

SUBMISSION OF THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

to the

SENATE FINANCE AND PUBLIC ADMINISTRATION COMMITTEE

regarding

ELECTORAL AND REFERENDUM AMENDMENT (ELECTORAL INTEGRITY AND OTHER MEASURES) BILL 2005

9 March 2006

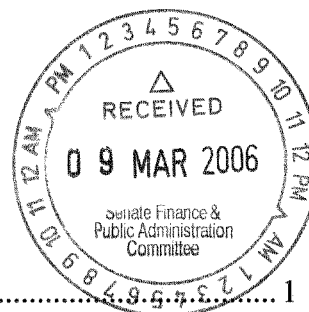


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Introduction

1. The Human Rights and Equal Opportunity Commission (the Commission) welcomes the opportunity to make this submission to the Senate Finance and Public Administration Committee on the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005* (the Bill).
2. The Commission is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). It is Australia's national human rights institution.
3. Section 11 of the HREOC Act sets out the Commission's function to promote an understanding, acceptance and public discussion, of 'human rights' in Australia.¹

¹ Section 11(1)(g) of the HREOC Act.

4. In addition, section 46C(1) of the HREOC Act sets out the Commission's function to promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders.
5. For the purposes of the HREOC Act, 'human rights' include the rights and freedoms recognised in the International Covenant on Civil and Political Rights (ICCPR).
6. In relation to the human rights of Aboriginal and Torres Strait Islander peoples the Commission must also have regard to the Universal Declaration of Human Rights (UDHR) and the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD).²

Overview of the Commission's Submission

7. A healthy democracy ensures that all members of the community have equal access to the political process. It is therefore vital that the right to vote is enjoyed equally by all Australians. The Commission is concerned however that such equality does not currently exist in Australia. Disadvantaged groups include certain young people, prisoners, Aboriginal and Torres Strait Islander peoples, people living in rural and remote areas, people with disability and homeless people.
8. This submission focuses on those aspects of the Bill that make it more difficult for prisoners, young people, Indigenous peoples, people with mental illness, people with intellectual disability and people living in rural and remote areas to exercise their human right to political participation.
9. The Commission is particularly concerned about those provisions relating to: (a) the right of prisoners to vote; and (b) the early closure of the rolls. It is the Commission's view that, if enacted in their current form, those provisions will prevent prisoners (a population in which Indigenous people, people with mental illness and people with intellectual disability are overrepresented), young people and possibly people in rural and remote areas (many of whom are Indigenous people) from exercising their fundamental human right to participate in the political process.
10. The Commission recommends removal or amendment of those provisions from the amending Bill.

The human right to political participation

11. The right to participate in the political process, including the right to vote, is a fundamental civil liberty and human right and should be enjoyed by all people without discrimination.

² Section 46C(4) of the HREOC Act.

12. As a party to the ICCPR and ICERD, Australia is bound under international law to ensure the protection and promotion of the rights in those Conventions.

13. Article 25 of the ICCPR states that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To 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 distinctions in article 2 of the ICCPR include 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

14. The United Nations Human Rights Committee has issued a General Comment (General Comment 25) to help interpret the meaning of article 25 of the ICCPR.

15. The General Comment explains that any restrictions on the rights in article 25 of the ICCPR 'should be based on objective and reasonable criteria.'

16. The General Comment provides examples of reasonable and unreasonable restrictions on the right to vote. For instance, a reasonable restriction would be to require a minimum age for exercising the right to vote. On the other hand it would be unreasonable to restrict the right to vote 'on the ground of physical disability or to impose literacy, educational or property requirements.'³

17. The General Comment specifically addresses the possibility of excluding convicted criminals from the right to vote. It suggests that any exclusion must be 'objective', 'reasonable' and 'proportionate' to the offence and the sentence. Further, '[p]ersons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote'.⁴

18. Article 5(c) of ICERD states that

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...

(c) Political rights, in particular the right to participate in elections, to vote and to stand for election on the basis of universal and equal suffrage, to take part in the

³ General Comment 25, paragraphs 4, 10.

⁴ General Comment 25, paragraph 14.

Government as well as in the conduct of public affairs at any level and to have equal access to public service;

Article 2 in ICERD refers to the obligation to eliminate racial discrimination and 'to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.'

19. Finally, article 21 of the UDHR provides that:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Prisoner disenfranchisement

20. The proposed amendments in the Bill seek to deny the right to vote for convicted persons serving a full time custodial sentence on the day the writ of election is issued. 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.
21. The Commission notes that this provision may exclude approximately 19,000 people from exercising their right to vote, which is about double the number of those prisoners who are currently excluded from voting.⁵
22. 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.
23. 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.
24. **The disenfranchisement provisions are disproportionate to any legitimate aim.** The blanket application of the provisions to all full time custodial prisoners will inevitably result in the disenfranchisement of persons serving sentences for matters unrelated to their fitness to participate in the political process. For example, in the Commission's view it is entirely disproportionate to deprive a fine

⁵ See the Bills Digest on the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005*

defaulter from voting in an election because he or she happens to be in gaol on the day an election writ is issued.

25. **The disenfranchisement provisions are arbitrary in their application.** The Bill's provisions are arbitrary because they fail to make any distinction between different prisoners. The provisions apply to all persons in full time prison irrespective of the offence committed or its seriousness. In the Commission's view it is inappropriate that, for example, a person in gaol for a week for fine default or a driving offence is automatically treated in the same manner as a person convicted of an offence like treason.
26. The provisions are also arbitrary because they make a blanket distinction between the form of detention without any reference to the type of offence or its seriousness. In the Commission's view there is no reasonable basis for distinguishing between those detained in prisons and those in home detention or periodic detention in the context of disenfranchisement provisions. The reasons that a person may or may not be suitable for home detention or periodic detention may be unrelated to the seriousness of the offence committed, but rather may be by reason of the personal, family or employment circumstances of the individual.
27. **The Commission is also concerned that the provisions may be discriminatory** in their application to Indigenous peoples, people with mental illness and people with intellectual disability and therefore contrary to article 25 of the ICCPR and – in the case of Indigenous peoples – articles 2 and 5(c) of ICERD. This is because those groups are overrepresented in prison populations and therefore the proposed disenfranchisement provisions will have a disproportionate impact on them.
28. According to the NSW Law Reform Commission people with intellectual disability are detained at a rate 4 times greater than that of the general population.⁶ In 1996, the NSW Law Reform Commission estimated that in NSW prisons people with intellectual disability make up between 1% and 3% of the general population, but represent between 9% and 13% of the total NSW prison population.⁷ A survey of NSW prisons in 2001 by the NSW Corrections Health Service found that approximately 11% of women and 11% of men were determined to have either an intellectual disability or were functioning in the borderline range.⁸
29. Studies also indicate high incidences of mental illness on admission to prison and high rates of prior treatment and assessment. A 2001 study by the Schizophrenia Fellowship of NSW suggests that 60% of people admitted to prisons have an active mental illness.⁹ The NSW Corrections Health Service also conducted a survey which revealed that 54% of women and 41% of men reported that they had received some form of psychiatric treatment or assessment for an emotional or

⁶ NSW Law Reform Commission (1996). Report 80: People with intellectual disability and the Criminal Justice System. Available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>

⁷ NSW Law Reform Commission (1996). Report 80: People with intellectual disability and the Criminal Justice System.

⁸ Butler T, Milner L. (2003) The 2001 New South Wales Inmate health Survey. Corrections Health Service, Sydney.

⁹ Schizophrenia Fellowship of NSW Inc. (2001) Report on the criminal justice system in Australia.

mental health problem at some point in their lives. Approximately one third of these people had been previously admitted to hospital as a psychiatric inpatient.¹⁰

30. As at 30 June 2005 there were 5,656 Indigenous people in Australian prisons or 22% of the total prison population.¹¹ In 2003, The Australian Bureau of Statistics estimated that Indigenous persons were 16 times more likely to be in prison than non-Indigenous persons.¹²
31. As noted above, Article 5(c) of ICERD requires Australia to guarantee to everyone, without distinction as to race, political rights and the right to participate in elections and vote on the basis of universal and equal suffrage. Article 2 of ICERD obliges States to amend, rescind or nullify any laws which have the effect of creating or perpetuating racial discrimination.
32. The Commission is therefore concerned that the proposed laws to disenfranchise all prisoners will breach both article 25 of the ICCPR and articles 2 and 5(c) of ICERD.
33. The current provisions of the *Commonwealth Electoral Act 1988* (the Act) exclude persons in detention on sentences for more than 3 years. The Commission notes that recent developments in international jurisprudence and academic writing suggest that the indiscriminate disenfranchisement of groups of prisoners risks contravening international law. The Commission similarly has concerns that the current disenfranchisement provisions in the Act fall outside the proportionality requirements embodied in article 25 of the ICCPR.
34. The recent judgement of the European Court of Human Rights (the European Court) in *Hirst v United Kingdom (No. 2)* considers whether a law in the United Kingdom, which sought to disenfranchise all prisoners, was contrary to Article 3 of Protocol No. 1 of the European Convention on Human Rights (ECHR).¹³
35. Article 3 of Protocol No. 1 is similar to article 25 of the ICCPR. That provision reads:

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.¹⁴

36. In examining Article 3 of Protocol No. 1 the European Court noted that:

¹⁰ Butler T, Milner L. (2003) The 2001 New South Wales Inmate health Survey. Corrections Health Service, Sydney.

¹¹ ABS, Prisoners in Australia, 2005. Series cat. no. 4517.0, Commonwealth of Australia, Canberra, 2005.

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Main+Features12005?OpenDocument>

¹² ABS, Prisoners in Australia, Series cat. no. 4517.0, Commonwealth of Australia, Canberra, 2003 p.5.

¹³ A summary of the judgement is available at:

<http://www.echr.coe.int/Eng/Press/2005/Oct/GrandChamberJudgmentHirstvUK061005.htm>

¹⁴ The full text of the Convention is available at <http://www.hri.org/docs/ECHR50.html>

...the rights guaranteed under Article 3 of Protocol No. 1 were crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law and also that the right to vote was a right and not a privilege.¹⁵

37. The European Court found that the UK law to disenfranchise all prisoners violated the ECHR. The Court stated that there may be reasons to limit the right to vote, but a decision to indiscriminately ban all prisoners could not be in pursuit of a legitimate aim nor be proportionate:

... any limitations on the right to vote had to be imposed in pursuit of a legitimate aim and be proportionate. Any such conditions had not to thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risked undermining the democratic validity of the legislature elected and its laws.¹⁶

38. The European Court went on to explain:

[T]he fact that a convicted prisoner is deprived of his liberty does not mean that he loses the protection of other fundamental rights. . . , even though the enjoyment of those rights must inevitably be tempered by the requirements of his situation. . . . [T]here is no clear, logical link between the loss of vote and the imposition of a prison sentence, where no bar applies to a person guilty of crimes which may be equally anti-social or 'uncitizen-like' but whose crime is not met by such a consequence.¹⁷

39. While Australia is not bound by the ECHR, the principles stated in this case provide valuable assistance with the application of article 25 of the ICCPR to the amendments proposed by the Bill.

40. Another case of interest is *Sauve v Canada (Chief Electoral Officer)* where the Canadian Supreme Court struck down a law that disenfranchised people serving a sentence of two years or more.¹⁸ The Supreme Court found that the law breached section 3 of the Canadian Charter of Rights and Freedoms which states:

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".¹⁹

41. The Canadian Supreme Court summarised the majority view as follows:

The right of every citizen to vote, guaranteed by s. 3 of the Canadian Charter of Rights and Freedoms, lies at the heart of Canadian democracy. The law at stake in this appeal denies the right to vote to a certain class of people—those serving

¹⁵ Press release issued by the Registrar, Grand Chamber Judgment *Hirst v The United Kingdom* (No. 2). Available at

<http://www.echr.coe.int/Eng/Press/2005/Oct/GrandChamberJudgmentHirstvUK061005.htm>

¹⁶ <http://www.echr.coe.int/Eng/Press/2005/Oct/GrandChamberJudgmentHirstvUK061005.htm>.

¹⁷ *Hirst v The United Kingdom* (No 2) (74025/01) [2004] ECHR 121.

¹⁸ *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519

¹⁹ <http://laws.justice.gc.ca/en/charter/index.html>

sentences of two years or more in a correctional institution. The question is whether the government has established that this denial of the right to vote is allowed under s. 1 of the Charter as a 'reasonable limit demonstrably justified in a free and democratic society.' I conclude that it is not. The right to vote which lies at the heart of Canadian democracy, can only be trammled for good reason. Here, the reasons offered do not suffice.²⁰

42. Some commentators have argued that curtailing the right of any prisoner amounts to an additional form of punishment - 'civil death' – and should therefore only be meted out by a judge in the context of sentencing considerations.²¹ Others have argued that the only circumstance that warrants deprivation of the right to vote is when a person has been convicted of treason.²²

43. Two Australian academics, Brian Mercurio and George Williams, made the following comment regarding the disenfranchisement of Australian prisoners:

In denying a section of the population the right to participate in the electoral process, nations risk violating the participation principle which requires that (with reasonable exceptions) all citizens have access to the ballot. Of course much depends upon what is reasonable and commentators still debate whether restrictions on convicted persons are appropriate.²³

44. The question of whether prisoner disenfranchisement is a 'reasonable exception' to universal suffrage was also analysed by Jerome Davidson in the context of the Australian disenfranchisement provisions.²⁴ Davidson concluded that punishment and deterrence appear to be the factors underlying the current proposal to disenfranchise all prisoners serving a sentence and that those reasons were insufficient to satisfy the 'reasonableness' test.

45. Some commentators have also argued that enfranchisement can assist with rehabilitation and social integration of prisoners.²⁵ This would be in accordance with Article 10(3) of ICCPR which provides:

The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.'

²⁰ *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, para 1.

²¹ Dhami MK (2005) Prisoner disenfranchisement policy: A threat to democracy? *Analyses of Social Issues and Public Policy*, 5(1) 235-247; Public Interest Advocacy Centre (2005) Submission to the Joint Standing Committee on Electoral Matters, Inquiry into the Conduct of the 2004 Federal Election.

²² Davidson J (2004). Inside outcasts: prisoners and the right to vote in Australia. Current Issues Brief No. 12 2003-2004. Information and Research Services, Parliamentary Library, Department of Parliamentary Services. Citing *Belczowski v The Queen* (1992) 90 DLR (4th) 330 at 342.

²³ Mercurio B and Williams G. (2004) Australian electoral law: 'free and fair'? *Federal Law Review* 32: 366 at 376.

²⁴ Davidson J (2004). Inside outcasts: prisoners and the right to vote in Australia. Current Issues Brief No. 12 2003-2004. Information and Research Services, Parliamentary Library, Department of Parliamentary Services.

²⁵ Dhami MK (2005) Prisoner disenfranchisement policy: A threat to democracy? *Analyses of Social Issues and Public Policy*, 5(1) 235-247.

Early closure of the rolls

46. The Commission understands that the proposed amendments regarding early closure of the rolls would require the following events to occur by 8pm on the same day as an election writ is issued:
- (a) most new enrolments - including youth who have turned 18 since the previous election and new Australian citizens;
 - (b) re-enrolments.
47. The amendments also seem to require the following to occur by 8pm three days after the election writ has been issued:
- (a) new enrolments for those persons who turn 18 or become Australian citizens between the date the election writ is issued and the election day;
 - (b) change of details – including address or name details.
48. In the Commission's view, closing new enrolments and re-enrolments on the day the election writ is issued - rather than 7 days after the writ as is currently the case - has the potential to disadvantage young, first-time voters and new Australian citizens who typically enrol in great numbers during the so-called 'grace period'.
49. The three day period for change of details is also very short and disadvantages itinerant populations and people living in remote and rural areas who may have additional difficulties in making change of address notifications. The impact of such disadvantages fall disproportionately on Australia's Indigenous population.
50. The short periods of time may also disadvantage people with disability who need assistance to access and complete the relevant materials.
51. While the Commission acknowledges that the motivation behind the early closure of the rolls is to ensure sufficient time to scrutinise the identity of new electors, the Commission also notes that the body in charge of conducting this function – the Australian Electoral Commission (AEC) – is against such a change:

The AEC is on record repeatedly expressing its concern at suggestions to abolish or shorten the period between the issue of the writs and the close of the rolls. That period clearly serves a useful purpose for many electors, whether to permit them to enrol for the first time (tens of thousands of electors), or to correct their enrolment to their current address so that they can vote in the appropriate electoral contest (hundreds of thousands of electors). The AEC considers it would be a backward step to repeal the provision which guarantees electors this seven day period in which to correct their enrolment.²⁶

52. Thus, according to the AEC, early closure of the electoral roll for the purposes of new enrolments and change of address has the potential to disenfranchise hundreds of thousands of voters.

²⁶ AEC, submission to the Joint Standing Committee on Electoral Matters (JSCEM) in 2002: (page 3 of the bills digest) AEC, Supplementary Submission, Inquiry into the 2001 federal election, p. 10 <http://www.aph.gov.au/house/committee/em/elect01/subs/sub174.pdf>

53. The United Nations Human Rights Committee General Comment 25 explains that article 25 of the ICCPR requires parties to the Convention to make it practically feasible for all people to exercise their right to vote:

States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. ... Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.²⁷

54. In the Commission's view the proposed amendments may breach article 25 of the ICCPR and article 5(c) of ICERD in that it unreasonably restricts the right of those otherwise entitled to vote from participating in an election.

Conclusion

55. In order to ensure that Australia fulfils its human rights obligations under the ICCPR and ICERD, the Commission recommends removal of those provisions of the Bill that seek to:
- (a) restrict the right of prisoners to vote (Schedule 1 items 3, 4, 13 to 16, 50, 61 and 66)
 - (b) bring forward the closure the electoral roll (Schedule 1 items 20, 24, 28, 39 to 45, 51, 52, 104 to 108)

²⁷ General Comment 25, paragraph 11.