

# THE BALLOT BEHIND BARS AFTER ROACH

Why disenfranchise prisoners?

CORNELIA KOCH and LISA HILL

The recent decision of the High Court in *Roach v Electoral Commissioner*<sup>1</sup> has once again brought into the spotlight the issue of whether prisoners should be entitled to vote. As a result of the case, prisoners serving a sentence of three years or more are disqualified from voting while prisoners serving shorter sentences are allowed to vote. This article explores and critiques the rationales for disenfranchising prisoners advanced by politicians as well as those relied on by the majority of the High Court in the *Roach* case. Where appropriate, reference is made to cases on prisoner disenfranchisement in overseas jurisdictions.

## Background to prisoner voting in Australia

Although Australia does not have a strong rights culture as understood in the classical liberal sense, it has — perhaps unconsciously — compensated for this by its obsession with ‘electoral fairness.’<sup>2</sup> The result is that Australia has a well-earned reputation as a leader in democratic practice: it was early to introduce universal suffrage (and therefore voting rights for women) and pioneered preferential voting, mobile polling booths, Saturday voting<sup>3</sup> and the secret ballot.<sup>4</sup> Further, it is the only English-speaking nation to use compulsory voting, thereby ensuring that Australia enjoys one of the highest and most socially-even levels of turnout in the world. This makes it all the more curious when any social group — especially one made up of legal citizens — is deliberately excluded from the Australian franchise. Yet that has been the fate of certain groups of prisoners since the Commonwealth of Australia came into being.

At the time of federation, the right to vote was denied to anyone ‘attainted of treason, or who had been convicted and is under sentence or subject to be sentenced for any offence ... punishable by imprisonment for one year or longer.’<sup>5</sup> In 1983 this disqualification was softened somewhat and people under sentence for offences punishable by between one and five years imprisonment were no longer disqualified. A further softening occurred in 1995 when the disenfranchisement was limited to those serving a sentence of five years or longer. In 2004 restrictions were once again tightened so that prisoners serving a sentence of three years or more were disqualified. In 2006 restrictions were tightened still further so that *all* prisoners serving a sentence of imprisonment were disqualified to vote in Senate and House of Representative elections. This meant that the entitlement to vote of prisoners in 2006 was

even more restrictive than it had been in 1902. The new law disenfranchised approximately 20,000 people and struck some commentators as suspect because it stripped the vote from prisoners ‘in random and discriminatory ways.’<sup>6</sup>

## The Roach Case

In August 2007 there was an unexpected turn of events when the High Court invalidated the Federal Parliament’s blanket ban on prisoner voting. The successful challenge to the 2006 legislation was mounted by Vickie Lee Roach, an Aboriginal woman serving a six-year sentence at the Dame Phyllis Frost Prison in Melbourne. Her lawyers argued that the legislative criteria for disenfranchisement were arbitrary and therefore inconsistent with representative democracy. They also submitted that the pre-2006 legislation was invalid. A majority of the High Court overturned the complete ban but upheld the 2004 law, which restricted voting to those prisoners serving a sentence of three or more years or anyone unpardoned of treason or treachery. Thousands of prisoners were thereby legally enabled to vote in the 2007 federal election.

The decision was surprising because the Gleeson court has often shown much deference to the legislature in constitutional cases. It was therefore unexpected that a majority would declare the blanket disenfranchisement of prisoners invalid. Chief Justice Gleeson and, in a joint judgment, Gummow, Kirby and Crennan JJ held that the 2006 amendments were inconsistent with the system of representative democracy established by the Constitution because voting in elections was an integral part of that system of government. Parliament could only disenfranchise a group of adult citizens if there was a substantial reason to do so. The majority defined a substantial reason as one which was ‘reasonably appropriate and adapted to serve an end ... consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.’ Removing the right to vote from all prisoners was thought to be casting ‘the net of disqualification’ too widely.<sup>7</sup> On the other hand, the majority upheld the 2004 amendment because in it the Parliament had distinguished between offenders guilty of serious lawlessness and others. Therefore, the legislative ban on voting for some prisoners was based on a substantial reason.<sup>8</sup> Justices Hayne and Heydon dissented, finding the blanket prohibition of prisoner voting constitutionally valid. Therefore, while the majority struck down the complete ban, their Honours

## REFERENCES

1. *Roach v Electoral Commissioner* (2007) 239 ALR 1 (*Roach*).
2. Brian Galligan, ‘Australia’s Political Culture and Institutional Design’ in Philip Alston (ed), *Towards an Australian Bill of Rights* (1st ed, 1994) 55, 59.
3. Marion Sawyer, ‘Pacemakers for the World’ in Marion Sawyer (ed), *Elections Full, Free and Fair* (2001).
4. Marion Sawyer, ‘Enrolling the People: Electoral Innovation in the New Australian Commonwealth’ in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (2003) 52, 53–56.
5. *Commonwealth Franchise Act 1902* (Cth) s 4.
6. Colin Hughes and Brian Costar, *Limiting Democracy: The Erosion of Electoral Rights in Australia* (2006) 84.
7. *Roach* (2007) 239 ALR 1, 4–5 [7], 11 [23] (Gleeson CJ); 24–5 [83], [85], 27–8 [95] (Gummow, Kirby, Crennan JJ).
8. *Ibid* 9 [19], 11 [25] (Gleeson CJ); 28 [98], 29 [101], [102] (Gummow, Kirby, Crennan JJ).

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accepted that the Constitution permits the exclusion of many prisoners from the franchise. The next part will explore which reasons for this disenfranchisement the majority accepted and what motivates politicians to push for disenfranchisement.

### Why disenfranchise prisoners?

At least six rationales can be found in political debates surrounding this topic, and in the *Roach* case specifically.

#### 1. It is electorally popular

In the Joint Standing Committee on Electoral Matters (JSCEM)'s Report into the conduct of the 1998 federal election, two of the minority reporters noted that, although the Main Report seemed open to the idea of relaxing restrictions on prisoner voting, it declined to recommend reform because 'such a move would not receive wide community support.'<sup>9</sup> At the time of the second reading of a 2004 Commonwealth Bill that sought to disenfranchise all prisoners Peter Slipper MHR asserted in Parliament that 'most reasonable Australians would believe that people who are incarcerated for the period ... mentioned ought to be deprived of the opportunity of playing a part in determining the leaders of our society.'<sup>10</sup> In what seemed like a cynical attempt to gain political mileage out of an issue dear to the hearts of voters, in a 1995 Parliamentary debate on the same issue, Slipper condemned the Labor government's approach to 'law and order' (ie prisoner voting) as 'weak, spineless and gutless.'<sup>11</sup> Senator Nick Minchin, a vigorous supporter of prisoner disenfranchisement, noted in a 2004 parliamentary debate that any 'pub test' would find that the average law-abiding citizen resents the voting rights of prisoners.<sup>12</sup> This is probably true but whether it is grounds for disenfranchisement is questionable. In *Minister of Home Affairs v NICRO*<sup>13</sup> the South African Constitutional Court considered the validity of a legislative ban on prisoner voting in that country. The government had submitted that if prisoners were allowed to vote, the general public would perceive the government as being soft on crime.<sup>14</sup> The majority of the Court stated in response that:

a fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration. It could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image.<sup>15</sup>

As some previous and dissenting JSCEM members in Australia have rightly noted, despite public antipathy

towards prisoners, 'wide community support' should not always be 'the main threshold criterion' for making reforms that affect their welfare. 'Parliaments sometimes have to give leadership.'<sup>16</sup>

#### 2. It protects the electoral process from contamination

Another common rationale for prisoner disenfranchisement is the belief that crime represents a poisoning or corruption of the civic personality and that such 'unsafe elements' as prisoners must therefore be excluded from infecting or tainting the political process.<sup>17</sup> According to Senator Eric Abetz, people who have 'so offended against society's laws' should not have a 'voice in the future direction of that society.'<sup>18</sup> Equally, for Don Randall MHR, people who have been involved in such 'vicious' crimes as 'aggravated bashings' have lost the 'civil sensibilities' that would entitle them to participate in the voting process.<sup>19</sup> A similar argument was made by the Canadian government in *Sauvé v Canada*,<sup>20</sup> a case concerning the constitutionality of a Canadian law disenfranchising prisoners serving sentences of two years or more. The government submitted that permitting inmates to vote 'demeans' the political system.<sup>21</sup> Chief Justice McLachlin, writing for the majority of the Supreme Court of Canada, pointed out that 'prisoners have long voted, [in Canada] and abroad, ... without apparent adverse effect to the political process, the prison population or society as a whole.'<sup>22</sup> Her Honour dismissed the 'idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process' as 'ancient and obsolete', stemming from the concept of 'civil death' pronounced by Edward III. In her Honour's view 'the retrograde notion that "worthiness" qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law' should be rejected.<sup>23</sup>

Apart from the fact that it is hard to see how the simple act of choosing between representatives could — even symbolically — pollute Australian democracy, the position that all prisoners should be removed from the electoral process to prevent tainting fails to square with the express stipulation in s 44(ii) of the *Australian Constitution* that a person sentenced to imprisonment of less than a year is able to be elected to Parliament. Surely the standards for representing the people should be higher than those for electing them. But in fact they are lower according to blanket disenfranchisers. It appears that the inconsistency between s 44(ii) and the

9. Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report of the Inquiry into the Conduct of the 1998 Federal Election and Matters Related Thereto*, 2000, 169.

10. Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2004, 32 620 (Peter Slipper).

11. Graeme Orr, 'Ballotless and Behind Bars: The Denial of the Franchise to Prisoners' (1998) 26 *Federal Law Review* 55, 73.

12. Colin Hughes and Brian Costar, 'Proposed Changes Could Deny Hundreds of Thousands of Australians a Vote', *The Age* (Melbourne) 3 November 2005, 3.

13. *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC).

14. *Ibid* [55].

15. *Ibid* [56].

16. Joint Standing Committee on Electoral Matters, above n 9, 169.

17. Jennifer Fitzgerald and George Zdenkowski, 'Voting Rights of Convicted Persons' (1987) 11 *Criminal Law Journal* 11.

18. Commonwealth, *Parliamentary Debates*, Senate, 6 October 2005, 64, (Eric Abetz).

19. Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2004, 32 606, (Donald Randall).

20. *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

21. *Ibid* [29].

22. *Ibid* [21].

23. *Ibid* [43].

2006 amendments was also an important consideration for the members of the majority in *Roach*. Justices Gummow, Kirby and Crennan emphasised the 'plain disharmony' between the constitutional provision and the blanket ban on prisoner voting,<sup>24</sup> while Gleeson CJ pointed out that s 44(ii) constitutes recognition in the *Constitution* 'that the mere fact of imprisonment ... does not necessarily indicate serious criminal conduct.'<sup>25</sup> However, the Chief Justice also stressed he was not suggesting that the one year limit set in s 44(ii) would have to be the lowest constitutionally acceptable limit for disenfranchising prisoners.<sup>26</sup> The majority of the South African Constitutional Court in *Minister of Home Affairs v NICRO*, considering a similar constitutional provision to s 44(ii), pointed out that no explanation was apparent why a person who qualified as a candidate in elections should be disqualified from voting.<sup>27</sup>

### 3. It serves as a punishment

For many, including Wilson Tuckey MHR, the deprivation of the right to vote is part of the punishment for crimes: 'Of course we put people in jail to punish them. And of course if someone has beaten up some old lady they have forgone their right to vote.'<sup>28</sup> Such an attitude towards both the purpose of incarceration and the justifiable loss of voting rights conflicts with Australia's international treaty obligations. Article 10(3) of the *International Covenant on Civil and Political Rights* — which Australia ratified in 1980 — rules out punishment as the primary purpose of imprisonment, and stipulates that the 'essential aim' is 'reformation and social rehabilitation.' The *Report of the Royal Commission into New South Wales Prisons* (1978) suggested that 'loss of liberty is the essential punishment with prisoners retaining all other rights except those necessarily limited by the need to maintain security.'<sup>29</sup> The United Nations Human Rights Committee has said that it 'fails to discern the justification' for blanket prisoner disenfranchisement:

in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoner's reformation and rehabilitation, contrary to article 10(3) in conjunction with article 25 of the Covenant.<sup>30</sup>

It may be possible to defend loss of voting rights for the crimes of treason, treachery or electoral fraud within a modern, liberal-democratic framework. It is more difficult to justify the loss of the premier privilege of citizenship for a property crime, which is the most commonly reported form of criminal activity, or an illicit drug offence, which is essentially a response to a medical problem and yet the most common cause for incarceration after 'Acts Intended to Cause Injury'.<sup>31</sup> Legislators should be careful to avoid conflating reasonable sanctions with the deprivation of a legal status that is intrinsic to liberal-democratic personhood. Does the commission of a property crime, for example, disqualify a person from making rational choices at election time or contributing to a sober public debate about an issue like immigration? In contrast to other categories of persons who are prevented from voting — for example mentally

disabled people — prisoners are, by definition, mentally fit to vote; if they were not, they could never have been convicted in the first place.<sup>32</sup>

Although Australian law-makers will not generally publicly admit to this as a rationale, prisoner disenfranchisement also serves to humiliate and stigmatise prisoners. The Seventh International Congress of Criminal Law (1957) found that the deprivation of civil rights is a form of 'degradation' that ought to be 'abolished'.<sup>33</sup> Justices Gummow, Kirby and Crennan in *Roach* similarly see the end to be served by disqualification of prisoners from voting as a further stigmatisation of this class of people by denying them the exercise of a civic right during their period of imprisonment.<sup>34</sup>

### 4. It serves as a deterrent

A number of politicians suggest that depriving prisoners of the right to vote has deterrence value. For example, some of the members of the JSCEM who pushed for blanket disenfranchisement in 1997 argued that loss of voting rights would provide a 'disincentive to crime'.<sup>35</sup> For Garry Nairn 'the right to vote is an incredibly strong right' that can be used 'as a deterrent against criminal activity [so that if] you play up ... you lose the right to vote.'<sup>36</sup> Justice Madala, in a dissenting judgment in *Minister of Home Affairs v NICRO*, expressed the same opinion:

Even if the prisoner loses the chance to vote by a day, that will cause him or her to remember the day he or she could not exercise his or her right because of being on the wrong side of the law.<sup>37</sup>

It is doubtful that disenfranchisement serves as a deterrent to criminal activity given that the much harsher penalty of imprisonment provides no insurance against recidivism.<sup>38</sup> In addition, since Australians at liberty have to be compelled to vote it seems rather perverse to disenfranchise those who often have even lower levels of political efficacy and therefore less inclination to vote in the first place. Aside from its negligible deterrence value, it is highly unlikely that disenfranchisement has any rehabilitative value. For Graeme Orr 'if anything it is *dehabilitative* [because it reinforces] a self-fulfilling cycle of disempowerment and civic irresponsibility' that caps a 'life-time of disenfranchisement that can only help ensure that the prisoner develops no engaged or continuing sense of social involvement or citizenship.'<sup>39</sup> The majority of the Canadian Supreme Court in *Sauvé v Canada* took the same view. It stated that the government was under a misconception if it attempted to send an 'educative message' to prisoners by depriving them of a voice in government.<sup>40</sup> In the majority's view, this was 'bad pedagogy'<sup>41</sup> because denying inmates the right to vote meant 'losing an important means of teaching them democratic values and social responsibility.'<sup>42</sup> In support of this proposition it relied on John Stuart Mill's argument that '[t]he possession and the exercise of political, and among others of electoral, rights, is one of the chief instruments both of moral and of intellectual training for the popular mind ...'.<sup>43</sup>

In *Hirst v United Kingdom (No. 2)*,<sup>44</sup> the European Court of Human Rights held that the disenfranchisement

24. *Roach* (2007) 239 ALR 1, 26 [90].

25. *Ibid* 9 [20].

26. *Ibid*.

27. *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) [67].

28. Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2004, 32 614, (Wilson Tuckey).

29. New South Wales, Royal Commission into New South Wales Prisons, *Final Report* (1978), 76.

30. Human Rights Committee, International Covenant on Civil and Political Rights, United Nations, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, CCPR/CO/73/UK; CCPR/CO/73/UKOT*, (2001), [10].

31. Brian Pink (Australian Statistician), 2008 *Year Book Australia* (2008) [407]–[420].

32. Fitzgerald and Zdenowski, above n 17, 39.

33. Mirjan Damaska, 'Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study' (1968) 59(3) *The Journal of Criminal Law, Criminology, and Police Science* 347, 353. Graeme Orr of the International Commission of Jurists commented that the Australian proposal was intended to 'appeal both to tabloid rhetoric and the common conception of prisoners as inhuman others' (See Orr, above n 11, 58).

34. *Roach* (2007) 239 ALR 1, 26 [89].

35. Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report of the Inquiry Into the Conduct of the 1996 Federal Election and Matters Related Thereto*, 1997, 48.

36. Transcript of Proceedings, *Committee Hearing on the Conduct of the 1996 Federal Election* (Parliament of Australia, Joint Standing Committee on Electoral Matters, 4 October 1996), 192.

37. *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) [116], following the dissenting judgment in *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 [103], [119]–[121] (Gonthier J).

38. Orr, above n 11, 69.

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of UK prisoners violated Article 3 of the European Convention on Human Rights. Following the reasoning in *Sauvé v Canada*, the Court determined that the UK's expressed aims in imposing the restrictions on prisoner voting rights — to deter crime, punish offenders, enhance civic responsibility and respect for the rule of law — were questionable. It held that there was no evidence of a deterrent effect of such prohibitions and that they were more likely to undermine the authority of the law than enhance it.<sup>45</sup>

**5. It is a consequence of their breach of the social contract**

Another rationale for prisoner disenfranchisement rests on a social contract argument. According to Senator Nick Minchin,

the right to vote is one of the privileges of living in a democracy ... if you have committed an offence against society so serious that you are actually incarcerated in a prison cell for a period of time then you entirely lose your rights, privileges and freedom as a citizen for the period of the imprisonment.<sup>46</sup>

Senator Abetz suggests that incarcerated Australians 'have been removed from society by society' and as a consequence 'forfeit the right to vote'. The implication here seems to be that prisoners are no longer part of 'the people'.<sup>47</sup>

It appears that Gleeson CJ in *Roach* also regards a contractarian argument as the strongest rationale for placing restrictions on prisoner franchise. His Honour explains that citizenship involves reciprocal rights and obligations. Serious offending may justify the temporary removal of a civic right because the citizen has not adhered to his or her civic responsibility.<sup>48</sup> In the Chief Justice's opinion 'civic responsibility and respect for the rule of law are prerequisites to democratic participation.' If individuals disregard their civic responsibility by committing serious criminal offences they can be treated as 'having suffered a temporary suspension of their connection with the community'.<sup>49</sup> This suspension is manifested at the physical level by imprisonment and also reflected at a symbolic level in deprivation of the right to participate in the political life of the community by voting.<sup>50</sup> In contrast, the majority of the Canadian Supreme Court in *Sauvé v Canada* took the opposite view. While it accepted that the social contract required citizens to obey the law, the Court did not believe that failure to do so nullified the citizens' continued membership of the community. It conceded that some rights were justifiably limited for penal reasons, for example the right to liberty, but held

that whether a right was subject to a justified limitation could not be determined by observing that an offender had, by his or her actions, withdrawn from the social contract. On the contrary, it emphasised that

the right of the state to punish and the obligation of the criminal to accept punishment is tied to society's acceptance of the criminal as a person with rights and responsibilities.<sup>51</sup>

Another problem with the type of contractarian reasoning advanced by defenders of prisoner disenfranchisement is the assumption that the allegedly 'contracting' parties have benefited mutually from the contract. A citizen is defined legally as 'an individual who owes allegiance to, and receives protection from, a state.'<sup>52</sup> But consider the high rates of incarceration and recidivism among inmates brutalised by state policies and institutions in childhood. The social contract argument becomes particularly problematic when applied to the case of Aboriginal inmates, whose rate of incarceration is 16 times the national average.<sup>53</sup> It is hard to see how incarcerated Aboriginal Australians have benefited from the social contract they are alleged to have breached; the state that ostensibly existed to protect them is now acknowledged to have done them extraordinary harm; harm which has been identified as a major contributory factor leading to their ultimate incarceration.

**6. It is a consequence of their moral culpability**

It appears that the main reason the majority of the High Court in *Roach* struck down the 2006 amendments, but upheld the 2004 Act, was a historical one: historically the particular moral culpability of an offender used to be the criterion for excluding some prisoners from voting, both in England and in the Australian colonies. At Federation this criterion was absorbed into the Commonwealth *Constitution*.<sup>54</sup> Their Honours accept this criterion without questioning it further. However, they do consider whether the mere fact of imprisonment is capable of determining the moral culpability of an offender. Politicians who advocate blanket disenfranchisement take the view that it is; as an example, Senator Abetz asserts that those 'deemed to be unworthy to walk the streets ... should not be entitled to vote'.<sup>55</sup> In contrast, the majority in *Roach* decided that imprisonment can be a consequence of practical considerations rather than moral culpability. This is particularly obvious in the case of short-term prisoners who serve sentences of six months or less. Homeless people, for example, cannot be put in home detention and may hence serve their sentence in prison, although they are not more or less morally culpable than comparable offenders

39. *Ibid.*

40. *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 [32].

41. *Ibid.* [30].

42. *Ibid.* [38].

43. *Ibid.*, quoting John Stuart Mill, 'Thoughts on Parliamentary Reform' (1859) in John M. Robson (ed), *Essays on Politics and Society* (1977) Vol. XIX, 322–23.

44. *Hirst v United Kingdom (No. 2)* [GC], no 74025/01, ECHR 2005–IX (Grand Chamber, 2nd instance).

45. *Hirst v United Kingdom (No. 2)*, no 74025/01, [42], [45]–[47] (Chamber, 1st instance).

46. Senator Nick Minchin cited in the *Report on the Provisions of the Electoral and Referendum Amendment Bill (No. 2) 1998* (1998).

47. Commonwealth, *Parliamentary Debates*, Senate, 19 June 2006, 89 (Eric Abetz). See also Commonwealth, *Parliamentary Debates*, Senate, 12 August 2004, 26 575 (Helen Coonan) and 26 328 (Judith Troeth).

48. *Roach* (2007) 239 ALR 1, 6–7 [12].

49. *Ibid.* 7 [14], referring to *Sauvé v Canada (Attorney General)* [1993] 2 SCR 438 (Gonthier J).

50. *Roach* (2007) 239 ALR 1, 9 [19].

51. *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 [47].

52. Roger Scruton, *A Dictionary of Political Thought* (1st ed, 1983) 63.

53. Human Rights and Equal Opportunity Commission (HREOC) *The right to vote is not enjoyed equally by all Australians* (2007) Right to Vote: Human Rights and Equal Opportunity Commission Website <hreoc.gov.au/HUMAN\_RIGHTS/vote/index.html> at 10 October 2007, citing figures obtained by the Australian Bureau of Statistics.

54. *Roach* (2007) 239 ALR 1, 5–6 [9] (Gleeson CJ): 17–22 [55]–[70], 29 [102] (Gummow, Kirby, Crennan JJ).

55. Commonwealth, *Parliamentary Debates*, Senate, 19 June 2006, 103 (Eric Abetz).



56. *Roach* (2007) 239 ALR 1, 9–11 [21]–[23] (Gleeson CJ); 26–7 [90]–[93] (Gummow, Kirby, Crennan JJ).

57. *Hirst v United Kingdom (No 2)* [GC], no. 74025/01, ECHR 2005–IX, [77], [82].

58. *Hirst v United Kingdom (No 2)*, no. 74025/01, [49].

59. *Ibid* 9 [19], 11 [25] (Gleeson CJ); 28 [98], 29 [101], [102] (Gummow, Kirby, Crennan JJ), a similar view was taken by the minority of the Canadian Supreme Court in *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 [174].

who have a home. Likewise, if someone is not able to pay a fine, a term of imprisonment may be imposed instead but that does not demonstrate the moral culpability of the offender.<sup>56</sup> In the authors' view, this was the decisive reason why the majority invalidated the 2006 amendments. The European Court of Human Rights found the UK ban on prisoner voting under consideration in *Hirst v United Kingdom (No. 2)* disproportionate for very similar reasons. It pointed out that the disenfranchisement applied indiscriminately to all prisoners regardless of the length of their sentence, the type and gravity of their offence or the individual circumstances of the offender. Furthermore, loss of the right to vote depended quite arbitrarily on whether the sentencing judge imposed a custodial or a non-custodial sentence.<sup>57</sup> Finally, in its first instance judgment the Court emphasised that the effect on a prisoner's right to exercise his or her vote depended randomly on the period of his or her imprisonment relative to the date of elections. A prisoner could be in custody for one week for a minor offence and miss out on an election if it was by chance held in that week, while another prisoner could be serving a sentence of a number of years for a serious crime but be released the day before the election and thus be able to vote.<sup>58</sup>

While the Australian High Court struck down the 2006 Act, it regarded the 2004 Act as constitutionally valid. The latter enactment only disenfranchised prisoners serving sentences of three years or more. For the majority of the High Court this constituted a determination by Parliament about which kind of criminal misconduct was morally so reprehensible that it justified the temporary removal of the right to vote from offenders. As long as Parliament made such a determination, the enactment seemed to be compatible with the system of representative government established by the *Australian Constitution*.<sup>59</sup>

## Conclusion

The result of the High Court's decision in *Roach* must be welcomed insofar as thousands of prisoners are once again entitled to vote in federal elections. However, the case has left the door open for the legislature to restrict the prisoner franchise drastically. Most likely, a law removing the entitlement to vote from all inmates serving a sentence of one year or more would be upheld by the High Court. From a judicial perspective this is probably inevitable as historically certain types of prisoners have always been disenfranchised in the Anglo-Australian legal system. This position was adopted when the *Commonwealth Constitution* was framed and so it is unsurprising that there is no general right to vote for prisoners implied in that instrument. However, as we have shown in this article, there is no reasonable rationale for preventing prison inmates from voting, with the possible exception of those imprisoned for treason, treachery or electoral fraud. The onus is therefore on the Australian Parliament to demonstrate leadership and give all prisoners the right to vote.

LISA HILL teaches politics at the University of Adelaide and CORNELIA KOCH teaches law at the University of Adelaide and is a PhD candidate and Research Scholar at The University of Queensland, Centre for Public, International and Comparative Law.

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