

4-1-2010

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### Recommended Citation

Megan A. Winder, Comment, *Disproportionate Disenfranchisement of Aboriginal Prisoners: A Conflict of Law That Australia Should Address*, 19 Pac. Rim L & Pol'y J. 385 (2010).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol19/iss2/7>

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# DISPROPORTIONATE DISENFRANCHISEMENT OF ABORIGINAL PRISONERS: A CONFLICT OF LAW THAT AUSTRALIA SHOULD ADDRESS

Megan A. Winder<sup>†</sup>

*Abstract:* In 2006, Australia's Parliament banned all prisoners from voting. A year later, Vickie Lee Roach, a female prisoner of Aboriginal descent, challenged the blanket ban promulgated in the 2006 amendment to the Commonwealth Electoral Act of 1918 ("Electoral Act"). Vickie won, but in a limited way. The High Court found an implied right to vote in the Australian Constitution, but held that Parliament could limit such voting, as it did in the Electoral and Referendum Amendment of 2004 ("E & R Amendment"), disenfranchising any prisoner serving three or more years in jail.

This Comment argues that the E & R Amendment conflicts with Australia's obligations under the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination, codified by Australia's Racial Discrimination Act of 1975 ("RDA"). The RDA mandates that Indigenous citizens be treated equally to non-Indigenous citizens, including with respect to voting rights and opportunities to participate in political life. The E & R Amendment disenfranchises a significant portion of the prison population—a large percentage of which is Aboriginal. Disproportionate disenfranchisement of this sort constitutes indirect discrimination and perpetuates racism against Aboriginal people, preventing meaningful participation in their own communities. To rectify the problem, Parliament should repeal the three-year disenfranchisement provision of the E & R Amendment.

## I. INTRODUCTION

At 3:45 AM on December 14, 2002, Vickie Lee Roach and her ex-boyfriend were caught while committing a robbery in Mordialloc, a town in Victoria, Australia.<sup>1</sup> The duo stashed some stolen goods in the trunk of the car and fled, with Vickie as driver, at speeds of up to 80 miles per hour.<sup>2</sup> Neither Vickie nor her ex-boyfriend were licensed to drive.<sup>3</sup> Vickie later said she had wanted to pull over as soon as she saw the police in pursuit, but did not because her ex-boyfriend threatened to kill her.<sup>4</sup> At the urging of her

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<sup>1</sup> Karen Kissane, *Former Delinquent Takes on Government and Wins*, AGE, Aug. 31, 2007, <http://www.theage.com.au/news/national/former-delinquent-takes-on-government-and-wins/2007/08/30/1188067278024.html> (last visited Feb. 7, 2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

ex-boyfriend, Vickie continued the high-speed escape.<sup>5</sup> At the time of the incident, she had alcohol, four kinds of tranquillizers, morphine, and a cannabis-related substance in her blood.<sup>6</sup>

Vickie's getaway ended when she struck a stopped car at a traffic light.<sup>7</sup> The impact engulfed both vehicles in flames.<sup>8</sup> The 21-year-old man in the other car suffered extensive injuries, including burns on his scalp, face, ears, back, arms, knees, and internal organs.<sup>9</sup> The burns covered upwards of forty-five percent of his body, requiring several operations to attach skin grafts and insert wires into his fingers.<sup>10</sup>

Vickie Lee Roach's story began long before that night. At the age of two, she was taken from her mother and her Aboriginal community.<sup>11</sup> Like many children of the "Stolen Generation," she was placed with a non-Aboriginal foster family.<sup>12</sup> The Stolen Generation is the name critics have given to the government-sanctioned program in which Aboriginal children were forcibly removed from their parents and communities to be placed with non-Indigenous families or orphanages that would "re-socialize" them, in large part by eliminating traces of Aboriginal heritage.<sup>13</sup> Vickie was raised by foster parents and, after leaving them, became a "delinquent" and drug addict.<sup>14</sup> Between 1976 and 2003, she had 125 convictions or findings of guilt from twenty-three court appearances.<sup>15</sup>

Vickie is now fifty years old. She is serving a six-year prison sentence for negligently causing serious injury to the other driver.<sup>16</sup> While living in prison, she has completed a Master's degree in professional writing and is studying for a Ph.D. in creative writing.<sup>17</sup> In addition to having

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Kissane, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Jewel Topsfield, *Leading the Charge*, SYDNEY MORNING HERALD, May 23, 2009, <http://www.smh.com.au/national/leading-the-charge-20090522-bia8.html> (last visited Feb. 6, 2010).

<sup>13</sup> See PETER READ, NEW SOUTH WALES DEPT. OF ABORIGINAL AFFAIRS, *THE STOLEN GENERATIONS: THE REMOVAL OF ABORIGINAL CHILDREN IN NEW SOUTH WALES 1883 TO 1969* (1981), available at <http://www.daa.nsw.gov.au/publications/StolenGenerations.pdf>.

<sup>14</sup> See Kissane, *supra* note 1.

<sup>15</sup> *Id.*

<sup>16</sup> *R. v. Roach* (2005) V.S.C.A. 162 (Austl.) (imposing a total of six years' imprisonment with non-parole period of four years). The judge sentenced Vickie to two years imprisonment for burglary, twelve months imprisonment for theft, two years imprisonment for conduct endangering persons, three years imprisonment for two counts of negligently causing serious injury.

<sup>17</sup> See Kissane, *supra* note 1.

published poetry and a novel, Vickie is a “peer educator” at the jail.<sup>18</sup> Through these experiences, Vickie became educated and politically aware.<sup>19</sup>

As an adult, Vickie enrolled to vote in the Kooyong electorate,<sup>20</sup> but was disenfranchised in Commonwealth elections based on the length of her prison sentence.<sup>21</sup> Disenfranchisement is defined as the act of taking away the right to vote in public elections from a citizen or class of citizens.<sup>22</sup> If Vickie were serving a one-year prison sentence, she would be eligible to vote.<sup>23</sup> Instead, because she is serving a sentence of greater than three years, she is barred under the Electoral and Referendum Act of 2004 from participating in state and federal elections during her incarceration.<sup>24</sup> Vickie was charged with one count of burglary, one count of theft, one count of conduct endangering persons, and two counts of negligently causing serious injury.<sup>25</sup> While the judge made some of her sentences run concurrently, he did not do so for all of them.<sup>26</sup>

Federal statutes govern elections in Australia.<sup>27</sup> The first statute to address felon voting rights, the 1902 Commonwealth Franchise Act, disenfranchised individuals convicted and sentenced for any offense punishable by imprisonment for one year or longer.<sup>28</sup> This provision remained substantially the same when the Commonwealth Electoral Act 1918 (the “Electoral Act”) was enacted, replacing the 1902 version. The Electoral Act stood until 1983, when disqualification was amended to apply to persons “under sentence . . . punishable . . . [by] the Commonwealth or of the State or Territory by imprisonment for five years or longer.”<sup>29</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See Australian Electoral Commission, 2007 Federal Election: Profile of the Electoral Division of Kooyong (Jan. 10, 2007), [http://www.aec.gov.au/Elections/federal\\_elections/2007/Profiles/k/Kooyong.htm](http://www.aec.gov.au/Elections/federal_elections/2007/Profiles/k/Kooyong.htm) (last visited Mar. 23, 2010). The Kooyong Electorate is an eastern inner metropolitan electorate covering an area of approximately forty-nine square kilometers in Victoria. By enrolling in this electorate, Vickie was permitted to vote to elect members of the federal House of Representatives and the Senate in Canberra.

<sup>21</sup> David Brown, *The Disenfranchisement of Prisoners: Roach v Electoral Commissioner & Anor—modernity v feudalism*, 32 ALT. L.J. 132 (2007).

<sup>22</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>23</sup> Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act, 2004, No. 123 (Austl.).

<sup>24</sup> *Id.*

<sup>25</sup> *R. v. Roach* (2005) V.S.C.A. 162 (Austl.).

<sup>26</sup> *Id.*

<sup>27</sup> Commonwealth Electoral Act, 1918, No. 27 (Austl.).

<sup>28</sup> Commonwealth Franchise Act, 1902, No. 7 (Austl.).

<sup>29</sup> Commonwealth Electoral Legislation Amendment Act, 1983, No. 144 (Austl.) omitted subsection (4) and added the new subsection (6)(b) in these terms. The provisions were subsequently renumbered by the Commonwealth Electoral Legislation Amendment Act, 1984, and became section 93(8)(b).

In 2004, Parliament amended the Electoral Act and its five-year prison term requirement for voting disqualification, through passage of the Electoral and Referendum Amendment (“E & R Amendment”).<sup>30</sup> The E & R Amendment demarcated a different enfranchisement line; namely, disenfranchising prisoners serving three years or more.<sup>31</sup> Parliament thought the three-year ban appropriate to disallow felons from voting for at least one scheduled federal election cycle.<sup>32</sup> In 2006, a conservative Parliament again amended the Act, enacting section 93(8AA) of the Electoral Act, providing that a person who is serving a sentence of imprisonment for an offense against any law is not entitled to vote in any federal election.<sup>33</sup> In September 2007, the High Court of Australia<sup>34</sup> heard a challenge to the blanket ban on disenfranchisement imposed by the amendments.<sup>35</sup> Vickie Lee Roach launched the challenge.<sup>36</sup>

In *Roach v. Electoral Commissioner*, the High Court, by a 4-2 majority,<sup>37</sup> held that the 2006 Amendments were inconsistent with the system of representative democracy established by the Constitution.<sup>38</sup> The High Court held that voting in elections stands at the heart of a system of representative government.<sup>39</sup> Disenfranchisement of a group of adult citizens, without a “substantial reason,” is arbitrary and inconsistent with such a system.<sup>40</sup> While the 2006 Amendment was invalid, the High Court specifically held that the 2004 E & R Amendment disqualifying prisoners serving sentences of three years or more was valid and remained operative.<sup>41</sup>

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<sup>30</sup> Electoral and Referendum Amendment (Electoral Integrity and Other Measures), 2005, No. 95 (Austl.).

<sup>31</sup> Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act, 2004, No. 123 (Austl.).

<sup>32</sup> Senate Deb. *Hansard* 24 June 2004, p. 25136.

<sup>33</sup> Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act, 2006, No. 65 (Austl.).

<sup>34</sup> *About the Court*, HIGH CT. OF AUSTRALIA, Jan. 2, 2010, <http://www.hcourt.gov.au/about.html> (last visited Feb. 8, 2010). The High Court of Australia, which consists of a chief justice and six associate justices, is the country's supreme court and the final court of appeal for both the federal and state court systems.

<sup>35</sup> *Roach v. Electoral Comm'r* (2007) 233 C.L.R. 162 (Austl.).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (Callinan, J. did not take part in the decision).

<sup>38</sup> *See id.* ¶ 92.

<sup>39</sup> *Id.* ¶ 80.

<sup>40</sup> *Roach v. Electoral Comm'r* (2007) 233 C.L.R. 162, ¶ 7 (Austl.).

<sup>41</sup> *Id.*

Roach argued that constraints derived from the text and structure of the Constitution rendered the blanket ban invalid.<sup>42</sup> The majority of the High Court of Australia found that the right to vote existed implicitly in the text of the Constitution itself.<sup>43</sup> Chief Justice Gleeson, in his majority opinion, concluded that sections seven and twenty-four of the Constitution, which require senators and members of the House of Representatives to be “directly chosen by the people,” mandated universal suffrage.<sup>44</sup> Chief Justice Gleeson further expounded that representative government has evolved, rendering sections seven and twenty-four as a “constitutional protection of the right to vote.”<sup>45</sup> In so finding, however, the Chief Justice left open the possibility that Parliament may create exceptions to the universal suffrage mandate that fit within the bounds of the Constitution.<sup>46</sup> In fact, the Chief Justice stated:

[T]he franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.<sup>47</sup>

Determining that franchise is crucial to Australian citizenship was simply the first step.

With this in mind, the joint majority came up with a test to determine whether the blanket ban had a nexus between the disqualification criterion and the original conduct that evinced culpability incompatible with participation in the electoral process.<sup>48</sup> The test required determining whether the impugned legislation impermissibly limited the operation of the system of representative government mandated by the Constitution.<sup>49</sup> A disqualification was only permissible if a “substantial reason” existed for such action.<sup>50</sup> The joint majority further defined “substantial reason” as any disqualification reasonably appropriate or adapted to serve an end that is

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<sup>42</sup> Written Submission of Plaintiff at 2, *Roach v. Electoral Comm’r* (2007) 233 C.L.R. 162 (Austl.) (H.C.A. May 9, 2010) (No. M19).

<sup>43</sup> *Roach v. Electoral Comm’r* (2007) 233 C.L.R. 162 (Austl.).

<sup>44</sup> See AUSTL. CONST., §§ 7, 24.

<sup>45</sup> *Roach v. Electoral Comm’r* (2007) 233 C.L.R. 162 (Austl.).

<sup>46</sup> *Id.* ¶ 6.

<sup>47</sup> See *id.* ¶ 7 (citing *McGinty v. Western Australia* (1996) 186 C.L.R. 140, ¶ 29 (Austl.)).

<sup>48</sup> See *id.* ¶ 83.

<sup>49</sup> See *id.* ¶ 84.

<sup>50</sup> *Id.* ¶¶ 83, 85.

“compatible with the maintenance of the constitutionally prescribed system of representative government.”<sup>51</sup>

The High Court determined that the 2006 blanket ban operated without regard to culpability other than that which may be attributed to prisoners in general.<sup>52</sup> This ultimately led the High Court to conclude that the “net of disqualification [was] cast too wide”<sup>53</sup> because it went “beyond what is reasonably appropriate or adapted (or ‘proportionate’) to the maintenance of representative government.”<sup>54</sup> In striking down the blanket ban disenfranchising prisoners, the majority implied that the mere fact of imprisonment does not necessarily indicate criminal conduct serious enough to warrant exclusion from such a fundamental right of citizenship.<sup>55</sup> Despite reaching this conclusion, the High Court held that the legislation in place prior to the 2006 amendments remained valid and continued to apply.<sup>56</sup> Accordingly, any Australian serving a sentence of three or more years for an offense against the federal government is not entitled to vote.<sup>57</sup> Thus, while Roach’s challenge was successful in that a majority of the High Court accepted that an implied right to vote existed in the Constitution and the blanket ban was unconstitutional, Vickie herself was personally unsuccessful because her sentence put her on the wrong side of the line drawn by the High Court. By reverting back to the three-year provision, the High Court’s decision potentially creates several conflicts of law, and allows for the continuation of a public policy that disproportionately affects Aboriginal persons.

This Comment argues that the reversion to the three-year sentencing cutoff under the E & R Amendment violates the Racial Discrimination Act [of] 1975 (“RDA”)<sup>58</sup> by indirectly discriminating against Aboriginal people and that Parliament should repeal the three-year sentencing cutoff, so as not to disenfranchise prisoners. Part II provides context for voting rights, as well as historical background supporting the idea that Aboriginal prisoners are disproportionately disenfranchised. Part III discusses the indirect discrimination analysis that the High Court should use in determining that

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<sup>51</sup> Roach v. Electoral Comm’r (2007) 233 C.L.R. 162, ¶¶ 83, 85 (Austl.).

<sup>52</sup> *See id.*

<sup>53</sup> *Id.* ¶ 95.

<sup>54</sup> *Id.*

<sup>55</sup> *See id.* ¶ 9, 23.

<sup>56</sup> *See id.* ¶¶ 97-101.

<sup>57</sup> Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act, 2004, No. 123 (Austl.).

<sup>58</sup> Racial Discrimination Act, 1975, No. 52 (Austl.).

the E & R Amendment should be struck down. Finally, Part IV argues that Parliament should remove prisoner voting restrictions altogether, thus streamlining the provisions governing prisoner voting rights.

## II. BACKGROUND

### A. *The History of Aboriginal Voting Rights in Australia*

Over time, there has been a progression of political inclusion making voting a constitutional right shared by Aboriginal people.<sup>59</sup> During the period from 1890 to 1940, biological racism was prevalent in Australia and “[n]on-European blood imposed a permanent barrier to admission into Australian society.”<sup>60</sup> The first federal Parliament passed the Commonwealth Franchise Act in 1902, granting universal adult suffrage to both men and women, but explicitly excluded any Aboriginal Australians not previously enfranchised by the states in which they resided.<sup>61</sup> In 1949, the Electoral Act was amended to provide Aboriginal persons with voting rights at the Commonwealth level in cases where they had previously acquired it at the state level.<sup>62</sup> Finally, in 1967, Aboriginal people in Australia were granted full citizenship and gained the right to be included in the national census.<sup>63</sup>

#### 1. *Voting in Australia Goes Beyond an Implied Constitutional Right—It Is Also Compulsory*

The right to vote was not among the rights explicitly articulated in the Constitution.<sup>64</sup> Often described as a “Washminster” system, Australian

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<sup>59</sup> See Michael Murphy, *Representing Indigenous Self-Determination*, 58 U. TORONTO L.J. 185, 188 (2008).

<sup>60</sup> ANDREW MARKUS, *AUSTRALIAN RACE RELATIONS: 1788-1993* 111 (1994).

<sup>61</sup> See Commonwealth Franchise Act, 1902, No. 8 § 4 (Austl.).

<sup>62</sup> JOHN CHESTERMAN & BRIAN GALLIGAN, *CITIZENS WITHOUT RIGHTS: ABORIGINES AND AUSTRALIAN CITIZENSHIP* 8 (1997).

<sup>63</sup> MICHAEL BANTON, *INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION* 281 (1996). The *Constitution Alteration (Aboriginals) 1967* was a referendum that amended § 51 of the Constitution and removed § 127 from the Constitution. Section 51 stated that the Federal Government had the power to make laws with respect to “the people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws.” The referendum removed the phrase “other than the Aboriginal race in any State,” giving the Commonwealth the power to make laws specifically to benefit Aboriginal people. The referendum also removed § 127, which said: “In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, Aboriginal natives shall not be counted,” thus providing that Aboriginal people could be counted in census data.

<sup>64</sup> See AUSTRALIAN CONSTITUTION; see also JEROME DAVIDSON, *DEPT. OF PARLIAMENTARY SERVS., INSIDE OUTCASTS: PRISONERS AND THE RIGHT TO VOTE IN AUSTRALIA* (2004).



constitutional law was influenced by a blend of American and British practices.<sup>65</sup> For instance, the Australian constitution includes the American practices of federalism and separation of powers, combined with a written constitution, but, like the British system, it has no Bill of Rights.<sup>66</sup> From inception, the Australian Constitution gave power primarily to the federal Parliament to create and change the laws of the land.<sup>67</sup> This power includes mediating conflicts between two existing laws, like issues with voting in federal elections.<sup>68</sup>

The Constitution requires a system of representative government. Section seven, dealing with the composition of the Senate, and section twenty-four, providing for the composition of the House of Representatives, both require that the respective members be “directly chosen by the people.”<sup>69</sup> The High Court has held that these provisions provide a system of representative government.<sup>70</sup>

Australian electoral law primarily derives from two sources, the Constitution and the Electoral Act. The Australian right to vote is implied in the Constitution.<sup>71</sup> Voting is also compulsory<sup>72</sup> for all eligible Australian citizens.<sup>73</sup> Although the Constitution provides for the basic legal framework for representative government at the federal level, the Electoral Act provides supplementary assistance for the conduct of federal elections.<sup>74</sup> In effect, it provides the legal basis for the administration of elections, including the creation and maintenance of an electoral roll.<sup>75</sup> However, the Constitution makes only general provisions regarding electoral rights and the judiciary

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<sup>65</sup> Timothy Vines, *An Australian Constitutional Experience*, Vol. II CROSS-SEC. J. 167, 168 n.2 (2006).

<sup>66</sup> Jason L. Pierce, *A Sketch of Australian Constitutional History*, 10 GREENBAG 327, 342 (2007).

<sup>67</sup> See Gerard Carney, *The High Court and the Constitutionalism of Electoral Law*, in REALISING DEMOCRACY: ELECTORAL LAW IN AUSTRALIA 170, 171 (Graeme Orr et al. eds., 2003).

<sup>68</sup> See Pierce, *supra* note 66.

<sup>69</sup> See AUSTL. CONST., §§ 7, 24.

<sup>70</sup> Attorney-General (Ex. Rel. McKinlay) v. The Commonwealth (1975) 135 C.L.R. 1, 55-56 (Austl.) (Stephen J.); Australian Capital Television Pty Ltd v. The Commonwealth (1992) 177 C.L.R. 106, 137-38, 150, 168, 184-85, 210-11, 229 (Austl.); Langer v. The Commonwealth (1996) 186 C.L.R. 302, 304 (Austl.).

<sup>71</sup> See Roach v. Electoral Comm’r (2007) 233 C.L.R. 162 (Austl.).

<sup>72</sup> Commonwealth Electoral Office Act, 1924, No. 10 (Austl.) (mandating compulsory voting).

<sup>73</sup> See SCOTT BENNETT, DEPT. OF PARLIAMENTARY SERVS., COMPULSORY VOTING IN AUSTRALIAN NATIONAL ELECTIONS (2008).

<sup>74</sup> PAMELA R. DUDGEON & PATRICIA M. HINCKS, AUSTRL. ELECTORAL COMM’N, DEMOCRACY RULES: AN ELECTORAL EDUCATION RESOURCE 7 (2007), available at [http://www.aec.gov.au/pdf/education/resources/democracy\\_rules/Teacher\\_Guide\\_by\\_section/Introduction.pdf](http://www.aec.gov.au/pdf/education/resources/democracy_rules/Teacher_Guide_by_section/Introduction.pdf).

<sup>75</sup> Commonwealth Electoral Act, 1918, No. 27, § 7 (Austl.); see also Australian Electoral Commission webpage, [http://www.aec.gov.au/About\\_AEC/index.htm](http://www.aec.gov.au/About_AEC/index.htm) (last visited Feb. 8, 2010).

has been reluctant to read new, explicit rights into the Constitution's text. As a result, courts rarely subject electoral laws to judicial review on rights grounds,<sup>76</sup> and thus electoral law is more a product of Parliamentary creation than judicial molding.

The compulsory nature of voting deeply affects Aboriginal people in a system of representative government.<sup>77</sup> Compulsory voting attempts to ensure that all qualified citizens have a say in the operation of their government.<sup>78</sup> When Aboriginal people are disenfranchised disproportionately, their government of elected officials no longer adequately represents them.

## 2. *Australian History Indicates that Felon Disenfranchisement Is Ineffective as a Punishment*

Felon disenfranchisement laws date back to ancient Greece and Rome, as well as Medieval Europe, when offenders were banished from the community as part of their "civil death," which often included the loss of property rights and the ability to pass property to their heirs.<sup>79</sup> As early as 1915, Australian residency qualifications were used to deny all prisoners the right to vote.<sup>80</sup>

Until 1983,<sup>81</sup> persons sentenced, or even subject to be sentenced, for an offense punishable by imprisonment for one or more years could not vote.<sup>82</sup> From 1983 to 1995, any person who was convicted and was under sentence for an offense punishable by imprisonment for five or more years was disenfranchised.<sup>83</sup> From 1995 to 2004, a prisoner actually had to be

<sup>76</sup> Graeme Orr, Bryan Mercurio & George Williams, *Australian Electoral Law: A Stocktake*, 2 ELECTION L.J. 383, 384 (2003).

<sup>77</sup> Commonwealth Electoral Legislation Amendment Act, 1983, No. 144, § 23 (Austl.).

<sup>78</sup> JOINT STANDING COMMITTEE ON ELECTORAL MATTERS, PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, THE 2004 FEDERAL ELECTION: REPORT OF THE INQUIRY INTO THE CONDUCT OF THE 2004 FEDERAL ELECTION AND MATTERS RELATED THERETO ch. 8, § 40 (2005) [hereinafter FEDERAL ELECTION 2004].

<sup>79</sup> Courtney Artzner, Note, *Check Marks the Spot: Evaluating the Fundamental Right to Vote and Felon Disenfranchisement in the United States and Canada*, 13 SW. J. L. & TRADE AM. 423, 427 (2007); see also JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH AND THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998), [http://www.sentencingproject.org/doc/File/FVR/fd\\_losingthevote.pdf](http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf) (last visited Feb. 8, 2010).

<sup>80</sup> Sandey Fitzgerald, *Ending Felon Disenfranchisement—What Voting Rights Should Prisoners Have?*, DEMOCRATIC AUDIT OF AUSTL., July 7, 2005, at 2 n.8, [http://arts.anu.edu.au/democraticaudit/papers/200507\\_fitz\\_felons.pdf](http://arts.anu.edu.au/democraticaudit/papers/200507_fitz_felons.pdf) (last visited Feb. 25, 2010).

<sup>81</sup> Commonwealth Electoral Legislation Amendment Act, 1983, No. 144, § 23 (Austl.).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

serving five or more years to suffer disenfranchisement.<sup>84</sup> From 2004 to 2006, Parliament reduced the threshold to three years.<sup>85</sup> In 2006, the Electoral Act was amended to provide that prisoners serving any sentence were disqualified from voting in federal elections.<sup>86</sup> The decision in the Vickie Lee Roach case declared the 2006 Amendment unconstitutional, effectively reinstating the three-year sentencing cutoff.<sup>87</sup> Today, voting is no longer a privilege held by a select few, but a right and obligation possessed by all mentally competent adults—except those serving a prison term of three or more years.<sup>88</sup>

### 3. *Aboriginal Voting Rights Are Critical to Self-Determination*

Aboriginal enfranchisement supports democracy and legitimizes the elected government. Australia's history of discrimination<sup>89</sup> against Aboriginal people through political, social, and economic means is substantial.<sup>90</sup> The primary historical justification for denying Aboriginal people the right to vote was their "lack of civilization."<sup>91</sup> During the twentieth century, in certain states with significant Aboriginal populations such as Queensland and Western Australia, fears surfaced that the large number of potential Aboriginal voters might threaten white dominance at the ballot box.<sup>92</sup>

Aboriginal people have lacked political rights for centuries.<sup>93</sup> One major impediment to expansion of Aboriginal rights was that expansion proposals failed to muster consensus among the majority non-Indigenous population.<sup>94</sup> Accordingly, changes in Aboriginal rights tended to mirror

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<sup>84</sup> This is a minor, but potentially important distinction from those who could be sentenced to prison and those who were actually sentenced to prison.

<sup>85</sup> Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act, 2004, No. 123 (Austl.).

<sup>86</sup> Prime Minister John Howard's party had control of Parliament. Electoral and Referendum Amendment Act, 2006 §§3, 4 (Austl.).

<sup>87</sup> *Roach v. Electoral Comm'r* (2007) 233 C.L.R. 162 (Austl.).

<sup>88</sup> The Constitution delineates who may and may not vote broadly.

<sup>89</sup> See HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *FACE THE FACTS* (2005 ed.), available at [http://www.hreoc.gov.au/racial\\_discrimination/face\\_facts/index.html](http://www.hreoc.gov.au/racial_discrimination/face_facts/index.html).

<sup>90</sup> See *Australia Apology to Aborigines*, B.B.C., Feb. 13, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7241965.stm> (last visited Jan. 2, 2009).

<sup>91</sup> See *Murphy*, *supra* note 59, at 188.

<sup>92</sup> See CHESTERMAN, *supra* note 62, at 13.

<sup>93</sup> See, e.g., *Mabo v. Queensland*, (1992) 175 C.L.R. 1 (Austl.) (recognizing that native title exists).

<sup>94</sup> See CHESTERMAN, *supra* note 62, at 13.

changes in the composition of the national government.<sup>95</sup> Few voices have spoken assertively for Aborigines. The legitimacy of an election stems from the fact that the government is elected by a majority of the population.<sup>96</sup> For Aboriginal people to enact change and truly participate, they must have their own voice—the power to vote as a unified population. The disenfranchisement of so many Aborigines impedes the Constitution's goal of a democratically elected government.

Aboriginal voting rights are critical to self-determination and participation in government. Securing fundamental rights for all Aboriginal people in Australia is reinforced by reference to human rights principles that are already part, or are becoming part, of international law.<sup>97</sup> Generally, the issue of disenfranchisement is not one of major public interest, suggesting that political parties are going to be the only way to instigate change.<sup>98</sup> Enfranchisement in Australia, similar to the United States, is an issue that splits along party lines.<sup>99</sup> The rights of the convicted prisoner will be influenced by who has a majority in Parliament. In this light, the catch-22 facing Aboriginal prisoners becomes apparent: the Aboriginal people have been disproportionately excised from the voting populace by being imprisoned at a much higher rate, yet voting is the strongest means available in a democracy to secure their own self-determination.

*B. By Ratifying the Convention on the Elimination of Racial Discrimination and Enacting the RDA, Parliament Provided for Equal Treatment of Aborigines*

Australia has struggled with discrimination since its colonization.<sup>100</sup> In order to combat such discrimination, the Australian Parliament has enacted a number of different measures to tackle issues such as racial discrimination, sex discrimination, and disability discrimination.<sup>101</sup> Among this legislation, Australia ratified the International Convention on the

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<sup>95</sup> Viniyanka Prasad, *The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations*, 9 CHI. J. INT'L L. 297, 305 (2008).

<sup>96</sup> See FEDERAL ELECTION 2004, *supra* note 78.

<sup>97</sup> S. James Anaya, *Panel, Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 237, 241 (2005).

<sup>98</sup> See Fitzgerald, *supra* note 80.

<sup>99</sup> *Id.*

<sup>100</sup> See READ, *supra* note 13.

<sup>101</sup> Racial Discrimination Act, 1974, No. 52 (Austl.); Sex Discrimination Act, 1984, No. 4 (Austl.); Disability Discrimination Act, 1992, No. 135 (Austl.).

Elimination of All Forms of Racial Discrimination (“CERD”) on September 30, 1975.<sup>102</sup>

By ratifying the CERD, Parliament agreed to work towards eliminating discrimination within Australia. The CERD requires states to guarantee the right to vote—including the right to participate in elections and to stand for election—to everyone, without distinction as to race.<sup>103</sup> The CERD also obliges states to amend, rescind, or nullify any laws that have the effect of creating or perpetuating racial discrimination, or of strengthening racial division.<sup>104</sup> To fulfill its obligations under the CERD, Australia passed the Racial Discrimination Act of 1975 (“RDA”). In doing so, Australia pledged to:

[R]eview government, national and local policies, and to change, or abolish, laws and regulations which create or continue racial discrimination; [and to] . . . take any special measures needed to make sure that disadvantaged racial groups have full and equal access to human rights and to basic freedoms; and . . . [to] tackle the prejudices that lead to racial discrimination, and to eliminate the barriers between races.<sup>105</sup>

While Australia lacks a constitutionally entrenched Bill of Rights, the RDA has provided sufficient authority to protect Aboriginal rights in other contexts.<sup>106</sup> For example, some of the basic rights and freedoms guaranteed under the CERD and the RDA include: “[t]he right to be treated equally by the courts and other tribunals, [t]he right to be protected by the government against violence or bodily harm, [t]he right to vote and take part in government and to have equal access to public services.”<sup>107</sup> This suggests that the Australian Parliament, upon enacting such legislation, intended for Aboriginal people to be treated equally, free from discrimination.

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<sup>102</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Oct. 30, 1975, 660 U.N.T.S. 195.

<sup>103</sup> *Id.* art. 5.

<sup>104</sup> *Id.* art. 2.

<sup>105</sup> PILCH, HOMELESSNESS LAW AND ADVOCACY RESOURCE MANUAL: CHAPTER 2: HOMELESSNESS AND DISCRIMINATION 16 (2008), <http://www.pilch.org.au/HLARM> (follow “Chapter 2—Homelessness and Discrimination” hyperlink) (last visited Feb. 8, 2010).

<sup>106</sup> *See, e.g.*, *Mabo v. Queensland* (1988) 166 C.L.R. 186 (legislative override of aboriginal title by the Queensland Government); *see also* Geoffrey W.G. Leane, *Indigenous Rights Wronged: Extinguishing Native Title in New Zealand*, 29 DALHOUSIE L. J. 41, 67 n.151 (2006).

<sup>107</sup> AUSTL. HUMAN RIGHTS COMM’N, YOUR GUIDE TO THE RACIAL DISCRIMINATION ACT 4 (2006).

### III. THE E & R AMENDMENT HAS DISCRIMINATORY EFFECTS THAT VIOLATE THE RDA'S DEFINITION OF INDIRECT DISCRIMINATION

The RDA is the most significant federal protection against racial discrimination in Australia.<sup>108</sup> It prohibits “any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom . . . .”<sup>109</sup> Historically, anti-discrimination legislation bans discriminatory practices on direct and indirect levels.<sup>110</sup> On a direct level, anti-discrimination legislation bans any discriminatory practice that overtly differentiates by reason of some irrelevant or impermissible consideration.<sup>111</sup> On an indirect level, anti-discriminatory legislation bans any action that has the same or substantially the same effect, thus creating discrimination.<sup>112</sup> Direct discrimination and indirect discrimination each have distinct burdens of proof that a plaintiff must meet in order to successfully challenge a potentially discriminatory law on RDA grounds.<sup>113</sup> While the E & R Amendment does not directly discriminate, it is a prime example of legislation that discriminates indirectly.

#### A. *The RDA Does Not Prohibit the E & R Amendment on Direct Discrimination Grounds*

The E & R Amendment does not fit within the direct discrimination classification of prohibited legislation. To demonstrate direct discrimination, the plaintiff must prove that the legislation meets two requirements: 1) that the act has “the purpose or effect” of impairing political freedom, and 2) that the act was based on race.<sup>114</sup> While the first prong may be met here by demonstrating a significantly disproportionate effect on Aboriginal people, the second prong is a stumbling block.<sup>115</sup> There is not a clear racial basis for the E & R Amendment, and as such, the legislation would fail to be

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<sup>108</sup> See generally HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, AN INTERNATIONAL COMPARISON OF THE RACIAL DISCRIMINATION ACT 1975 (2008 ed.).

<sup>109</sup> Racial Discrimination Act, 1974, No. 52, § 9 (Austl.).

<sup>110</sup> See *Waters v. Public Transport Corp.* (1991) 173 C.L.R. 349, 357 (Austl.).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, *supra* note 108.

<sup>114</sup> Racial Discrimination Act, 1975, No. 52, § 9 (Austl.).

<sup>115</sup> *Id.*

considered directly discriminatory, pursuant to the *Briginshaw* test.<sup>116</sup> Rather, the court should examine the E & R Amendment through the lens of indirect discrimination.

The High Court has not addressed whether or not direct and indirect discrimination are to be treated as mutually exclusive classes.<sup>117</sup> In the absence of such a classification, federal courts have treated them separately.<sup>118</sup> In fact, one such court held “that the material difference in treatment is based on the status . . . of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator.”<sup>119</sup> That court further held that where a state government acting with the best of intentions unintentionally discriminates, such action does not rise to the level of the *Briginshaw* test.<sup>120</sup> Such is the case here.

### B. *The RDA Prohibits the E & R Amendment on Indirect Discrimination Grounds*

Indirect race discrimination focuses on the effect on a person of particular practices or policies that disadvantage them.<sup>121</sup> In 1990, the RDA was amended in order to provide a way to reverse legislation or individual action that indirectly discriminates against citizens.<sup>122</sup> According to the amended section, 9(1A), racial discrimination is established if a condition or requirement was imposed on a complainant that a) was not reasonable in the circumstances, and b) had the effect of interfering with the recognition, enjoyment or exercise, on an equal footing, by persons of [Aboriginal descent] of any relevant human right or fundamental freedom.<sup>123</sup> Political rights, in particular the right to participate in elections by voting on the basis of universal and equal suffrage, is included in the definition of human right

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<sup>116</sup> See *Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336, 362 (Austl.) (Dixon, J.). This case stands for the proposition that legislation must be created in order to discriminate to be “direct discrimination,” and that such legislation would require a higher standard of evidence to reach a state of “reasonable satisfaction” that the legislation did in fact discriminate. In Vickie Roach’s case, the legislation is facially neutral, and therefore does not fit the *Briginshaw* test or require the higher standard of evidence.

<sup>117</sup> *Australian Medical Council v. Wilson & Others* (1996) 68 F.C.R. 46, 74 (Austl.).

<sup>118</sup> *Id.*

<sup>119</sup> See *Waters v. Public Transport Corp.* (1991) 173 C.L.R. 349, 359 (Austl.).

<sup>120</sup> See HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM’N, *supra* note 108.

<sup>121</sup> *Tanevski v. Fluor Australia Pty Ltd.*, (2008) NSWADT 217, para. 53.

<sup>122</sup> House of Reps. Deb. *Hansard* 12 November 1990, p. 3764 (statement of Peacock, MP). Section 9(1A) was added to the RDA by the *Law and Justice Legislation Amendment Act* 1990 (Austl.) which came into effect on 22 December 1990. The secondary purpose of the amendment seems to have been to equalize the RDA with all other discrimination statutes and allow for challenges on indirect discrimination grounds.

<sup>123</sup> *A.B. v. New South Wales* (2005) 194 F.L.R. 156, 156 (Austl.).

or fundamental freedom, according to section 9(2) of the Act.<sup>124</sup> The amendment further condemns any “act involving a distinction based on, or an act done by reason of, the other person’s race, colour, descent or national or ethnic origin.”<sup>125</sup>

The legislative purpose for amending section 9 of the RDA was to directly address forms of discrimination that do not qualify as direct discrimination, but that clearly have a discriminatory effect on a racial group.<sup>126</sup> As Mr. Melham, M.P., stated during the introduction of the legislation, the purpose was to determine “whether the imposed term, condition or requirement impacts disproportionately on persons of the same race etc. . . . [meaning] it will not be necessary to establish that every person in that group needs to be affected to show a disproportionate impact . . . .”<sup>127</sup> Thus, indirect racial discrimination contrary to section 9(1A) of the RDA is concerned with laws that are neutral on their face yet are discriminatory in their impact and outcome.<sup>128</sup> In order to sustain a finding of indirect discrimination, a plaintiff must demonstrate two things: 1) that the legislation unreasonably violates guaranteed Constitutional or legislative rights, and 2) that the violation creates an adverse discriminatory effect.<sup>129</sup>

1. *Disenfranchisement Imposed by the E & R Amendment Violates the RDA’s Guarantee of Political Rights*

Disenfranchisement imposed by the E & R Amendment unreasonably violates the RDA’s guarantee of political rights, thus meeting the first prong of the indirect discrimination test. To determine reasonableness, the High Court has adopted a passage speaking to section 5(2) of the Sex Discrimination Act that the test is “less demanding than one of necessity, but more demanding than one of convenience.”<sup>130</sup> The Court further stated that “the criterion is an objective one, which requires the court to weigh the

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<sup>124</sup> Racial Discrimination Act, 1975, No. 52 (Austl.). By reference to the CERD, Article 5(c): (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 Government as well as in the conduct of public affairs at any level and to have equal access to public service.

<sup>125</sup> *Id.* § 9.

<sup>126</sup> House of Reps. Deb. *Hansard* 12 November 1990, p. 3764 (statement of Peacock, MP).

<sup>127</sup> House of Reps. Deb. *Hansard* 12 November 1990, p. 3768 (statement of Melham, MP).

<sup>128</sup> *De Silva v. Minister for Immigration & Multicultural Affairs* (1998) 89 F.C.R. 502, 513 (Austl.).

<sup>129</sup> *Dept. of Foreign Affairs & Trade v. Styles* (1989) 23 F.C.R. 251, 263 (Bowen, C.J. & Gummow, J. analyzing the Sex Discrimination Act in the same manner that the RDA would be addressed).

<sup>130</sup> *Id.*



nature and extent of the discriminatory effect . . . against the reasons advanced in favour of the requirement or condition on the other.”<sup>131</sup>

In determining what constitutes “reasonable,” federal courts have looked at a variety of factors, including 1) whether the purpose of the legislation could be achieved without employing a discriminatory requirement, or by employing a requirement that is less discriminatory in its impact;<sup>132</sup> 2) whether the legislation is effective, efficient and convenient;<sup>133</sup> or 3) whether the legislation serves relevant policy objectives.<sup>134</sup> While proponents argue that felon disenfranchisement qualifies under these factors, disenfranchisement is an unreasonable and ineffective punishment that is offensive to public policy.

*a. Proponents of Felon Disenfranchisement Justify Their Argument for the Three Year Rule on a Number of Grounds*

There are a number of arguments that proponents of felon disenfranchisement put forth to justify the diminution of the right to vote. Some such arguments are: 1) convicted felons are not trustworthy voters (i.e. they would vote for policies that help criminals); 2) convicted felons are not loyal to the republic; 3) felons will participate in electoral fraud; 4) logistical problems exist with inmate voting (i.e. in which jurisdiction would their votes count); 5) disenfranchisement is a legitimate aspect of criminal punishment. The final justification is the most problematic because it is the most widely held, and likely the most supported by the public at large.<sup>135</sup>

Disenfranchisement may be seen as a legitimate aspect of criminal punishment by certain groups and members in Parliament who may want to appear tough on crime and criminals.<sup>136</sup> For example, in debating the implementation of the complete ban on prisoner voting, Mr. Nairn, MP, stated: “people who commit offences against society sufficient to warrant a prison term should not, while they are serving that prison term, be entitled to vote and elect the leaders of the society whose laws they have disregarded.”<sup>137</sup> This sentiment is supported by other elected officials, like

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<sup>131</sup> *Id.*

<sup>132</sup> See *Waters v. Public Transportation Corp.* (1991) 173 C.L.R. 349, at 363-64 (Mason, C.J. & Gaudron, J.).

<sup>133</sup> *Id.* at 378 (Brennan, J.).

<sup>134</sup> *Id.* at 410 (McHugh, J.).

<sup>135</sup> See, e.g., Krystyna Pollard, Op-Ed., *Killers Would Get Right to Vote Under Labour*, AAP NEWSFEED, Mar. 11, 2003.

<sup>136</sup> See FELLNER & MAUER, *supra* note 79.

<sup>137</sup> Gary Nairn, M.P., House of Reps., Speech to House of Reps. (May 10, 2006).

Senator Eric Abetz who stated: “If you are not fit to walk the streets, as deemed by the judicial system . . . then chances are you’re not a fit and proper person to cast a vote in relation to the future of your country.”<sup>138</sup> The members of Parliament who addressed this issue in the debates were likely swayed by the public’s distaste for allowing “killers . . . the right to vote.”<sup>139</sup> Thus, disenfranchisement was thought to serve as a form of retribution.<sup>140</sup>

Disenfranchisement has also been proposed as a deterrent to future crime. Prisons function within the criminal justice system “as a means to control [the] communities [and] maintain a stable system of order.”<sup>141</sup> Further, the commission of a crime and subsequent lawful conviction constitute an active and deliberate repudiation of the terms of the social contract a citizen is thought to abide by.<sup>142</sup> Exclusion from the franchise is a penalty that signifies the criminal’s apparent desire to no longer be considered a member of the community in which he or she committed the crime.<sup>143</sup> It can thus be argued that such exclusion, and resulting disenfranchisement, is a choice that each person must make upon deciding to break the law.

*b. Disenfranchisement Is an Unreasonable Means to Punish Citizens*

Disenfranchisement of prisoners is an inappropriate way of punishing citizens. As one judge has noted:

Prisoners are human beings . . . . [and] are also citizens of this country . . . . They should, so far as the law can allow, ordinarily have the same rights as all other persons . . . . They have lost their liberty whilst in prison . . . . [but] they have not

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<sup>138</sup> Julia Baird, *A Hard Sell For More Compassion*, SYDNEY MORNING HERALD, 17 July 2004, <http://www.smh.com.au/articles/2004/07/16/1089694558141.html?from=storylhs#> (last visited Jan. 3, 2010).

<sup>139</sup> See Pollard, *supra* note 135.

<sup>140</sup> Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 721-24 (1973) (discussing European responses to crime through civil death, outlawry, infamy, and attainder).

<sup>141</sup> David Jacobs & Ronald E. Helms, *Towards a Political Model of Incarceration: A Time Series Examination of Multiple Explanations for Prison Admission Rates*, 102 AM. J. OF SOC. 323 (1996).

<sup>142</sup> Robert Jago & Jane Marriott, *Citizenship or Civic Death? Extending the Franchise to Convicted Prisoners*, 5 WEB J. CURRENT LEGAL ISSUES (2007), <http://webjcli.ncl.ac.uk/2007/issue5/jago5.html> (last visited Jan. 3, 2010).

<sup>143</sup> *Id.*

lost their human dignity or their right to equality before the law.<sup>144</sup>

As a goal of the penal system, disenfranchisement is retributive to the extent that the offender is deprived of something they value.<sup>145</sup> However, the disproportionate number of Aboriginal prisoners suggests that disenfranchisement, through the E & R Amendment, is not appropriate or adapted to serving a legitimate objective—namely, rehabilitation. The statement of purpose for the revised standard Guidelines for Corrections in Australia explicitly states that the community correctional services exist for the purposes of: 1) providing assessment and advice to sentencing and releasing authorities in the formulation of orders and directions for offenders; 2) to ensure that offenders fulfill the orders and directions of courts and releasing authorities; 3) to assist the rehabilitation of offenders through the adoption of productive, law-abiding lives in the community; 4) to contribute to public safety by preventing crime and through reducing recidivism; and 5) to provide offenders with an opportunity to make restitution to their victims or to the wider community.<sup>146</sup> According to the Australian Institute of Criminology, which reports directly to the Minister of Home Affairs in the Attorney General's office, the principles are intended to show the spirit in which correctional programs should be administered and the goals toward which administrators should aim.<sup>147</sup> Nothing in the guidelines suggest that the punishment, either pre- or post-sentencing should serve retributive or deterrent purposes, nor does it say that the punishment should extend beyond incarceration, which is essentially what disenfranchisement does.<sup>148</sup>

Disenfranchisement prevents reintegration of offenders into society, setting up a scenario where felons must abide by the law, after their lawful conviction, without the ability to vote to protect their future interests once out of prison.<sup>149</sup> Further, denying prisoners the right to vote may undermine

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<sup>144</sup> *Muir v. The Queen* (2004) 206 A.L.R. 189, ¶ 25 (Kirby, J.).

<sup>145</sup> Mandeep Dhami, *Prisoner Disenfranchisement Policy: A Threat to Democracy?* 5 ANALYSES OF SOC. ISSUES AND PUB. POL'Y 235, 239 (2005).

<sup>146</sup> CONFERENCE OF CORRECTIONAL ADMINISTRATORS, STANDARD GUIDELINES FOR CORRECTIONS IN AUSTRALIA CORRECTIVE SERVICES MINISTERS' CONFERENCE 5 (2004), available at [http://www.aic.gov.au/criminal\\_justice\\_system/corrections/reform/standards.aspx](http://www.aic.gov.au/criminal_justice_system/corrections/reform/standards.aspx) (follow "Standard guidelines for corrections in Australia" hyperlink).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See generally Richard Hasen, *Ending Felon Disenfranchisement in the United States: Litigation or Legislation?*, DEMOCRATIC AUDIT OF AUSTL., Sept. 1, 2004, [http://arts.anu.edu.au/democraticaudit/search\\_keyw\\_frm.htm](http://arts.anu.edu.au/democraticaudit/search_keyw_frm.htm) (last visited Feb.26, 2010).

respect for the rule of law because citizens who cannot participate in the making of laws have no incentive to recognize such authority.<sup>150</sup> Social policy activists have condemned the retribution justification for disenfranchisement.<sup>151</sup> Prisoners, like all citizens, have an interest in political issues.<sup>152</sup> Disenfranchisement opponents claim that “by rationalizing and facilitating a tendency to localize the blame for crime in the individual, disenfranchisement helps to obscure the complexity of the roots of crime and their entanglement with contingent social structures,” such as lack of education or poverty.<sup>153</sup> Disenfranchisement, therefore, prevents a nation from embracing a minority population, like the Aboriginal population, and hinders the democratic process. Disenfranchisement, by definition, divests prisoners of freedom and voting rights. Depriving citizens of their freedom and voting rights occurs primarily to protect the interests of the dominant class.<sup>154</sup> In various jurisdictions outside of Australia—most notably Canada and the United Kingdom—prisoner disenfranchisement was found to not be rationally connected to rehabilitation, and was disallowed by those nations’ courts.<sup>155</sup>

A policy of disenfranchisement of prisoners prevents full rehabilitation because it leaves the convicted, yet rehabilitated, felon with fewer rights than those guaranteed by full citizenship. The E & R Amendment denies prisoners, particularly Aboriginal prisoners who are overrepresented in the prison system, compared to the overall prison population, the right to vote—in direct conflict with the RDA’s guarantee of equality.

c. *The Sentence Does Not Fit the Crime with Regard to the E & R Amendment*

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<sup>150</sup> See Dhami, *supra* note 145.

<sup>151</sup> See Itzkowitz & Oldak, *supra* note 140, at 730-31.

<sup>152</sup> Daniel Guttman, *Vicki Roach v Commonwealth: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?*, 11 SYD. L. REV. 297, 318 (2007).

<sup>153</sup> Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box,”* 102 HARV. L. REV. 1300, 1300 n.1 (1989).

<sup>154</sup> BRANDON ROTTINGHAUS, INTERNATIONAL FOUNDATION FOR ELECTION SYSTEMS, INCARCERATION AND ENFRANCHISEMENT: INTERNATIONAL PRACTICES, IMPACT AND RECOMMENDATIONS FOR REFORM 5 (2003).

<sup>155</sup> See generally *Sauvé v. Canada* [2002] 3 S.C.R. 519 (Can.); *Hirst v. United Kingdom (No. 2)*, App. No. 74025/01 Eur. Ct. H.R. (2005). It should be noted that unlike the *Roach* case in Australia, both the Canadian Supreme Court and the European Court of Human Rights found that there was an express right to vote in the country’s Constitution.

The right to vote freely for a chosen candidate is essential in a democratic society, and any restriction of this right undermines representative government.<sup>156</sup> The Commonwealth mandates that all citizens vote, with very few limitations.<sup>157</sup> Legitimacy of democratic governments depends on full franchise.<sup>158</sup> In Australia, prisoners are required to vote unless they are serving a sentence of three or more years.<sup>159</sup> In the case of a disenfranchised prisoner, the crime may have had nothing to do with his or her ability to vote. If the crime leading to conviction were related to voting issues, such as bribery or extortion of public officials, perhaps disenfranchisement would be an appropriate punishment. But in the current system, a person who was not convicted of crimes involving deceit is disenfranchised merely by virtue of the length of sentence.

There are a number of situations exemplifying the disconnect between the type of crime and disenfranchisement imposed by legislation.<sup>160</sup> Bribery is a prime example, where the seriousness of the crime is not reflected in the length of the sentence. The Electoral Act section seventy-eight states that: "A person shall not improperly seek to influence a member of a Redistribution Committee for a State or the Australian Capital Territory, a member of an augmented Electoral Commission . . . in the performance of his or her duties . . . ."<sup>161</sup> That section also describes the penalty: 2000 dollars or imprisonment for twelve months, or both.<sup>162</sup> Under the current scheme of disenfranchisement for sentences of three or more years, any person who sought to improperly influence an elected official would not lose his right to vote. Thus, the crime need not have any connection to electoral or political processes or to the security of the state for the prisoner to be disenfranchised.<sup>163</sup> Instead, a person who was not convicted of crimes involving deceit might be disenfranchised, whereas a person who was convicted of bribing an official could vote in every future election.<sup>164</sup> The

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<sup>156</sup> Reynolds v. Sims, 377 U.S. 533, 555 (1964).

<sup>157</sup> See Commonwealth Electoral Act, 1918, No. 27 (Austl.).

<sup>158</sup> See Fitzgerald, *supra* note 80.

<sup>159</sup> See generally TIM EVANS, AUSTRALIAN ELECTORAL COMM'N, COMPULSORY VOTING IN AUSTRALIA (2006), [http://www.aec.gov.au/pdf/voting/compulsory\\_voting.pdf](http://www.aec.gov.au/pdf/voting/compulsory_voting.pdf) (last visited Feb. 11, 2010).

<sup>160</sup> Unlike many other jurisdictions, including Germany and Canada, Australia legislates disenfranchisement instead of allowing it as a potential punishment imposed by a judge to "fit" the crime.

<sup>161</sup> Commonwealth Electoral Act, 1918, No. 27, § 78 (Austl.).

<sup>162</sup> *Id.*

<sup>163</sup> See Robin L. Nunn, Comment, *Lock Them Up and Throw Away the Vote*, 5 CHI. J. INT'L L. 763, 768 (2005).

<sup>164</sup> This assumes that bribery was the only charge that such a person was convicted of.

three-year ban is arbitrary and injures the political freedom guaranteed by the RDA and implied in the Constitution.

*d. The E & R Amendment Lacks Equity and Is Fundamentally Unfair*

Disenfranchisement of felons is not uniform across Australia.<sup>165</sup> The E & R Amendment is not applied equally across the country.<sup>166</sup> Currently, the same offense may carry mandatory detention in one state but not in another, demonstrating the inconsistency of how offenders are actually punished.<sup>167</sup>

Every Australian jurisdiction sets its own rules for the franchise.<sup>168</sup> While some states adopt the changes to the Commonwealth franchise as a matter of course, they are not obliged to do so.<sup>169</sup> This discretion generates substantial variation in prisoner qualifications for franchise among Australian states and territories.<sup>170</sup> This situation is further complicated by the fact that some jurisdictions choose to disenfranchise, while others do not. By legislating at the Commonwealth level to disenfranchise prisoners—regardless of the effect of state law—Parliament imposes a secondary punishment, in breach of the doctrine of federalism.<sup>171</sup> The prisoner will not only serve his or her sentence, but in jurisdictions that do adopt the Commonwealth rule per se, will be disenfranchised from state and federal

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<sup>165</sup> Graeme Orr, *Ballotless and Behind Bars: The Denial of the Franchise to Prisoners*, 26 FED. L. REV. 55, 61 (1998). Although this provides a delineation of state voting from 1998, it demonstrates that each state or territory has its own voting method.

<sup>166</sup> AUSTL. LAW REFORM COMM'N, SAME CRIME, SAME TIME: SENTENCING OF FEDERAL OFFENDERS 103, 14 (2006).

<sup>167</sup> *Id.*

<sup>168</sup> See Orr, *supra* note 165.

<sup>169</sup> See Western Australia Electoral Commission Legislation, [http://www.slp.wa.gov.au/legislation/agency.nsf/waec\\_menu.htmlx](http://www.slp.wa.gov.au/legislation/agency.nsf/waec_menu.htmlx) (last visited Jan. 3, 2010) (demonstrating that franchise legislation in Western Australia has closely followed the dates of all major Commonwealth legislation).

<sup>170</sup> See, e.g., Heather Anderson, *Engaging the Civil Dead: Citizens' Media and Prisoner*, 2 GLOBAL MEDIA J. 1 (2008) (discussing the fact that Tasmania disallows all non-federal prisoners from voting whereas South Australia enforces no such disenfranchisement).

<sup>171</sup> See AUSTL. CONST., § 51 (establishing the Commonwealth of Australia in which the legislative power of the Commonwealth “vested by this Constitution in the Parliament” and detailing a range of powers and responsibilities of the Federal Parliament, most of which are outlined in Section 51. Powers not enumerated in this section are known as residual powers because they reside with the states. This division of powers between the central and state governments is the core of the federal idea).

elections.<sup>172</sup> Alternatively, in a state that does not adopt the Commonwealth rule, the prisoner will not lose his or her right to vote at federal elections.<sup>173</sup>

To complicate matters further, there is no uniformity amongst the states, or between the states and the Commonwealth, as to what constitutes an offense punishable by imprisonment.<sup>174</sup> For example, in Western Australia, there is a scheme whereby persons who default on payment of fines lose their drivers license.<sup>175</sup> This is a stark contrast with the Australian Capitol Territory (“ACT”) or in Queensland, where the same defaulter would actually be imprisoned.<sup>176</sup> In this scenario, an Australian citizen in Western Australia who defaults on fines retains the right to vote, whereas a citizen in ACT or Queensland who is jailed for defaulting on fines may lose his/her federal voting rights, depending on the length of the confinement.<sup>177</sup> In this light, the E & R Amendment appears unreasonable because its effects are arbitrary and differ from one territory to the next.

2. *The Disproportionate Disenfranchisement Imposed upon Aboriginals by the E & R Amendment Interferes with Their RDA-Guaranteed Right to Participate in Elections*

To demonstrate indirect discrimination, a plaintiff must establish that there has been “adverse effect discrimination.”<sup>178</sup> Adverse effect discrimination is evidenced by an article of legislation that differentiates for an irrelevant or impermissible reason, or has the “same or substantially the same effect as if different treatment had been accorded precisely for a reason of that kind.”<sup>179</sup> The provisions of paragraph (c) of subsection 9(1A) of the RDA express that any act that has the “purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of . . . any human right or

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<sup>172</sup> See, e.g., Electoral Act, 1992, Queensl. Stat. § 64 (tying qualification to vote in state elections to qualification to vote under the Commonwealth Act, to vote in federal elections).

<sup>173</sup> There is no restriction on prisoners voting in South Australia. See JEROME DAVIDSON, DEPT. OF PARLIAMENTARY SERVS., INSIDE OUTCASTS: PRISONERS AND THE RIGHT TO VOTE IN AUSTRALIA 13 n.14 (2004).

<sup>174</sup> *Id.*

<sup>175</sup> Voting Rights of Prisoners, AUSTRALIAN DEMOCRATS ACTION PLAN, Mar. 10, 2007, at 2, [http://www.democrats.org.au/docs/ActionPlans/Electoral\\_Prisoners\\_2007.pdf](http://www.democrats.org.au/docs/ActionPlans/Electoral_Prisoners_2007.pdf) (last visited Feb. 10, 2010).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See *Waters v. Public Transport Corp.* (1991) 173 C.L.R. 349, 357 (Austl.).

<sup>179</sup> *Id.*

fundamental freedom in the political, economic, social, cultural or any other field of public life," is prohibited.<sup>180</sup>

The disproportionate effects of prisoner disenfranchisement paint a picture of systemic and institutionalized disadvantage. According to the 2006 census, the total Australian population was just under twenty million.<sup>181</sup> The Aboriginal population was approximately 510,160, or approximately 2.5% of the total population.<sup>182</sup> Of greater importance, however, is the Aboriginal voting age population. In 2007, the Aboriginal population that could, and was required to vote, was estimated to be 1.7% of the current voting age population.<sup>183</sup> Without every one of the votes counted, the Aboriginal population would have difficulty creating legislative change.

Between 2000 and 2006, the rate of Aboriginal imprisonment in Australia rose substantially.<sup>184</sup> Today, Aboriginal offenders are approximately three times more likely than non-Aboriginal offenders to receive a sentence of imprisonment, regardless of their prior history.<sup>185</sup> This rate of imprisonment is likely the result of a number of factors, including socio-economic status, mental health status, education, and homelessness.<sup>186</sup> Unfortunately, Aboriginal incarceration rates continue to increase

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<sup>180</sup> See, e.g., Sex Discrimination Act, 1984, No. 4, § 5 (Austl.). This section differs dramatically from the equivalent provisions in other discrimination legislation. As a consequence the concept of indirect discrimination under the RDA is broader than the concept in such other legislation. See *Australian Medical Council v. Wilson* (1996) 68 F.C.R. 46, 81 (Sackville, J.) (Austl.); see also *Australian Medical Council v. Wilson* (1996) 68 F.C.R. 46, 48 (Black, C.J.) (Austl.) ("impairing the enjoyment of a right on an equal footing must be taken to be a broad one that involves looking at the footing upon which rights are enjoyed by those sections of the community at large who do not suffer from the racial discrimination and the other like types of discrimination that the Act aims to eliminate").

<sup>181</sup> Austl. Bureau of Statistics, 2006 Census of Population and Housing (2006).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* The total number of people age 18 or above who identify themselves as Aboriginal divided by the total number of Australians age 18 and over.

<sup>184</sup> Austl. Bureau of Statistics, 1993 Prisoners in Australia (1993); see also Lucy Snowball & Don Weatherburn, *Indigenous Over-Representation in Prison: The Role of Offender Characteristics*, 99 CONTEMP. ISSUES IN CRIME & JUST. 1 (2006).

<sup>185</sup> *Id.* at 2.

<sup>186</sup> Anne Grunseit et. al, Law and Justice Foundation of N.S.W., *Taking Justice into Custody: The Legal Needs of Prisoners - Summary Report* (2008).



disproportionately despite the efforts outlined by the Royal Commission<sup>187</sup> in the Aboriginal Deaths in Custody Report.<sup>188</sup>

In Australia, the percentage of Aboriginal prisoners increased from 15% of the total prison population in 1993, to 24% in 2007.<sup>189</sup> Although felon disenfranchisement laws is justified on race-neutral grounds, the discriminatory impact remains.<sup>190</sup> Laws denying felons the right to vote weaken the voting power of minority communities.<sup>191</sup> This is significant because minorities comprise approximately one-quarter of all convicted offenders who are prevented from voting.<sup>192</sup> With the sole exception of incarceration in the state of Tasmania, an Aboriginal person is thirteen times more likely to be imprisoned than a non-Indigenous person.<sup>193</sup> In Western Australia, Aboriginal persons are twenty-one times more likely to be in prison than non-Aboriginal persons<sup>194</sup>—a staggering number, considering the population of Western Australia is only 3.8% Aboriginal.<sup>195</sup>

Excluding prisoners with indeterminate,<sup>196</sup> life-term, and periodic-detention sentences, in 2007, the median aggregate sentence for prisoners was three years.<sup>197</sup> As a result of the E & R Amendment, the median prisoner is disenfranchised. This is particularly alarming, considering those who were sentenced for indeterminate or life sentences did not factor into the aggregate. The higher rate at which Aboriginal offenders are sent to prison stems mainly from: 1) a higher rate of conviction for violent crime,

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<sup>187</sup> FINAL REPORT OF THE ROYAL COMMISSION INTO ABORIGINAL DEATHS, [http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/IndigLRes/rciadic/rciadic\\_summary/rcsumk01.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/IndigLRes/rciadic/rciadic_summary/rcsumk01.html) (last visited Jan. 3, 2010). Between October 1987 and November 1990, the Royal Commission into Aboriginal Deaths in Custody investigated the deaths of 99 Aboriginal persons in police and prison custody.

<sup>188</sup> Annette Hennessy, *Indigenous Sentencing Practices in Australia*, Int'l Society for Reform of the Criminal Law Conference: Justice for All—Victims, Defendants, Prisoners and Community, Brisbane, July 2006, <http://www.isrc.org/Papers/2006/Hennessy.pdf> (last visited Feb. 10, 2010).

<sup>189</sup> Austl. Bureau of Statistics, 1993 Prisoners in Australia (1993).

<sup>190</sup> See Nunn, *supra* note 163, at 768.

<sup>191</sup> *Id.*

<sup>192</sup> See Austl. Bureau of Statistics, 2007 Prisoners in Australia (2007).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> AUSTL. BUREAU OF STATISTICS, 2007 POPULATION DISTRIBUTION, ABORIGINAL AND TORRES STRAIT ISLANDER AUSTRALIANS (2007).

<sup>196</sup> *R. v. Veen* (No. 2) (1988) 164 C.L.R. 465 (Austl.). An indeterminate sentence is at the Governor's pleasure, imposed in addition to or in substitution for, a finite sentence. It is available in most of the Australian states and territories. These provisions override the common law requirement of proportion between the crime and the punishment.

<sup>197</sup> See AUSTL. BUREAU OF STATISTICS, 2007 PRISONERS IN AUSTRALIA (2007).

and 2) a higher rate of re-offending, particularly following imposition of sanctions intended as alternatives to fulltime imprisonment.<sup>198</sup>

The end result is that approximately 48% of Aboriginal prisoners are unable to vote because of the three-year voting restriction.<sup>199</sup> Comparatively, only about 39% of the non-Aboriginal prison population has been disenfranchised.<sup>200</sup> From the prison statistics alone, it is evident the E & R Amendment has disproportionately disenfranchised Aboriginal voters. The proportion of voting-age convicted Aboriginals is higher than their non-Indigenous counterparts. This is increasingly true in states adopting the Commonwealth rule per se.<sup>201</sup>

Disproportionate disenfranchisement prevents Aboriginal people from meaningfully participating in Australian politics and society as a whole. Aboriginal people have, in the government's own words, "less opportunity than other members of the electorate to participate in the political process."<sup>202</sup> As of 2007, not a single Aboriginal person had been elected to the Australian Commonwealth House of Representatives, and only two had been elected to the Commonwealth Senate.<sup>203</sup> The fact that Aboriginal people lack proportional representation in elected bodies further prevents meaningful participation.

A variety of factors relate to the over-representation of Aboriginals in custody. The Royal Commission into Aboriginal Deaths in Custody noted that the overrepresentation of Aboriginal people in prison was directly related to the "whole of life" experience of Aboriginal people.<sup>204</sup> The Commission found that "the single significant contributing factor to incarceration is the disadvantaged and unequal position of Aboriginal people in Australian society in every way, whether socially, economically or culturally."<sup>205</sup> By sanctioning the pattern of disadvantage and stigmatizing Aboriginal prisoners by not allowing them to vote, the racial distinctions

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<sup>198</sup> See Snowball & Weatherburn, *supra* note 184.

<sup>199</sup> AUSTL. BUREAU OF STATISTICS, 2008 PRISONERS IN AUSTRALIA (2008).

<sup>200</sup> *Id.*

<sup>201</sup> See, e.g., Crime and Misconduct and Other Legislation Amendment Bill, 2006, Queensl. Stat. (copying the federal blanket ban on prisoner voting).

<sup>202</sup> Hennessy, *supra* note 188. This language, essentially defining vote dilution, is borrowed from the "totality of circumstances" analysis from the Voting Rights Act of 1965, 42 U.S.C. § 1973(b)(1988).

<sup>203</sup> See Murphy, *supra* note 59, at 188-89.

<sup>204</sup> See FINAL REPORT OF THE ROYAL COMMISSION INTO ABORIGINAL DEATHS, *supra* note 187.

<sup>205</sup> HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N OF AUSTL., ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMM'R, SUBMISSION TO THE EXPERT SEMINAR ON INDIGENOUS PEOPLES AND THE ADMINISTRATION OF JUSTICE (2003), [http://www.hreoc.gov.au/Social\\_Justice/madrid/issue1.html](http://www.hreoc.gov.au/Social_Justice/madrid/issue1.html) (last visited Feb. 10, 2010).

become more pronounced, pervasive, and entrenched by the politically powerful non-Indigenous majority.<sup>206</sup>

Further, disenfranchisement does not end at the prison walls. Theoretically, the end of a prison sentence restores the prisoner's voting rights. In practice, however, ex-prisoners must apply to re-enroll.<sup>207</sup> This leads to a variety of different problems, including the fact that many ex-prisoners are homeless and unable to establish a stable address.<sup>208</sup> Additionally, the evidentiary requirements to re-enroll and dependence upon witnesses who may be in positions of power, but who can attest to prisoner identity, can also work against the intent of enfranchising legislation.<sup>209</sup> As a result of their convictions, many prisoners suffer permanent disqualification and deregistration by default.<sup>210</sup>

Disenfranchised Indigenous minorities are uniquely situated to suffer political injustices that have not been rectified by their unequal representation in political and economic institutions.<sup>211</sup> Minor parties in Australia, such as the Greens,<sup>212</sup> expressed concerns about the racially discriminatory impact of removing the right to vote.<sup>213</sup> Even in the debates, one senator expressed doubt about such disenfranchising measures:

Firstly, it is up to the courts to judge people and penalise them by sending them to prison. That is where the penalty should start and finish. It should not be up to us to be legislating in a general way to take away the rights of people who go to prison—in particular, basic civil rights and the right to vote.<sup>214</sup>

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<sup>206</sup> Wojciech Sadurski, *Gerhardy v. Brown v. the Concept of Discrimination: Reflections on the Landmark Case That Wasn't*, 11 SYDNEY L. REV. 5, 40 (1986).

<sup>207</sup> Lisa Hill, *Prisoner Voting Rights*, AUSTL. REVIEW OF PUBLIC AFFAIRS (2009), <http://www.australianreview.net/digest/2009/11/hill.html> (last visited Feb. 10, 2010).

<sup>208</sup> See Fitzgerald, *supra* note 80, at 6. Additionally, electoral legislation allows people who cannot meet residency qualifications to enroll as itinerants, but very small numbers of itinerants/homeless appear to take advantage of these special arrangements.

<sup>209</sup> *Id.* at 7.

<sup>210</sup> *Id.* at 7.

<sup>211</sup> Steven Curry, *INDIGENOUS SOVEREIGNTY AND THE DEMOCRATIC PROJECT 1* (2004).

<sup>212</sup> Greens is a political party in Australian politics that supports peace and non-violence, grassroots democracy, social and economic justice, ecological sustainability. For more information, see <http://greens.org.au>.

<sup>213</sup> Jennifer Norberry, *The Evolution of the Commonwealth Franchise: Tales of Inclusion and Exclusion*, in *Realising Democracy: Electoral Law in Australia 80–99* (Graeme Orr et al. eds., 2003).

<sup>214</sup> Sen. Bob Brown, Speech to the Senate (Feb. 15, 1999). Sen. Brown is a member of the Australian Greens representing Tasmania.

The statistics demonstrate that the percentage of Aboriginal people who are incarcerated is disproportionate, and growing.<sup>215</sup> Such findings suggest that as conviction rates for Aboriginals rise, Aboriginal voting may decline. The racial disparity in voting participation caused by disenfranchisement laws will grow with time due to the current rise in Aboriginal incarceration, coupled with the increasing number of disenfranchised Aboriginal voters. This demonstrates the disproportionate effect the E & R Amendment has on Aboriginal prisoners.

#### IV. THE CONFLICT OF LAW BETWEEN THE E & R AMENDMENT AND THE RDA CAN BE RESOLVED WITH CORRECTIVE LEGISLATION REPEALING THE E & R AMENDMENT'S THREE-YEAR BAN

Two major methods exist to address conflicts of law: litigation and legislation.<sup>216</sup> Empowering courts with discretion to disenfranchise felons at their sentencing seems appropriately individualized and a more legitimate way to punish and deter, in contrast to disenfranchisement by legislation for every prisoner serving a term of three or more years.<sup>217</sup> However, given the courts' historical reluctance to expand or address prisoner enfranchisement, Parliament should pass legislation overruling the E & R Amendment.

Parliament has the ability to rectify the current felon disenfranchisement law. Under section 51(xxvi) of the Constitution, Parliament has the power to make laws with respect to "[t]he people of any race, for whom it is deemed necessary to make special laws."<sup>218</sup> Additionally, Sections 7 and 24 of the Constitution require that Parliament be "directly chosen by the people." While this Constitutional provision does not guarantee individual voting rights, disenfranchising a segment of the population is unacceptable except on incapacity grounds—such as age or mental illness—which are both listed qualities in the text of the Constitution.<sup>219</sup> Neither ethnicity nor a felony conviction should qualify as incapacity grounds. The most simple and just solution would be to dispose of prisoner disenfranchisement. This solution would also present the most efficient way of eliminating disparities between Aboriginal and non-Indigenous prisoners resulting from the E & R Amendment's

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<sup>215</sup> See Austl. Bureau of Statistics, 2007 Prisoners in Australia (2007).

<sup>216</sup> See Hasen, *supra* note 149.

<sup>217</sup> See S. Standing Comm. for the Scrutiny of Bills, 2004 Alert Digest No. 6, at 10-11.

<sup>218</sup> See AUSTL. CONST., § 51.

<sup>219</sup> *Id.*

disenfranchising provision. It can be expected, however, that this potential solution will be met with significant opposition.<sup>220</sup>

In the event that Parliament does not find the popular support to remove felon disenfranchisement entirely, Parliament can rectify the discrepancy between the seriousness of a crime and its sentence by mandating that the restrictions relate directly to the crime committed.<sup>221</sup> The punishment should fit the crime. This option, by its very nature, would not prove as powerful as removing the E & R Amendment's three-year provision outright. Vickie Roach's case is one that would benefit from making the punishment fit the crime. None of the crimes<sup>222</sup> for which she was convicted carried a three-year sentence, but as a result of the consecutive structure of her sentences, she is nevertheless disenfranchised. As such, Parliament should make the punishment for prisoners like Vickie fit the crimes committed.

Parliament should take action in order to retain legitimacy in the eyes of the world.<sup>223</sup> Prisoner disenfranchisement is strikingly inconsistent with a number of international human rights norms and principles.<sup>224</sup> The rights and interests of Indigenous peoples are evolving through the dynamic process of international lawmaking.<sup>225</sup> The right not to be discriminated against on the basis of race, in a systematic way, has the legal status of *jus cogens*; that is, the prohibition of systematic racial discrimination has the legal status of a peremptory norm of law from which no derogation is permitted.<sup>226</sup>

In contrast to the Australian High Court's decision in the *Roach* opinion, various constitutional courts have recently struck down not only lifetime voting bans, but even the exclusion from voting of persons who are currently incarcerated.<sup>227</sup> For instance, in 1999, the South African

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<sup>220</sup> See Graeme Orr, *Constitutionalising the Franchise and the Status Quo: The High Court on Prisoner Voting Rights*, DEMOCRATIC AUDIT OF AUSTRALIA, Oct. 19, 2007, [http://www.democraticaudit.anu.edu.au/papers/20071019orr\\_prisonervotingrights.pdf](http://www.democraticaudit.anu.edu.au/papers/20071019orr_prisonervotingrights.pdf) (last visited Mar. 25, 2010).

<sup>221</sup> *Lange v. Austl. Broad. Corp.* (1997) 189 C.L.R. 520, 523-24 (Austl.).

<sup>222</sup> See *Roach v. Electoral Comm'r* (2007) 233 C.L.R. 162 (Austl.).

<sup>223</sup> See G.A. Res. 61/295, U.N. Doc. A/61/L.67 art. 1, cl. 1 (Sept. 13, 2007) (stating that Australia has not met the international standard for creating Indigenous self-determination, nor is there assimilation of the Aboriginal people).

<sup>224</sup> PHILIP LYNCH, HUMAN RIGHTS LAW RESOURCE CENTRE, *THE HUMAN RIGHT TO VOTE AND PARTICIPATE IN PUBLIC AFFAIRS* 8 (2006).

<sup>225</sup> Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998*, 23 MELB. U. L. REV. 372, 375 (1999).

<sup>226</sup> 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

<sup>227</sup> See *August v. Electoral Comm'n* 1999 (3) SA 1 (CC) (S. Afr.); see also *Sauvé v. Canada* [2002] 3 S.C.R. 519 (Can.).

Constitutional Court required that the government allow prisoners to vote, stating:

The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic . . . nation; that our destinies are intertwined in a single interactive polity.<sup>228</sup>

In other jurisdictions, most notably Canada and the United Kingdom, the disenfranchisement of prisoners was deemed not rationally connected to the object of punishment, and the courts of those countries disallowed it for this reason.<sup>229</sup> A citizen's right to vote should depend on his ability to make a rational choice, not his prison status. Loss of voting rights 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.<sup>230</sup> As a result, every prisoner should be entitled to vote in all elections concerning his community and the community should facilitate such political participation.<sup>231</sup>

Many international legal organizations, like the United Nations and the European Court of Human Rights, would likely support the abolition of the three-year disenfranchisement rule.<sup>232</sup> The U.N. Committee on Human Rights has stated that the Committee "fails to discern the justification for such a practice in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoner's reformation and social rehabilitation."<sup>233</sup> In the event that Parliament does not correct this conflict of law, the High Court's hands are tied until the next

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<sup>228</sup> See *August v. Electoral Comm'n* 1999 (3) SA 1 (CC) ¶ 17 (S. Afr.) (Sachs, J.).

<sup>229</sup> See *Sauvé* [2002] 3 S.C.R. 519 (Can.); *Hirst v. United Kingdom* (No. 2) (2006) 42 E.H.R.R. at 41 (U.K.). It should be noted that unlike the *Roach* case in Australia, both the Canadian Supreme Court and the European Court of Human Rights found that there was an express right to vote in the country's Constitution.

<sup>230</sup> Justice Peter Nagle & Richard Summerell, Report of the Royal Commission into New South Wales Prisons, *Aboriginal Deaths in Custody* (1978).

<sup>231</sup> *Id.*

<sup>232</sup> See Sarah Pritchard, *Approaching its Use-by Date? National Enforcement Mechanisms: the Case of Australia*, in *Non-Discrimination Law: Comparative Perspectives* 368 (Titia Loenen & Peter R. Rodrigues eds., 1999). Article 25 of the International Covenant on Civil and Political Rights ("ICCPR"), for example, recognizes an Aboriginal citizen's right to take part in public affairs, to vote and be elected, and to have access to public service.

<sup>233</sup> U.N. Int'l Covenant on Civil and Political Rights, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland* ¶ 10, CCPR/CO/73/UK; CCPR/CO/73/UKOT (Dec. 6, 2001).

challenge is brought, and even then constitutional avoidance may be possible, unless the two laws are at issue.<sup>234</sup>

## V. CONCLUSION

Vickie Lee Roach personifies convicted individuals who have been improperly, undemocratically, and systematically disenfranchised. The E & R Amendment's ban indirectly discriminates against Aboriginal people, because it has a discriminating effect that does not justify the status quo.

As a result of the E & R Amendment, Aboriginal people are disproportionately disenfranchised on a massive scale, in violation of the RDA's statutory guarantee of equality under the law. Parliament should resolve the resulting conflict of law through legislation—preferably repealing the three-year disenfranchisement provision of the E & R Amendment. The disproportionate disenfranchisement of Aboriginal people—perpetuating racism and preventing the population's meaningful participation in Australian politics—should end.

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<sup>234</sup> James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1, 51 (2006).