CONFERENCE OF LEADERS OF RELIGIOUS INSTITUTES IN NSW
CLRI (NSW)

ABN 52 476 36 2010
MEMBER OF CATHOLIC CHURCH RELIGIOUS GROUP

Senate Committee Inquiry into the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005

Submission by Social Justice Committee Conference of Leaders of Religious Institutes (NSW)

Social Justice Committee
Conference of Leaders of Religious Institutes (NSW)
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Rosebery NSW 2018
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1. Introduction

The Conference of Leaders of Religious Institutes in New South Wales (hereafter referred to as CLRI(NSW)) represents 3,500 women and men religious, and promotes the life, mission and concerns of religious congregations in the Church and in our society. CLRI(NSW) does this by:

- articulating our spirituality and commitment as members of religious congregations;
- actively promoting Reconciliation;
- working for justice for all through our advocacy, especially for Aborigines and Torres Strait Islanders, Australians who live in poverty, refugees and asylum seekers, those harshly treated before the law, and victims of racism;
- raising our corporate voice to challenge the structures of injustice in our state, our country and our world; and
- establishing committees, working groups and task forces which maximise the potential of the Conference to bring about change, especially structural change, in the area of social justice.

As one of these established committees, the Social Justice Committee (hereafter referred to as the Committee) is a means through which CLRI (NSW) can act effectively with respect to issues of social justice. The functions of the Committee are to investigate, to initiate action concerning, and to prepare papers on, social justice issues.

One of the social justice issues that the members of CLRI(NSW) are actively involved in is Prisoners rights. This proposed legislation will have a tangible and symbolic effect on prisoners' citizenship status in Australia. This submission will explore this issue in greater depth

Yours sincerely,

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2. Introduction

The *Electoral Referendum Amendment (Electoral Integrity and Other Measures) Bill* 2005 introduced by the Special Minister of State, the Honourable Senator Eric Abetz, proposes changes to our Electoral processes that strike at the very heart of the principle of democracy- a citizen's right to vote.

This submission relates specifically to the proposed revocation of prisoners' right to vote in Federal elections contained in items 13 to 15 that repeal paragraph 93(8)(b) and existing subsection 93(8AA), and substitute a new subsection 93(8AA) which provides that prisoners serving a sentence of full-time detention are not entitled to vote.

CLRI opposes these changes because they would have an unacceptable impact on the core democratic and human rights of Australian citizens and undermine the legitimacy of our representative democracy. Taking away prisoners' right to vote would also represent an unfortunate and unnecessary reversion to medieval notions of 'civil death' incompatible with the modern aims of offender rehabilitation and reintegration to the community.

3. Should the deprivation of liberty extend to the deprivation of citizenship?

In a recent High Court judgment his Honour Mr Justice Michael Kirby (dissenting) commented that:

> "Prisoners are human beings. In most cases, they are also citizens of this country, "subjects of the Queen" and "electors" under the Constitution. They should, so far as the law can allow, ordinarily have the same rights as all other persons before this Court. They have lost their liberty whilst they are in prison. However, so far as I am concerned, they have not lost their human dignity or their right to equality before the law".
> *Muir v The Queen 2004 HCA 21* at paragraph 25.

Criminal offenders who receive a prison sentence lose their liberty, they do not lose their rights as citizens. Imprisonment is the punishment, preventing prisoners from voting at elections constitutes an unfair "double punishment". A court's decision to sentence an offender with a term of imprisonment is a reflection of the nature and severity of the crime; the Government's proposal to take away prisoner voting rights, does not reflect the nature of the offence, it is an arbitrary decision to exclude a group of citizens from democratic processes. This violates the constitutional right of all citizens to elect those who govern them.

The proposed arbitrary removal of a prisoner's right to participate in a democracy would offend the principle of equality before the law. Due to the lack of uniformity in Australian State and Territory criminal laws it is possible that an offence in one State may be punishable by six months jail, whereas in another State the same offence warrants community service or a fine. A foreseeable consequence of the *Electoral Referendum Amendment (Electoral Integrity and Other Measures) Bill* 2005, is discrimination against prisoners on the basis of the quirks and variations of State and Territory criminal codes. For example, if two individuals in two different States commit a crime of equal nature and severity, one of them could receive a one

year prison sentence, whereas the other, due to the level of penalty prescribed for the offence, might receive a fine or community service. In this way the variations and quirks of state criminal laws, reproduce themselves at a Federal electoral level: one offender remains a full citizen, while the other has his or her constitutional right to elect a representative government taken away- by the very people who lay claim to legitimacy through democratic election.

In 1978 the Royal Commission into New South Wales Prisons, released the Nagle Report. Justice Nagle expressed the view that "all prisoners should be entitled to vote at State and Federal elections" and that "a citizen's right to vote should depend only on his ability to make a rational choice". Justice Nagle also added that:

> "The loss of voting rights is an archaic leftover from the concepts of 'attainder' and 'civiliter mortuus' and has no place within a penal system whose reform policies aim to encourage the prisoner's identification with, rather than his alienation from, the community at large."

Almost thirty years after the Nagle Report, and countless prison reforms later why is the Howard Government trying to remove prisoners' voting rights? Is there a rehabilitative purpose to the revocation of prisoner franchise? Or is the decision based purely on the notion that those who break the law are no longer entitled to have rights as citizens. If the latter is the case, CLRI challenges the Government to provide a source for their power to remove a section of the community's right to elect their political representatives.

4. Voting Rights in Australia

a) Constitutional protections

A citizen's right to vote is implied in the Australian Constitution, Section 7 and Section 24 both sections require that the members of the two houses of Parliament are to be 'directly chosen by the people'. Indeed, "the very concept of representative government and representative democracy signifies government by the people through their representatives" *Australian Capital Television Pty Ltd v The Commonwealth* (1992) per Mason CJ. In the same year Justices Deane and Toohey stated that "the powers of government belong to and are derived from the governed, that is to say, the people of the Commonwealth" *Nationwide News Pty Ltd v Wills* (1992).

b) International obligations

The *International Covenant on Civil and Political Rights* (ICCPR) is in force in Australia. It is a fundamental multilateral treaty on international human rights. Article 25 of the *ICCPR*, in combination with article 2, provides that every citizen shall have the right to vote at elections under universal suffrage without a distinction of any kind on the basis of race, sex or other status. Australia's previous refusal to grant the right to vote to certain classes of prisoners, such as those serving three or five year sentences, constitutes discrimination on the basis of their "other status". Consequently it is arguable that the Australian Government is currently in breach of its international obligations. CLRI seeks a response from the Government on its

commitment to its domestic human rights obligations in relation to its attempt to abolish prisoners' right to vote.

5. International Comparisons (Canada, South Africa, United Kingdom)

Australia's move to ban prisoners from voting is inconsistent with recent decisions in The South African Constitutional Court (*South African Minister for Home Affairs v National Institute for Crime Prevention & the Reintegration of Offenders [Nicro]*) and in the Canadian High Court case *Sauve and the Attorney-General of Canada (No. 2)*. In both of these cases restrictions on a prisoner's right to vote were struck down as unconstitutional.

Canadian Chief Justice McLachlin's comments in the judgment of illustrate the inviolability of universal suffrage:

> "The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility."

Furthermore, the European Court of Human Rights has recently determined that the United Kingdom's ban on prisoners' voting rights is in breach of its obligations under the European Convention on Human Rights.

6. Conclusion

It is important to recall that prisoners are citizens who have been deprived of their liberty, not their rights as citizens. The right to elect a political representative is an implied right in the Australian Constitution and an internationally recognized human right. The focus of debate surrounding criminality and sentencing should remain on the rehabilitation of offenders and their reintegration into our community; not their alienation from society and the political process of our representative democracy.

CLRI (NSW) opposes all aspects of the *Electoral Referendum Amendment (Electoral Integrity and Other Measures) Bill* 2005 relating to changes to prisoners voting rights. We urge the Government to repeal this Bill and for other members of the Senate to oppose it.