

# **Brimbank Melton Community Legal Centre**

a program of Community West Inc.



## **Senate Finance and Public Administration Legislation Committee**

### **Submission: Prisoners and the Right to Vote**

*"The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally it says that everybody counts."*

Constitutional Court South Africa, affirming  
the right of South African prisoners to vote, April 1999

**2 March 2006**

**Brimbank Melton Community Legal Centre**

822 Ballarat Rd, Deer Park VIC 3023  
Ph: (03) 9363 1811 Fax: (03) 9360 4851  
Email: [info@communitywest.org.au](mailto:info@communitywest.org.au)  
Web: [www.communitywest.org.au](http://www.communitywest.org.au)

A.B.N. 75 989 153 699      Incorporation No. A0002870G

## **Introduction**

This submission is prepared in response to the Senate Finance and Public Administration Legislation Committee's Inquiry into the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 (Cth)* (the Bill).

This submission deals only with Items 14 and 15 of Schedule 1 of the Bill which seek to deny the right to vote for any person serving a sentence of imprisonment.

## **About the Brimbank Melton Community Legal Centre**

The Brimbank Melton Community Legal Centre provides free legal services to disadvantaged people who live, study or work in Melbourne's outer Western region. The Centre also undertakes community legal education, law reform and policy work. The Centre is a program of Community West Inc, an independent, not-for-profit, community organisation based in outer Western Melbourne

The Centre has a strong tradition of law reform work around issues concerning the human rights of persons in custody in prisons and immigration detention. The Centre regularly provides advice and casework services to prisoners.

## **Summary**

The right to vote is fundamental human right. It can only be restricted when the restriction is objective, reasonable and proportionate.

The removal of voting rights for all sentenced prisoners is a restriction on the right to vote which is neither objective, reasonable or proportionate. Contrary to the reasons advanced for the proposed legislative change, denying prisoners the right to vote will:

- Detract from efforts to make prisoners more responsible and will be counter productive to prisoner rehabilitation;
- Undermine the integrity of the democratic process in Australia; and
- Breach the Australian Constitution and Australia's international human rights commitments.

## **The right to vote is a human right and a constitutional right**

The right to vote is one of the most fundamental human rights. It is the cornerstone of democracy and is protected by a number of international human rights instruments.

The International Covenant on Civil and Political Rights (ICCPR) guarantees that "every citizen shall have the right...to vote...at genuine periodic elections" (Article 25). The ICCPR entered into force for Australia in 1980. By ratifying the ICCPR, Australia accepted an obligation to implement the treaty in domestic law.

There are also strong arguments that the Australian Constitution contains an implied guarantee of the right to vote<sup>1</sup>.

### **Any restrictions on the right to vote must be reasonable**

The right to vote is not absolute. The ICCPR prohibits “unreasonable restrictions” on the right to vote (Article 25). The UN Human Rights Committee has commented that any restrictions on the right to vote must be objective, reasonable and proportionate<sup>2</sup>.

Similarly, in the context of constitutional rights, the High Court has stated that any restriction must be for a legitimate aim, must be reasonably appropriate and must be adapted to achieving that legitimate aim<sup>3</sup>.

Voting restrictions based on age, mental capacity and citizenship or residence are examples of restrictions that may be allowable.

### **Reasons advanced for denying prisoners the right to vote**

The Federal Government has advanced few reasons for denying all sentenced prisoners their human right to vote. The Second Reading Speech and Explanatory Memorandum do not disclose the Government’s reasons for introducing the prisoner amendment. Public comments on the matter are set out below:

*“If the community, through the courts under the rule of law, has judged an individual to have so offended against society’s laws that they should forfeit their fundamental right of freedom by being separated from society, then it seems passing strange that they should retain their right to vote in the future direction of that society”*; former Special Minister for State, Eric Abetz.<sup>4</sup>

*“I doubt there’s too many prisoners sitting in the jail thinking, ‘Oh dear oh dear, I’m not going to get an opportunity to vote next Saturday at the Federal election. I would doubt that very much...If you’ve done something to society that warrants a custodial sentence then you know, really, you shouldn’t be able to have some say in the elected officials, who are there legislating and making the laws that that particular person’s been flouting...Most Australians would expect that would be part of the sentence that while you’re in jail, well you shouldn’t be helping make decisions about who’s running the country”*; current Special Minister of State, Gary Nairn.<sup>5</sup>

*“Any ‘pub-test’ would find that law-abiding citizens resented allowing prisoners the vote”*; Senator Nick Minchin, in Parliamentary debate in 2004.<sup>6</sup>

---

<sup>1</sup> Davidson, Jerome *“Inside outcasts: prisoners and the right to vote in Australia”* (Department of Parliamentary Services 2004)

<sup>2</sup> UN Human Rights Committee, *General Comment 25; Article 25*, UN Doc HRI/GEN/1/Rev.5 (2001)

<sup>3</sup> *Lange v ABC* (1997) 145 ALR 96 at 108

<sup>4</sup> Address to the Sydney Institute, 4 October 2005

<sup>5</sup> <http://www.abc.net.au/am/content/2006/s1578328.htm>, 25 February 2006

<sup>6</sup> 24 June 2004

In 1997, the Joint Standing Committee on Electoral Matters, reversing two previous recommendations, recommended the removal of voting rights for all sentenced prisoners, stating:

*“While rehabilitation is an important aspect of imprisonment, equally important is the concept of deterrence, seeking by the denial of a range of freedoms to provide a disincentive to crime. Those who disregard Commonwealth or State Laws to a degree sufficient to warrant imprisonment should not be expected to retain the franchise”;*<sup>7</sup>

Essentially, the arguments advanced in support of the prisoner amendment seem to be:

- Deterrence through punishment: Removing the right to vote will deter criminal behaviour;
- Preserving the integrity of the democratic process/punishment: If you commit a serious breach of society’s laws, you should be deprived of your right to participate in the future direction of society. A person who has shown no respect for society’s laws has no moral or civic authority to shape those laws; and
- Majority support: A majority of Australian people support denying sentenced prisoners the right to vote.

## **Reasons advanced are not objective, reasonable or proportionate**

### **Deterring crime or promoting reoffending?**

The aim of deterring crime by effective punishment is a legitimate aim. However, there is no evidence that depriving prisoners of the right to vote will have any impact whatsoever on crime rates. Common sense suggests that it will have no impact. Given the complete lack of evidence that removing voting rights will deter crime, there is no justification for depriving prisoners of their fundamental human right.

Further, depriving prisoners of the right to vote may actually contribute to increasing crime rates.

The ICCPR provides that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation” (Article 10). This statement recognises that the penal system should work towards reforming prisoners so that they do not reoffend on release.

To promote rehabilitation, modern correctional practice focuses on trying to make prisoners more responsible, rather than taking responsibility away from them.<sup>8</sup>

---

<sup>7</sup> *The 1996 Federal Election: Report of the Inquiry into the conduct of the 1996 Federal Election and matters related thereto*, Commonwealth of Australia, June 1997, p 48

<sup>8</sup> Professor Robert White, University of Tasmania, ABC News 5 October 2005

Depriving prisoners of the right to vote detracts from their social rehabilitation. It promotes civic exile and is a modern extension of the old civic death concept. Voting provides a connection to society. It encourages prisoners to take the responsibilities of citizenship. It promotes rehabilitation.

In the UK, where there has been significant debate about prisoner voting rights in connection with the European Court of Human Rights decision in *Hirst v UK (No 2)*, the Chief Inspector of Prisons, Sir David Ramsbotham spoke out in favour of prisoner voting rights, stating:

*"They have had their liberty removed as punishment but they are still citizens of this country. If you are trying to encourage them to be responsible citizens when they come out, useful and law abiding members of society, it seems to me you have to encourage that responsibility by giving them as much as you can"*<sup>9</sup>.

In Australia, Dr Bob Montgomery, Forensic Psychologist speaking on behalf of the largest representative body of psychologists, the Australian Psychological Society stated:

*"There is no need to add further punishment, such as the loss of basic democratic rights like voting...The more punitive the penal system, the more alienated its inmates are likely to become."*<sup>10</sup>

Accordingly, contrary to the assertion that removing prisoner voting rights will deter crime, expert opinion suggests it will detract from prisoner rehabilitation and may actually contribute to increasing rates of reoffending.

### **Preserving or undermining the integrity of the democratic process?**

Loss of liberty is the punishment that follows a sentence of imprisonment. The old concept of civic death, whereby an automatic consequence of imprisonment is the loss of all other civil rights, has no place in modern Australian law. There is no justification for punishing prisoners by removing the right to vote from prisoners simply because of the fact of their imprisonment. Imprisonment does not somehow remove from a human being their capacity to make rational, informed choices about their choice of representative.

The Government seems to argue that the fact of imprisonment somehow deprives a person of the requisite moral or civic authority to vote. They say, in essence, if you breach our laws, why should you be allowed to shape them? The right answer to this question is: Because it is good for democracy.

Depriving prisoners of their voting rights will clearly undermine the integrity of the democratic process. The Constitutional Court South Africa, in April 1999 affirming the right of South African prisoners to vote, stated:

---

<sup>9</sup> Interviewed on GMTV 8 March 2001

<sup>10</sup> Media Release, 6 October 2005

*“The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally it says that everybody counts.”*<sup>11</sup>

The present voting prohibition on prisoners serving sentences of three years or more affects around 9,000 prisoners<sup>12</sup>. The removal of voting rights for all sentenced prisoners will affect around 19,000 prisoners<sup>13</sup>. It will further deprive a small, politically vulnerable minority of the Australian community of its already weak voice. It will also have a disproportionate affect on the indigenous community, as the rate of indigenous imprisonment is around 16 times the non-indigenous rate<sup>14</sup>.

Given that nearly every aspect of their daily existence is controlled by executive government, it is perhaps even more important that prisoners have a voice through the ballot box. Depriving prisoners of the vote will allow politicians to more easily ignore the problems in our prison system.

### **Majority support for minority oppression?**

The Federal Government is confident that a majority of Australians support denying prisoners the right to vote. It has advanced this as a reason for supporting the legislation.

Even if a majority does support the legislation, this provides no justification for denying a fundamental human right. It is extremely concerning that the Federal Government seems to think otherwise. Human rights and constitutional rights exist to prevent minority oppression at the hands of the majority.

The right to vote can only be restricted when the restriction is objective, reasonable and proportionate. Majority support is irrelevant.

### **The legislation will breach Australia’s international human rights obligations and the Australian Constitution**

Removing the right of all sentenced prisoners to vote is not an objective, reasonable or proportionate restriction on the fundamental human right to vote.

Depriving all sentenced prisoners of their voting rights will breach Australia’s international human rights obligations. There are strong arguments it will also breach the Australian Constitution.<sup>15</sup>

---

<sup>11</sup> *August v Electoral Commission* (1999) 3 SA 1 (CC) [16]

<sup>12</sup> Australian Bureau of Statistics, “Prisoners in Australia 2004”

<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid*

<sup>15</sup> The South African Constitutional Court, the Canadian Supreme Court and the European Court of Human Rights have all recently found restrictions on prisoner voting rights to be unconstitutional or in breach of the human right to vote; *August v Electoral Commission* (1999) 3 SA 1 (CC) [16], *Sauve v Canada* [2002] 3 SCR 519, *Hirst v UK (No 2)* ECHR 2005.

## **Further information?**

Hugh de Kretser

Principal Community Lawyer

T 03 9363 9927

E [hughdk@communitywest.org.au](mailto:hughdk@communitywest.org.au)