
Michael Kirby: Let Australia never be a prisoner to exclusion

Sydney Morning Herald
Michael Kirby
October 1, 2007

Australia is a country in a process of renewal. However, one of the good features that we traditionally boast of, to define the essence of Australian society, has been our shared commitment to "a fair go" for all. To be a tolerant, inclusive, moderate society in which virtually everyone can find their place. Like every democracy, we have sometimes strayed from these noble ideals.

Last week, the High Court published its reasons for orders made earlier in an important case. Those orders took the always serious and solemn judicial step of invalidating an act of the Federal Parliament. That act, passed last year, had taken away the right to vote from all prisoners in Australia. The High Court declared that, consistent with the constitution, this could not be done.

The 2006 law excluded about 8000 citizens from the vote. More than 20 per cent of them, like the applicant before the High Court, Vickie Roach, are indigenous citizens.

Since colonial times, there had been exclusions from voting for persons convicted of treason or other "infamous crimes". For much of the history of the Commonwealth a person had to be serving a sentence of more than a year to be so disqualified. This was later changed to five years, then in 2004 it was cut back to three years. But then, in 2006, the total prohibition on sentenced prisoners was introduced. Roach challenged the validity of the new law. In effect, she said that when sentenced to prison, she was there as punishment, not for further punishment. She was still a citizen and a human being.

The High Court was told that a similar total exclusion in Canada was struck down by the Supreme Court in 2002. In Britain last year, a similar law was held to infringe the fundamental rights in the European Convention on Human Rights, to which Britain is required to conform.

However, in the United States, 4 million citizens, no less, are banned from voting for life.

The Federal Government defended its legislation. It argued that prisoners under sentence had temporarily forfeited their right to take part in federal elections. It said it was up to Parliament to decide such matters because of the "sovereignty" of Parliament.

However, in our country, by the wisdom of the constitution, no parliament is completely "sovereign". It is only the people who are sovereign. The people express their will in the constitutional text, which spells out a democratic form of government. As the Chief Justice, Murray Gleeson, observed, it would be incompatible with the text and character of the constitution to revive today the early- 19th-century British exclusion of Roman Catholics from the vote. Equally, it would be invalid to restore the early-20th-century Australian exclusions from the vote of women and indigenous people.

The constitution expressly provides that a person may be elected to Parliament although sentenced to imprisonment of less than one year. If a member of Parliament, with those higher

duties, could serve despite such a sentence, it would be paradoxical to exclude altogether prisoners with their much less onerous obligations of being voters.

Accordingly, four of the High Court judges upheld the challenge to the total exclusion of prisoners. They held that the 2006 act did not sufficiently distinguish between more culpable and less culpable conduct. It made no allowance for prisoners serving sentences of a few days or sentences of strict liability. The net of disqualification was thus cast too widely. It was therefore unconstitutional. Two judges dissented. But the court ordered, in effect, that prisoners serving sentences of less than three years must have the right to vote in the coming election.

Some, of course, will say that we should not worry about prisoners. Take away their civil rights. Throw away the key. We all know the usual suspects who are of this persuasion. However, it has not been the temperate tradition of Australia. Prisoners must be able to "live it down". As for those serving shorter sentences, they remain entitled to choose their rulers.

That is why the decision of the High Court is such an important one. It is part of the mosaic of law that defines the identity of the Australian community. Unlike the United States, Australia would never tolerate excluding millions - or thousands - of citizens from the vote because of past convictions. It is vigilant against alteration of voting rights for partisan political advantage. It celebrates democracy and representative government as a core feature of what it is to be an Australian.

When we go to vote in the federal election in a few weeks time, stand in the queue proudly as a citizen. Reflect on the importance of the moment and on your constitutional right to choose your governors. And think of how the High Court protects that right and guards it as a constitutional entitlement that can only be taken away in the most serious and relevant and justifiable of circumstances.

Michael Kirby is a judge of the High Court of Australia.

This is an edited extract from an address given on Saturday, when he was awarded an honorary doctorate at Southern Cross University.

<http://www.smh.com.au/news/opinion/let-australia-never-be-a-prisoner-to-exclusion/2007/09/30/1191090936573.html>