IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

Nº M19 OF 2007

BETWEEN:

VICKIE LEE ROACH

Plaintiff

AND:

ELECTORAL COMMISSIONER

First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

REPLY SUBMISSIONS OF THE PLAINTIFF

1. The Plaintiff's Reply deals with the following issues:
   1.1. the applicable criterion for validity of a law relating to the disqualification of electors;
   1.2. non-uniform operation of laws as between states;
   1.3. disqualification from voting for persons convicted of "serious offences";
   1.4. the implied freedom of political communication and participation;
   1.5. disenfranchisement as punishment;
   1.6. "the people" and "electors"; and
   1.7. the comparative jurisprudence.
2. The Plaintiff relies on her written submissions dated 9 May 2007 in relation to the remaining issues in the case in response to both Defendants' submissions and those of the interveners.

The Applicable Criterion for Validity of a Law

3. Neither the Commonwealth nor the interveners have set out any cogent or workable criteria or principles to determine the validity of a law relating to the qualification or disqualification of electors. The Commonwealth submits that there is "*no fixed test, capable of consistent application at all times*" (Commonwealth Submissions at [16]). It later says "*The true test of the limitation of the power is ... does the electoral system provide for a choice by the people*" (Commonwealth Submissions at [73]. Also, the Commonwealth submits that the voting system as a whole must not be "*so distorted as not to answer the broad identification ... of ultimate control by periodic popular election*" (Commonwealth Submissions at [12]) and that the expression "chosen by the people" is "*a broad expression to identify the requirement of a popular vote*" (Commonwealth Submissions at [15]).[1]

[1] The State of New South Wales appears to take a similar approach in paragraphs 3.5, 4.2 and 4.5 of its submissions as does the State of Western Australia at paragraph 2(b) and 24.

4. The Commonwealth and the interveners fail to address the critical distinction between a law in respect of the qualification of an elector to become entitled to vote and a law in respect of the disqualification of an elector previously entitled to vote as a member of the people. For example, the Commonwealth asserts that the disqualification in question is valid provided it "*does not so distort the electoral system as to mean that the system no longer answers the requisite identification 'chosen by the people*" (Commonwealth Submissions at [19.5]).

5. In suggesting a solely quantitative criterion (Commonwealth Submissions at [3.5]), the Commonwealth is contending that so long as only a sufficiently small number of people are denied the vote they previously had, that disqualification will be valid regardless of how arbitrary, capricious or politically driven the disqualification may be. Put simply, no matter how politically manipulative the disqualification is (e.g. increasing the minimum voting age or imposing a maximum age to better secure the re-election of the government of the day), it is valid.

6. The Commonwealth and the interveners' approach fails to take account of the suggested limitations on the Commonwealth's power already acknowledged on numerous occasions by members of this Court set out in paragraph 59 of the Plaintiff's Submissions. Further, the approach relies entirely on jurisprudence arising in a different context. For example, in *McGinty v Western Australia* (1996) 186 CLR 140, *Attorney-General (Cth); ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 and *Langer v Commonwealth* (1996) 186 CLR 302, the meaning of section 24 was considered in the context of the power of Parliament to set electoral boundaries and to prescribe a method of voting. In the context of ss 29 and 31 of the Constitution, a broad requirement that ss 7 and 24 provide for periodic popular election can be well understood. Such an approach is less useful when considering the specific question, not before determined by this Court, of who can be disqualified from exercising the vote they were previously entitled to exercise.

Non-Uniform Application of Laws in Different States

7. The Commonwealth (Commonwealth Submissions at [23] and [68]), relying on *Leeth v The Commonwealth* (1992) 174 CLR 455, contends that inconsistent operation of laws in different states is not prohibited by the Constitution.

8. The Plaintiff does not submit that there is any general doctrine of equality of operation of laws in the Constitution (which was rejected in *Leeth*). Rather, the Plaintiff submits that the consequence of any such inconsistency as between different states of a federation is relevant to the application of the "reasonably appropriate and adapted" test. The existence of the many inconsistencies identified by the Plaintiff (only one of which was differences as between laws in the states) assist in demonstrating the arbitrary nature of the impugned provisions to explain why they are not directed at achieving the Commonwealth's stated object in a proportionate manner. These inconsistencies also assist in explaining why disqualifying a person from voting because the person is in prison serving a sentence on a particular day, is an imposition of additional punishment (see [16]-[21], below).

Disqualification from Voting of Serious Offenders

9. All three of the Commonwealth's stated legitimate objects dealing with the "social compact" and "respect for the law" state that the legislation disqualifies from voting persons "*who have committed a serious breach of the law*". The Commonwealth contends that, if a person has committed an offence "*serious enough*" to be punished with a sentence of imprisonment, it is open to Parliament to deny that person the vote (Commonwealth's Submissions at [20], [56] and [57]).

10. The loose assertion that imprisonment is equivalent to a test for the seriousness of the offence is without foundation. In paragraph 96 of her submissions, the Plaintiff identifies that offences of a non-serious nature can and do result in imprisonment. Also, the Commonwealth *Crimes Act 1914* and various other pieces of state legislation including the *Sentencing Act 1991 (Vic)*[2] and the *Criminal Law (Sentencing Act) 1988 (SA)*[3] specifically differentiate in their application between an "offence" and "serious offence", particularly in relation to sentencing. A person can, therefore, be imprisoned for an offence which is not defined as "serious". For example, under s 3C of the *Crimes Act 1914 (Cth)* an offence is only "serious" if it is punishable by imprisonment for 2 years or more.[4]

11. Further, as outlined by the Plaintiff at paragraphs 28 and 29 of her original submissions, the many factors that determine whether a particular person is in prison serving a sentence on a particular day, do not enable imprisonment to be equated with conviction of a "serious" offence.

Implied Freedoms

12. By alleging (Commonwealth's Submissions at [58]) that the implied freedom of political communication cannot operate as a limitation on the power from which it is derived (ss 7 and 24), the Commonwealth mischaracterises the Plaintiff's argument. The Plaintiff does not allege that the implied freedom limits sections 7 and 24, but, rather, that it limits the power exercised under sections 51(xxxvi) and 30.

13. Moreover, the Commonwealth's argument that voting cannot be protected by the implied freedom reveals a paradox. The Commonwealth asserts that voting cannot be an incident of the freedom of political communication because the freedom is "required to enable the act of voting" and therefore protects activities anterior to and distinct from voting. The Commonwealth also contends that voting is not protected by ss 7 and 24 (which it argues leaves no room for implication), and is a matter with which the parliament is at liberty to deal in an almost unrestricted way.

14. If the Commonwealth's arguments were to be accepted, the act of voting that is "enabled" by the implied freedom has no protection, but the communication that enables it does. On this analysis, voting is not protected by the implied freedom because it is dealt with by sections 7 and 24; but neither is it protected by any express provision because, in the Commonwealth's submissions, all section 7 and

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[2] Section 3 defines "serious offence" as including (among others) various offences such as murder, manslaughter, armed robbery, abduction and sexual offences. Schedule 1 also includes definitions of "serious offender". Certain sentencing principles apply to serious offences and serious offenders under that act.

[3] Section 20A defines "serious offence" as including (among others) offences such as serious drug offences, certain offences against the person, robbery or aggravated robbery. However, to be considered "serious", the offence must carry a maximum penalty of at least 5 years.

[4] In June 2006, 35% of the prison population was serving a sentence of two years or less (Special Case at [50(d)]).

24 do is to provide for a vague concept of periodic popular election. Such an approach lacks coherence and should not be adopted by this Court.

15. The better view is that voting is either implicitly, or expressly, protected by ss 7 and 24 and there is, therefore, a requirement that any legislation disqualifying a person previously entitled to vote from voting at the least be reasonably appropriate and adapted or proportionate to a legitimate end. If, contrary to the Plaintiff's submissions, the current jurisprudence leaves a gap in constitutional protection, the Plaintiff submits that it is necessarily filled by extending the implied freedom beyond a strict reading of "communication" to communication, participation and association.

10 **Punishment**

16. The Commonwealth and the interveners have contended that, provided a law does not have the consequence that an election is no longer a popular choice or a choice by the people, it is a valid law irrespective of its operative effect or purpose. The effect of these submissions is that the federal Parliament has power under ss 51(xxxvi) and 30 to impose a penalty or punishment for breach of state or federal criminal laws. As was noted in the Plaintiff's original submissions (see footnote 36), the Commonwealth Parliament has no power to punish for anything other than Commonwealth crimes.

17. Despite the objects set out by the Commonwealth, the Plaintiff contends that the
20 operative effect and substantial purpose, viewed objectively, of the impugned provisions is the pursuit of law and order by imposing an additional penalty or punishment on persons serving a sentence of imprisonment.[5]

18. As McHugh J observed in *Re Woolley; Ex parte Applicants M276/2003*, "if the effect of the law is not readily distinguishable from the effect of inflicting punishment, a rebuttable inference will arise that the purpose of the law is to inflict punishment".[6] In these circumstances, it is for the Commonwealth to rebut the inference that the purpose of the impugned provisions is to inflict punishment. It has not done so. Further, it is possible for a law to have more than one purpose; and if one purpose is punitive, then that will suffice to bring into play the constitutional requirements
30 applying to such a law.[7]

19. A punitive aspect of the impugned provisions is suggested in the Commonwealth's submissions at [19.5], [56] and [57]. Moreover, certain extrinsic material relating to the enactment of the impugned provisions reveals a punitive purpose.[8]

20. If the operative effect and/or purpose of the impugned provisions is to inflict punishment or impose a penalty for breach of the criminal law, then the Parliament has no power under ss 30 and 51 (xxxvi) to enact those laws for two reasons:

    20.1. In the case of a person convicted of breaching a State law establishing a criminal offence, punishment for breach of State criminal law is beyond the power of the Commonwealth Parliament. Sections 51(xxxvi) and 30 do not

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[5] The additional punishment or penalty is imposed upon those persons for breach of the criminal law (either State law, as in the Plaintiff's case, or Commonwealth or Territory law in other cases).
[6] (2004) 225 CLR 1 at 35
[7] Ibid at 37
[8] See, eg, Senate Finance and Public Administration Legislation Committee Report 2006 at [3.47]: "the rationale for the denial of the right to vote is twofold: educative (to ensure that people realise the importance of the role of the democratic system in society) and punitive (as punishment for the commission of a crime)."

extend to authorising a law that imposes a punishment on a person for breach of a State law.

20.2. In the case of a person convicted of breaching a law of the Commonwealth, punishment for breach of the law may only be imposed as an exercise of the judicial power of the Commonwealth pursuant to Ch III of the Constitution.[9] There is no such exercise here, as the punishment is imposed by the Parliament (and given effect by the Electoral Commissioner) after the exercise of judicial power by the sentencing judge has concluded.[10]

10 21. The adjudgment of the Plaintiff's criminal guilt was an exercise of the judicial power of the State. The additional punishment or penalty of her disenfranchisement has been imposed by the Commonwealth legislature is beyond power and hence the impugned provisions are invalid.

"The People" and "Electors"

22. The State of Western Australia submits that, because the Constitution delineates between "the people" and "electors", the Plaintiff's argument fails (Western Australian submissions at [10]). The Commonwealth and the Interveners also characterize the Plaintiff's argument as based on an assertion of universal suffrage.

23. The Plaintiff's case is not based on any such contention. Her argument accepts a 20 considerable latitude for Parliament in determining the qualification of an elector. She also acknowledges that some forms of disqualification can be valid (e.g. restrictions based on age and soundness of mind). In addition, the Plaintiff has submitted that there may be room for other permissible restrictions such as disqualification based on electoral fraud, treason or treachery (Plaintiff's Submissions at [65] and [72]).

24. Rather, the Plaintiff submits that there is a limitation on the power of Parliament to disqualify members of the people previously entitled to vote from voting and she has proposed a criterion (based on the text, context and purpose of the relevant provisions) to be applied to determine the validity of such a law. In contrast, the Commonwealth and the interveners offer either no real limitation or one that is so 30 broad that it is capable of seriously undermining the representative democracy provided for by the Constitution.

Comparative Jurisprudence

25. The Commonwealth contends that because the instruments on which the Canadian and European Court of Human Rights decisions are based confer individual rights, the reasoning in those decisions cannot be transferred to the interpretation of the Australian Constitution.

26. The Plaintiff has acknowledged that the constitutional text and context differs in these jurisdictions. However, the Plaintiff submits that these decisions support her

[9] *Woolley* (2004) 225 CLR 1 at 35; *Chu Kheng Lim v Minister for Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; *Al Kateb v Godwin* (2004) 219 CLR 562 at 650; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 633.

[10] This is particularly so in relation to those people sentenced to a term of imprisonment of less than 3 years prior to the commencement of the impugned provisions, as at the time of sentence there was no possibility that a consequence of the sentence would have been disenfranchisement.

contention that the legislation in question is arbitrary and not rationally connected, or reasonably appropriate and adapted, to any legitimate ends. The comparative cases relied upon are of assistance to the Court in applying the constitutional requirements to a particular legislative regime. This Court has not infrequently used comparative jurisprudence in this way.[11] Also, in so far as the relevant provisions are analogous to ss 7 and 24, they plainly can be of assistance to the Court in its approach to a proper construction of those provisions.

27. Further, the Commonwealth's reliance on New Zealand, United States and Indian authorities is misplaced. Contrary to the assertion by the Commonwealth in paragraph 44, the New Zealand High Court in *Re Bennett* (1993) 2 HRNZ 358 did not uphold prisoner disenfranchisement legislation as "constitutionally valid". The New Zealand Bill of Rights Act is not a constitutional document but an ordinary act of the New Zealand Parliament. In *Bennett,* the court concluded there was a direct inconsistency between provisions of the *Electoral Act* and the *Bill of Rights Act.* The *Bill of Rights Act* provides that where such an inconsistency exists, the other Act shall prevail. Thus *Bennett* went no further than to establish the inconsistency and the court undertook no discussion of prisoner disenfranchisement more generally.

28. The United States and Indian authorities are also of limited assistance. In both those jurisdictions, the relevant Constitution expressly contemplates disqualification from voting of criminals, and the question arising in the present case does not arise in those jurisdictions.

Dated 4 June 2007

RON MERKEL

KRISTEN WALKER

FIONA FORSYTH

[11] *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR at 130. *Polyukhovich v Commonwealth* (1991) 176 CLR 501, 611-12, 627-8, 631, 699-700, 707; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 140, 154, 211.