

CRIMINAL PRIORS & THE RIGHT TO BE ELECTED

The salutary tale of Ronald 'Bunna' Walsh

OSCAR ROOS and BENJAMIN HAYWARD

REFERENCES

1. [1971] VR 33.
2. See *Roach v Electoral Commissioner* (2007) 239 ALR 1, 17–9 (Gummow, Kirby and Crennan JJ).

On 30 May 1970 Ronald William 'Bunna' Walsh was popularly elected to the Legislative Council of Victoria. After the declaration of the polls, however, Walsh's election was referred by the Victorian Legislative Council to the Victorian Supreme Court sitting as the Court of Disputed Returns. The referral was based on Walsh's criminal record.

At the time of Walsh's election, s 73 of the *Constitution Act Amendment Act 1958* (Vic) 'provided that no person shall be capable of being elected or continuing to be a Member of the Legislative Council who ... has been convicted of treason or any felony or infamous crime in any part of Her Majesty's dominions' (emphasis added). Walsh had no adult criminal history, but he did have several Children's Court priors for which he, in the main, had escaped conviction and, therefore, the operation of s 73. However, on 14 February 1950, when Walsh was aged 16, he had been convicted in the Children's Court at South Melbourne of the offence of robbery and sentenced to six weeks imprisonment suspended on his entering into a good behaviour bond.

In *R v Walsh*¹ the Victorian Supreme Court determined that Walsh's conviction for an offence of robbery, even though it was recorded when Walsh was child, constituted a conviction for felony, hence making him subject to the disqualification provision contained in the *Constitution Act Amendment Act*. Consequently, Walsh's election was declared void.

When the Victorian Parliament came to enact its *Constitution Act* in 1975, the disqualification provisions were amended. Children's Court priors, whether a conviction was recorded or not, no longer disqualified a person who was otherwise eligible, from being elected to either House of Parliament. Walsh was subsequently elected to the Victorian Legislative Assembly in May 1979 and went on to enjoy a distinguished parliamentary career, during which he held a number of Ministerial portfolios. Walsh retired from the Victorian Parliament in 1992.

A contemporary issue

The story of Ron 'Bunna' Walsh is worth recounting because it serves as a timely reminder of the valuable contribution to public life that can be made by those who have a criminal record. It is of contemporary relevance because most Australian jurisdictions still provide for some form of parliamentary disqualification based on a person's criminal history. This article surveys the various provisions that apply in the several

Australian jurisdictions and argues specifically that the Victorian and Western Australian parliamentary disqualification provisions are draconian and in breach of fundamental human rights. In those two jurisdictions, in particular, there is urgent need for legislative reform.

It is worth noting two limitations on the scope of this article. First, the focus is solely on parliamentary disqualification based on *prior* criminality, as opposed to disqualification based on the commission of a criminal offence by a parliamentary member *while in office*. While the policy issues concerning the two forms of parliamentary disqualification may overlap slightly, we maintain that the arguments in favour of limiting or eliminating disqualification based on a candidate's criminal history are much more clear cut and compelling.

Second, this article focuses exclusively on the parliamentary disqualification provisions which apply in the various states and territories. The Commonwealth parliamentary disqualification provision is contained in s 44(ii) of the *Australian Constitution*, which disqualifies those 'attained of treason' or *currently* serving a sentence of imprisonment of *one year or longer* from 'being chosen ... as a senator or a member of the House of Representatives'. As the Commonwealth disqualification provision is constitutionally entrenched, it can only be amended by a 'double majority' referendum procedure (*Australian Constitution* s 128). This creates an almost insurmountable obstacle to its alteration. By contrast, the state and territory provisions are contained in ordinary statutes, which, subject to one possible complication in Victoria, are amenable to alteration through the normal parliamentary process.

A brief colonial history

Given Australia's history as a penal colony, it is unsurprising that colonial legislation made some provision for parliamentary disqualification based on a person's criminal history. In summary, colonial legislation bore the following features:

- disqualification of candidates and sitting members was linked to disqualification of electors (ie the loss of voting rights)
- disqualification was suffered by those 'attained' of treason, convicted of felony, or of any 'infamous crime' in any part of the 'Queen's dominions'
- the period of disqualification ended for those pardoned, or who had served their sentence.²

The other Australian states either have no provision for parliamentary disqualification based on criminal history, or provisions which are much more narrowly targeted than in Victoria or Western Australia.

These disqualifications were justified on the basis that persons attainted of treason or convicted of felony were 'dead in law'. Additionally, the disqualification of those convicted of an 'infamous offence' (such as fraud or perjury) reflected their historical incompetence as witnesses.

Strikingly, contemporary disqualification provisions in some jurisdictions are significantly broader than their colonial antecedents.

A survey of the current law in the states and territories

Victoria

The current Victorian provisions for parliamentary disqualification based on criminal history are contained in the *Constitution Act 1975* (Vic). Section 48(2) provides that a person who has been convicted of 'treason or treachery' under Australian law and has not been pardoned (s 48(2)(a)), or is serving a sentence of five years imprisonment or more (s 48(2)(b)), is not entitled to be enrolled as an 'elector'. Additionally, s 44(3) disqualifies an elector who has been convicted or found guilty of an indictable offence punishable on first conviction by imprisonment for life or a term of five years or longer while over the age of 18 under the law of Victoria or any of 'the British Commonwealth of nations'.

The astonishing breadth of the Victorian disqualification provision needs to be emphasised.

First, in contrast to the legislative provisions enacted when *R v Walsh* was decided in 1971, and in contrast to the historical position, the current provision captures both those offenders who are convicted, and also those offenders who escape the recording of a conviction against them as a reflection of the relative lack of seriousness of their offending.

Second, disqualification is triggered irrespective of whether the relevant indictable offence is prosecuted on indictment or presentment (as are the more serious crimes), or summarily in a Magistrates' Court.

Third, the restriction of the category of indictable offences to which the disqualification provision applies relates to the duration of imprisonment that may be imposed, rather than the punishment actually inflicted on the offender; that is, 'punishable', rather than punished.

Fourth, the specification of a relevant sub category of indictable offences, which may trigger disqualification, that is, 'punishable on first conviction by imprisonment for life or a term of five years or more', is hardly a limitation

at all: apart from a minority of mostly minor indictable offences, nearly all indictable offences are punishable by a term of imprisonment of five years or more, even though the overwhelming majority of people found guilty of those offences are sentenced to a much lesser term of imprisonment, or (most commonly) escape imprisonment entirely.

Fifth, the Victorian disqualification encompasses offending within the 'British Commonwealth of nations'.³

Lastly, the disqualification is effectively life long. Although there is provision in the *Constitution Act 1975* (Vic) for the Legislature to relieve a disqualified person 'from the consequences of alleged defaults',⁴ this provision appears only to make provision for relief from disqualification on grounds of conflicts of interest. To qualify for relief under s 61A, the disqualifying act must have 'occurred or arose without the actual knowledge or consent of the [disqualified] person or was accidental or due to inadvertence'.⁵ This requirement makes the provision inapplicable to disqualification related to criminal history, as disqualification related to criminal history is triggered by the commission of an indictable offence, and the commission of an indictable offence normally requires the establishment of a mental element of intent: it cannot be said that an indictable offence was committed 'accidentally' or 'inadvertently' or 'without the actual knowledge or consent of the offender'.⁶

Two examples will suffice to illustrate the breadth of the Victorian disqualification and its potential to result in injustice:

- shoplifting
- political offences against tyrannical governments within the 'British Commonwealth of Nations', compared with offending in non-Commonwealth nations.

Shoplifters who are prosecuted under Victorian law are normally charged with the offence of theft. Theft is an indictable offence under s 74 of the *Crimes Act 1958* (Vic), and is punishable by a term of imprisonment of up to ten years. Shoplifting is normally regarded as a relatively minor offence: it is almost inevitably prosecuted summarily, most first time offenders escape conviction, and all but the worst shoplifters escape imprisonment. Nevertheless, anyone who has been found guilty of a charge of theft as an adult is disqualified for life from being elected to the Victorian Parliament.

As pointed out by Taylor, a person found guilty of plotting to overthrow the notorious dictator Idi

3. A term which is probably synonymous with the British Commonwealth: see Greg Taylor, *The Constitution of Victoria* (2006) 232 fn 159.

4. *Constitution Act 1975* (Vic) s 61A.

5. *Constitution Act 1975* (Vic) s 61A(1)(c).

6. See also Taylor, above n 3, 233–4.

Amin in Uganda in the 1970s by non-violent means would be disqualified from being elected to the Victorian Parliament, on the assumption that such plotting constituted an indictable offence under Ugandan law (Uganda being a member of the British Commonwealth), while a mass murderer convicted under the laws of the United States of America would not be so disqualified.⁷ Nelson Mandela by contrast, (assuming he were resident in Victoria and enrolled on the Victorian electoral roll) narrowly escapes disqualification, not because of his criminal offending (Mandela was sentenced in South Africa with respect a number of capital offences in 1964 and has never been pardoned), but because at the time of conviction, South Africa was not a member of the British Commonwealth.⁸

There is a further complication unique to Victoria. Sections 44(3), 48(2) and 61A of the *Constitution Act 1975* (Vic) have all been entrenched; they purportedly cannot be amended except by way of a three fifths 'special majority' of each of the two Houses of the Victorian Parliament.⁹

Western Australia

The equivalent Western Australian disqualification provisions are contained in s 76B(1) of the *Electoral Act 1907* (WA) and ss 32(1)(b) of the *Constitution Acts Amendment Act 1899* (WA). They provide that a person is disqualified from election to the WA Parliament if they have been: convicted *on indictment* of an offence for which the 'indictable penalty' includes imprisonment for more than five years.

The *Constitution Acts Amendment Act 1899* (WA) s 32(2) defines 'offence' as any offence against any state, Commonwealth or territory law, and 'indictable penalty' as 'the penalty ... specified for the offence in the event of a person being convicted of it on indictment'. These provisions were inserted in 2004 and have not been subject to judicial interpretation. However, the plain and ordinary meaning of the phrase 'indictable penalty' makes it equivalent to 'punishable', the phrase used in Victoria. Irrespective of the actual punishment meted out to the offender, if the maximum penalty available to the sentencing court included more than five years jail, an indictable offence within Australia is a disqualifying offence for the WA Parliament, provided that the offender was convicted, and the prosecution was brought on indictment.

When compared to the Victorian disqualification provisions, the WA provisions are narrower. Moreover, Western Australia, unlike Victoria,⁹ has spent conviction legislation (*Spent Convictions Act 1988* (WA)) which allows for certain types of criminal convictions to become 'spent' on the application of the offender after a period of ten years. Nevertheless, we maintain that the WA provisions are still far too broad.

First, as is the case in Victoria, the majority of indictable offences under Australian law are punishable by more than five years imprisonment. In Western Australia, for example, 'stealing' is subject to up to seven years jail (*Criminal Code* (WA) s 378) and supplying or selling a 'prohibited drug' (apart from cannabis, but including

a number of common 'party' or 'recreational' drugs) carries a maximum penalty of 25 years (*Misuse of Drugs Act 1981* (WA) s 6(1)).

Second, while the recording of a conviction by the sentencing court may be one reliable indicator of the relative seriousness of a crime (and normally takes into account the individual circumstances of the offender), whether an offence is indictable, and prosecuted on indictment, is less so.¹⁰

South Australia, Queensland, New South Wales and Tasmania

The other Australian states either have no provision for parliamentary disqualification based on criminal history, or provisions which are much more narrowly targeted than in Victoria or Western Australia.

In Queensland, the *Parliament of Queensland Act 2001* (Qld) s 64(2) contains a calibrated series of disqualification provisions:

- disqualification while a person is actually serving a sentence (s 64(2)(a))
- two years disqualification where a person has been convicted of a state or Commonwealth offence and sentenced to more than one year's imprisonment (s 64(2)(b))
- seven years disqualification in the case of bribery involving a member of the Queensland Parliament (s 64(2)(c))
- ten years disqualification on conviction of certain offences under the *Electoral Act 1992* (Qld) (s 64(2)(d))
- disqualification for life on conviction for 'treason, sedition or sabotage' under Australian law (s 64(2)(e)).¹¹

Queensland also has spent conviction legislation, but the provisions do not apply where an offender has been sentenced to more than 30 months imprisonment, nor do they apply to the disqualifying offences under the *Electoral Act 1992* (Qld).

In South Australia there is no parliamentary disqualification based on criminal history, save for a disqualification period of two years where a person has been convicted of offences of bribery or undue influence under the *Electoral Act 1985* (SA).¹²

In Tasmania, like South Australia, there is also no general disqualification based on a candidate's criminal history, although those found guilty of criminal offences under the *Electoral Act 2004* (Tas) (which includes offences such as bribery and electoral intimidation) are incapable of being elected to the Tasmanian Parliament for a period of four years.¹³ Also, a prisoner currently serving a sentence of imprisonment of three years or more is disqualified from being elected.¹⁴

In New South Wales there is no disqualification based on criminal history,¹⁵ although a prisoner currently serving a sentence of imprisonment of 12 months or more is not entitled to be enrolled to vote, and hence is disqualified from being elected to the NSW Parliament.¹⁶ Interestingly, New South Wales is the

7. Ibid 233.

8. *Constitution Act 1975* (Vic) ss 18(2)(d) [re s 44(3)], 18(2)(e) [re s 48(2)], 18(2)(f) [re s 61A], s 18(1A) [re defining a 'special majority' as a 3/5ths majority of both Houses].

9. At the time of writing Victoria has released a consultation paper inviting comment on a draft model *Spent Convictions Bill*: Department of Justice, Victoria, *Draft Model Spent Convictions Bill — Consultation Paper* (November 2008) <[http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Media+Room/News+Archive/JUSTICE+-+Public+Discussion+on+Spent+Convictions+\(NEWS\)](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Media+Room/News+Archive/JUSTICE+-+Public+Discussion+on+Spent+Convictions+(NEWS))> at 13 February 2009.

10. The High Court has rejected a necessary connexion between the seriousness of an offence, and whether it is triable summarily, or on indictment in interpreting s 80 of the *Australian Constitution*: see, eg, *Cheng v The Queen* (2000) 203 CLR 248, 295 (McHugh J).

11. Treason, sedition and sabotage are offences under Commonwealth law. While the Commonwealth has spent conviction legislation which could technically apply to these offences, we believe it is highly unlikely that such an offence would be punished by 30 months imprisonment or less so as to attract the operation of the Commonwealth's spent conviction legislation: see *Crimes Act 1914* (Cth) s 85ZM(2), 85ZV.

12. *Electoral Act 1985* (SA) s 133.

13. *Electoral Act 2004* (Tas) s 239(1)(a).

14. *Constitution Act 1934* (Tas) s 14(1) when read in conjunction with the *Electoral Act 2004* (Tas) s 31(2).

15. Anne Twomey, *The Constitution of New South Wales* (2004) 427.

16. *Parliamentary Electorates and Elections Act 1912* (NSW) ss 21(b), 79 and 81B.

... why is it, for example, that a shoplifter is ineligible to run for the Victorian Parliament, whereas a murderer is not disqualified from being a candidate for the NSW Legislature?

only jurisdiction to require, in limited circumstances, compulsory disclosure of a candidate's criminal history. The *Parliamentary Electorates and Elections Act 1912* (NSW), Part 5 Division 5A requires a candidate to file a 'child-related conduct declaration' with their nomination papers, stating whether or not they have been convicted of, or charged with, a 'child sexual offence'. The NSW Electoral Commissioner must then make that declaration public.¹⁷

The territories

In the Northern Territory a person convicted under Australian law and serving a sentence of imprisonment for one year or longer is not qualified to be elected to the Northern Territory Assembly.¹⁸ Moreover, a person who is not qualified to vote under the *Commonwealth Electoral Act 1918* (Cth) cannot be nominated as a candidate for election:¹⁹ this additionally serves to exclude those convicted of treason or treachery.²⁰

In the Australian Capital Territory a person cannot be nominated for the ACT Assembly if they are currently serving a sentence of one year or more with respect to an indictable offence. There is also a 'disqualification period' of two years if a person has been convicted of certain ACT electoral offences, or the Commonwealth offence of interfering with political liberty.²¹

Human rights and representative democracy

The right to vote and the right to stand as a member of parliament have been described as '[t]wo of the fundamental rights in a representative democracy'.²² The two rights are necessarily connected: if they are not, democracy ceases to be truly representative. Accordingly, in the UN *International Covenant on Civil and Political Rights* (ICCPR) the two rights are linked compendiously. Article 25 provides that 'every citizen shall have the right and opportunity ... without unreasonable restrictions ... to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage' (emphasis added). Australia is a signatory to the ICCPR, and by virtue of the federalism clause in Article 50, its guarantees extend to each of the Australian states and territories.

It is worth noting that the rights under Article 25 are not absolute. Restrictions on these rights, however, must be based on 'objective and reasonable criteria'.²³ In the context of the right to vote, it has been suggested that a period of suspension based on criminal conviction should be proportionate to the offence and the sentence.²⁴ We suggest these observations

are equally applicable to the intertwined right to be elected. By way of example, it has been held that a 15-year suspension of all political rights (including the right to vote) based on membership of a political party declared illegal was an unreasonable restriction on the rights protected by Article 25.²⁵

Given that the right to be elected has been identified as a fundamental human right, the wide disparity in the relevant rules between the various Australian jurisdictions is unacceptable. The extent of this disparity suggests that the various provisions cannot be justified solely by reference to legitimate parochial concerns: why is it, for example, that a shoplifter is ineligible to run for the Victorian Parliament, whereas a murderer is not disqualified from being a candidate for the NSW Legislature?

In addition to this disparity, disqualification provisions in Victoria and Western Australia appear to be inconsistent with the ICCPR for another reason — a lack of any proportionality between the sentence and the period of disqualification. In both states, the period of disqualification is effectively life long, and disqualification is based on the maximum sentence for the particular offence concerned, not the sentence that was actually passed on the offender.

We maintain that any evaluation of the various parliamentary disqualification provisions based on prior criminality which apply in the several Australian jurisdictions must recognise that eligibility to stand for election to parliament is a fundamental democratic and human right which should only be curtailed in exceptional circumstances.

Criminality and the legitimate curtailment of the right to be elected

Roach v Electoral Commissioner

In 2007 the High Court handed down its decision in *Roach v Electoral Commissioner*.²⁶ Although *Roach* concerned the interpretation of the *Australian Constitution*, and the extent to which the 'implied right' to vote in federal elections can be curtailed by the Commonwealth Legislature, the decision is of considerable relevance to the issues addressed in this article. As discussed above, the right to vote and the right to be elected are necessarily linked. In *Roach*, the High Court articulated the basis on which democratic participation generally may be legitimately curtailed by reference to prior criminality.

17. New South Wales' spent conviction legislation does not extend to sexual offences: see *Criminal Records Act 1991* (NSW) s 7(1)(b). However, it should be noted that there are discrepancies between the definitions of 'sexual offences' and 'child sexual offence' in each Act: *Criminal Records Act 1991* (NSW) s 7(4), cf *Parliamentary Electorates and Elections Act 1912* (NSW) s 81K(1).

18. *Northern Territory (Self Government) Act 1978* (Cth) s 21(1)(c).

19. See *Electoral Act* (NT) ss 21(1)(a), 36(1)(b) and *Northern Territory (Self Government) Act 1978* (Cth) s 14.

20. *Commonwealth Electoral Act 1918* (Cth) s 93(8)(c). Re the Commonwealth offences of treason and treachery, see above n 11.

21. *Electoral Act 1992* (ACT) s 104(4), (5).

22. Twomey, above n 15, 397.

23. Office of the High Commissioner for Human Rights, General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art 25), CCPR/C/21/Rev.1/Add.7 (1996) [4].

24. *Ibid* [14].

25. *Silva v Uruguay* (1981) CCPR/C/12/D/34/1978 [9].

26. (2007) 239 ALR 1.

A 4:2 majority of the High Court invalidated amendments to the *Commonwealth Electoral Act 1918* (Cth) which purported to prevent all prisoners currently serving a sentence from voting in federal elections. According to the majority,²⁷ the amendments overrode a 'constitutional imperative'²⁸ in an 'arbitrary'²⁹ and 'disproportionate'³⁰ fashion. In the course of delivering his majority judgment, Chief Justice Gleeson made the following observations:

Since what is involved is not an additional form of punishment, and since deprivation of the franchise takes away a right associated with citizenship, that is with full membership of the community, the rationale for the exclusion must be that serious offending represents such a form of civic irresponsibility that it is appropriate for parliament to mark such behaviour as anti social and to direct that physical separation from the community will be accompanied by symbolic separation in the form of loss of a fundamental right ... Serious offending may warrant temporary suspension of one of the rights of membership, that is, the right to vote ... [I]t is legitimate for society to curtail the right to vote temporarily of people who have demonstrated a great disrespect for the community by committing serious crimes, on the basis that civic responsibility and the rule of law are prerequisites to democratic participation.³¹

Although Gleeson CJ's comments were directed specifically at the removal of the right to vote as a consequence of criminal offending, and the extent of permissible limitations on the 'implied right to vote' under s 24 of the *Australian Constitution*, we maintain that Gleeson CJ's comments can equally be applied to that other fundamental aspect of 'democratic participation', namely the right to be elected.

Post Roach — Some proposed criteria governing the curtailment of the right to be elected

We propose that parliamentary disqualification provisions based on prior criminality should be framed with reference to the following three related criteria.

Parliamentary disqualification should be temporary

One of the fundamental values underpinning our criminal justice system is the prospect of rehabilitation. Permanent parliamentary disqualification based on previous offending, such as generally applies in Victoria, is corrosive of that value.

Parliamentary disqualification should only be triggered by serious criminality

The removal of the right to be elected is a serious step. It should only be contemplated in response to serious criminality. Serious criminality should be assessed by reference to the punishment inflicted on the offender for committing the offence, not the maximum available penalty for the offence. The disqualification provisions in Victoria and Western Australia fail to satisfy this criterion.

Parliamentary disqualification should be a proportionate response to serious criminality

The notion of proportionality in this context means that the end sought to be advanced by the disqualifying provision must be legitimate, and the legislative means

chosen to achieve that end must be 'reasonably appropriate and adapted' to achieve it.³²

Two legitimate ends of parliamentary disqualification provisions based on prior criminality can be identified based on the above survey of existing Australian laws: symbolic, temporary separation from full participation in the community of those who have demonstrated great disrespect for that community through their offending (to adopt the words of Gleeson CJ in *Roach*); and the protection of the institutional integrity of parliament (ie minimising the risk of recidivism posed by those convicted of certain specific offences which pose a threat to the integrity of Parliament, such as bribery).

By contrast, we maintain that it is illegitimate to disqualify a person from eligibility to be elected as an additional form of punishment beyond the expiration of any sentence, either on the basis that punishment of the offender is not of itself a legitimate end of parliamentary disqualification,³³ or that the continuance of disqualification beyond the serving of a sentence is disproportionate. We also maintain that it is illegitimate to disqualify a person from eligibility to be elected on grounds of their general character: in a robust democracy, questions of a candidate's general character are properly left to the electors to determine, and could possibly be dealt with through an electoral disclosure requirement, in similar, but broader terms, to the limited disclosure provisions which apply in New South Wales.

Conclusion

The American constitutional law scholar, Professor LH Tribe, has stated 'in deciding who may and may not vote in its elections, a community takes a crucial step in defining its identity'.³⁴ The same might be said in relation to the right to stand for election: the basis and extent to which that right is curtailed says something about the nature of the society in which we live. Our system of representative democracy is degraded when the right to be elected is arbitrarily, capriciously or unreasonably removed or curtailed.

The current parliamentary disqualification provisions in Victoria and Western Australia based on prior criminality are draconian and fail basic human rights standards. That Victoria and Western Australia, of all the Australian jurisdictions, have the harshest parliamentary disqualification provisions, is ironic, given that Victoria is the only state to date to enact a human rights Charter³⁵ and Western Australia has indicated an interest in following suit.³⁶ That fact alone should provide an impetus for legislative reform in those two states, along the lines suggested in this article.

OSCAR ROOS and BENJAMIN HAYWARD teach law at Deakin University.

© 2009 Oscar Roos and Benjamin Hayward

email: oscar.roos@deakin.edu.au

email: benjamin.hayward@deakin.edu.au

27. *Roach v Electoral Commissioner* (2007) 239 ALR 1 (Gleeson CJ, Gummow, Kirby and Crennan JJ, Hayne and Heydon JJ dissenting).

28. *Ibid* 11 [24] (Gleeson CJ).

29. *Ibid* 11 [23] (Gleeson CJ).

30. *Ibid* 25 [85] (Gummow, Kirby and Crennan JJ).

31. *Ibid* 6–7 [15] (Gleeson CJ) (emphasis added).

32. *Ibid* 25 [85] (Gummow, Kirby and Crennan JJ).

33. For a brief reference to this point, see *ibid* 6 [10] (Gleeson CJ).

34. LH Tribe, *American Constitutional Law* (2nd ed, 1988) 1084 as extracted in *Roach v Electoral Commissioner* (2007) 239 ALR 1, 7 [14] (Gleeson CJ).

35. The Victorian *Charter* contains a provision in similar terms to the *International Covenant on Civil and Political Rights*, Art 25(b): see *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 18(2)(a).

36. See Consultation Committee for a Proposed WA Human Rights Act — Final Report, November 2007 (aka 'the Chaney Report') <<http://www.justice.wa.gov.au>> at 12 November 2008.