

Little boxes

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Abstract

This editorial argues that rather than preserving or reinforcing the fabric of society; discrimination against prisoners/ex-prisoners in employment, voting and/or political representation actually damages it.

Little Boxes

INTRODUCTION

There are currently 42,215 Australians in custody (ABS 2023). For those currently or previously confined to little boxes in prisons conveniently located in the most disadvantaged postcodes of Australia, a further symbol of their disenfranchisement can be three other types of little boxes: the electoral ballot; the criminal record tick box on employment and licencing applications; and police checks/ National Police Certificate/ criminal record databases. Depending on the prisoner's and ex-prisoner's crime and jurisdiction, all three types of boxes can strongly remind people that they are marginalized by excluding them from most jobs, voting, and standing for elections.

THE ELECTORAL BALLOT

'If one could find a concrete core to democracy, it would be in the ability of all the people to have a say that counts' (Orr 1998, p. 56).

A history of prisoner voting

The governments of the Australian colonies were appointed rather than elected from 1788 to 1843, so there was no right to vote or to nominate as a candidate for elections, whether

convict, emancipist or free settler/merchant. As the sentiment of the population shifted to a desire for representative government, the free settlers mostly wanted to ensure that both convicts and emancipists (convicts who had served their sentence or been pardoned) did not receive the right to vote or stand for government. However, the Australian Patriotic Association [APA] was formed in 1835, mainly by prominent emancipists and others who wanted opportunity for emancipists and their families. The APA was led by respected leaders such as William Charles Wentworth (explorer, barrister, publisher of *The Australian* and the son of a convict woman) and William Bland (an emancipist medical practitioner and education philanthropist). The APA lobbied in New South Wales for emancipist rights, establishment of the jury system and the reform of the colony's Legislative Council which, since 1824, had five appointed officials as advisers to the Governor. The APA wrote a draft bill for the colonial government and two draft constitutions, then in 1839 sent a petition to the British government. In 1842, the *Constitution Act 1842* was passed, enabling the Legislative Council to be expanded the following year to 36 Members, two thirds of whom were elected, among them Wentworth and Bland. The other colonies similarly gained varying degrees of representative government in the 1850s (1870 for Western Australia), although there were restrictions on the rights of indigenous people, certain other races and women (women could only vote in South Australia and thus the Northern Territory, as well Western Australia). People without a certain level of wealth could not run for office, and convicts could not vote.

In the year after federation, the *Commonwealth Franchise Act 1902* made Australia the first nation to grant women the dual rights of voting and standing in federal elections, although the rights were limited to women of European background who had been resident in Australia for at least six months. The same Act maintained racial restrictions (s. 4), but positive aspects included the capping of campaign expenses so that wealthy people could not buy their seats, and prisoners being allowed to vote unless 'attainted of treason, or... convicted and... under sentence or subject to be sentenced for any offence punishable under the law of any part of the King's dominions by imprisonment for one year or longer...' (s. 4). The word 'punishable' makes this section more onerous because disqualification is

linked to the maximum sentence (Holland 2003, p. 13). The reference to the King's dominions is also problematic since the prisoner may have been sentenced to less than a year in Australia, yet could be disqualified if there could be a sentence of a year or more in another Commonwealth country. 'Attainted of treason' may also be unfair because a person convicted of treason or sedition attracts a lifetime disqualification even if subsequently pardoned. In 1983, the disqualification for prisoners was changed to those sentenced to five years or longer, although it was tightened in 2004 to three years or more. In 2006, the Howard government made all prisoners disqualified from voting in federal elections. This legislation was challenged in the High Court by Vickie Roach, an imprisoned Indigenous activist in *Roach v. Electoral Commissioner* [2007] HCA 43 (26 September 2007). A majority of the High Court invalidated the government's blanket ban, but upheld the 2004 legislation that disqualified prisoners with a sentence of at least three years.

Current restrictions on prisoner eligibility to vote and stand for election

The electoral ballot has two aspects – the right to be a candidate and the right to vote, the exercise of both depending on the jurisdiction. As at 5 February 2024, the following tabular summary broadly represents the eligibility of prisoners and ex-prisoners to nominate as a candidate for elections or to vote in elections:

Juris-diction:	Right to be a candidate in an election	Right to vote (in election/ referendum)	Ban duration (if applicable):	Sources:
CTH	Eligible to nominate for Senate or House of Representatives if an Australian citizen aged at least 18. Ineligible if a member of a state parliament/territory legislative assembly or disqualified by s.44 of the Constitution. Section 44(ii) disqualifies one who is 'attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer.'	Eligible (and compulsory) if serving a sentence of less than three years, serving a sentence of periodic detention, on early release, or on parole (and an Australian citizen aged at least 18). Ineligible if serving a sentence of three years or longer. Not compulsory if homeless. If homeless, can enrol with a 'no fixed address' enrolment form.	The person serving a sentence of at least three years becomes eligible to enrol and vote, as well as nominate as a candidate for office, once released from prison , unless attainted of treason (Holland 2003, 11-12).	AEC 2021, 2023a, 2023b, 2023c; Commonwealth of Australia 1900
ACT	Eligible to nominate for ACT Legislative Assembly if an Australian citizen aged at least 18	Eligible (and compulsory), regardless of the length of	N/A	ACT Electoral Commission 2021, 2023;

	and an elector or entitled to be an elector. Re imprisonment, ineligible if under a sentence of imprisonment for one year or longer for a conviction of an indictable offence; or within the preceding two years: (a) been convicted of an offence related to bribery, violence or intimidation under the <i>Electoral Act 1992</i> (ACT) or (b) been convicted of an offence related to interfering with political liberty under the Commonwealth Crimes Act 1914 (Cth) or the Criminal Code 2002 (ACT), or (c) been found by the Court of Disputed Elections to have contravened one of the above laws.	sentence. Not compulsory if interstate or homeless. If homeless, can enrol with a 'no fixed address' enrolment form. Mobile polling booths are provided, whether in prison or detention facility.		AEC 2023b
NSW	Eligible to nominate for NSW Legislative Assembly or the Legislative Council if at least 18 years old and enrolled to vote for any district in New South Wales. Re imprisonment, ineligible to nominate if serving a sentence of at least one year. Note: If already serving, seat in either House becomes vacant if convicted of an 'infamous crime', or of an offence punishable by imprisonment for life or for a term of at least five years.	Eligible (and compulsory) if a remand inmate or inmate serving a sentence of less than 1 year. Ineligible if serving a sentence of at least one year. If homeless, can enrol with a 'no fixed address' enrolment form. If enrolled but homeless, will not be fined if do not vote.	The person serving a sentence of at least one year becomes eligible to enrol and vote, as well as nominate as a candidate for office, once released from prison.	NSW Electoral Commission 2023; Corrective Services NSW, p. 4; s. 13 <i>Constitution Act 1902</i> (NSW); Frappell and Blunt 2021, ch.5
NT	Eligible to nominate for NT Legislative Assembly if an Australian citizen aged at least 18; and entitled or qualified to become entitled to vote; and been a Cth resident for at least six months and within NT for at least three months. Re imprisonment, ineligible if been convicted and under sentence of one year or longer for a Cth/ State/ Territory offence.	Eligible (and compulsory) if on remand, serving a sentence of periodic detention, or serving a sentence of less than three years (and an Australian citizen aged at least 18). Ineligible if serving a sentence of three years or longer. If homeless, can enrol with a 'no fixed address' enrolment form.	The person serving a sentence of at least three years becomes eligible to enrol and vote upon release. If serving a sentence of at least one year becomes eligible to nominate as a candidate for office upon release	NT Electoral Commission 2020, 2023
QLD	Eligible to nominate for QLD Legislative Assembly if an Australian citizen aged at least 18 and enrolled for any electoral district in QLD. You are a disqualified person if: (a) you are subject to a term of imprisonment or detention, periodic or	Eligible (and compulsory) if on remand, serving a sentence of periodic detention, or serving a sentence of less than three years (and an Australian citizen aged at least 18). Ineligible if	The person serving a sentence of at least three years becomes eligible to enrol and vote upon release.	QLD Electoral Commission 2024, 2023, 2020

	otherwise; (b) you have, within two years before the day of nomination , been convicted of an offence against the law of QLD, another State or the Cth and sentenced to more than one year's imprisonment ; (c) you have been convicted within seven years before the day of nomination of an offence against the Criminal Code, Section 59 or 60 ; (d) you have been convicted within 10 years before the day of nomination of a disqualifying electoral offence (s. 2 - Definitions of the Electoral Act 1992 defines Disqualifying Electoral Offences); (e) you have been convicted, and not pardoned, of treason, sedition or sabotage under the law of QLD, another State or the Cth.	serving a sentence of three years or longer . If homeless, can enrol with a 'no fixed address' enrolment form.		
SA	Eligible to nominate for SA House of Assembly or Legislative Council if an Australian citizen aged at least 18 of sound mind, and have lived at your SA address for at least one month. Re imprisonment, ineligible if convicted of an indictable offence (in SA, an offence that guarantees the defendant the right to a trial by jury), or attainted of treason .	Eligible (and compulsory), regardless of the length of sentence . If homeless, can enrol with a 'no fixed address' enrolment form.	N/A	Electoral Commission SA n.d.-a, n.d.-b, n.d.-c; AEC 2023b
TAS	Eligible to nominate for TAS House of Assembly or Legislative Council if an elector, and have lived in TAS for five years at any one time or two years immediately preceding nomination. Re imprisonment, ineligible if been convicted and under sentence of one year or longer, or attainted of treason .	Eligible (and compulsory) if serving a sentence of less than three years (and an Australian citizen aged at least 18 who has lived in TAS at least a month). Ineligible if serving a sentence of three years or longer . If homeless, can enrol with a 'no fixed address' enrolment form.	The person serving a sentence of at least three years becomes eligible to enrol and vote upon release .	TAS Electoral Commission n.d., 2023; AEC 2023b; <i>Constitution Act 1934</i> (Tas)
VIC	Eligible to nominate for VIC Legislative Assembly or Legislative Council if enrolled to vote in VIC so an Australian aged at least 18, and resident in Victoria. Re imprisonment, ineligible if been convicted or found guilty of an indictable offence punishable by imprisonment for life, or a term of five years or more, on first	Eligible (and compulsory) if serving a sentence of less than five years (and an Australian citizen aged at least 18 who has lived in VIC at least a month). Ineligible if serving a sentence of five years or longer . If homeless, can	The person serving a sentence of at least five years becomes eligible to enrol and vote upon release .	VIC Electoral Commission n.d., 2022a, 2022b; AEC 2023b

	conviction. The offence must have been committed when you were 18 years or over and be an offence under Victorian law or the law of any other part of the British Commonwealth of Nations.	enrol with a 'no fixed address' enrolment form.		
WA	Eligible to nominate for WA Legislative Assembly or Legislative Council if an elector so an Australian aged at least 18 resident in WA and not subject to legal incapacity. Re imprisonment, ineligible if serving or yet to serve a sentence/s of detention , or been convicted on indictment of an offence for which the indictable penalty was or included imprisonment for life or imprisonment for more than 5 years.	Eligible (and compulsory) if serving a sentence of less than one years (and an Australian citizen aged at least 18 who has lived in WA at least a month). Ineligible if serving a sentence of one year or longer. If homeless, can enrol with a 'no fixed address' enrolment form.	The person disqualified while serving a sentence becomes eligible to enrol and vote or nominate for election upon release.	WA Electoral Commission 2021a, 2021b, 2024; AEC 2023b
<p>Note 1: Where 'Australian citizen' is mentioned above, British subjects on the electoral roll between certain dates may also nominate, enrol and vote. This information has been excluded for the sake of simplicity, but refer to the AEC website for further information.</p> <p>Note 2: Districts are electorates for the Legislative Assembly in VIC (VIC Electoral Commission 2022a).</p> <p>Note 3: Regions are electorates for the Legislative Council in VIC (VIC Electoral Commission 2022b).</p>				

It may be noted in closing this section that a prisoner's right (and responsibility) to vote relies on the ability to access the ballot within the prison system. Some but not all prisons allow mobile polling teams to set up ordinary polling booths inside the prison. In the absence of this, inmates need to request a postal ballot which may or may not be arranged by the prison. Electoral commissions advise prisoners to apply for registration as a postal voter on their website, but many prisoners have no or limited access to computers/ tablets. Even if they can use computers/ tablets, there may be no Internet or 'read-only' access, making registration reliant on the prison arranging the postal vote. With eligible prisoners needing to go through a long process to access a postal ballot (rather than all eligible prisoners either receiving a postal vote or gaining access to polling booths within prison), the electoral commissions and/or prisons are clearly not treating the right to vote as a fundamental franchise in a democracy. A further issue is that prisoners are more likely to have low literacy and numeracy levels yet they may not have the option to access the easier mobile polling booths. Having to fill out a postal vote requires that the envelope also be properly be filled in and a signature provided. For example, mobile booths were unavailable

at Darwin Correctional Centre in 2021. Of the 506 postal votes lodged, 298 were rejected, including 188 for having no signature, no date or no time, or being dated after the close of polls. The Electoral Commissioner observed that these ‘avoidable’ issues could have swung the seat of Barkly where there was a margin of five votes (Gibson 2021).

CRIMINAL RECORD TICK BOXES AND POLICE CHECKS

An ex-prisoner will invariably be called upon to tick ‘No’ to ‘criminal record’ or to provide a police check/ National Police Certificate when applying for a job or licence. Even if no such request is made, the employer or regulator could conduct its own check on a criminal record database.

A criminal record also affects the ex-prisoner’s ability to travel to certain countries, which may affect the person’s employment and family. Depending on the person’s age when sentenced, the offence and the jurisdiction, the duration of the criminal record could be anywhere between 5-10 years and an indefinite period. Being excluded from many, if not most, employment opportunities is onerous, although there may be justification for certain jobs, such as those involving children. In general, though, employers and regulators require information on criminal records as a matter of course. The ‘ban the box’ movement in the United States has had a huge impact, with approximately 33% of all states having implemented ‘ban the box’ laws. Of the 67% of states that are yet to legislate, many have major cities that have regulated employers in this way (Paycor 2024). There are limitations. Most states require that there be no criminal background check until after a job offer, and many of the states apply the legislation to government employers only. The legislation does, however, allow ex-prisoners to be considered for interview rather than being immediately rejected because of their record. In Australia, the ‘ban the box’ movement is in its infancy. In many businesses, the criminal background check remains an acceptable form of employment discrimination, although employers are required to ask an employee to consent to a police check (AHRC 2012). There is no presumption or even consideration that a job candidate who has done their time or been pardoned has been rehabilitated. The Australian Human Rights Commission (AHRC 2012, p. 5) provides ten guidelines for the

prevention of discrimination in employment on the basis of criminal record (refer to Appendix). These, however, are merely suggestions for best practice and are clearly being disregarded by employers, particularly government employers (unless privacy laws prohibit the collection of criminal laws as excessive for employment purposes – AHRC 2012, p. 21). The principle that employers may only ask about a criminal record where there is a connection between the inherent requirements of the particular job and a criminal record has been legislated in the Northern Territory. This provides real protection and redress for people with criminal records. For example, in *Hosking v Fraser*, the NT Anti-Discrimination Commission was unconvinced that an employment agency's requirement for a police check was an inherent requirement for a nursing position (AHRC 2012).

JUSTIFICATIONS FOR PRISONER DISENFRANCHISEMENT

Hill (2009) and Brown (2007) discuss some of the justifications that Australian governments have provided for restricting the right of prisoners to vote. The first common justification is that prisoner disenfranchisement is popular among voters, but the authors question whether this fundamental human right and responsibility should be allowed to be limited merely for political expediency. Then there is the justification that criminals have broken the social compact/contract and so do not deserve the benefits of the political process. An extension of this is the ancient 'civil death' justification whereby loss of citizenship was imposed as a deliberate way to humiliate, degrade, punish and devastate offenders' lives. Hill considers that it may be possible to defend disenfranchisement for the crime of treason, but for other crimes there is no reason to think that the commission of a crime renders a person incapable of rational decision-making during an election. Prisoners retain their rights except for those that need to be limited in order to maintain security. Indeed, the votes of prisoners are important as a means of representing them, their families and their communities, and this representation will make initiatives that help prisoners to reintegrate with society more likely to eventuate. Deprivation of the right to vote should not be justified as punishment. As Hill points out, Article 10(3) of the *International Covenant on Civil and Political Rights* (ratified by Australia in 1980) requires that the 'essential aim' of imprisonment is 'reformation and social rehabilitation'. Article 25 of the ICCPR also

specifies that every adult citizen shall have the right and opportunity to vote and to be elected at genuine elections, with universal and equal suffrage.

Similar justifications for the criminal record tick boxes and police checks are provided. A limited number of jobs involving vulnerable people may justify the check, but for all other positions it would take legislation to provide fairness and opportunity for ex-prisoners. There are altruistic employers who go out of their way to employ ex-prisoners, for example in gyms, but they are the exception. Part of the problem may be lack of trust in the effectiveness of the prison system to rehabilitate, and with good reason, but lack of post-release support, tick boxes and police checks cause ex-prisoners to remain in the disadvantage that drives recidivism. Society may take the view that an ex-prisoner does not deserve a second chance, but excluding them will only harm society as the causes of crime are not being addressed. The presumption of innocence is a fundamental principle for people accused of a crime, but ex-prisoners are not even being accused of a crime when they are applying. Employers will continue to discriminate in fear until such discrimination is disallowed, but at present the government employers are the most consistent enforcers of the criminal record, and there is no political will to risk being seen as soft on crime.

CONCLUSION

The restriction of the voting and representation rights and responsibilities of prisoners is without valid justification or social benefit. Indeed, the disqualification of prisoners has a detrimental effect, serving to alienate rather than rehabilitate them. The message that disqualification conveys is that inmates' views, hopes and desires for political representation and a better future are of less importance. Being muzzled and excluded promotes the 'Us vs Them' attitude that perpetuates crime.

Allowing companies and governments to require job applicants and licence applicants to show they do not have a criminal record establishes a severe and pervasive barrier to meaningful employment as well as long-lasting stigma. Unemployment is exacting for people released from prison since they have housing and transport issues, have lost family

support and are struggling to cope with life outside and parole conditions, all with no resources. For Indigenous people, these stresses are magnified (AJC n.d.; 2000). Orr suggests that the over-representation of Indigenous people in Australian prisons may be grounds for complaint under the *Racial Discrimination Act 1975* (Cth) (pp. 75-80). Again, this incredible burden on ex-prisoners contributes to Australia's high recidivism rate.

APPENDIX - Guidelines for the prevention of discrimination in employment on the basis of criminal record (AHRC 2012, p. 5)

'The following Guidelines form the basis for best practice workplace policy and practice on employing people with a criminal record. They are described in more detail in *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*.

1. Employers should create an environment which will encourage an open and honest exchange of criminal record information between an employer and job applicant or employee.
2. Employers should only ask job applicants and employees to disclose specific criminal record information if they have identified that certain criminal convictions or offences are relevant to the inherent requirements of the job.
3. Oral and written questions during the recruitment process should not require a job applicant or employee to disclose spent convictions unless exemptions to spent conviction laws apply.
4. Advertisements and job information for a vacant position should clearly state whether a police check is a requirement of the position. If so, the material should also state that people with criminal records will not be automatically barred from applying (unless there is a particular requirement under law).
5. Criminal record checks should only be conducted with the written consent of the job applicant or current employee.
6. Information about a person's criminal record should always be stored in a private and confidential manner and used only for the purpose for which it is intended.

7. The relevance of a job applicant's or employee's criminal record should be assessed on a case-by-case basis against the inherent requirements of the work he or she would be required to do and the circumstances in which it has to be carried out. A criminal record should not generally be an absolute bar to employment of a person.
8. If an employer takes a criminal record into account in making an employment decision, in most cases the employer should give the job applicant or employee a chance to provide further information about their criminal record including, if they wish, details of the conviction or offence, the circumstances surrounding the offence, character references or other information, before determining the appropriate outcome in each case.
9. If criminal record information is considered relevant, an employer should have a written policy and procedure for the employment of people with a criminal record which can be incorporated into any existing equal opportunity employment policy, covering recruitment, employment and termination.
10. If criminal record information is considered relevant, an employer should train all staff involved in recruitment and selection on the workplace policy and procedure when employing someone with a criminal record, including information on relevant antidiscrimination laws.'

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