

ROACH V ELECTORAL COMMISSIONER

High Court of Australia (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ)
26 September 2007
[2007] HCA 43

FEDERAL CONSTITUTIONAL LAW – franchise – representative government – *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth) – Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004 (Cth) – whether legislation prohibiting a person serving any sentence of imprisonment from voting was valid.*

Facts:

The *Commonwealth Electoral Act 1918* (Cth) provides for the establishment and maintenance of the electoral roll. Since federation, certain classes of persons in Australia have not been entitled to cast a vote, including prisoners serving sentences for serious crimes.

In 2004 the Commonwealth Government introduced the *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth) ('the 2004 Act'). The effect of section 3 and Schedule 5 of the 2004 Act was to broaden the category of prisoners excluded from the franchise from those serving sentences of five years or longer to capture those serving sentences of three years or longer.

In 2006 the Commonwealth Government introduced the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2006* (Cth) ('the 2006 Act'). The combined effect of sections 93(8AA), 202(2)(c) and 221(3) of the 2006 Act was to remove prisoners serving any custodial sentence from the electoral roll for the term of their imprisonment.

In June 2006 there were 20,209 prisoners in Australia, 24 percent of whom were Indigenous. The plaintiff, Vickie Roach, is one such Indigenous person. In 2004 the plaintiff was convicted of offences under the *Crimes Act 1958* (Vic) and sentenced to a term of six years imprisonment.

In challenging the validity of the 2006 Act, the Plaintiff submitted that:

1. Sections 93(8AA), 202(2)(c) and 221(3) of the 2006 Act are incompatible with sections 7 and 24 of the *Australian Constitution*, which respectively provide that the Senate and House of Representatives shall be 'directly chosen by the people' 'until the Parliament otherwise provides.
2. Section 93(8AA) of the 2006 Act punishes those who are convicted according to State laws and is therefore beyond the scope of the legislative power of the Commonwealth conferred by sections 51(xxxvi) and 30 of the *Australian Constitution*.
3. Sections 93(8AA), 202(2)(c) and 221(3) of the 2006 Act are invalid because they contravene either the implied freedom of political communication or the implied freedom of participation, association and communication in the *Australian Constitution*.
4. Since sections 8 and 30 of the *Australian Constitution* speak only of the 'qualification' of electors, any legislation for the *disqualification* of electors must satisfy the inherent constitutional requirement government is in fact representative.

The plaintiff also submitted that the disqualification of prisoners serving a term of imprisonment could only be 'rationally connected with representative democracy' if the

offence involved electoral fraud or an act that undermined the existence of the federal polity.

The respondent accepted that sections 7 and 24 of the *Australian Constitution* placed some limits on the scope of laws that could be enacted regarding the exercise of the franchise, but argued that the question of whether or not the legislation infringed those limits was a matter of permissible degree and that the 2006 Act did not infringe it.

The plaintiff also requested a ruling, in the event of any of her four submissions being accepted by the High Court, regarding the validity of the 2004 Act and a ruling on which party should pay the costs of the special case.

Held, that sections 93(8AA) and 208(2)(c) of the 2006 Act infringe sections 7 and 24 of the Constitution and are invalid:

1. The words of sections 7 and 24, which require that Senators and Members of the House of Representatives are ‘directly chosen by the people’, are to be applied to different circumstances at different times and imply a component of legislative choice: [8]; *Attorney- General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 referred to.

2. The phrase ‘chosen by the people’ admits the requirement that the franchise is generally held by all adult citizens unless there is a substantial reason for excluding them: [83]; *McGinty v Western Australia* [1995] HCA 41 referred to.

3. A reason for exclusion from the franchise will only be substantial if it is ‘reasonably appropriate and adapted’ to serve a purpose which is consistent with the maintenance of representative government: [85]; *Lange v Australian Broadcasting Corporation* 189 CLR 520 referred to.

4. The rationale for the exclusion of prisoners from the franchise is not to mark a form of additional punishment; rather, the exclusion is made because serious offending marks such a form of civic irresponsibility that it is appropriate to limit the offender’s exercise of the franchise: [10]-[12].

5. The mere fact of imprisonment does not necessarily indicate serious criminal conduct: section 44 of the *Australian Constitution* indicates that a sentence of less than a year does not disqualify a citizen from their membership

of the House of Representatives or the Senate. Additionally, the fact that a number of people are not eligible for non-custodial sentences by reason of personal characteristics such as poverty, homelessness, geographical location or mental problems means that use of the fact of imprisonment as the indicator of what crimes are so serious as to warrant disenfranchisement becomes arbitrary: [20], [23].

6. Section 93(8AA) of the 2006 Act operates without regard to culpability or the nature of the crime committed and, in imposing a civil disability without regard to proportion, goes beyond what is reasonably appropriate and adapted within the framework of the maintenance of representative government: [95].

Held, that sections 93(8AA) and 208(2)(c) of the 2006 Act do not infringe sections 8 and 30 of the Constitution:

7. The phrase ‘qualification’ in sections 8 and 30 of the *Constitution* is sufficiently broad to allow for reservations or exceptions to a qualification: [41].

Held, that sections 93(8AA) and 208(2)(c) of the 2006 Act are not beyond the scope of Commonwealth legislative power:

8. Although section 93(8AA) of the 2006 Act penalises those who are convicted of offences against State laws, the imprisonment merely provides the factum on which the federal law operates: [42].

9. If the federal law can be properly characterised as one made with respect to the qualification of electors, then the nature of the factum on which the legislation operates will not put it outside of Commonwealth legislative power: [42].

Held, that it is not necessary to decide whether the plaintiff’s case infringes the implied freedom of political communication:

10. The plaintiff’s case is not properly characterised as concerning an implied freedom of political communication, but rather with the process of participation as an elector of government: [43].

Held, that the provisions of the 2004 Act prior to the 2006 amendments remain in force and valid:

AUSTRALIA

11. The 2004 Act operates in a substantively different way to the 2006 Act as legislative disqualification of electors is made with regard to considerations beyond the bare fact of their imprisonment and with regard to their culpability: [98].

Held, that the plaintiff shall have one half of her costs:

12. The plaintiff brought her matter as a test case, which has in part succeeded. It would be just for the plaintiff to have one half of her costs: [103].