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# Voting Rights in Prison: Issues Paper

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# About the Author

This research paper was researched and written by University of Queensland (UQ) law student **Martin Churchill** for and on behalf of **Civil Liberties Australia**, an independent, not-for-profit organisation that promotes individual rights and civil liberties in Australia.

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# Introduction

Conveniently locked away from the public eye, prisons are the last stronghold against universal franchise. In the past the questions was, why should we extend the privilege of voting to women? To Indigenous Australians? But now that voter enfranchisement is widely perceived as a fundamental right, the onus of proof has shifted. The question is not why should we give prisoners the vote, but is there sufficient justification for stripping a fundamental political right from members of our society?

The Australian landscape is indeed diverse when it comes to prisoner disenfranchisement regulations. The Commonwealth,[1] Northern Territory[2] and Tasmania[3] allow those serving a sentence of less than three years to vote; Queensland, which until last year allowed none of its prisoners to vote, has now joined this group.[4] Victoria is more lenient, preventing only those serving a sentence of five years or more from voting;[5] while South Australia[6] and the ACT[7] have no voter restrictions at all. New South Wales[8] and Western Australia[9] have the most restrictive rules that disenfranchise all prisoners serving sentences of twelve months or more.

# Roach and the Franchise in Australia

From 1902, prisoners serving a sentence for an offence punishable by imprisonment of one year or more were deprived of the right to vote at Commonwealth elections for the duration of their sentence. In 1983, the Commonwealth shifted to a more lenient five-year rule. In 1995, the reference to those serving a sentence for an offence punishable by five years or longer was made yet more lenient, being altered to include only those whose actual sentence was five years or more. The reference to five years was changed to three in 2004. Then, in 2006, Parliament passed a blanket ban depriving all those serving sentences for a criminal offence from voting at Commonwealth elections.[10] This legislation was challenged by Vickie Lee Roach in the High Court of Australia. Roach argued that the blanket ban did not meet the requirement of representative democracy in the Australian Constitution.

By a 5:2 majority, the High Court held that the blanket ban was unconstitutional because it infringed the requirement of representative democracy under the Constitution. However, it upheld the previous restrictions. The majority reasoned that the franchise could be removed from a group if there was adequate justification for it.[11]

Two of the main justifications for the restrictions were examined: extra punishment, and the idea of the reciprocity of civic rights and obligations. As Gleeson CJ pointed out at [10], the 'extra punishment' rationale cannot be applied to Commonwealth restrictions, since the Commonwealth does not have the power to legislate punishment of state offences. This would not be a problem for the states or most overseas jurisdictions.

Gleeson CJ reasoned at [12] that, since the basis of the deprivation is not extra punishment, and the restrictions take away a right associated with citizenship, the rationale must be that serious offending

[1] *Commonwealth Electoral Act 1918* (Cth) s 93(8AA).
[2] *Northern Territory (Self-Government) Act 1978* (Cth) s 14.
[3] *Electoral Act 2004* (TAS) s 31.
[4] *Electoral Act 1992* (Qld) s 106(3).
[5] *Constitution Act 1975* (Vic) s 48(2)(b).
[6] *Electoral Act 1985* (SA) ss 29(4)-(5).
[7] *Electoral Act 1992* (ACT) s 71.
[8] *Electoral Act 2017* (NSW) s 30(4).
[9] *Electoral Act 1907* (WA) s 18(1).
[10] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [71]-[74] (Gummow, Crennan and Kirby JJ).
[11] Ibid [7] (Gleeson CJ), [83] (Gummow, Crennan, and Kirby JJ).

represents a form of civic irresponsibility that it is appropriate for parliament to mark as antisocial and to direct that physical separation from the community will be accompanied by symbolic separation in the form of a fundamental political right. He further stressed that reciprocity of rights and obligations is important in the context of membership of the community, i.e. that when people are given political rights there is an important onus on them to fulfil their political and social obligations.

Given the Court's opinion that prisoner voting restrictions are in principle justified, the majority reasoned, in line with overseas decisions, that specific restrictions would be justified if the disenfranchisement was proportional to the offence and sentence.[12] While disenfranchisement for the duration of one's sentence was arguably proportional to the *sentence*, it would not be proportional to the *offence* since disenfranchisement of those serving trivially short sentences for trivial offences could not be justified.[13] Hence, a total blanket ban would be unconstitutional. However, it was argued that a blanket ban applying only to those serving a sentence longer than a minimum length – for example the one, three, or five year rules that had been in place previously – would be proportional to the severity of the offence.[14]

# Human Rights Acts in Australia

The Australian system does not recognise an individual right to vote, since the Constitution enshrines only a collective right of the nation to have its legislature 'directly chosen by the people'. That does not mean, however, that Australia has no obligations to uphold human rights. Australia is a signatory to various international treaties and covenants, including the *International Covenant on Civil and Political Rights* (ICCPR), which recognises an individual right to vote. Unfortunately, many rights concern matters over which the states have exclusive jurisdiction, meaning that the Commonwealth cannot, by signing international treaties, force them to recognise these rights.

Nonetheless, Queensland, Victoria, and the ACT have implemented Human Rights Acts or Charters (HRAs) that mirror, to a large extent, the ICCPR. These HRAs recognise many human rights and freedoms as fundamental and provide that they may only be limited reasonably. They also require statements of compatibility to accompany each Bill; however, it is important to note that no Act is invalid by reason of non-compliance. The Commonwealth has passed the *Human Rights (Parliamentary Scrutiny) Act 2011*, but this merely requires statements of compatibility to accompany all Acts passed; it does not require that human rights be limited only reasonably.

The relevant provision of the ICCPR, Article 25, concerns the right to take part in public life. It requires that "[e]very citizen shall have the right and the opportunity... and without unreasonable restrictions... [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors". The three relevant HRAs contain similar provisions;[15] yet Queensland and Victoria still prohibit prisoners from voting who are serving sentences of at least three or five years respectively.

[12] Ibid [23] (Gleeson CJ), [90] (Gummow, Crennan and Kirby JJ).
[13] Ibid [93]-[95] (Gummow, Crennan, and Kirby JJ).
[14] Ibid [98], [102] (Gummow, Crennan and Kirby JJ).
[15] *Human Rights Act 2004* (ACT) s 17(b); *Human Rights Act 2019* (Qld) s 23(2)(a); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 18(2)(a).

# Overseas Jurisdictions and the ICCPR

While the High Court in *Roach* allowed three-year and one-year rules, the discussion was based on conformity with the internal obligations imposed by the Constitution. For a normative analysis of conformity with internationally recognised human rights, we must look to overseas jurisdictions and international treaties or covenants.

General Comment No 25 to the ICCPR sets out the relevant principles applicable in interpreting Article 25. Section 14 requires that grounds for the deprivation of the right to vote should be objective and reasonable. It recognises that criminal conviction may constitute valid grounds for suspending the right to vote, as long as the period of such suspension is proportionate to the offence and the sentence.

The question then becomes, what does 'proportionate to the offence and sentence' mean? Most jurisdictions have a similar requirement. The two at the forefront of the debate, the European Union (EU) and Canada, have laid out their interpretations in a few key judgements, and several other jurisdictions, including South Africa, have applied these principles.[16]

The first such case, *Sauvé v Canada (no 1)*,[17] involved a blanket ban barring all convicted prisoners from voting. The Canadian Supreme Court ruled unanimously that the provision was drawn too broadly and unreasonably infringed fundamental rights. Twelve years later, the revised legislation was challenged in *Sauvé v Canada (no 2)*.[18] This legislation altered the ban to cover all prisoners serving a sentence of two years or more. The Court held, by a 5:4 majority, that the law was unconstitutional as the government had failed to identify what exactly required the removal of the right to vote. Further, there was no rational connection between the ban and the objectives used to justify it – which violated the requirement in the Canadian Charter of Rights and Freedoms that the rights set forth therein could only be subject to "such reasonable limits prescribed by law as can be justified in a free and democratic society".

The EU has subsequently taken up the gauntlet. In *Hirst v UK (No 2)*,[19] the European Court of Human Rights (ECtHR) held that a UK blanket ban applying to all convicted prisoners was invalid because it was not proportionate to the offence and sentence. This was because it applied arbitrarily, and there was "no direct link between the facts of any individual case and the removal of the right to vote". The UK has refused to change its legislation despite multiple warnings from the ECtHR.

Since then, the *Hirst* principles have been applied in two more cases before the ECtHR. In *Frodl v Austria*,[20] the Court held that a ban applying to all prisoners serving a sentence of one year or more was invalid under the *Hirst* principles. In *Scoppola v Italy*,[21] however, the ECtHR upheld the legislation before it. This was surprising, as the *Scoppola* legislation was much stricter than that in any of the previous cases – it banned those serving a sentence of three or more years from voting for a five-year period, and those serving five years or more from voting for life.

The majority judgement in *Scoppola* shows that in that case the ECtHR was not concerned with the strictness of the legislation, but only with whether the period of suspension was proportionate to the offence and sentence. *Scoppola* has not yet been considered by other courts, and it is uncertain what this shift in the ECtHR's thinking will mean for future voting restrictions.

[16] *Minister of Home Affairs v National Institute for Crime Prevention and the ReIntegration of Offenders (NICRO)* (2005) 3 SA 280.
[17] (1993) 2 SCR 438.
[18] (2002) 3 SCR 519.
[19] [2005] ECHR 681.
[20] [2010] ECHR 508.
[21] [2012] ECHR 868.

However, it is important to remember *Scoppola* does not really support the imposition of strict prisoner voting bans. Due to the nature of the ECtHR, the issue in *Scoppola*, as in *Hirst* and *Frodl*, was of necessity largely jurisdictional.

# Justifications

Justifications for the restrictions are markedly absent in the primary legislative materials. For instance, when in 2019 the Queensland legislature implemented a three-year rule, the only reason given in the explanatory memoranda was that a three-year rule would improve consistency, since that was the current position in the Commonwealth.[22] However, in the broader debate over prisoner disenfranchisement, there are three main lines of argument.

The first is that disenfranchisement is just another form of punishment. This argument was considered in *Sauvé (no 2)* where the Court noted that this argument merely falls back on the prerogative of parliament to legislate as it pleases; it does not normatively justify why extra punishment is necessary, and why it should take the form of disenfranchisement.[23]

The more philosophical debate is a back-and-forth between two countervailing considerations.[24] The anti-disenfranchisement argument is that the franchise is a fundamental right, and that not even criminal activities warrant stripping people of the rights that they enjoy as members of the human race. In a world governed by today's values, this is arguably strong enough to create a presumption against the normative validity of prisoner disenfranchisement and force the onus of proof onto the opposition.

The pro-disenfranchisement response revolves around civic responsibility – the idea that the social contract is a two-way street requiring obedience to the rule of law as well as granting privileges. Why should those who despise the laws, have a say in their creation? Gleeson CJ took a somewhat similar line in *Roach* at [12]. This argument does carry weight, and it is a matter of opinion whether it satisfies the burden of proof placed on it.

The final line of argument focuses on practical benefit. Those in favour of disenfranchisement may argue that the restrictions teach offenders about the consequences of their actions and send a message about the community's view of crime.[25] Those opposed may respond that granting voting rights teaches prisoners about civic duties.[26] They may further argue that allowing prisoners to take part in public life is a valuable means of rehabilitation; however, this can be argued both ways. The five majority judges in *Sauvé* claimed that neither the record nor common sense supported the claim that disenfranchisement promoted rehabilitation,[27] while the four in minority pertinently noted that denial of the right to vote was perceived as meaningful by the disenfranchised applicants themselves, and can therefore contribute to the rehabilitation of prisoners.[28]

Unfortunately, the (few) relevant studies evaluating these claims are from the United States, and focus on the different issues that arise from disenfranchisement for life.[29] They are rendered even less applicable since there is another layer of complication: due to apathy, red tape, and limited access to information, very few

[22] Explanatory Notes, Electoral and Other Legislation Amendment Bill 2019 (Qld) p5.
[23] *Sauvé* (n 18) [25].
[24] Cf. *Sauvé* (n 18) [114]-[121].
[25] Ibid [181]-[182].
[26] Ibid [38].
[27] Ibid [49].
[28] Ibid [183].
[29] Alice Malmberg, 'Can Re-Enfranchisement Help Offenders Rehabilitate?' (BA Thesis, University of California, 2018); Christopher Uggen and Jeff Manza, 'Voting and Subsequent Crime and Arrest: Evidence From a Community Sample' (2004) 36 *Columbia Human Rights Law Review* 193; Guy Hamilton-Smith and Matt Vogel, 'The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism' (2012) 22(2) *Berkeley La Raza Law Journal* 407.

enfranchised prisoners actually vote.[30] While engaging with civil rights and obligations may have a rehabilitative effect, apathetically ignoring them will do quite the opposite. This is an important reminder that while prisoner voting reforms would be an important step forward, they would need to be accompanied by more holistic reforms and programs both encouraging and facilitating the exercise of voting rights by prisoners.

The High Court in *Roach* used a hybrid justification: that the restrictions could be used to mark serious offending as antisocial, and add symbolic to physical separation from the community. This resembles the 'extra punishment' argument, but it explains why the restrictions complete and complement physical incarceration, and also argues that crimes against society must be met with complete segregation from society. However, given the focus of contemporary theories of punishment on rehabilitation, it could be argued that complete segregation is furthering not an aim of, but a 'lesser evil' associated with, punishment by incarceration.[31]

Perhaps of most significance is the claim that prisoner voting restrictions in Australia are discriminatory in their application. As of 2016, Indigenous Australians were 12.5 times more likely to be imprisoned than non-Indigenous Australians.[32] Although accurate statistics on the issue are not available, it is estimated that nearly 0.6 per cent of Indigenous people are disenfranchised, while the rate for non-Indigenous people is less than 0.075 per cent.[33] For Indigenous people trying to participate in the democratic process, this is not merely a severe setback but also highlights the concerning discriminatory effect of voter disenfranchisement laws in Australia.

# Conclusion

The legislation covering prisoner disenfranchisement in Australia is a confused jumble, with some jurisdictions barring all prisoners serving a term of at least one, three or five years from voting, while others have no restrictions at all. And the inconsistency of the regulations merely reflects the confused state of the rationale advanced for them. True, various justifications have been mooted such as rehabilitation and the teaching of civic responsibility, but there is no statistical data evaluating whether the restrictions actually advance those ends.

Furthermore, the regulations disproportionately impact upon Indigenous Australians. Of course, demographic differences mean that any law will always affect some people or groups more than others. That is not a reason to repeal it, unless the burden of on one group outweighs the benefits of that law. However, when the benefits of prisoner disenfranchisement (if any) are purely speculative, and Indigenous people are affected 12.5 times more than the rest of the nation, the time has come for a major rethink.

[30] Tom Joyner, 'Potentially thousands of prisoners prevented from voting in federal elections, FOI documents reveal', *ABC News* (online, 5 July 2017) <https://www.abc.net.au/news/2017-07-05/prisoners-left-disenfranchised-in-successive-federal-elections/8461316>.

[31] Cf. *Hirst* (n 19) [44].

[32] Australian Law Reform Commission, *Disproportionate Incarceration Rate* (2018) <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/executive-summary-15/disproportionate-incarceration-rate/>.

[33] Australian Bureau of Statistics, *Prisoners in Australia, 2019* (2019) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02019>.

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