



Unit 4: Representative Democracy. The story of voting rights in Australia including for Aboriginal and Torres Strait Islander people and women – Year 5 - C & C Strand: Government & Democracy

Topic 5.2: The Constitution and the right to vote in Australia

Right to vote – prisoners. The story of Vickie Lee Roach

Should prisoners in gaol be allowed to vote? Convicts transported to Australia could not vote. But what about now? Should disqualification from voting be used as a punishment for crime?

In 1902 the [Commonwealth Franchise Act](#) denied the right to vote in federal elections to any person who was convicted and serving a sentence for any offence that was *punishable* by imprisonment for one year or longer. This meant that the disqualification was not based upon the *actual* sentence of a prisoner – but instead upon the possible maximum sentence for that type of crime. If your sentence could have been one of imprisonment for a year or more (but your actual sentence was 3 months), you were still disqualified from voting until you had served your sentence. Once you had served the sentence, you were qualified to vote again. Conviction is not a permanent disqualification from voting.

This lasted until 1983, when the pendulum swung back in favour of prisoners voting. The law was changed so that prisoners were only disqualified from voting in federal elections if they were serving a sentence for an offence *punishable* by five years or more in prison. In 1995 it was changed again so that only prisoners serving an *actual* sentence of five years or longer were disqualified from voting. This meant that more prisoners could vote, because previously those sentenced to less than 5 years' imprisonment could still be disqualified, as long as the potential maximum sentence was 5 years or more of gaol time.

In 2004, the law was changed so that prisoners serving an actual sentence of 3 years or more were disqualified from voting. In 2006 it was changed again so that *all* prisoners serving a sentence of full-time detention were disqualified from voting. The justification was that by committing a crime that deserved imprisonment,

they had breached the trust of the community and should therefore lose the privilege of voting. Those opposing such a move argued that prisoners were already punished by imprisonment. They should not get a second punishment by losing the right to vote. They also argued that encouraging prisoners to exercise their civic responsibilities, such as voting, is a step towards rehabilitation.

The [Roach case](#)

[Vickie Lee Roach](#), an Indigenous Yuin woman, was convicted of five offences in 2004 and sentenced to 6 years' imprisonment. She had been driving the getaway car in an armed robbery when she hit a car stopped at a traffic light, causing serious injuries to the driver.



Vickie Lee Roach

Source: As found in the ACC High Court Case study.
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While serving her sentence in prison, she challenged the validity of the 2006 federal law that banned all prisoners from voting. She pointed out that because of the disproportionately high representation of Aboriginal and Torres Strait Islander people in prisons, the impact on them of losing voting rights is [greater and unfair](#). Indigenous Australians, though only around 3% of the Australian population, make up [about 29%](#) of the prison population. Preventing prisoners from voting is therefore likely to have a higher impact on Aboriginal and Torres Strait Islander peoples.

The High Court decided in 2007 in [Roach v Electoral Commissioner](#) that the 2006 law banning all prisoners from voting was invalid, but the previous 2004 law denying the vote to prisoners serving 3 year sentences or longer was valid. How did it reach this conclusion? The Court pointed to [sections 7](#) and [24](#) of the Constitution, which require that the two Houses of the Commonwealth Parliament be 'directly chosen by the people'. Who are the people? Does 'the people' include prisoners? If all prisoners were excluded from voting, would this mean that the Houses were not directly chosen by 'the people'?

The Court accepted that over time, our understanding of the meaning of 'the people' had changed. While in the past, people had been excluded from voting because of their sex or race, this had long ceased to be acceptable.

When prisoners are excluded from voting that diminishes the number of 'the people' who choose the parliamentarians
Source: AEC

A majority of the Court now accepted that the Constitution required there to be a 'universal franchise' that did not permit people to be excluded because of their sex or race.

But obviously some exclusions would still be permitted. For example, it would not make sense to insist that two year old children must vote. So the majority said that there must be a 'substantial reason' for an exclusion from voting, and that reason had to be compatible with the democratic system of government set out in the Constitution. People could justifiably be excluded from voting if they did not have the mental capacity to vote (eg those suffering from serious dementia) or were still developing the capacity to give a free and informed vote (eg children). People could also be excluded from the right to vote if they were not full members of the community (eg non-citizens).

What about prisoners? Historically, at least some prisoners had been prevented from voting since the very first Commonwealth election – but never all prisoners, until 2006. [Chief Justice Gleeson](#) thought that some prisoners could be excluded from the right to vote because their conduct showed 'such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right'.

Just as criminal behaviour can justify the removal of your right to liberty (eg by being imprisoned), so it can also justify removal of your right to vote. But the Justices did not think that *all* criminal conduct justified disqualification from voting – only serious criminal conduct. They thought that short sentences did not indicate such seriously bad conduct as to justify removal of the right to vote.

The Court decided that the 2006 law was invalid, but that the 2004 law, which disqualified prisoners from voting if they were imprisoned for three years or more, was valid. The result was that Vickie won an important case that protects the rights of people to vote at the Commonwealth level, including women and people of racial minorities, as well as prisoners with sentences of less than three years. But as Vickie was serving a 6 year sentence, she did not obtain the right to vote for herself.

On what basis should the right to vote be denied?

If people can be denied the right to vote due to their rejection of civic responsibility, should this be confined to particular types of crimes? What sort of crimes should attract such a penalty? In New South Wales in the 1890s, men were denied the right to vote if they had been convicted of domestic violence in the previous year or failed to pay maintenance to support their family. Should such a rejection of civic responsibility result in disqualification today?

Under our compulsory voting system, it is an offence not to vote, for which you can be fined. What if a person refuses to pay such fines and is then imprisoned? Should a person be punished by the removal of his or her right to vote because he or she has refused to vote?

What if a person has been wrongfully convicted? Even if their conviction is later overturned, they may have lost their vote in the meantime. If the criminal justice system can sometimes make mistakes or be unfair, should it prevent prisoners from being able to hold the system to account and seek to change it by exercising their vote?





Topic 5.2: Lesson/ Activities Four

Exclusions to the right to
vote – Prisoners.
The story of Vickie Lee Roach



AUSTRALIAN
CONSTITUTION
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Time/Lesson	Learning Goal
<ul style="list-style-type: none">1 hour	To <u>discuss</u> the notion that there are still Australian citizens who are excluded from the right to vote. To <u>consider</u> the conditions that allow individuals to be marginalised in society which removes their democratic right to vote. To <u>form an opinion</u> on whether this is just or unjust.
Rationale	Success Criteria
Throughout the topic “the Constitution and the right to vote in Australia” students have been considering how the right to vote in Australia has changed throughout history since the arrival of the First Fleet. They have critically examined the voting system under the form of a democratic Government and how exclusions impact on human rights. By learning about the exclusions in prisoners’ right to vote, they can understand that all Australians still do not have equal voting rights. This part of the unit allows them to evaluate current exclusions.	Students <u>analyse</u> a case study involving exclusions to the right to vote. They <u>discuss</u> and <u>make decisions</u> about the validity of the exclusion of prisoners from the right to vote and <u>discuss</u> the issue of possible discrimination against Indigenous People because although they make up around 3% of the Australian population, they make up around 29% of the prison population.
Teaching Reference Document	
TRD 23. Right to Vote – Prisoners The High Court decided in 2007 in <i>Roach v Electoral Commissioner</i> that the 2006 law banning <i>all</i> prisoners from voting was invalid, but the previous 2004 law denying the vote to prisoners serving 3 year sentences or longer was valid. How did it reach this conclusion? The Court pointed to <u>sections 7</u> and <u>24</u> of the Constitution, which require that the two Houses of the Commonwealth Parliament be ‘directly chosen by the people’.	
Resources	
<ul style="list-style-type: none">Padlet account https://padlet.com/The Roach Case: Australian Constitution Centre High Court Case Study. The Right to Vote survives incarceration (Roach v Electoral Commissioner 2007)https://www.sydneycriminallawyers.com.au/blog/should-prisoners-be-allowed-to-vote-2/https://www.qld.gov.au/law/sentencing-prisons-and-probation/prisonsand-detention-centres/prisoners-rightshttps://humanrights.gov.au/our-work/rights-and-freedoms/projects/prisoners-rights	

Tuning In

- Teacher direct instruction: The role of the High Court in interpreting Commonwealth laws.
- Explain that students are going to use the knowledge about prisoners being excluded from the right to vote to debate whether it is right that prisoners are denied the vote.
- Introduce the method chosen to debate: Padlet, Post-it notes, class debate, other (own choice).
- Note of caution to teachers: Vickie Lee Roach's story has themes of DV. Support students and staff who will be triggered/distressed.

Teacher Instruction

- The Roach case – Study the TRD 23 and then the High Court Case Study in the Australian Constitution Centre.
"Vickie Lee Roach, a Yuin woman, was convicted of five offences in 2004 and sentenced to 6 years' imprisonment. She had been driving the getaway car in an armed robbery when she hit a car stopped at a traffic light, causing serious injuries to the driver. While serving her sentence in prison, she challenged the validity of the 2006 Commonwealth law that banned all prisoners from voting. She pointed out that because of the disproportionately high representation of Aboriginal people in prisons, the impact on them of losing voting rights is greater and unfair. Indigenous Australians, though only around 3% of the Australian population, make up about 29% of the prison population. Preventing prisoners from voting is therefore likely to have a higher impact on Aboriginal and Torres Strait Islander peoples."
- Read/show the current rules for exclusions of prisoners under Commonwealth law. Do you consider the law compatible with the democratic system of government set out in the Constitution or do you consider no people should be excluded from voting?
- To elicit discussion, ask the question:
 - Why would a prisoner want to vote?
 - Should prisoners in gaol be allowed to vote?
 - Convicts transported to Australia could not vote. But what about now?
 - Should disqualification from voting be used as a punishment for crime?
 - What if a person has been wrongfully convicted?
 - The two Houses of the Commonwealth Parliament must be 'directly chosen by the people'. Who are the people?
 - Does 'the people' include prisoners?
 - If all prisoners were excluded from voting, would this mean that the Houses were not directly chosen by 'the people'?
 - Do you consider the law compatible with the democratic system of government set out in the Constitution?

Group/Independent Learning

- Class debate - **All prisoners should be allowed to vote.**
- Students are given time to research the question.
- NOTE Many web sites have quite a high level of vocabulary and understanding, it may be wise to select portions of the text and deconstruct them with students (link to reading comprehension levels and understanding).
- Some helpful sites:
 - <https://www.sydneycriminallawyers.com.au/blog/should-prisoners-be-allowed-to-vote-2/>
 - <https://www.qld.gov.au/law/sentencing-prisons-and-probation/prisons-and-detention-centres/prisoners-rights>
 - <https://humanrights.gov.au/our-work/rights-and-freedoms/projects/prisoners-rights>
- You may choose to run this debate in several ways depending on the ability of your students.
 - A simple hand raising with one person offering an opinion then another countering the opinion.
 - For and against poster/wall where students can write their arguments on a post-it note that will later be shared with the class.
 - Extend this by dividing the class and giving them the for and against arguments to summarise.
 - A class debate - <https://www.youtube.com/watch?v=yi6lm-Sb6Vw>
 - A Padlet debate (example)

The image shows a Padlet board titled "HASS Debate" with the subtitle "Let's have some fun". The board is organized into four columns representing different positions in a debate:

- Column 1: Prisoners should have a constitutional right to vote.**
 - Supporting text: "2007 in Roach v Electoral Commissioner that the 2006 law banning all prisoners from voting was invalid, but the previous 2004 law denying the vote to prisoners serving 3 year sentences or longer was valid. This means that currently the law is that prisoners who are serving a sentence of less than 3 years are eligible to vote."
- Column 2: Agree - prisoners should have a right to vote.**
 - Supporting text: "Prisoners are already punished by imprisonment. They should not get a second punishment by losing the right to vote."
- Column 3: Disagree - prisoners should not have a right to vote.**
 - Supporting text: "By committing a crime that deserved imprisonment, they have breached the trust of the community and should therefore lose the privilege of voting."
- Column 4: Alternative model: prisoners should have a right to vote.**

Wrapping It Up

Discuss the results of the debate. If you choose you could give a winner or a winning argument.

Differentiation

Support

Various levels of support will be necessary depending on how you choose to debate. In Padlet you can edit and approve students' work. If you are writing post-it notes you could have some prewritten arguments for and against and allow students who need support to use these and determine where they should be placed instead of having them write their own.

Extension

As an extension students could perform a personal investigation of other exclusions under the Constitution; i.e. non-citizens and draw conclusions about their rights.

Assessment Strategies

Students' debate contributions will give insight into their understanding. These can be used as a formative assessment of knowledge and understanding or as a part of a summative assessment folio using the criteria from the Standard Elaborations (below).

HASS Knowledge and Understanding

A	B	C	D	E
identification and <u>thorough description</u> of the importance of values and processes to Australia's democracy and <u>thorough</u> description of the roles of different people in Australia's legal system	identification and <u>detailed description</u> of the importance of values and processes to Australia's democracy and <u>detailed</u> description of the roles of different people in Australia's legal system	identification of the importance of values and processes to Australia's democracy and description of the roles of different people in Australia's legal system	identification of <u>aspects</u> of the importance of values and processes to Australia's <u>democracy</u> and partial description of the roles of different people in Australia's legal system	<u>statements about aspects</u> of the importance of values and processes to Australia's democracy and <u>statements about aspects</u> of the roles of different people in Australia's legal system