

Prisoners' vote is the Australian way

Michael Kirby

Australia is a country in a process of renewal. Many things long accepted are undergoing revision. However, one of the good features that we traditionally boast of has been our shared commitment to "a fair go" for all — to be a tolerant, inclusive, moderate society in which virtually everyone can find a place. Like all democracies, we have sometimes strayed from these noble ideals.

Last week in Canberra, the High Court published its reasons for orders to invalidate an act of the federal parliament. That act, passed in 2006, had taken away the right to vote from all prisoners serving a sentence of imprisonment. The court declared that this could not be done.

Figures produced to the court showed there were nearly 26,000 prisoners in Australia, of whom nearly 6000 were on remand. Of the other 20,000, the 2006 law excluded about 8000 citizens from voting. More than 20 per cent of them, like the applicant in the case before the High Court, Vickie Roach, were indigenous citizens.

Since colonial times, there had been exclusions from voting for

happened to coincide with an election. Ms Roach, on her own behalf and for other prisoners, said that when sentenced to prison, she was there as punishment, not for further punishment. Similar total exclusions in Canada and Britain have been held to offend basic rights.

However, in the US, 4 million citizens, no less, are banned from voting for life. In New Zealand only those serving three years or more in prison lose their right to vote.

The federal government argued that prisoners under sentence had temporarily forfeited their right to take part in federal elections. It said that it was up to parliament to decide such matters because of the "sovereignty" of parliament.

However, by the wisdom of the constitution, no parliament is completely "sovereign". It is only the people who are sovereign. The constitution spells out a democratic form of government. As Chief Justice [Murray] Gleeson observed, it would be incompatible with the text and character of the Australian 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 Australian constitution expressly provides that a person may be elected to serve in parliament although sentenced to imprisonment of up to one year. If a member of parliament could serve despite such a sentence, it would be paradoxical to exclude altogether prisoners with their much less onerous obligations from being voters.

Four judges upheld the challenge to the total exclusion of prisoners. The court ordered, in effect, that prisoners serving sentences of less than three years must have the right to vote in the coming elections. Within the electoral cycle, such prisoners will ordinarily be back in the community.

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. Ours is a land made up, largely, of immigrants without sharp class distinctions. Many of our earliest settlers were convicts. They were people

who served their time. Prisoners must be able to "live it down".

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. Australia remains a land respectful of human dignity, including of its prisoners. Unlike the US, it would never tolerate excluding millions (or thousands) of citizens from the vote because of past convictions. 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.

■ *This is an extract from an address by Justice Michael Kirby of the High Court of Australia at Southern Cross University last week.*



Michael Kirby

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 one year's imprisonment to be so disqualified.

This was later changed to five years and in 2004 it was cut back to three. Then in 2006, total prohibition on sentenced prisoners was introduced — even if the sentence

was for just a few days that