PRISONER'S VOTING RIGHTS

Julian Disney

In every Australian State or Territory, and at the Federal level, electoral legislation deprives many prisoners of the right to vote at parliamentary elections.

*In Victoria and Tasmanian State elections no prisoner has the right to vote unless he has not yet been convicted and sentenced.[1]

*In New South Wales and South Australian State elections a prisoner has no vote if he is serving a sentence of twelve months or more.[2]

*At Commonwealth or Territory elections, and Western Australian and Queensland State elections, a prisoner has no right to vote if he is under sentence for an offence for which the maximum sentence, in any part of the "Queen's dominions" (i.e. most of the British Commonwealth), is twelve months or more. This ridiculously broad provision disenfranchises a prisoner whose own sentence is, say, one month, if his offence was one for which the maximum sentence in, say, Jamaica or Malta, is twelve months.[3]

Except in New South Wales and Tasmania, if a person loses the right to vote due to imprisonment, he does not recover the right when let out on parole. He gets it back only when the sentence has expired.

The right to vote is the fundamental basis of a democratic society. It provides the ideological and moral justification for the exercise of governmental power over a citizen. If a citizen has no right to vote, or no opportunity to exercise the right, the State has no justification for seeking to co-erce the actions of that citizen.[4]

It is ironic, to say the least, to disenfranchise prisoners, for no other citizens are more co-erced by the power of the State (except perhaps in mental institutions). It is a classic example of double punishment and of the general, but inexcusable and out-moded, conception of prisoners as outlaws who are to be deprived not only of their freedom but of most other legal, political and basic human rights as well.

However, the major purpose of this article is not to put the case that all prisoners should have the right to vote. In my view, that case is simple and incontestable, and electoral legislation around Australia should be amended forthwith by excluding the sections which disqualify prisoners. My main purpose is to emphasise that, in reality, disenfranchisement of prisoners is even more extensive than is suggested by the formal rules summarised above, and to explore the needs and the possibilities for reform. It is no good giving a prisoner a right to vote if he is then prevented from exercising that right. Yet, nowhere in Australia are facilities provided for voting by prisoners and, as a result, none can vote. This gross denial of a fundamental legal and political right applies even to unconvicted prisoners who are in prison awaiting trial or are on weekend detention (since most elections are on Saturdays). In New South Wales, at any given time about 20% of prisoners are serving sentences of less than 12 months and another 13% are unconvicted persons.[5] Thus, about one-third (or 1200 people) of New South Wales prisoners have not been disenfranchised and yet are prevented from voting.

What action should the electoral and prison authorities take to rectify this unjust, and quite possibly illegal, situation?

External Voting

Firstly, prisoners could be allowed out to vote at a polling booth near the prison. If, as would usually be the case, the booth is not within the electorate for which they are enrolled, they could cast an "absent vote" which would then be sent to their own electorate for counting. This method

is possible without any amendment to present legislation and its implementation is entirely up to the prison authorities. If prison officials decided to escort prisoners to a nearby booth, the electoral authorities would have to allow the prisoners to vote. The only argument that prison authorities can make against adopting this method is the danger of escape or disruptive conduct by prisoners. This danger is especially slight when the only prisoners with a right to vote are those who are unconvicted or have a short sentence.

Booths in Prison

A second alternative is to set up a polling booth within each prison. Three objections to this method have been raised by electoral officials. Firstly, some of them allege that polling booths must be open to the general public. However, there is no specific requirement of that nature in the legislation nor is there any reason why it should be implied. Booths must be open to the candidates and their scrutineers, but there is no reason why such people could not be allowed to attend a booth in prison. Even if booths must be open to the public, they could be established either just outside the prison gate (to which prisoners could be escorted easily and securely) or in the visitors' area inside.

A second objection is that electoral officers at the booth would be in danger. There is no reason why electoral and prison officials cannot devise a system which provides adequate security (primarily by restricting the numbers of prisoners near the booth at any one time) but does not infringe the secrecy and freedom of the voting process. If necessary, prison officers could be appointed as electoral officers to run the booth.

The third objection is that there would not be enough potential voters at the prison to justify the expense and trouble of establishing a booth. A simple answer is that, if the prisoners have no other way in which to exercise their right to vote, a booth must be established regardless of cost and inconvenience. Furthermore, many prison officers (and

perhaps their families) could be expected to vote at the booth. In New South Wales the Electoral Commissioner will establish a booth if he believes that at least fifty persons are likely to vote at it. Even without relying on warders' votes, all but one or two of the N.S.W. Prisons would satisfy the Commissioner's criterion (for which there is no statutory basis).

There seem to be no valid objections to this method. Its implementation would need the agreement of both prison and electoral authorities, but needs no legislative amendments. However, action must not be left until the last minute because most electoral laws prevent the establishment of new polling booths after the election date has been set (and the writs issued).

Postal Voting

The third, and probably most attractive, alternative is to enable prisoners to cast postal votes. The present legislation provides a short list of grounds upon which electoral officers can accept a postal vote.[6] Prisoners (like other persons) are entitled to vote by post if they are "seriously ill or infirm", "approaching maternity", or have religious beliefs precluding attendance at a booth (for example, strict Jewish beliefs restrict movement on Saturdays, when most elections are held). However, these qualifications are unlikely to be met by many prisoners.

Two other grounds enable a person to vote by post if, throughout the hours of polling, he or she will not be within eight kilometres "by the nearest practicable route" of a polling booth, or will be "travelling under conditions which will preclude him" from voting at any polling booth. It could be argued that prisoners satisfy these criteria, but if the argument were rejected by the courts it would be necessary to change the legislation to give them a postal vote. The Commonwealth and New South Wales electoral offices have indicated that they do not regard incarceration as sufficient

ground for a postal vote, and apparently their counterparts in other States take a similar view.

The necessary amendment would be very simple, and should apply not only to prisoners but to all persons in custody (such as those held in police stations on polling day).. It should add to the list of those entitled to vote by post, "any person who will throughout the hours of polling on polling day be precluded from voting at any polling booth because he is,or will be, in custody."

It would also be necessary to ensure that postal votes pass unopened through the prison censorship system. Where the censorship is authorised only by regulation, it is probably overriden by the electoral Acts, which require secret ballot. However, it would be desirable to have legislation (or at least, a formal administrative arrangement) to the effect that postal votes are to be passed on unopened to the electoral authorities. Similar provisions have been enacted in recent years concerning letters to Ombudsmen. However, in view of the general untrustworthiness of prison mail systems and the specific attempts in at least two States (Victoria and South Australia) to violate the secrecy of letters to the Ombudsman, it would be preferable for postal votes to be collected personally from prisoners by an electoral officer. Even if it is a relevant consideration, the administrative "inconvenience" would be trifling.

The postal voting method has the significant advantage of causing less administrative inconvenience, and real or imagined security risks, than the other methods. It is the method used in New Zealand and the United States and the official reaction in Australia has tended to regard it as the "least objectionable" alternative.

On the other hand, by comparison with the other two methods, postal voting has the disadvantage that it may need legislative action. However, in some States it may be easier to get legislative action than persuade the electoral or prison authorities to change their policies. A useful stimulus to legislative or administrative reform might be the commencement

of a legal action for mandamus, seeking a court order that the electoral authorities comply with their statutory duty to enable eligible persons to cast a vote. Such an action is presently being considered by the New South Wales Council for Civil Liberties.

Postal voting is not very appropriate in relation to persons unexpectedly incarcerated in the last day or so before the election. Some electoral laws require applications for postal votes to reach the electoral authorities by late in the afternoon before polling day. For "late arrivals" in prison, and for persons in the custody of police or other officials, it might be necessary to require the custodians to escort them to a nearby polling booth. Whichever method of voting is adopted, several major issues remain.

Encouragement or Compulsion to Vote

Many prisoners who are otherwise eligible to vote will be ineligible because they are not on the electoral roll. If facilities are provided for voting by prisoners, a supporter of our system of compulsory voting (or a person who believes that, once adopted, the system should be applied uniformly) will probably support the prosecution of prisoners who are eligible to enrol but do not do so, or, having enrolled, do not vote. Such prosecutions would soon swell the ranks of enrolled prisoners, especially if the electoral and prison authorities adopt measures to inform prisoners of the procedures for enrolment and voting and of the penalties for non-compliance. If compulsory voting is a "good thing", then it is probably bad not to apply it to prisons. This is especially so if the rationale is that the compulsion "helps people to help themselves".

However, even opponents of compulsory voting (or of its rigid enforcement, especially in prisons) might support extensive campaigns to inform prisoners about voting rights and procedures. After all, prisoners are persons upon whom the Government has had an unusually profound impact and who should be given every opportunity and encouragement to vote

in the election of "their" Government. Furthermore, if prisoners are to have voting rights they must be given the sort of information which is available to fellow citizens outside and which (quite apart from compulsion) induces many of those citizens to want to cast a vote. In other words, even if prisoners should not be compelled to vote they should not be denied information which might encourage them to do so (nor, of course, information which might have the reverse effect).

Residential Requirements

Some prisoners may have difficulty in persuading the electoral authorities that they satisfy the residential requirements for enrolment as voters.

If a prisoner lived in a particular electorate for at least one month[7] sometime before his imprisonment and has not since that time left it (whether to go to prison or elsewhere) with the intention of settling elsewhere, then he remains entitled to be on the electoral roll for that electorate. No matter how long his sentence, he remains entitled to enrolment (and to be put on the roll, if he is not already) so long as he does not form a fixed intention of not returning to live in the electorate. Of course, his case is even stronger if he positively intends to return to the electorate on release, but this intention is not necessary. Some officers may need considerable persuasion to accept these principles, but I believe them to be legally accurate and enforceable in the courts.

If a prisoner cannot satisfy these principles, it is difficult to see how he can be enrolled anywhere. If he can show that, upon release, he intends to live in a particular electorate he might possibly be allowed to enrol there, but some electoral officers are reluctant (perhaps correctly in law) to grant enrolment in such circumstances even to non-prisoners. The only other possibility seems to be to claim enrolment for an electorate in which the prisoner has been in prison for a month or more. However, it is unclear whether incarceration

can amount to residence, because during the qualifying month it might be difficult to establish a fixed intention to remain in the electorate. The main difficulty is that the prisoner's location is always at the mercy of the prison authorities.

Access to political information

The third matter is extremely important and concerns another aspect of information deprivation. It is no use giving a prisoner a right to vote, and the opportunity to cast a vote, if he or she is then deprived of the information necessary or desirable to choose between the candidates. In New South Wales at least, there have been specific examples of normal election material being withheld from prisoners to whom it had been addressed. Of course, there is also the general question of the restrictions upon prisoner access to the media. Even the Financial Review (let alone the Alternative Criminology Journal) has been excluded from Long Bay Gaol. Of course, deprivation of information about elections and general politics is only one of the iniquities of information deprivation in prisons but it is worth emphasising in the present context that, for so long as such deprivation persists, any attempt to enfranchise prisoners will be largely a sham. If the deprivation is to be rectified piece-meal, then, in this context, particularly necessary reforms include extensive access to the media during election campaigns, distribution of such election material as is being distributed to citizens outside (especially how-to-vote cards) and visits by representatives of parties in the election.

Late in 1974 the Whitlam Government sought to allow postal voting by prisoners, but the Bill was defeated on other grounds by the Liberal Opposition in the Senate.[8] No similar provision has been introduced since then. In 1975 a private member's Bill to similar effect was introduced into the Victorian Parliament by Barry Jones M.L.A., but it made no progress.

Before the 1976 State elections in New South Wales the Council for Civil Liberties re-iterated its concern (expressed over several years to both Commonwealth and State Ministers)

at statutory and administrative disenfranchisement of prisoners. Together with the Prisoners Action Group, it extracted from the relevant Liberal Minister an undertaking that postal voting would be enabled by amending legislation. His Labour successor has not yet indicated his attitude. The Ombudsman was also approached but his response was disappointingly unhelpful, even though the matter is clearly appropriate for action by him. In some other States an approach to the Ombudsman might be more productive.

Conclusion

The right to vote is not one of the most important issues in the area of prison reform, but it is a significant one. The present position is inexcusable and provides a clear example of legislative and administrative disregard for the basic legal and human rights of prisoners.

FOOTNOTES

[In doing research for this article I have benefited from the assistance of Judith Hart of the Law School, University of New South Wales]

1. Vic. - Constitution Act 1975, s.48(2); Tas. - Constitution Act, 1934, s.14.
2. C'th and Territories - Commonwealth Electoral Act 1918, s.39(4); W.A. - Electoral Act 1907 s.18; Qld - Elections Act 1915, s.11.
3. N.S.W. - Parliamentary Electorates and Elections Act 1912, s.21; S.A. Constitution Act 1934, s.33(2)
4. There may be a valid exception in the case of very young persons, and severely mentally disturbed people, but these issues are not relevant in this context. These exceptions are based on incapacity, or reluctance to impose compulsion, and can provide no justification for disenfranchisement of prisoners, which is solely punitive in motivation. The U.S. Supreme Court has held deprivation of a prisoner's right to vote to be unconstitutional (O'Brien v. Skinner (1974) 414 U.S. 524)
5. Official statistics supplied by the N.S.W. Commissioner for Corrective Services (March 1976)

6. Unless otherwise indicated the relevant Acts are as in footnotes 1-3 <u>supra</u>. C'th - s.85(1); N.S.W. - s.114A; Vic - Act no. 6224, s.219; S.A. - Electoral Act, 1929, s.73; W.A. - s.90; Tas - s.78.
7. There are some variations between States in this requirement, and also some additional residential requirements. In Australia, the applicant must have resided in the country at some time for a continuous period of six months, and also, for State elections, have resided in the particular State for three months (six months in Tasmania). For one month (or three months for Queensland elections) immediately prior to his application he must have resided in the particular subdivision for which he wishes to enrol. See generally, my chapter on "Electoral Law" in <u>Law for the People</u> (Penguin, 1976) edited by S. Ross and M. Weinberg.
8. Electoral Laws Amendment Bill 1974 (C'th), clause 27, applying to any person who "is, or will be, serving a sentence of imprisonment and, by reason of that fact, will, although entitled to vote, be precluded from attending at any polling booth to vote".