

ROACH v ELECTORAL COMMISSIONER (2007) 233 CLR 162

Commentary: *Roach v Electoral Commissioner* (2007) 233 CLR 162

Jonathan Crowe and Dani Larkin

*Roach v Electoral Commissioner*¹ ('*Roach*') is one of the most significant cases in recent Australian constitutional history. The plaintiff, Vickie Lee Roach, was an Aboriginal woman serving a six-year prison term. The case examined amendments to the *Commonwealth Electoral Act 1918* concerning the right of prisoners to vote in federal elections. The *Commonwealth Franchise Act 1902* had originally excluded federal and state prisoners serving sentences of one year or longer from the franchise. The *Commonwealth Electoral Act 1918* maintained this rule until 1983, when the disqualification was restricted to prisoners serving sentences of five years or longer. In 2004, the Act was amended to reduce the disqualifying sentence to three years. Then, in 2006, the legislation was further amended to make any prisoner serving a current sentence ineligible to vote.

A majority of the High Court (comprising Gleeson CJ, Gummow, Kirby, and Crennan JJ) upheld the 2004 amendment but struck down the 2006 change. Gleeson CJ recognised that 'the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote.'² However, the right is subject to exceptions. The disqualification of prisoners serving substantial sentences falls into this category. Gummow, Kirby, and Crennan JJ reached a similar result, using more cautious language. They did not speak explicitly of an implied constitutional right to vote³ but nonetheless held that ss 7 and 24 rule out disproportionate restrictions on universal franchise.

The approach taken by the majority judges in *Roach* was reaffirmed in the 2010 case of *Rowe v Electoral Commissioner*⁴ ('*Rowe*'). The case concerned the

validity of amendments to the *Commonwealth Electoral Act 1918* that effectively prevented applications for inclusion or change of details on the Commonwealth electoral roll from being accepted after the day that writs were issued. Late applicants were therefore unable to vote, whether or not they were otherwise eligible. The previous arrangement, adopted in 1983, had allowed a seven-day grace period from the issuing of the writs to the closing of the rolls. The High Court ruled by a bare majority that the early closure of the rolls was unconstitutional. The majority, comprising French CJ, Gummow, Bell, and Crennan JJ, viewed the change as placing a disproportionate restriction on the franchise.

Roach and Rowe departed from the long-standing reluctance of the High Court to recognise any constitutional protection of the right to vote. The High Court rejected the notion of a constitutional guarantee of adult suffrage in *Attorney General (Cth); Ex rel McKinlay v Commonwealth*⁵ ('*McKinlay*') and declined in *McGinty v Western Australia*⁶ ('*McGinty*') to establish a guarantee of equal voting value. The express protection of the right to vote in s 41 of the *Constitution* was held in *R v Pearson; Ex parte Sipka*⁷ to be a dead letter.⁸ However, there were references throughout both these cases to the important position of representative democracy in the constitutional framework. McTiernan and Jacobs JJ took the view in *McKinlay* that 'the long established universal adult suffrage may now be recognised as a fact and as a result it is doubtful whether...anything less than this could now be described as choice by the people.'⁹ In the same case, Murphy J reasoned that democratic elections necessarily required uniform adult suffrage.¹⁰

These sentiments were echoed by some of the judges in *McGinty*. Brennan CJ and Gummow J declined to uphold the principle of equal vote value, but they were nevertheless open to the possibility that Parliament cannot place new restrictions on adult franchise. Brennan CJ noted that the franchise has expanded in scope over time and thought that it was 'at least arguable that the qualifications of age, sex, race and property which limited the franchise in earlier times could not now be reimposed so as to deprive a citizen of the right to vote.'¹¹ Gummow J expressed a similar view, opining that what amounts to popular choice must be 'determined by reference to the particular stage which then has been reached in the evolution of representative government'.¹² Gaudron and Toohey JJ likewise opined that a system which denied universal adult franchise would not satisfy the requirement in ss 7 and 24 that representatives be 'chosen by the people'.¹³

The view of McTiernan and Jacobs JJ in *McKinlay* found further support in the judgment of Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills*.¹⁴ Their Honours adopted the position that representative government necessarily requires 'all citizens of the Commonwealth who are not under some special disability' to have equal voting rights.¹⁵ This understanding of the democratic franchise as an evolving aspect of the constitutional framework was echoed by McHugh J in *Langer v Commonwealth*.¹⁶ His Honour observed that the question '[w]hether or not a member has been "chosen by the people" depends on a judgment, based on the common understanding of the time, as to whether the people as a class have elected the member.'¹⁷

Nonetheless, it was not until *Roach* that a High Court majority clearly acknowledged the constitutional importance of a universal adult franchise and confirmed the need for a 'substantial reason' to justify a departure from universal suffrage.¹⁸ The decision was therefore controversial. The dissenting judgments of Hayne and Heydon JJ in both *Roach* and *Rowe* criticised the majority judges for relying on unsupported constitutional implications.¹⁹ Several prominent constitutional scholars, including Jeffrey Goldsworthy, Anne Twomey, and Nicholas Aroney, also criticised the cases for being insufficiently grounded in the original meaning and context of the Constitution.²⁰ Other commentators have defended the decisions, including one of the present authors.²¹

Our rewritten judgment endorses the view of the majority judges that the Constitution contains an implied, conditional guarantee of universal franchise. However, we contend that the majority, in upholding the 2004 Act and disenfranchising prisoners serving significant sentences, did not go far enough. In particular, the majority judges make only passing mention of the vastly disproportionate incarceration rates of Aboriginal and Torres Strait Islander people and the impact this has on their participation in the electoral system.²² We draw attention to this important factor, discussing the social causes of Indigenous incarceration (including its impact on women), and use it to argue that any exclusion of prisoners from the franchise is disproportionate and therefore constitutionally invalid.

We also refer to Canadian constitutional jurisprudence, particularly the case of *Sauvé v Canada*.²³ This case is referenced by the High Court in *Roach*,²⁴ but we suggest it could have been utilised differently to draw out the disproportionate impact of the prisoner disqualification on Indigenous voting rights. Canada differs from Australia due to the role of the *Canadian Charter of Rights and Freedoms*. Nonetheless, the Supreme Court's nuanced discussion of the significance of Indigenous incarceration for electoral participation provides a model that Australian courts could follow in applying the implied rights jurisprudence in a more socially and historically contextualised manner, taking account of the ongoing impact of colonialism on Indigenous people today.

Notes

1 *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*').

2 *Ibid.*, 174.

3 *Ibid.*, 199–200.

4 *Rowe and Another v Electoral Commissioner* [2010] HCA 46 ('*Rowe*').

5 (1975) 135 CLR 1 ('*McKinlay*').

6 *McGinty and Others v Western Australia* (1996) 186 CLR 140 ('*McGinty*').

7 (1983) 152 CLR 254.

8 For criticism of this decision, see Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36 *Sydney Law Review* 205.

9 *McKinlay* (1975) 135 CLR 1, 36.

10 *Ibid.*, 69.

11 *McGinty* (1996) 186 CLR 140, 166–7.

12 *Ibid.*, 286–7.

- 13 Ibid., 201 (Toohey J), 221–2 (Gaudron J).
- 14 (1992) 177 CLR 1.
- 15 Ibid., 72.
- 16 (1996) 186 CLR 302.
- 17 Ibid., 343.
- 18 *Roach* (2007) 233 CLR 162, 174 (Brennan CJ), 199 (Gummow, Kirby and Crennan JJ).
- 19 *Roach* (2007) 233 CLR 162, [157]–[162] (Hayne J), [179] (Heydon J); *Rowe* (2010) 243 CLR 1, [194]–[205], [219]–[221] (Hayne J), [292]–[304] (Heydon J).
- 20 See e.g. Jeffrey Goldsworthy, ‘Original Meanings and Contemporary Understandings in Constitutional Interpretation’ in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (Federation Press, 2009) 267–8; Anne Twomey, ‘*Rowe v Electoral Commissioner*: Evolution or Creationism?’ (2012) 13(2) *University of Queensland Law Journal* 181; Nicholas Aroney, ‘Towards the “Best Explanation” of the Constitution: Text, Structure, History and Principle in *Roach v Electoral Commissioner*’ (2011) 30(1) *University of Queensland Law Journal* 145; James Allan, ‘The Three “Rs” of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No) ‘Riginalism’ (2012) 36(2) *Melbourne University Law Review* 743.
- 21 Jonathan Crowe, ‘The Narrative Model of Constitutional Implications: A Defence of *Roach v Electoral Commissioner*’ (2019) 42(1) *University of New South Wales Law Journal* 91. See also Graeme Orr and George Williams, ‘The People’s Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia’ (2015) 8(2) *Election Law Journal* 123.
- 22 *Roach* (2007) 233 CLR 162, [36] (Gummow, Kirby and Crennan JJ), [173] (Hayne J). The judgment of Gleeson CJ recognises the disproportionate impact of the prisoner disqualification on vulnerable socio-economic groups but fails to specifically address the position of Indigenous Australians. See *Roach* (2007) 233 CLR 162, [22]–[23].
- 23 *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.
- 24 *Roach* (2007) 233 CLR 162, [13]–[15], [18] (Gleeson CJ), [100] (Gummow, Kirby and Crennan JJ).

VICKIE LEE ROACH PLAINTIFF;

AND

ELECTORAL COMMISSIONER DEFENDANTS;

(2007) 233 CLR 162

Constitutional law—Legislative power—Universal franchise—Voting rights—Prisoners—Imprisonment—Aboriginal and Torres Strait Islander peoples.

- [1] LARKIN AND CROWE JJ.¹ Vickie Lee Roach is an Aboriginal woman serving a six-year term of imprisonment at the Dame Phyllis Frost Centre in Deer Park, Victoria. She is enrolled to vote in the Federal Division of Kooyong in Victoria. Ms Roach grew up in Sydney's outer western suburbs. She was raised by a foster family, with whom she had a difficult relationship. She ran away from her foster family for the first time at age nine, and for the final time at age 13. After that, she was obliged to support herself and became involved with drugs and prostitution. It was around that time that she met her birth mother for the first time, and discovered she was Aboriginal. Her mother and Ms Roach both identify as members of the Stolen Generations.
- [2] Ms Roach spent significant time in the juvenile justice system as a teenager and commenced her first prison sentence as an adult at the age of 17, after being convicted for self-administration of heroin. She served a six-month sentence, left prison for four months, then served another sentence for credit fraud. After that, she stayed out of prison for ten years. She married and had a son, but her partner was abusive and suffered from alcoholism, and the marriage eventually broke down. The dissolution of Ms Roach's marriage led to acrimonious and emotionally draining court proceedings where her ex-partner was named the residential parent for her son.
- [3] Ms Roach formed another relationship, but that partner was also abusive. He almost killed her several times. She left the relationship, but he tracked her down. Ms Roach was arrested along with him after they robbed a convenience store in December 2002. She was driving the getaway car with police in pursuit when she struck a parked car at a traffic light. Ms Roach was sentenced to six years' imprisonment with a four-year non-parole period for recklessly causing injury. While in prison, she studied sociology, philosophy, and literature, and ultimately completed a master's degree in professional writing from Swinburne University. She is the plaintiff in this case.

- [4] The *Australian Constitution* ('*Constitution*') was not the product of a legal and political culture, or of historical circumstances, that created expectations of enfranchisement and democratic representation for Indigenous peoples. It was, rather, the product of violent invasion, forced displacement, and colonial rule. That history is germane to this case. We concur with Gleeson CJ and Gummow, Kirby, and Crennan JJ that the *Australian Constitution* contains an implied, conditional guarantee of universal franchise, which cannot be abridged without a compelling reason. However, the majority judges' decision to uphold a ban on voting by prisoners serving significant sentences fails to take adequate account of its disproportionate impact on Indigenous voters.

The constitutional and legislative context

- [5] Part VI (ss 81–92) of the *Commonwealth Electoral Act 1918* provides for the establishment and maintenance of a roll of electors for each electoral division. Part VII (ss 93–97) sets out the qualifications and disqualifications to enrol and vote. Section 93 provides that persons who have attained 18 years and are citizens are entitled to enrol and, if enrolled, to vote at Senate and House of Representatives elections. However, there are exceptions. One such exception, contained in s 93(8AA), concerns prisoners serving sentences under Commonwealth, state, or territory law. Between 2004 and 2006, this exclusion applied to prisoners serving sentences of three years or longer. However, it was amended in 2006 to apply to all prisoners without distinction.
- [6] Gleeson CJ and Gummow, Kirby, and Crennan JJ hold that the 2006 law is invalid as a disproportionate restriction on the universal franchise. Hayne and Heydon JJ say this goes too far; they would uphold the 2006 Act. We say it does not go far enough; any ban on prisoners voting, provided they meet the usual criteria for enrolment, is constitutionally invalid. The present section explains the constitutional basis for the conditional guarantee of universal franchise. We agree with the majority judges that this guarantee is subject to reasonable and proportionate restrictions. However, we disagree that the 2004 Act is such a restriction. This is because it imposes a disproportionate burden on Indigenous Australians, who are particularly affected by the prisoner disqualification.
- [7] Sections 7 and 24 of the *Constitution* provide that members of the Senate and House of Representatives must be 'directly chosen'. Those words are part of a broader constitutional scheme of representative government, as recognised by several members of this Court in *Nationwide News v Wills*² and *Australian Capital Television v Commonwealth*.³ Sections 7 and 24 'further the institutions of representative and responsible government'; they should be given a purposive interpretation with this aim in mind.⁴ These provisions do not exist in a vacuum; their meaning is influenced by surrounding social and

constitutional narratives, including narratives about the meaning of representative government. This meaning is not static, but evolves over time.

- [8] McTiernan and Jacobs JJ said as long ago as 1975 that ‘the long established universal adult suffrage may now be recognised as a fact.’⁵ They meant that it is a social fact, but it is also a constitutional fact, for the *Constitution* is part of the social fabric. As Windeyer J famously and correctly observed, ‘the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances’.⁶ The so-called ‘universal franchise’ is, of course, not truly universal; even today, only 76% of the Indigenous population is enrolled to vote.⁷ The expectation of universal franchise is, however, now well established as part of the normative framework of Australian representative government.
- [9] There are some forms of disenfranchisement that would clearly be inconsistent with this normative expectation. These include, for example, disenfranchising voters who belong to a particular race, religion, gender, or political party. It was, indeed, the case at Federation that women could not vote in some state elections, and members of particular races (including not only Indigenous peoples but also people from Asia, Africa, or the Pacific Islands) were disenfranchised for significant parts of Australia’s history.⁸ However, the evolution of representative government is such that these forms of exclusion are no longer consistent with the terms and structure of the *Constitution*. They would not produce the kind of governmental system the *Constitution* requires.
- [10] Those are easy cases. Others are more difficult. Representative government, like other legal concepts, creates both a ‘core of settled meaning’ and a ‘penumbra of debatable cases’.⁹ The disenfranchisement of prisoners is an issue on which the members of this Court disagree. Never in Australian history, prior to 2006, has that disqualification encompassed all prisoners without distinction. It is plausible that the Australian constitutional narrative does not recognise such a measure as consistent with the practice of representative government. On the other hand, Australian law has always disqualified at least some serious offenders. It is on this basis that the majority judges in this case find that the 2006 Act should be struck down, but the 2004 Act should be upheld.
- [11] Legislative history is germane to constitutional reasoning since it shows the evolving boundaries of social conduct, but it is not the only factor this Court should consider in determining whether a restriction on the franchise is proportionate. Other aspects of history are also relevant. If a restriction on the franchise impacts disproportionately and unfairly on a segment of the population—particularly one that is already vulnerable and disadvantaged for other reasons—then this, too, should be taken into account. That is the case here, considering the disproportionate impact of restricting prisoners’ voting rights on Australia’s Indigenous population, as detailed further below.

Indigenous disenfranchisement

- [12] Indigenous Australians have experienced significant political limitations placed upon their civil rights since colonisation.¹⁰ They were politically excluded from the consultation and debates which led to the *Constitution's* enactment.¹¹ As a result, the *Constitution* was created in a way that contradicted principles of equality and a true sense of representative democracy in excluding a portion of the nation's interests, namely those of Indigenous Australians, from consideration.¹² Those actions have led to the establishment of political institutions and electoral processes entrenched within the *Constitution* that have maintained the unequal political standing of Indigenous Australians by limiting their access to political engagement through voting.¹³
- [13] Prior to Federation, for state elections, only Aborigines who held freehold title were allowed to vote in Queensland¹⁴ and Western Australia.¹⁵ However, New South Wales, South Australia, Tasmania, and Victoria did not exclude Aborigines from voting in their state elections, which meant they were also entitled to vote for the first federal parliament in 1901.¹⁶ After Federation, the Indigenous franchise was limited again with the passing of the *Commonwealth Franchise Act 1902*. This legislation limited Indigenous Australians from enrolling and voting at Commonwealth elections through its explicit targeting of 'native people' of Australia and other countries.¹⁷
- [14] The *Commonwealth Electoral Act 1918* was reformulated in 1949 to recognise Indigenous voting rights at federal elections, but only if they fell within s 41 of the *Constitution*.¹⁸ Section 41 provides that 'no adult person' entitled to vote at state elections should be prevented from voting at federal elections 'by any law of the Commonwealth'.¹⁹ Therefore, only Indigenous citizens who had the right to vote at the state or territory elections where they resided were able to enrol and to vote at Commonwealth elections. It was not until 1962 that the *Commonwealth Electoral Act 1918* was amended to give Indigenous Australians generally the right to vote. Indigenous Australians were also not subject to compulsory voting for Commonwealth elections until 1984.²⁰
- [15] The primary electoral disqualification that affects Indigenous voting in Commonwealth elections is the prisoner disqualification. The *Commonwealth Franchise Act 1902* had originally excluded federal and state prisoners serving sentences of one year or longer from the franchise. The *Commonwealth Electoral Act 1918* maintained this rule until 1983, when the disqualification was restricted to prisoners serving sentences of five years or longer. In 2004, the Act was amended to reduce the disqualifying sentence to three years. Then, in 2006, the legislation was further amended to make any prisoner serving a current sentence ineligible to vote. Prisoners will not appear on the certified list of voters for elections prepared by the Australian Electoral Commission if they fall within this disqualification provision.²¹

- [16] The provision, on its face, appears neutral as to race. However, this does not take account of the statistical data that shows Aboriginal and Torres Strait Islanders are disproportionately incarcerated. Indigenous Australians comprise less than three per cent of Australia's population,²² but 24 per cent of the national prison population. This figure, rather than reducing, continues to increase over time.²³ These rates of incarceration mean that Indigenous Australians are disproportionately affected by the prisoner disqualification.²⁴ This disadvantage, furthermore, occurs against a broader backdrop of vulnerability and dispossession, stemming from Australia's colonial history, which continues to affect Indigenous people today.

Indigenous pathways into incarceration

- [17] Any discussion of Indigenous incarceration rates must include acknowledgement and understanding of continuing post-colonial dispossession and intergenerational trauma. Those experiences have been shown to cause significant levels of psychological and cultural disempowerment of Indigenous Australians, which can lead to frustrated, destructive, and anti-social behaviour towards authorities, agencies, and other people from the community.²⁵ The impact of European colonisation on Indigenous Australians was highlighted in the *National Report of the Royal Commission into Aboriginal Deaths In Custody*.²⁶ Limitations have historically been placed on the ability of Indigenous people to express their cultural identity and practice their cultural traditions.²⁷
- [18] Indigenous Australians across the country have also been subject to alarming rates of child removals. The Australian government targeted 'half-caste' Aboriginal children and removed them from their parents' care and into the care of the state without reason or justification to do so. Aboriginal children, like the plaintiff's mother, were placed in institutions and trained to grow up as good European labourers or domestic workers.²⁸ This is commonly referred to as the Stolen Generations. The *Bringing Them Home Report* of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families identifies the severity of the trauma the Stolen Generations caused to parents, children, and future generations.²⁹
- [19] Indigenous children, like the plaintiff in this matter, suffered years of neglect as well as physical, emotional, mental, and sexual abuse whilst institutionalised.³⁰ Those who were taken as children during the Stolen Generations are more at risk from suffering mental health and substance abuse issues than the general population, due to the trauma and dislocation they experienced.³¹ Those issues have also been the underlying cause of many Indigenous Australians who have suffered dispossession and displacement as part of the Stolen Generations entering into incarceration.
- [20] In more contemporary times, often the pathway to incarceration begins for many Indigenous children with being placed in out-of-home care, which

further displaces those children from their culture, family, and friends.³² Indigenous children occupy high rates of national child removal and their over-representation in out-of-home care continues to increase every year.³³ The *Health of Children in 'Out-of-Home' Care Report* produced by the Royal Australasian College of Physicians highlights that Indigenous children are 6.5 times more likely to enter out-of-home care compared to non-Indigenous children³⁴ and shows the health risks such placements can bring.

- [21] Trauma from dispossession and the Stolen Generations becomes intergenerational by being passed down to younger generations through learned behaviours, economic hardship, and social disadvantage. Indigenous children hold a heavier health burden compared with the general population.³⁵ This includes social, emotional, mental health, and physical illness problems,³⁶ which place those children at higher risk of further adverse effects on their overall well-being coming into out-of-home care.
- [22] The very first encounters Indigenous children have with authority are often negative. When a child is placed in out-of-home care, they can be moved to and from multiple schools, locations, and out-of-home care options throughout their lifetime.³⁷ Separating Indigenous children from their land and kin is a form of abuse in itself which can result in life-long harm and trauma.³⁸ The disruption those circumstances can bring to a child's life can lead to frustration with authority and the system and result in those children acting out in anti-social and criminal behaviour.³⁹
- [23] Statistically, Indigenous children are also more likely to enter into institutionalisation through early entry into a detention centre. From there, the likelihood that they proceed into adult incarceration increases.⁴⁰ Australian census data also evidences that Indigenous families usually have a different home structure compared to non-Indigenous families, including a higher rate of single-parent families.⁴¹ Single-parent families are especially vulnerable to family separation and breakdown caused by incarceration of a parent, as well as other causes, such as ill health.
- [24] These circumstances highlight a streamlined pathway into incarceration for Indigenous Australians, rendering them inherently more vulnerable than non-Indigenous people. Indigenous women, in particular, are severely over-represented among the prison population.⁴² It is therefore relevant to take account of the special vulnerability and disadvantage Indigenous women face due to the intersectionality of race and gender identity.⁴³ Over 80 per cent of imprisoned Indigenous women are mothers.⁴⁴ These women are often not only sole carers to their own children but also kinship carers for other children from their community.⁴⁵
- [25] These extended caring roles place Indigenous women in financially vulnerable positions which can, under extreme cultural and parenting pressures, lead to criminal behaviour. The criminal acts may take the form of minor offences committed under circumstances of necessity (like repeated stealing offences to feed dependents or a financial inability to pay minor fines and

traffic offences). However, these offences, when repeated due to unchanging financial conditions and lack of support, can lead to incarceration. The historical barriers outlined above, which persist today, place Indigenous citizens (particularly women) at higher risks of being incarcerated and therefore excluded from voting at Commonwealth elections.

The Canadian approach

- [26] Similar issues of Indigenous prisoner disenfranchisement were considered in Canada's landmark electoral law case of *Sauvé v Canada*.⁴⁶ This case provides a useful example of how a Commonwealth political system with a colonialist past has dealt with overcoming historically and democratically limiting electoral legislation that affected the participation of First Nations people. Like Indigenous Australians, First Nations of Canada were identified in *Sauvé* as experiencing higher levels of poverty, societal exclusion, institutionalisation, and racial discrimination than other Canadian citizens.
- [27] The *Sauvé* litigation comprised two challenges to Canadian federal electoral legislation. In 1993, the defendant Richard Sauvé challenged a blanket ban against voting by prisoners in the Federal Court of Canada. The Federal Court declared the ban to conflict with the right to vote contained within the *Canadian Charter of Rights and Freedoms* 1982.⁴⁷ The Canadian Parliament responded by amending the law to limit the ban to prisoners serving sentences of two years or more.⁴⁸ The plaintiff successfully challenged those electoral law changes again in the Supreme Court in 2002.⁴⁹ The majority judges in the Supreme Court held that the justifications for disenfranchising prisoners relied upon by the Canadian Parliament were too vague. They lacked adequate consideration of principles of proportionality and did not consider important relevant extrinsic factors impacting on those individuals subject to disenfranchisement.⁵⁰
- [28] McLachlin CJ found that the social, economic, and historical conditions of First Nations people significantly led to their overrepresentation in Canadian prisons.⁵¹ This, in turn, undermined the legitimacy of the disqualification. Her Honour also noted the disproportionate and arbitrary character of a ban on prisoners voting in elections based purely on the length of their sentences:
- Section 51(e) imposes blanket punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct. It is not individually tailored to the particular offender's act. It does not, in short, meet the requirements of denunciatory, retributive punishment. It follows that it is not rationally connected to the goal of imposing legitimate punishment.⁵²
- [29] Accordingly, a ban of this kind was found to unjustifiably limit the right to vote conferred by the *Charter of Rights and Freedoms*.⁵³ *Sauvé* set a standard

for Canadian courts which requires them to uphold government legislation denying citizens the right to vote only where this can be ‘demonstrably justified’.⁵⁴ Gleeson CJ suggests that this is a higher standard of review than that articulated by the joint reasons in this case. However, whether or not that is so, the distinction does not bear upon our conclusions here. Disqualifying prisoners from voting, given the disproportionate impact on Indigenous Australians, is clearly at odds with contemporary ideas of universal franchise, which (as we mentioned previously) do not admit of exclusions based on categories such as race.

- [30] The Canadian Parliament is yet to repeal its electoral prisoner disqualifying legislation, but the invalidated provision is not applied. Prisoners in Canada are able to enrol and vote in both federal and provincial elections by way of special ballot.⁵⁵ This is done by Elections Canada appointing a staff member as an election liaison officer to govern the special ballot process within correctional institutions.⁵⁶ Those measures have increased voter registration in Canada of those incarcerated and, as a result, improved levels of First Nations voting due to their high incarceration rates.⁵⁷ Prisoners have been able to use their ballots to bring change to the correctional system of Canada.⁵⁸

Conclusion and orders

- [31] The blanket ban on voting by prisoners challenged in this case fails to take account of the distinct inequalities and experiences that exist between Indigenous and non-Indigenous Australians. However, the same point applies to the preceding provision applying to those serving sentences of three years or longer. Indeed, we find that any ban on prisoners voting would be contrary to s 24 for the reasons considered above. Removing the disqualification would have salutary consequences for prisoners’ integration with the wider community. Denying a person an ongoing connection to society through the electoral process while incarcerated adds an additional layer of punishment. It is unnecessary for persons sentenced to imprisonment for a state offence to be further subject to Commonwealth legislation that adds an additional penalty to their sentence.
- [32] Denying an incarcerated person voting rights also increases the difficulty of reforming social connections upon release. Exercise of voting and other civil rights ensures a person’s basic links to society are maintained even while they are incarcerated. It provides those persons with a continued sense of civic responsibility and political inclusion to better enable them to reintegrate back into the community. This is particularly important for Indigenous Australians, given their low rates of electoral enrolment. It is crucial for incarcerated persons of Indigenous descent, who are still subject to the effects of colonisation, to vote and otherwise participate in political membership of the community if the cycle of incarceration and exclusion is not to continue.

- [33] We therefore find that disqualifying prisoners from voting at Commonwealth elections is a disproportionate restriction on the democratic franchise enshrined in s 24 of the *Constitution*. We uphold the challenge to the validity of s 93(8AA) of the *Commonwealth Electoral Act 1918*. We further find that the previous legislation is also invalid. The plaintiff has raised points of important constitutional principle on behalf of a vulnerable segment of the community of which she is a member. It is appropriate for her to receive costs from the second defendant.
- [34] The questions in the Amended Special Case should be answered as follows:
- (1) Section 93(8AA) and s 208(2)(c) of the *Commonwealth Electoral Act 1918* are invalid.
 - (2), (3) Unnecessary to answer.
 - (3A) The provisions listed in the question are invalid.
 - (3B) The provisions listed in the question are invalid.
 - (3C) The provisions listed in the question are invalid.
 - (4) The second defendant.
 - (5) Unnecessary to answer, given the answer to Question 1.

Notes

- 1 Dani Larkin and Jonathan Crowe.
- 2 (1992) 177 CLR 1, 70–3 (Deane and Toohey JJ).
- 3 (1992) 177 CLR 106, 137 (Mason CJ), 209–10 (Gaudron J).
- 4 *Ibid.*, 228 (McHugh J).
- 5 *Attorney General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 36.
- 6 *Victoria v Commonwealth* (1971) 122 CLR 353, 396–7.
- 7 Australian Electoral Commission, *Indigenous Enrolment Rate* (11 October 2019) <https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm>.
- 8 *Commonwealth Franchise Act 1902* s 4.
- 9 HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) *Harvard Law Review* 593, 607.
- 10 Tony Birch, ‘The Last Refuge of the “Un-Australian”’ (2001) 7(1) *University of Technology Sydney Review* 17, 17.
- 11 Michael Dodson, ‘Citizenship in Australia: An Indigenous Perspective’ (1997) 22(2) *Alternative Law Journal* 57, 58.
- 12 George Williams, ‘Race and the Australian Constitution: From Federation to Reconciliation’ (2000) 38(4) *Osgoode Hall Law Journal* 643, 649.
- 13 Owen Dixon, ‘Two Constitutions Compared’ in *Jesting Pilate and Other Papers and Addresses* (Law Book Co, 1965) 100, 102.
- 14 *Elections Act 1885* (Qld) s 6(1). This provision was amended in 1905 to deny even Aborigines holding freehold title the right to vote in Queensland elections.
- 15 *Constitution Amendment Act 1893* (WA) s 12.
- 16 Indigenous voters were, however, affected by other barriers to electoral participation, including for example the ban on voting when in receipt of charitable aid. See George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) 96–103.
- 17 *Commonwealth Franchise Act 1902* s 4.

- 18 *Commonwealth Electoral Act 1949* s 3.
- 19 Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36 *Sydney Law Review* 205.
- 20 *Commonwealth Electoral Act 1949* s 42(5), as amended by *Commonwealth Electoral Legislation Amendment Act 1983* s 28(j).
- 21 *Commonwealth Electoral Act 1918* ss 208(2)(c), 221(3)(b).
- 22 Australian Bureau of Statistics, *Census: Aboriginal and Torres Strait Islander Population* (27 June 2017) <<https://www.abs.gov.au/ausstats/abs@.nsf/MediaReleasesByCatalogue/02D50FAA9987D6B7CA25814800087E03>>.
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