizens rest easier in their bed of Australian democracy.

Citizenship, the right to vote, the right to return and live in one's country, all, one who have thought, the very rudiments of democratic governance stand on very thin constitutional ground in Australia.

4.6.4 Graeme Orr

Graeme Orr,⁸⁰ in an October 2007 publication,⁸¹ stated:

In late August this year, to the great surprise of most commentators, the High Court struck down the ban on prisoner voting. The surprise was a product of both the conservatism of the Court in the past decade, and its longstanding deference to parliamentary sovereignty in electoral matters.

...

[The plaintiff's] case is a limited victory for the civil rights of prisoners. The voting rights of the bulk of prisoners remain in play in the game of political football.

*The greater longer-term interest in the case is its affirmation, as a general precedent, that the words 'directly chosen by the people' are words of limitation. At a minimum, any gross attempt to undo universal adult suffrage would be rebuffed by the Court, using *Roach's* case as a shield*

⁷⁹ Kim Rubenstein, 'Not all Australian citizens are equal', *Age*, 30 August 2007. Kim Rubenstein is Professor and Director of the Centre for International and Public Law at the ANU College of Law, Australian National University.

⁸⁰ Graeme Orr is an Associate Professor in electoral law at the TC Beirne School of Law, University of Queensland.

⁸¹ Graeme Orr, 'Constitutionalising the franchise and the status quo: The High Court on prisoner voting rights', *Democratic Audit of Australia, Discussion Paper 19/07*, October 2007, downloaded from http://democratic.audit.anu.edu.au/papers/20071019orr_prisonervotingrights.pdf on 3 October 2008.

In tempering its traditional deference to parliamentary sovereignty, the High Court has not, however handed a sword to those who might litigate for a broader franchise. ...

Any battles to further extend the franchise remain matters for the court of public opinion and parliament. If and only if they are won there – and entrenched over time – may the courts of law come to shield them.

4.6.5 Anthony Gray

In a journal article, Anthony Gray⁸² advocated that, following the High Court's decision in *Roach*, the principle of universal adult suffrage should also apply at the state level:

I cannot agree that if universal suffrage is now required at least federally, as a majority of the judges have now found, that the same right does not and should not apply at the state level. What high constitutional purpose is served by giving people the right to vote in some elections in Australia but not others? Surely Australia (including its states) is either a representative democracy or not? ...

*The High Court found in *Roach* that representative government required universal suffrage at the federal level. The same should apply at the state level.*

4.6.6 Australian Human Rights Commission

In July 2008, the Australian Human Rights Commission called for judges to be given the power to disenfranchise some prisoners as part of the sentencing process, rather than for the current situation to continue whereby legislation prohibits all prisoners serving sentences of three years or more from voting.

Graeme Innes, Human Rights Commissioner, was reported as saying that judges should be given the power to remove prisoners' voting rights at the time of sentencing, according to a pre-determined list of offences and the seriousness of the offence committed. Mr Innes said:

We would accept ... that there are some situations where people should have their right to vote removed ... but we would say that is a matter for consideration during the sentence because then the particular circumstances of the crime are before the judge.

There would be a limited set of crimes to which a judge would be expected to consider this as an issue as part of the sentencing process, so in a limited number of

⁸² Anthony Gray, 'The guaranteed right to vote in Australia', [2007] *QUTLJJ* 12, downloaded from <http://www.austlii.edu.au/au/journals/QUTLJJ/2007/12.html> on 8 October 2008. Anthony Gray is a senior lecturer in the School of Law, University of Southern Queensland.

*crimes judges would be asked to determine whether a person's right to vote should be removed as part of their sentence.*⁸³

5 PRISONER DISENFRANCHISEMENT IN SELECTED OTHER JURISDICTIONS

Provided below is:

- a list of prisoner voting rights in the various Australian jurisdictions;
- a brief discussion of recent leading international cases concerning prisoner disenfranchisement from the Canadian Supreme Court, the European Court of Human Rights and the Constitutional Court of South Africa; and
- an outline of prisoner disenfranchisement in the United States of America.

⁸³ CCH Australia, 'Give judges power to remove right to vote: HREOC', *News Article*, 28 July 2008.

5.1 AUSTRALIAN STATES AND TERRITORIES

Prisoner enfranchisement differs between the various Australian states and territories.⁸⁴

Jurisdiction	Voting	Relevant legislation
Qld	Cannot vote if sentenced and in detention on full-time basis for an offence against the law of the Commonwealth or a State or Territory	<i>Electoral Act 1992 (Qld)</i> ⁸⁵
NSW	Cannot vote if sentenced to imprisonment of 12 months or more	<i>Parliamentary Electorates and Elections Act 1912 (NSW)</i>
Vic	Cannot vote if sentenced to imprisonment of five years or more	<i>Constitution Act 1975 (Vic)</i>
SA	No restriction	<i>Electoral Act 1985 (SA)</i>
Tas	Cannot vote if serving a sentence of imprisonment of three years or more	<i>Electoral Act 2004 (Tas)</i>
WA	Cannot vote if serving a sentence of imprisonment ⁸⁶	<i>Electoral Act 1907 (WA)</i>
ACT	No restriction	<i>Electoral Act 1992 (ACT)</i>
NT	Cannot vote if sentenced to imprisonment of three years or more	<i>Electoral Act 2004 (NT) and Northern Territory (Self-Government) Act 1978 (Cth)</i>

⁸⁴ This table represents the law as at early October 2008.

⁸⁵ *Electoral Act 1992 (Qld)*, s 101(3). This provision was inserted by s 35G of the *Crime and Misconduct and Other Legislation Amendment Act 2006 (Qld)*. The provision was introduced during consideration in detail of the relevant Bill because “[t]he Government has decided in the interests of maintaining consistency under the joint roll arrangements with the Commonwealth to also exclude prisoners from voting” (Explanatory Notes, p 6, for amendments made during consideration in detail of the Crime and Misconduct and Other Legislation Amendment Bill 2006 (Qld)).

⁸⁶ Note however a proposal under the Electoral Amendment Bill (No. 2) 2008 (WA) for the restriction on voting by prisoners to be limited to those serving a sentence of imprisonment of three years or more.

5.2 SUPREME COURT OF CANADA – SAUVÉ V CANADA (CHIEF ELECTORAL OFFICER)⁸⁷

By a 5:4 majority, the Supreme Court of Canada in *Sauvé v Canada (Chief Electoral Officer)* held that section 51(e) of the *Canada Elections Act* was invalid under various provisions of the *Canadian Charter of Rights and Freedoms*.

Section 51(e) of the *Canada Elections Act* denied the right to vote to “[e]very person who is imprisoned in a correctional institution serving a sentence of two years or more”.

Provisions of the *Canadian Charter of Rights and Freedoms* that were referred to included:

1. *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.*

...

3. *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.*

...

15(1). *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

In summary, the majority judges held that:

- the government had to show that the infringement achieved a constitutionally valid purpose or objective and that the particular method was reasonable and demonstrably justified;
- the right to vote was fundamental to Canadian democracy and the rule of law and could not be set aside lightly. Limits to the right required careful examination rather than deference;
- the government failed to identify particular grounds justifying the denial of the right to vote. It did state two broad objectives for the ban – to enhance civic responsibility and respect for the rule of law, and to provide additional punishment or enhance the criminal sanction given – however these objectives were vague and failed; and
- the ban did not meet the proportionality test. In particular, the government did not establish a rational connection between the ban and its stated objectives.

⁸⁷ *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, downloaded from <http://www.canlii.org/en/ca/scc/doc/2002/2002scc68/2002scc68.pdf> on 6 October 2008.

In relation to the last point above, the majority considered that denying prisoners the right to vote was more likely to result in a decreased respect for the law and democracy.

The problem here, quite simply, is that denying penitentiary inmates the right to vote is bad pedagogy. It misrepresents the nature of our rights and obligations under the law, and it communicates a message more likely to harm than to help respect for the law.

Denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. ...

The government gets this connection exactly backwards when it attempts to argue that depriving people of a voice in government teaches them to obey the law. The "educative message" that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. ...

[T]he history of democracy is the history of progressive enfranchisement. ...

To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.

[I]t is not apparent that denying penitentiary inmates the right to vote actually sends the intended message to prisoners, or to the rest of society. ...

It is a message sullied, moreover, by negative and unacceptable messages likely to undermine civic responsibility and respect for the rule of law. Denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy. More profoundly, it sends the unacceptable message that democratic values are less important than punitive measures⁸⁸

The majority also said that the government offered no credible explanation of why it should be allowed to deny a fundamental democratic right as a form of state punishment.

The majority considered that the ban did not minimally impair the right to vote. It was too broad, and the argument that it applied to only certain prisoners and did not operate as a blanket exclusion disenfranchising all prisoners was irrelevant.

Finally, the majority considered that the negative effects of denying certain prisoners the vote would outweigh any benefits that might ensue. The ban removed one possible way to social development and conflicted with rehabilitation

⁸⁸ *Sauvé v Canada (Chief Electoral Officer)*, per McLachlin CJ at paras 30-33, 38-40 (pp 30-31, 34-35).

and integration. It also had a disproportionate effect on Canada's already disadvantaged Aboriginal population.

The dissenting judges held that:

- the case rested on philosophical, political and social considerations which were not capable of “scientific proof”;
- if the social or political philosophy advanced by Parliament reasonably justified a limitation of the right in the context of a free and democratic society, then it should be upheld as constitutional;
- “reasonableness” was the predominant consideration – whether the policy position of the Parliament was an acceptable choice amongst those permitted under the *Charter*;
- the “dialogue” between the courts and the Parliament was particularly important;
- the infringement of the *Charter* was, in this case, a reasonable limit that was demonstrably justified in a free and democratic society;
- the objectives of the ban were both pressing and substantial; and
- the ban met the proportionality test – it was rationally connected to its objectives, it was minimal, it was not arbitrary, and the objectives of the ban and their salutary effects outweighed the temporary disenfranchisement of serious offenders.⁸⁹

5.3 EUROPEAN COURT OF HUMAN RIGHTS – *HIRST V UNITED KINGDOM (No 2)*⁹⁰

The European Court of Human Rights held, by a 12:5 majority, in *Hirst v United Kingdom (No 2)*, that the automatic disenfranchisement imposed by the United Kingdom on all convicted prisoners violated Article 3 of Protocol 1 to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (‘the Convention’).

The relevant provision was section 3 of the *Representation of the People Act 1983* (UK), which prevented convicted prisoners from voting in parliamentary or local elections. Certain prisoners were saved from this exclusion, including those

⁸⁹ *Sauvé v Canada (Chief Electoral Officer)*, per Gonthier J at paras 65-208 (pp 45-121).

⁹⁰ *Hirst v United Kingdom (No 2)* (2005) ECHR 74025/01, downloaded from <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=11077&sessionId=14406349&skin=hudoc-en&attachment=true> on 6 October 2008.

imprisoned for contempt of court and those imprisoned only for default in, for example, payment of a fine. Some 48,000 prisoners were affected.⁹¹

Article 3 of Protocol 1 to the Convention provided:

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 Court held that:

- the rights guaranteed by this provision were fundamental to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law, and that the right to vote was a right and not a privilege;⁹²
- however, the rights under the provision were not absolute. Limitations were possible (the margin was wide), but these had to stem from a legitimate aim and be proportionate. They had to reflect, not be contrary to, maintaining the integrity and effectiveness of an electoral procedure directed at identifying the will of the people through universal suffrage. Any exclusions of groups or categories of the general population had to be reconcilable with the underlying purposes of the provision;⁹³
- prisoners continued to enjoy all the fundamental rights and freedoms guaranteed by the Convention, except for the right to liberty. Prisoners did not forfeit their rights under the Convention merely because of their status as a convicted prisoner. There was no place for automatic disenfranchisement of convicted prisoners based purely on what might offend public opinion;⁹⁴
- however, a democratic society could still take measures to protect itself against activities intended to destroy the rights or freedoms set out in the Convention. Article 3 of Protocol 1 did not, therefore, prevent restrictions being placed on the right to vote in certain circumstances. This was not to be undertaken lightly and the principle of proportionality required a discernible and sufficient link

⁹¹ European Court of Human Rights, 'Grand Chamber Judgment *Hirst v The United Kingdom (No 2)*', Press Release, 6 October 2005, downloaded from <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=hirst%20%7C%2074025/01&sessionid=14406428&skin=hudoc-pr-en> on 6 October 2008.

⁹² *Hirst v United Kingdom (No 2)*, paras 58-59 (p 10).

⁹³ *Hirst v United Kingdom (No 2)*, paras 60-62 (p 11).

⁹⁴ *Hirst v United Kingdom (No 2)*, paras 69-70 (pp 12-13).

between the sanction and the conduct and circumstances of the individual concerned;⁹⁵

- the aims of the United Kingdom Government in disenfranchising all convicted prisoners was to prevent crime and to enhance civic responsibility and respect for the rule of law;⁹⁶
- in terms of the proportionality test, the Court considered that 48,000 affected prisoners was a significant number, and the ban was not negligible in its effects. It included a wide range of offenders and sentences, and it was not apparent that there was any direct link between the facts of any individual case and the disenfranchisement. The Court referred to there being no evidence that the Parliament had sought to weigh the competing interests or assess the proportionality of the ban on the right of a convicted person to vote. There was no substantive debate by members of the legislature on the continued justification, in the light of modern day penal policy and current human rights standards, for maintaining the ban;⁹⁷ and
- accordingly, although the margin under Article 3 of Protocol 1 was wide, it was not all-embracing. The ban disenfranchised a significant number of people and did so in a way which was indiscriminate. It automatically applied to all convicted prisoners, irrespective of the length of their sentence and the nature or gravity of their offence and their individual circumstances. As such, the ban was incompatible with Article 3 of Protocol 1.⁹⁸

⁹⁵ *Hirst v United Kingdom (No 2)*, para 71 (pp 13-14).

⁹⁶ *Hirst v United Kingdom (No 2)*, paras 74-75 (pp 14-15).

⁹⁷ *Hirst v United Kingdom (No 2)*, paras 77-79 (pp 15-16).

⁹⁸ *Hirst v United Kingdom (No 2)*, para 82 (p 17).

The Court also provided the following information, as at October 2005, on the enfranchisement of prisoners in various European countries.⁹⁹

Prisoners may vote		Prisoners may frequently/sometimes vote		Prisoners cannot vote	
Albania	Iceland	Austria	Malta	Armenia	Latvia
Bosnia and Herzegovina	Lithuania	Belgium	Netherlands	Azerbaijan	Liechtenstein
Cyprus	Portugal	France	Norway	Bulgaria	Moldova
Croatia	Slovenia	Germany	Poland	Estonia	Russia
Czech Republic	Spain	Greece	Romania	Georgia	Slovakia
Denmark	Sweden	Italy	Turkey	Hungary	United Kingdom
Finland	Switzerland	Luxembourg		Ireland	
Former Yugoslav Republic of Macedonia	Ukraine				

5.4 CONSTITUTIONAL COURT OF SOUTH AFRICA – *MINISTER OF HOME AFFAIRS v NICRO*¹⁰⁰

In March 2004, by a 9:2 majority, the Constitutional Court of South Africa in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* upheld an application for an order declaring particular provisions of the *Electoral Act* (SA) inconsistent with the South African Constitution.

The provisions of the *Electoral Act* held to be invalid deprived convicted prisoners serving sentences of imprisonment without the option of a fine of the right to enrol or vote during the term of their imprisonment.

⁹⁹ See European Court of Human Rights, ‘Grand Chamber Judgment *Hirst v The United Kingdom (No 2)*’, Press Release, endnote 4.

¹⁰⁰ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] 5 BCLR 445, downloaded on 7 October 2008 from <http://www.saflii.org/za/cases/ZACC/2004/10.pdf>.

The key Constitutional provision relied upon by the Court was section 19(3)(a):

Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.

Other relevant Constitutional provisions included:

- section 1, which stated certain fundamental values on which the Republic of South Africa was founded, including universal adult suffrage;
- section 36, which stated that the rights in the Bill of Rights:
 - ... may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
 - (a) *the nature of the right;*
 - (b) *the importance of the purpose of the legislation;*
 - (c) *the nature and extent of the limitation;*
 - (d) *the relation between the limitation and its purpose; and*
 - (e) *less restrictive means to achieve that purpose.*
- section 3, which made provision for a common and equal citizenship in South Africa, including a statement that “all citizens are equally subject to the rights, privileges and benefits of citizenship”.

In summary, the Court held that:

- the right to vote was vested in all citizens, but it was not an absolute right and was subject to limitation in terms of section 36;¹⁰¹
- limitation under section 36 called for a “proportionality analysis”;¹⁰²
- the Government was required to place sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement sought to serve;¹⁰³
- the Government’s contentions regarding the reasons for the limitation – which were related to cost and the logistics involved in making special arrangements for voting by the excluded category of prisoners – were not supported on the facts and expanding the special arrangements to allow the excluded category to vote would not result in an undue financial burden;¹⁰⁴

¹⁰¹ *Minister of Home Affairs v NICRO*, para 25 (p 12).

¹⁰² *Minister of Home Affairs v NICRO*, para 33 (p 16).

¹⁰³ *Minister of Home Affairs v NICRO*, para 65 (pp 31-32).

¹⁰⁴ *Minister of Home Affairs v NICRO*, paras 39-53 (pp 19-26).

- a further argument made on behalf of the Government – that making special provision for convicted prisoners to vote would, in the context of the country’s major crime problem, send the wrong message to law-abiding citizens about the allocation of resources and result in an undermining of confidence in the electoral process – was no basis for depriving prisoners of a fundamental right;¹⁰⁵
- no information had been provided about the sorts of offences for which shorter periods of imprisonment were likely to be imposed, the sort of persons who were likely to be imprisoned for such offences, and the number of persons who might lose their vote because of relatively minor transgressions. As such, the Court had “wholly inadequate information” on which to test the validity of the ban;¹⁰⁶ and
- it was relevant that all convicted prisoners serving a sentence of imprisonment were disenfranchised whereas a prisoner serving a sentence of imprisonment of less than 12 months without the option of a fine could stand for election.¹⁰⁷

5.5 UNITED STATES OF AMERICA

The extent of prisoner disenfranchisement in the United States of America is generally regarded as significant.

It said in 2005 that “[f]or the broadest spectrum of approaches to voting rights for convicted criminals, look no further than the United States.”¹⁰⁸

A recent report of *The Sentencing Project*¹⁰⁹ provides the following information on prisoner disenfranchisement in the United States:

- 48 states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offence;

¹⁰⁵ *Minister of Home Affairs v NICRO*, paras 54-57 (pp 26-27).

¹⁰⁶ *Minister of Home Affairs v NICRO*, para 67 (p 33).

¹⁰⁷ *Minister of Home Affairs v NICRO*, para 67 (pp 33-34).

¹⁰⁸ ‘Prisoner voting: World views’, *BBC News*, 28 April 2005.

¹⁰⁹ The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, September 2008, downloaded from http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf on 8 October 2008. *The Sentencing Project* is a national organisation working for a fair and effective criminal justice system by promoting reforms in sentencing law and practice and alternatives to incarceration. See *The Sentencing Project* website, <http://www.sentencingproject.org/About.aspx>.

- only two states (Maine and Vermont) permit inmates to vote;
- 35 states prohibit felons from voting while they are on parole and 30 of these states also exclude felony probationers;
- two states deny the right to vote to all ex-offenders who have completed their sentences (Kentucky and Virginia). Nine others disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offences after a waiting period has elapsed;
- each state has developed its own process of restoring voting rights to ex-offenders but few ex-offenders take advantage of them;
- an estimated 5.3 million Americans, or one in 41 adults, have currently or permanently lost their voting rights as a result of felony conviction;
- 1.4 million African American males, or 13% of black men, are disenfranchised, a rate which is seven times the national average; and
- 2.1 million disenfranchised persons are ex-prisoners who have completed their sentences.

It has been said that:

Conviction rates among ethnic minorities in the US are much higher than rates among white people. As a result, a much higher proportion of black and Hispanic people are excluded from the vote.

This has prompted criticism and even several lawsuits claiming racial discrimination – particularly in Florida, where it is estimated almost one-third of black people are denied the vote.

The state was crucial in deciding the 2000 presidential election in favour of George W Bush and his Republican Party. Many in the defeated Democrat Party blamed the disqualification of ethnic minorities – traditional Democrat voters – for their loss.¹¹⁰

Another article on prisoner disenfranchisement in the United States says:

The United States stands virtually alone among democracies in having laws that continue to disenfranchise former prisoners even after they have paid their debts to society and finished parole or probation. A vast majority of the nearly 5 million US citizens who were barred from voting in the last presidential election would have been free to vote in Australia, Britain, France and Canada.

Like so much of what ails America, laws that strip felons of the right to vote are rooted in race. The South enacted these restrictions during the late 19th and early 20th century as part of a sweeping effort to limit black political power. This ugly legacy is painfully evident in statistics showing that black people account for about 40 percent of disenfranchisement cases and only about 12 percent of the population.

¹¹⁰ 'Prisoner voting: World views', *BBC News*, 28 April 2005.

*In the half-dozen states that have the strictest post-prison sanctions, one in four black men have permanently lost the right to vote.*¹¹¹

In May 2006, the American Civil Liberties Union published a report, *Out of Step with the World: An Analysis of Felony Disenfranchisement in the US and other Democracies*.¹¹²

¹¹¹ 'Letting ex-prisoners vote', *International Herald Tribune* (global edition of the New York Times), 30 August 2005.

¹¹² American Civil Liberties Union, *Out of Step with the World: An Analysis of Felony Disenfranchisement in the US and other Democracies*, May 2006, downloaded from http://www.aclu.org/images/asset_upload_file825_25663.pdf on 8 October 2008.

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