Roach v Electoral Commissioner
[2006] HCA 43

Commonwealth legislation since 1902 has provided that certain prisoners are not entitled to vote in elections for the Federal Parliament. From 2004 to 2006, those serving a sentence of three years were rendered ineligible.

The *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth) amended the *Commonwealth Electoral Act* 1918 (Cth) so that *all prisoners* serving a sentence of full-time detention were not entitled to vote. As amended, section 93(8AA) of the *Commonwealth Electoral Act* provided: "A person who is serving a sentence of imprisonment for an offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any Senate election or House of Representatives election." The term "sentence of imprisonment" was defined in s 4(1A) to mean: "(a) the person is in detention on a full-time basis for an offence against a law of the Commonwealth or a State or Territory; and (b) that detention is attributable to the sentence of imprisonment concerned."

On 30 June 2006 there were 20,209 prisoners in Australian prisons who were serving a sentence. Of the prison population, 24 per cent was Indigenous, ranging from 82 per cent in the Northern Territory to six per cent in Victoria. Around 35 per cent of prisoners were serving two years or less.

Vickie Roach is an Indigenous Australian citizen. In 2004 she was convicted of five offences and sentenced to six years imprisonment. She challenged the validity of the ban on prisoner voting in the *Commonwealth Electoral Act*. The High Court found, with Hayne and Heydon JJ dissenting, that the 2006 amendments to the Act were invalid as they were inconsistent with the system of representative democracy established by the Constitution. However, the prior exclusion of persons serving a sentence of three years or more was upheld.

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GLEESON CJ: Important features of our system of representative democracy, such as compulsory voting, election of members of the House of Representatives by preferential voting, and proportional representation in the Senate, are the consequence of legislation, not constitutional provision. One striking example concerns a matter which the framers deliberately left to be dealt with by Parliament: female suffrage. The Constitution, in s 128, refers to States "in which adult suffrage prevails." In 1901, adult suffrage meant the franchise for women as well as men. Quick and Garran, referring to the Convention Debates, noted "the difficulty as to women's suffrage" which was taken into account in the wording of s 128. Another example is voting by Aboriginal people, which remained an issue not fully resolved until the second half of the twentieth century.

The combined effect of ss 51(xxxvi), 8 and 30 is that Parliament may make laws providing for the qualification of electors. That Australia came to have universal adult suffrage was the result of legislative action. Universal suffrage does not exclude the possibility of some exceptions. The Oxford English Dictionary says that the term means "the right of all adults (with minor exceptions) to vote in political elections." Among countries which now have universal suffrage there are observable differences in the exceptions that are accepted, but there is also a broad agreement as to the kinds of exception that would not be tolerated. Could Parliament now legislate to remove universal adult suffrage? If the answer to that question is in the negative (as I believe it to be) then the reason must be in the terms of ss 7 and 24 of the Constitution, which require that the senators and members of the House of Representatives be "directly chosen by the people" of the State or the Commonwealth respectively. In 1901, those words did not mandate universal adult suffrage. In 1901, the words "foreign power" in s 44(i) did not include the United Kingdom, yet in *Sue v Hill* [(1999) 199 CLR 462] this Court held that, by reason of changes in Australia's relations with the United Kingdom and in national and international circumstances over the intervening period, they had come to include the United Kingdom. The meaning of the words "foreign power" did not change, but the facts relevant to

the identification of the United Kingdom as being included in or excluded from that meaning had changed.

In *McKinlay* [(1975) 135 CLR 1 at 36], McTiernan and Jacobs JJ said that "the long established universal adult suffrage may now be recognized as a fact". I take "fact" to refer to an historical development of constitutional significance of the same kind as the developments considered in *Sue v Hill*. Just as the concept of a foreign power is one that is to be applied to different circumstances at different times, McTiernan and Jacobs JJ said that the words "chosen by the people of the Commonwealth" were to be applied to different circumstances at different times. Questions of degree may be involved. They concluded that universal adult suffrage was a long established fact, and that anything less could not now be described as a choice by the people. I respectfully agree. As Gummow J said in *McGinty v Western Australia* [(1996) 186 CLR 140 at 286-7], we have reached a stage in the evolution of representative government which produces that consequence. I see no reason to deny that, in this respect, and to this extent, the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote. That, however, leaves open for debate the nature and extent of the exceptions. The Constitution leaves it to Parliament to define those exceptions, but its power to do so is not unconstrained. Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people. To say that, of course, raises questions as to what constitutes a substantial reason, and what, if any, limits there are to Parliament's capacity to decide that matter.

It is difficult to accept that Parliament could now disenfranchise people on the ground of adherence to a particular religion. It could not, as it were, reverse Catholic emancipation. Ordinarily there would be no rational connection between religious faith and exclusion from that aspect of community membership involved in participation, by voting, in the electoral process. It is easy to multiply examples of possible forms of disenfranchisement that would be identified readily as inconsistent with choice by the people, but other possible examples might be more doubtful. An arbitrary exception would be inconsistent with choice by the people. There would need to be some rationale for the exception; the definition of the excluded class or group would need to have a rational connection with the identification of community membership or with the capacity to exercise free choice. Citizenship, itself, could be a basis for discriminating between those who will and those who will not be permitted to vote. Citizens, being people who have been recognised as formal members of the community, would, if deprived temporarily of the right to vote, be excluded from the right to participate in the political life of the community in a most basic way. The rational connection between such exclusion and the identification of community membership for the purpose of the franchise might be found in conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right.

This brings me to the issue in the present case ... Since 1902, when the Commonwealth Parliament first legislated with respect to the franchise, the legislation always provided that, along with persons of unsound mind and persons attainted of treason, prisoners *of certain kinds* were not entitled to vote. The rationale for excluding persons of unsound mind is obvious, although the application of the criterion of exclusion may be imprecise, and could be contentious in some cases. The rationale is related to the capacity to exercise choice. People who engage in acts of treason may be regarded as having no just claim to participate in the community's self-governance. It will be necessary to return to the rationale for excluding prisoners. First, however, the changes in the exclusion over the years should be noted. Not all people in prison are serving sentences of imprisonment. Some are awaiting trial. They are not covered by any of the exclusions. There was some discussion in argument concerning fine defaulters. It was suggested that, perhaps depending on the precise terms of the orders made against them, they also would not be excluded. It is unnecessary to pursue that question. From 1902 until 1983, the exclusion was of convicted persons under sentence or subject to be sentenced for an offence punishable by imprisonment for one year or longer. From 1983 until 1995, the reference to one year was replaced by five years. From 1995 to 2004, the reference to imprisonment for an offence punishable by imprisonment for five years or longer was altered to serving a sentence of five years or longer. From 2004 to 2006, the period of five years was altered to three years. In 2006, Parliament enacted s 93(8AA) of the *Commonwealth Electoral Act* 1918 (Cth) which provides that a person who

is serving a sentence of imprisonment for an offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any Senate election or House of Representatives election. The plaintiff's challenge to the validity of s 93(8AA) gives rise to the primary issue in the present case. If it succeeds, there is a question whether the previous (three-year) regime still validly applies.

What is the rationale for the exclusion of prisoners? Two possibilities may be dismissed. First, the mere fact of imprisonment is not of itself the basis of exclusion. According to the Australian Bureau of Statistics, at 30 June 2006 there were 25,790 prisoners (sentenced and unsentenced) in Australian prisons. Unsentenced prisoners (typically persons on remand awaiting trial) comprised 22 per cent (5,581) of the total prisoner population. They have the right to vote. We were informed that they do so either by postal voting or by the visit to prisons of mobile voting booths. Accordingly, there is nothing inherently inconsistent between being in custody and voting; even under the current exclusion, more than one-fifth of prisoners vote. Secondly, exclusion by federal law from voting cannot be justified as an additional punishment. The great majority of prisoners in Australia are people who have been sentenced by State courts for offences against State law. The States bear the principal responsibility for the administration of criminal justice. There would be serious constitutional difficulties involved in seeking to justify a federal law such as s 93(8AA) as an additional punishment upon State offenders; especially upon State offenders who had previously been convicted and sentenced under State law. I do not intend to suggest that there would be no difficulties about treating it as additional punishment for offences against federal or territorial law, but the position of State offenders is sufficient to demonstrate the problem with treating it as punishment at all.

The rationale for the exclusion from the franchise of some prisoners, that is, those who have been convicted and are serving sentences, either of a certain duration or of no particular minimum duration, must lie in the significance of the combined facts of offending and imprisonment, as related to the right to participate in political membership of the community. The combination is important. Just as not all prisoners are excluded, even under s 93(8AA), from voting, not all persons convicted of criminal offences are excluded. Non-custodial sentences do not attract the exclusion. A pecuniary penalty, no matter how heavy, does not lead to loss of the vote. Since it is only offences that attract a custodial sentence that are involved, this must be because of a view that the seriousness of an offence is relevant, and a custodial sentence is at least a method, albeit imperfect, of discriminating between offences for the purpose of marking off those whose offending is so serious as to warrant this form of exclusion from the political rights of citizenship.

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 political right. The concept of citizenship has itself evolved in Australian law. The preamble to the *Australian Citizenship Act* 2007 (Cth) declares that Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations. The reference to the reciprocity of rights and obligations is important in the context of membership of the community. Serious offending may warrant temporary suspension of one of the rights of membership, that is, the right to vote. Emphasis upon civic responsibilities as the corollary of political rights and freedoms, and upon society's legitimate interest in promoting recognition of responsibilities as well as acknowledgment of rights, has been influential in contemporary legal explanation of exclusions from the franchise as consistent with the idea of universal adult suffrage.

In *Sauvé v Canada (Chief Electoral Officer)* [[2002] 3 SCR 519 at 585], Gonthier J cited a passage in a work of the American constitutional law scholar, Professor Tribe, who wrote:

> "Every state, as well as the federal government, imposes some restrictions on the franchise. Although free and open participation in the electoral process lies at the core of democratic institutions, the need to confer the franchise on all who aspire to it is tempered by the recognition that completely unlimited voting could subvert the ideal of popular rule which democracy so ardently embraces. Moreover, in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity."

Gonthier J made the point that it is legitimate for society to curtail the vote temporarily of people who have demonstrated a great disrespect for the community by committing serious crimes, on the

basis that civic responsibility and respect for the rule of law are prerequisites to democratic participation. This, he said, reinforces the significance of the relationship between individuals and their community when it comes to voting.

The litigation in *Sauvé* concerned an issue similar to the present, but the issue arose under a different legal regime. *The Canadian Charter of Rights and Freedoms*, in s 3, guarantees every citizen the right to vote. Section 1, however, permits "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This qualification requires both a rational connection between a constitutionally valid objective and the limitation in question, and also minimum impairment to the guaranteed right. It is this minimum impairment aspect of proportionality that necessitates close attention to the constitutional context in which that term is used. No doubt it is for that reason that the parties in the present case accepted that *Sauvé* (like the case of *Hirst* discussed below) turned upon the application of a legal standard that was different from the standard relevant to Australia. The Supreme Court of Canada had previously held that a blanket ban on voting by prisoners, regardless of the length of their sentences, violated the Charter. The legislature changed the law to deny the right to vote to all inmates serving sentences of two years or more. Dividing five-four, the Supreme Court of Canada again held that the legislation violated the Charter. The central issue was whether the s 1 justification (involving the minimum impairment standard) had been made out.

The United Kingdom has for many years had legislation which disenfranchises all convicted prisoners. The European Court of Human Rights, in *Hirst v United Kingdom (No 2)* [(2006) 42 EHRR 41], by majority, held that the automatic blanket ban imposed on all convicted prisoners violated Art 3 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The majority accepted that the United Kingdom law pursued the legitimate aim of enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. However, they concluded that the measure was arbitrary in applying to all prisoners, and lacked proportionality (which in this context also required not only a rational connection between means and ends but also the use of means that were no more than necessary to accomplish the objective), even allowing for the margin of appreciation to be extended to the legislature. We were informed by counsel that the United Kingdom's response to the decision has not yet been decided.

There is a danger that uncritical translation of the concept of proportionality from the legal context of cases such as *Sauvé* or *Hirst* to the Australian context could lead to the application in this country of a constitutionally inappropriate standard of judicial review of legislative action. Human rights instruments which declare in general terms a right, such as a right to vote, and then permit legislation in derogation of that right, but only in the case of a legitimate objective pursued by means that are no more than necessary to accomplish that objective, and give a court the power to decide whether a certain derogation is permissible, confer a wider power of judicial review than that ordinarily applied under our Constitution. They create a relationship between legislative and judicial power significantly different from that reflected in the Australian Constitution, and explained at the commencement of these reasons. The difference between the majority and minority opinions in both *Sauvé* and *Hirst* turned largely upon the margin of appreciation which the courts thought proper to allow the legislature in deciding the question of proportionality. Neither side in the present litigation suggested that this jurisprudence could be applied directly to the Australian Constitution. Even so, aspects of the reasoning are instructive.

To return to *Sauvé*, Gonthier J, with whom L'Heureux-Dubé, Major and Bastarache JJ agreed, and who favoured upholding the legislation disenfranchising prisoners serving sentences of two years or more, related the disqualification to the idea of citizenship. He said [3 SCR at 585]:

> "The disenfranchisement of *serious criminal offenders* serves to deliver a message to both the community and the offenders themselves that *serious criminal activity* will not be tolerated by the community. In making such a choice, Parliament is projecting a view of Canadian society which Canadian society has of itself. The commission of *serious crimes* gives rise to a temporary suspension of this nexus: on the physical level, this is reflected in incarceration and the deprivation of a range of liberties normally exercised by citizens and, at the symbolic level, this is reflected in temporary disenfranchisement. The symbolic dimension is thus a further manifestation of community disapproval of the *serious criminal conduct.*" (Emphasis added)

Those observations apply also to Australia. It is consistent with our constitutional concept of choice by the people for Parliament to treat those who have been imprisoned for serious criminal offences as

having suffered a temporary suspension of their connection with the community, reflected at the physical level in incarceration, and reflected also in temporary deprivation of the right to participate by voting in the political life of the community. It is also for Parliament, consistently with the rationale for exclusion, to decide the basis upon which to identify incarcerated offenders whose serious criminal wrongdoing warrants temporary suspension of a right of citizenship. I have no doubt that the disenfranchisement of prisoners serving three-year sentences was valid, and I do not suggest that disenfranchisement of prisoners serving sentences of some specified lesser term would necessarily be invalid. The specification of a term reflects a judgment by Parliament which marks off serious criminal offending, and reflects the melancholy fact that not all sentences of imprisonment necessarily result from conduct that falls into that category.

That fact is also reflected in one provision of the Constitution itself. Section 44 deals with the disqualification of senators and members of the House of Representatives. The section disqualifies a person who "has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer". I do not suggest that, by implication, this imposes a lower limit on Parliament's capacity to disqualify voters. There is, of course, an incongruity in the fact that the current legislation, in the relevant respect, imposes stricter standards upon eligibility to be a voter than the Constitution imposes upon eligibility to be a senator or a member of the House of Representatives. The point, however, is that s 44 recognises that the mere fact of imprisonment, regardless of the nature of the offence or the length of the term, does not necessarily indicate serious criminal conduct. That was so in 1901, and it remains so today.

One of the major problems currently affecting the administration of criminal justice, in Australia and elsewhere, is that of the short-term prison sentence, an expression which is normally used to refer to sentences of six months or less. In a 2001 report, the New South Wales Legislative Council's Select Committee on the Increase in Prisoner Population recommended that the government consider and initiate public consultation in relation to the abolition of sentences of six months or less. The Bureau of Crime Statistics and Research was asked to estimate the impact on the prison system of such abolition. In 2000-2001, offenders sentenced to less than six months accounted for 65 per cent of all persons sentenced to prison by New South Wales adult criminal courts for that year. They are a much lower percentage of the total prison population but, for obvious reasons, the turnover is greater. According to the Bureau, it was estimated that, if all those who currently received sentences of six months or less were instead given non-custodial penalties, the number of new prisoners received in New South Wales prisons would drop from about 150 per week to about 90 per week. In 2004, the New South Wales Sentencing Council reported on the same topic. Short-term sentences were not abolished. In 2007, the Judicial Commission of New South Wales recorded that "sentences of six months or less, usually imposed by lower courts, have a significant impact on the prison population." Section 5(2) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) reflects a legislative concern to attempt to limit the number of short sentences. Western Australian legislation has gone further. In England, short-term sentences were significantly affected by ss 181-195 of the *Criminal Justice Act* 2003 (UK).

As a matter of sentencing practicality, in the case of short-term sentences the availability of realistic alternatives to custody is of particular importance. If an offence is serious enough to warrant a sentence of imprisonment for a year or more, the likelihood is that the sentencing judicial officer will have formed the view that there was no serious alternative to a custodial sentence. In most Australian jurisdictions, there is a legislative requirement to treat imprisonment as a last resort when imposing a penalty. More than 95 per cent of short-term sentences are imposed by magistrates. The availability, in all the circumstances of a particular case, of other sentencing options such as fines, community service, home detention, or periodic detention may be critical. Relevant circumstances may include the personal situation of the offender, or the locality. In the case of offenders who are indigent, or homeless, or mentally unstable, the range of practical options may be limited. In rural and regional areas, the facilities and resources available to support other options also may be limited. In its June 2004 Report, made pursuant to ss 100J(1)(a) and (d) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW), the New South Wales Sentencing Council recorded that the Chief Magistrate "acknowledged the unavailability of uniform sentencing options throughout NSW" and "clearly demonstrated that alternatives to sentences of full-time imprisonment are not equally distributed across the State." Practical considerations of this kind give particular meaning to "disadvantaged". I do not suggest these

problems are peculiar to New South Wales. I refer to it because it is the largest jurisdiction. A study published in 2002 examined the types of offence for which people were serving short terms of imprisonment in New South Wales. Theft (excluding robbery) was the most common offence. Then followed breaches of court orders, assault, and driving or traffic offences.

The adoption of the criterion of serving a sentence of imprisonment as the method of identifying serious criminal conduct for the purpose of satisfying the rationale for treating serious offenders as having severed their link with the community, a severance reflected in temporary disenfranchisement, breaks down at the level of short-term prisoners. They include a not insubstantial number of people who, by reason of their personal characteristics (such as poverty, homelessness, or mental problems), or geographical circumstances, do not qualify for, or, do not qualify for a full range of, non-custodial sentencing options. At this level, the method of discriminating between offences, for the purpose of deciding which are so serious as to warrant disenfranchisement and which are not, becomes arbitrary.

The step that was taken by Parliament in 2006 of abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people.

I would uphold the challenge to the validity of s 93(8AA). I have already indicated that in my view the previous legislation was valid.

Gummow, Kirby and Crennan JJ: Section 1 of the Constitution vests the legislative power of the Commonwealth in the Federal Parliament, which consists of the Queen, the Senate and the House of Representatives. Of s 1, together with ss 7, 8, 13, 24, 25, 28 and 30, the Court said in its joint judgment in *Lange* [v *Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557], and with reference to the description by Isaacs J in *Federal Commissioner of Taxation v Munro* [(1926) 38 CLR 153 at 178] of the Constitution as concerned to advance representative government, that these provisions give effect to this purpose by "providing for the fundamental features of representative government".

The plaintiff's case proceeds on the footing that questions respecting the extent of the franchise and the manner of its exercise affect the fundamentals of a system of representative government. However, it has been remarked in this Court that in providing for those fundamentals the Constitution makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution. Ultimately, the issues in the present case concern the relationship between the constitutionally mandated fundamentals and the scope for legislative evolution.

On their face, the laws impugned by the plaintiff are supported by s 51(xxxvi) and by ss 8 and 30 of the Constitution; that is to say, as matters in respect of which the "Constitution makes provision until the Parliament otherwise provides". But the power granted the Parliament by s 51(xxxvi) itself is conferred, in accordance with the opening words of s 51, "subject to this Constitution".

Section 8 of the Constitution reads:

> "The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once."

Section 30 states:

> "Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once."

These provisions contain specific limitations upon the power of the Parliament to prescribe the franchise. There can be no plural voting (for example, by reference to the location of several parcels of real property owned by the elector) and the qualifications of electors cannot differ between the two legislative chambers.

Further, it appeared to be common ground (and correctly so) that these provisions were to be read not in isolation but with an appreciation both of the structure and the text of the Constitution. Reference may first be made to s 128. This requires submission of proposed laws for the alteration of the Constitution to be submitted to the electors qualified to vote for the election of members of the House of Representatives. Section 7 requires the Senate to be composed of Senators "directly chosen by the people of the State" and is to be read with the territories power in s 122. Section 24, which also

is to be read with s 122, requires that members of the House of Representatives "be composed of members directly chosen by the people of the Commonwealth".

The Commonwealth correctly accepts that ss 7 and 24 place some limits upon the scope of laws prescribing the exercise of the franchise, and that in addition to the specific insistence upon direct choice by those eligible to vote, laws controlling that eligibility must observe a requirement that the electoral system as a whole provide for ultimate control by periodic popular election. However, the Commonwealth emphasised that whether the voting system has been so distorted as not to meet that requirement is a matter of permissible degree. The Commonwealth submitted that that degree was not exceeded by the 2006 Act, but it did not offer any particular criterion for the determination of such questions. However, in oral submissions, the Solicitor-General of the Commonwealth readily accepted that a law excluding members of a major political party or residents of a particular area of a State would be invalid; so also, despite prevalent attitudes in 1900, would be a law which now purported to exclude from the franchise persons of indigenous descent or bankrupts.

For her part, the plaintiff emphasised that a law which stipulates a criterion for disenfranchisement fixing upon service at the election date of any sentence of imprisonment operates in an arbitrary or capricious fashion, with no rational ground for the automatic exclusion from exercise of the popular franchise mandated by the Constitution, and would be invalid. She submitted that the 2006 Act was such a law.

Reference also should be made to s 44 of the Constitution. Among those incapable of being chosen or sitting as a senator or member is, as specified in s 44(ii), any person who:

> "[i]s attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer" ...

The Commonwealth submits that whatever implication or principle may be evident in the grounds in s 44(ii) for disqualification of senators and members, and of candidates for election, s 44(ii) is disconnected from consideration of the validity of the denial by s 93(8AA) of the exercise of the franchise. That submission should be rejected as being too wide.

Not only must the Constitution be read as a whole, but an understanding of its text and structure may be assisted by reference to the systems of representative government with which the framers were most familiar as colonial politicians. These do not necessarily limit or control the evolution of the constitutional requirements to which reference has been made. However, they help to explain the common assumptions about the subject to which the chosen words might refer over time. Why was express provision made in s 44(ii) for disqualification of those who might be elected to membership of the Senate or the House, but, as regards the exercise of the franchise such matters left by ss 8 and 30 to later legislation? Had the two subjects been linked in the Australasian colonial constitutions? What was the rationale in those constitutions for the disqualification by provisions of the kind later found in s 44(ii)?

The answers to these questions throw light upon the issues in the present case, particularly upon the broader submissions respecting impermissible distortions of the system of representative government established under the Constitution ...

In *Mulholland v Australian Electoral Commission* [220 CLR at 237], Gummow and Hayne JJ observed:

> "The recurrent phrase in the Constitution 'until the Parliament otherwise provides' accommodates the notion that representative government is not a static institution and allows for its development by changes such as those with respect to the involvement of political parties, electoral funding and 'voting above the line'. Some of these changes would not have been foreseen at the time of federation or, if foreseen by some, would not have been generally accepted for constitutional entrenchment.
>
> Thus, care is called for in elevating a 'direct choice' principle to a broad restraint upon legislative development of the federal system of representative government."

As the Commonwealth submissions respecting the impermissible exclusion of sections of society such as bankrupts and those of indigenous descent demonstrate, there are constitutional restraints necessarily implicit in the otherwise broad legislative mandate conferred by the words "until the Parliament otherwise provides". The difficulty, as Gaudron J observed in *McGinty* [186 CLR at 220-1], lies in the process by which it may be determined that a law impermissibly limits the electoral process and system.

So in *Mulholland* itself, the Court held that provisions in the Electoral Act respecting the registration of political parties and the requirements of "the 500 rule" did not infringe the Constitutional imperatives respecting representative government. Earlier, in *Langer v The Commonwealth* [(1996) 186 CLR 302] the Court upheld the prescription by the Electoral Act of a method of full preferential voting for elections for the House of Representatives. *McGinty* affirmed that the Constitution contained no implication affecting disparities of voting power upon holders of the franchise for the election of members of a State legislature.

On the other side of the line lies the freedom of communication on matters of government and politics which was identified in *Lange* [(1997) 189 CLR 520 at 559] as "an indispensable incident" of the system of representative government established and maintained by the Constitution. As remarked earlier in these reasons, disqualification from exercise of the franchise is, if anything, a subject even closer to the central conceptions of representative government. Given the particular Australian experience with the expansion of the franchise in the 19th century, well in advance of that in the United Kingdom, this hardly could be otherwise.

Voting in elections for the Parliament lies at the very heart of the system of government for which the Constitution provides. This central concept is reflected in the detailed provisions for the election of the Parliament of the Commonwealth in what is otherwise a comparatively brief constitutional text.

In *McGinty* the Court held that what is involved here is a category of indeterminate reference, where the scope for judgment may include matters of legislative and political choice. But that does not deny the existence of a constitutional bedrock when what is at stake is legislative disqualification of some citizens from exercise of the franchise.

In *McGinty* [186 CLR at 170] Brennan CJ considered the phrase "chosen by the people" as admitting of a requirement "of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them". This proposition reflects the understanding that representative government as that notion is understood in the Australian constitutional context comprehends not only the bringing of concerns and grievances to the attention of legislators but also the presence of a voice in the selection of those legislators. Further, in the federal system established and maintained by the Constitution, the exercise of the franchise is the means by which those living under that system of government participate in the selection of both legislative chambers, as one of the people of the relevant State and as one of the people of the Commonwealth. In this way, the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic.

Such notions are not extinguished by the mere fact of imprisonment. Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration. Indeed, upon one view, the Constitution envisages their ongoing obligations to the body politic to which, in due course, the overwhelming majority of them will be returned following completion of their sentence.

The question with respect to legislative disqualification from what otherwise is adult suffrage (where 18 is now the age of legal majority throughout Australia) thus becomes a not unfamiliar one. Is the disqualification for a "substantial" reason? A reason will answer that description if it be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government. When used here the phrase "reasonably appropriate and adapted" does not mean "essential" or "unavoidable". Rather, as remarked in *Lange*, in this context there is little difference between what is conveyed by that phrase and the notion of "proportionality". What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power.

The affinity to what is called the second question in *Lange* will be apparent. It has been said that the ability to cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire relevant information and thus upon that freedom of communication seen in *Lange* as an indispensable incident of the representative government mandated by the Constitution. The present case concerns not the ability to cast a fully informed vote but upon denial of entitlement to cast any vote at all. This case concerns not the existence of an individual right, but rather the extent of the limitation upon legislative power derived from the text and structure of the Constitution and identified in *Lange*.

Some guidance for resolution of the present case is provided by *Coleman v Power* [(2004) 220 CLR 1]. There Gummow and Hayne JJ and Kirby J were of the view that in the statutory provision under consideration the proscription of "abusive" and "insulting" words was to be construed as applying to words which, in the circumstances where they are used, are so hurtful as either intended to or be reasonably likely to provoke unlawful physical retaliation. Were that not so, and were a broader meaning given to the area of proscribed communication then the end served by the statute would necessarily be the maintenance of civility of discourse; given the established use of insult and invective in political discourse, that end could not satisfy the second question or test in *Lange*. McHugh J construed the statute as imposing an unqualified prohibition upon the use of insulting words in a broad sense which thus went beyond what could be regarded as reasonably appropriate and adapted to maintaining the constitutionally prescribed system of representative government.

Paragraph (a) of s 93(8) of the Electoral Act disentitles those who are incapable of understanding the nature and significance of enrolment and voting because they are of unsound mind. That provision plainly is valid. It limits the exercise of the franchise, but does so for an end apt to protect the integrity of the electoral process. That end, plainly enough, is consistent and compatible with the maintenance of the system of representative government.

The end served by the denial in s 93(8AA) of the exercise of the franchise by electors then serving a sentence of imprisonment for an offence against federal State or Territory law is further to stigmatise this particular class of prisoner by denying them during the period of imprisonment the exercise of the civic right and responsibility entailed in the franchise. The measurement of that end against the maintenance of the system of representative government first requires a closer examination of the particular class of prisoner which has been singled out in this way.

Section 93(8AA) operates without regard to the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender. As indicated earlier in these reasons, there is long established law and custom, stemming from the terms of the institution in the Australasian colonies of representative government, whereby disqualification of electors (and candidates) was based upon a view that conviction for certain descriptions of offence evinced an incompatible culpability which rendered those electors unfit (at least until the sentence had been served or a pardon granted) to participate in the electoral process. That tradition is broken by a law in the terms of s 93(8AA) as such a law has no regard to culpability. Moreover, the disqualification imposed by that provision may operate more stringently than that imposed by s 44(ii) of the Constitution upon candidates and members of the Senate and the House, even though the latter seek, or are subject to, unique responsibilities as legislators which are different in kind to those of electors. The disharmony between s 93(8AA) of the Act and s 44(ii) of the Constitution is plain.

Contemporary penal policy sometimes asserts that the imposition of a custodial sentence is to be a last rather than first resort. Things may have stood differently at the time of federation. But with respect to the present state of affairs, several matters to which the Chief Justice refers in his reasons are of particular significance. First, a very substantial proportion of prisoners serve sentences of six months or less. Secondly, when decisions to impose short-term custodial sentences are made, the range of practical sentencing options (including fines, home or periodic detention and community service orders) may be limited by the facilities and resources available to support them and by the personal situation of those offenders who are indigent, homeless or mentally unstable.

Moreover, s 93(8AA) is not yoked to sentencing laws or practices of any particular description. Rather it picks up the consequences of the administration of those laws as they apply from time to time across the range of Australian jurisdictions. Sentencing policy and, in particular, that regarding mandatory sentencing is notoriously a matter of continuing public debate and variable legislative responses in different Australian jurisdictions. In such matters, statutory provisions and administrative policies and emphases constantly change. However, the Constitution with its central notion of electoral representation and participation endures.

The 2006 Act treats indifferently imprisonment for a token period of days, mandatory sentences, and sentences for offences of strict liability. It does not reflect any assessment of any degree of culpability other than that which can be attributed to prisoners in general as a section of society. In that regard, the plaintiff referred, as examples, to current legislation in several States and Territories whereby, as a last resort, failure to pay fines may result in a term of imprisonment, and to legislation in Victoria and Queensland whereby begging is an offence punishable by a term of imprisonment. (The Commonwealth disputed whether all the current legislation with respect to fine defaulters would

produce consequences which answered the definition of "sentence of imprisonment" in s 4(1A) of the Electoral Act but that cannot fully meet the point the plaintiff seeks to make.) Further, in 2006 of the prison population 6.3 per cent was serving a sentence for a public order offence or a road traffic or motor vehicle regulatory offence and 17.6 per cent was serving a sentence of less than one year.

The Solicitor-General of the Commonwealth accepted that, for example, manslaughter is a striking example of an offence which involves an extensive range of moral culpability down to little more than negligence; this may be reflected in the term of the sentence imposed. He responded that the 2006 Act operated with a valid degree of precision by limiting the period of disqualification to that for which the law provided incarceration. The difficulty with that proposition is the scope thereby provided for the particularly capricious denial of the exercise of the franchise.

The legislative pursuit of an end which stigmatises offenders by imposing a civil disability during any term of imprisonment takes s 93(8AA) beyond what is reasonably appropriate and adapted (or "proportionate") to the maintenance of representative government. The net of disqualification is cast too wide by s 93(8AA) ...

The consequences of invalidity of the 2006 Act

The invalidity of the relevant provisions of the 2006 Act does not fully dispose of the case. The position of the Commonwealth is that if the 2006 Act be invalid the twofold consequence is that the Electoral Act as it stood after the 2004 Act, with a disenfranchisement based on the period of sentence being served three years or longer, is both operative and valid. The plaintiff counters that in this form the relevant provisions of the 2004 Act are inoperative or, if otherwise operative, are invalid ...

The three year provisions (to put the subject matter in short form) of the 2004 Act differ in their nature from the 2006 Act. They operate to deny the exercise of the franchise during one normal electoral cycle but do not operate without regard to the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process. In that way the three year provisions are reflective of long established law and custom, preceding the adoption of the Constitution, whereby legislative disqualification of electors has been made on the basis of such culpability beyond the bare fact of imprisonment.

The plaintiff seemed to eschew her standing to challenge a disqualification system such as that of five years or longer established by the 1995 Act. But to succeed even with respect to the three year provisions the plaintiff has to make good her original submission. This was that disqualification of persons serving a term of imprisonment could only be a basis of exclusion "rationally connected with representative democracy" if the offence involved an attack on the existence of the federal polity or electoral fraud such as to undermine the integrity of the electoral system.

At a general level of debate there is support for and against reasoning of this kind in the majority and minority reasons given by the Supreme Court of Canada in *Sauvé v Canada (Chief Electoral Officer)*. However, the Supreme Court there was considering (and held invalid) a two year or more sentence disqualification provision and did so by reference to an express conferral upon citizens by s 3 of the Canadian Charter of Rights and Freedoms of "the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein". The reasoning of the majority in *Sauvé* was that the legislation was an unreasonable infringement of the right to vote guaranteed to citizens by s 3 of the Charter. This reasoning was influential in the decision of the European Court of Human Rights in *Case of Hirst v The United Kingdom (No 2)*. There the question was whether the exclusion imposed by the United Kingdom upon convicted prisoners in detention was disproportionate according to the jurisprudence of that Court. The Grand Chamber by a decision of 12 of the Judges to five held against the United Kingdom. Article 3 of Protocol 1 to the European Convention on Human Rights guarantees "free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" and this has been classified by the European Court as conferring individual rights.

The question respecting the three year provision that is presented by the constitutional jurisprudence of this Court differs from that which would arise at Ottawa or Strasbourg. It is whether the 2004 Act is appropriate and adapted to serve an end consistent or compatible with the maintenance of the prescribed system of representative government. The end is the placing of a civil disability upon those serving a sentence of three years or longer for an offence, the disability to continue whilst that sentence is being served.

Given the 19th century colonial history, the development in the 1890s of the drafts of the Constitution, the common assumptions at that time, and the use of the length of sentence as a criterion of culpability founding disqualification, it cannot be said that at federation such a system was necessarily inconsistent, incompatible or disproportionate in the relevant sense. Further, in the light of the legislative development of representative government since federation such an inconsistency or incompatibility has not arisen by reason of subsequent events. Despite the arguments by the plaintiff respecting alleged imperfections of the three year voting disqualification criterion, such a criterion does distinguish between serious lawlessness and less serious but still reprehensible conduct. It reflects the primacy of the electoral cycle for which the Constitution itself provides in s 28. There is, as remarked earlier in these reasons, a permissible area in such matters for legislative choice between various criteria for disqualification. The 2004 Act fell within that area and the attack on its validity fails.

HAYNE J: The plaintiff did not give content to the "representative government criteria" which underpinned all of her submissions. Rather, it was submitted that it mattered not how those criteria were formulated; it sufficed to describe the operation of the impugned law as "arbitrary and discriminatory" and as "over- and under-inclusive". But if, as must be the case, the "representative government criteria" include a criterion about qualification of electors, the specification of that criterion concludes the issue that must now be decided. The plaintiff, at least implicitly, makes an assertion that the representative government criterion governing the qualification of electors must have a particular content. That assertion is not based on Constitutional text or history and the argument thus becomes circular. The assertion of content determines the answer. This approach is flawed ...

[I]t is clear that the power given to the Parliament by s 30 to provide for the qualification of electors is to be read as limited by the requirements of ss 7 and 24 that the two Houses are "directly chosen by the people". The central question is what limitation on the power is conveyed by those words. Thus when the plaintiff submits that "[s]atisfaction of the representative government criteria is necessary to ensure the requisite consistency" the critical step is to identify what is meant by the "representative government criteria". This the plaintiff sought to do by reference first to statements made in decisions of this Court, and then by reference to some decisions of ultimate courts of other countries and some international materials.

Some particular emphasis was given, in argument, to what was said by McTiernan and Jacobs JJ in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* [(1975) 135 CLR 1 at 36]:

> "The words 'chosen by the people of the Commonwealth' fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in s 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. *It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who might be eligible to vote before a member can be described as chosen by the people of the Commonwealth.* For instance, the long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether, subject to the particular provision in s 30, anything less than this could now be described as a choice by the people." (emphasis added)

Two points are to be noted about this passage. First, there is the reference to "common understanding". Second, there is the suggestion that the meaning or application of "directly chosen by the people" may change over time.

Is "directly chosen by the people" to be understood by reference to "the common understanding of the time"? That is, do what might be called "generally accepted Australian standards" provide a valid premise for consideration of the issues presented in this matter?

There are at least two reasons to reject reference to "common understanding" or "generally accepted Australian standards" as informing the content that is to be given to "directly chosen by the people". First, there is the obvious difficulty of determining what those standards are, and to what extent they are "generally accepted". Does it suffice that they are standards that are reflected in legislation which, by hypothesis, has been passed by a majority of popularly elected representatives in the two Houses of the federal Parliament? If that is sufficient, the limitation has no content; the Parliament may do as it chooses. If that is not sufficient, what is it that will demonstrate either the content of the asserted understanding or its common or general acceptance?

Secondly, and more fundamentally, it is not to be supposed that the ambit of the relevant constitutional power (as distinct from the political capacity to exercise the power) is constrained by what may, from time to time, be identified as politically accepted or acceptable limits to the qualifications that may be made to what now is an otherwise universal adult suffrage. Political acceptance and political acceptability find no footing in accepted doctrines of constitutional construction. The meaning of constitutional standards does not vary with the level of popular acceptance that particular applications of the power might enjoy.

The plaintiff's argument that the franchise cannot be "wound back" amounted to the contention that the Parliament has no legislative power to depart from what now is seen as a commonly understood minimum requirement for the franchise. To the extent to which the argument depends upon the invocation of "common understanding", it must be rejected for the reasons that have been given. To the extent to which it makes the temporal point noted in connection with the plaintiff's first path of argument, it must likewise be rejected.

Further, although it is not necessary to decide the point, it may greatly be doubted that the content of the expression "directly chosen by the people" changes over time. "[D]irectly chosen by the people" expresses a standard. It is not an expression that has a relevantly different application as facts change. The standard expressed is unvarying. It describes an important characteristic that each of the Houses of the Parliament must have. That the meaning of "directly chosen by the people" cannot be charted by metes and bounds does not entail that the meaning changes over time.

The expression "directly chosen by the people" may be seen as standing in sharp contrast with expressions like "foreign power", or "postal, telegraphic, telephonic, and other like services". The latter expressions must be applied to various facts and circumstances that can and do change over time. In particular, the political or technical facts to which they are applied may require different applications of the relevant expression over time. The better view may well be that "directly chosen by the people" is not an expression of that kind. It is, however, not necessary to decide the point. It suffices to say that its content is not to be found by reference to what is "commonly understood", what is politically accepted, or what is politically acceptable.

The plaintiff sought to give content to the "representative government criteria" by reference to a deal of overseas material. Emphasis was placed, in argument, on the ways in which other nations, operating under different constitutional instruments and arrangements, have dealt with prisoners voting. Particular reference was made to several Canadian decisions about the application of the Canadian *Charter of Rights and Freedoms* to federal laws disqualifying prisoners from voting, to the decision of the European Court of Human Rights in *Hirst v United Kingdom (No 2)* concerning the compatibility of s 3 of the *Representation of the People Act* 1983 (UK) with the First Protocol to the European Convention on Human Rights, and to a decision of the Constitutional Court of South Africa concerning the validity of provisions depriving prisoners, serving a sentence of imprisonment without the option of paying a fine, of the right to participate in elections during the period of their imprisonment. All of these decisions held the legislation in question to be incompatible with an applicable statement of rights and freedoms, or to be constitutionally invalid. It was said that these decisions, or these decisions when read in conjunction with international instruments such as the International Covenant on Civil and Political Rights, revealed a generally accepted international standard that could, even should, find application either in the search for the "common understanding" of which McTiernan and Jacobs JJ spoke in *McKinlay*, or otherwise in the construction of "directly chosen by the people". American decisions upholding the validity of statutes providing for the life-long disenfranchisement of felons were said to be irrelevant on the ground that they depended upon the particular text and history of s 2 of the Fourteenth Amendment to the United States Constitution.

The argument from overseas material, in all of the several forms in which it was advanced by the plaintiff, should be rejected. The reasons given earlier in relation to "common understanding" or "generally accepted Australian standards" require that rejection. But there is a further and fundamental flaw in the plaintiff's argument.

Any appeal to the decisions of other Courts about the operation of other constitutional instruments or general statements of rights and freedoms is an appeal that calls for the closest consideration of whether there are any relevant similarities between the instruments that were examined and applied in those decisions and the particular provisions that this Court must consider. The plaintiff's argument

that no useful guidance is to be had from United States' decisions acknowledges the force of this proposition.

There is no similarity between the provisions considered in the cases referred to and relied on by the plaintiff and the provisions of the Constitution that are in issue in the present matter. The only connection between the cases and other international materials upon which the plaintiff relied and the present issues is to be found in the statement of the problem as an issue about the validity of legislative provisions excluding prisoners from voting. That the problem may be stated in generally similar terms does not mean that differences between the governing instruments may be ignored. Yet in essence that is what the appeal made by the plaintiff to "generally accepted international standards" seeks to have the Court do.