Upholding the Australian Constitution Volume Twenty-one

Proceedings of the Twenty-first Conference of The Samuel Griffith Society

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Foreword

John Stone

The 21st Conference of The Samuel Griffith Society was held in Adelaide on 28-30 August, 2009. The papers delivered there make up this volume of the Society's Proceedings, *Upholding the Australian Constitution*.

Attendance at this Conference was for my wife and me a novel experience. For 17 years (and some 20 Conferences) previously we had always been so involved in the essentially trivial and time-consuming, but none the less necessary, mechanics of ensuring that proceedings ran smoothly, that our own capacity to participate was necessarily diminished. In Adelaide, by contrast, all those responsibilities had been devolved to other, younger and doubtless more capable hands. The Society's new Secretary, Bob Day, and his highly capable personal secretary, Joy Montgomery, now assumed all the duties associated with the actual running of the meeting, while our new Conference Convenor, Julian Leeser, ably attended to the speaking program. Meanwhile, we remained (to coin a phrase) "relaxed and comfortable".

As on all previous occasions, the Conference bill of fare in Adelaide maintained what Professor Dean Jaensch (himself a speaker on this occasion) described some years ago as its "eclectic" quality. Apart from a number of papers on the Bill of Rights issue, to which I shall return, we enjoyed two papers, each excellent in its own way, presenting the arguments for and against some form of Judicial Appointments Commission. I personally own to the view that such a body would not solve any of the perceived problems of political patronage in judicial appointments, but rather simply transfer the exercise of such patronage from the hands of elected Ministers to the hands of unelected appointees to any such Commission.

Experience also strongly suggests that it would not be long before the usual cabal of left-wing lawyers, exercising their well-practised processes of "entryism", would gain control of any such body. One has only to think of the highly politicised record today of the Law Council of Australia, which 20 or more years ago was "captured" in this way, to see the future. As Alan Anderson said when presenting one of the papers on this topic (see Chapter Twelve), that organisation, "which holds itself out as an apolitical participant" in any such judicial appointments body, may readily be seen in its true colours by noting that, in the year 2006, "over two-thirds of its media releases….related to David Hicks, Guantanamo Bay, or alleged abuses of the 'human rights' of illegal immigrants". Accordingly, while the Conference was undoubtedly indebted to the Honourable Bruce Debelle – until recently a Justice of the Supreme Court of South Australia – for so ably presenting the contrary arguments (see Chapter Eleven), I must respectfully demur from them. In doing so, it would be only appropriate to congratulate His Honour on his award (AO) in the Order of Australia, announced in the Australia Day Honours list just as this Foreword was being written.

To return now to the Bill of Rights matter, the Conference was privileged to hear a number of excellent papers on that issue. Apart from those by David Bennett, QC and Miranda Devine, it heard three other papers, two of them by currently serving State Attorneys-General. The Attorney-General of New South Wales, the Hon John Hatzistergos, MLC and the Attorney-General of Western Australia, the Hon Christian Porter, MLA both spoke about the problems created by Bill of Rights advocacy within the domestic legal context, while a further paper, by Emeritus Professor Ivan Shearer, provided a fascinating insight into the latter's experience as a member for some years recently of the Human Rights Committee of the United Nations.

In his paper, *Parliamentary Will v. Statutory Bill* (sub-titled *The Important Role of Legislatures in Progressive Social Change*), Mr Hatzistergos spelled out instance after instance where democratically elected bodies have had to grapple with conflicting claims to "rights" for this versus "rights" for that, and make decisions (involving either a change in the law, or a refusal to change the law) for which they can then be held electorally responsible. He contrasted these processes with the judicial *fiat* exercised, in countries possessing various forms of Bills of Rights, by unelected judges.

Whereas, in a democracy, decisions of the former kind will undoubtedly render one set of partisans or the other decidedly unhappy, there is an acceptance – even by those partisans – of the result. Although that acceptance may be accompanied by a determination to have the decision in question re-contested in the future and overturned, such a response is wholly in accordance with the basic democratic process.

By contrast, judicial *fiat* almost invariably creates feelings of impotence and more or less bitter resentment, to the point where such feelings threaten even to bring the rule of law itself into disrepute. To take but one example, developments in Britain since the European Union's *European Charter of Human Rights* began to debauch British judicial processes have not only led to the UK *Human Rights Act* 1988, but are also continuing to lead to a massive loss of confidence in the courts. The same processes, though less far advanced, are also in train across the Tasman, as the New Zealand courts begin to exercise their new found (rather, newly given) powers under that country's *Bill of Rights Act* 1990.

Mr Porter's paper on *The Brennan Committee*, while wholly consistent with those views of his fellow Attorney, focused on the processes whereby in recent years Bill of Rights advocates (including those making up the whole of that Committee) have sought to con a generally unsuspecting public into accepting – or at any rate, failing to resist – the snares being cast over them. Those who attended the 18th Conference of the Society in 2006 will recall Ben Davies's lively paper, *Who gets the Bill? The Lawyers' Bill of Rights in Victoria*, in which he described how those processes worked so successfully in the case of Victoria's *Charter of Rights and Responsibilities* some years ago. At that time, the Liberal Party Opposition in the Victorian Parliament simply went missing. On the basis of Mr Porter's paper, it seems unlikely that their Western Australian counterparts, now in government there, will be following that egregious example.

As remarked above, Professor Shearer's paper, *The Australian Bill of Rights Debate: The International Law Dimension*, provided fascinating insights. Yet without, I hope, any suggestion of disrespect for Professor Shearer himself – on the contrary, the Society is greatly in his debt – it also raises some basic questions. Reading it (as, in the course of the editorial process, I have recently done three times), one is driven to ask why on earth Australia – and a highly intelligent man representing Australia – is having anything to do with these travesties of judicial processes?

Let us leave aside the fact that, customary international law apart, there is not, and never has been, anything which could rightfully be described as "international law" – that is, statutes produced for the world by some form of democratically elected assembly. The body of bumph masquerading as "law" in this area is, rather, principally the product of the political wheelings and dealings of that most corrupt of bodies, the United Nations. And it shows.

Even within this generally unacceptable body of United Nations *pronunciamentos*, however, an especially depraved place must be accorded to the UN Human Rights Committee. Years ago, then Senator Rod Kemp, in his paper *International Tribunals and the Attack on Australian Democracy*, delivered to the Society's 4th Conference (1994), painted a clear picture of the hypocrisies involved. Since then, it has been downhill all the way.

Two excellent papers, by Professor Scott Prasser and Professor Dean Jaensch, on *The Virtues of Upper Houses* and *The Attack on Australia's Democracy?*, respectively, dealt with the valuable role played by Upper Houses within our system of parliamentary democracy. I personally believe that, at the federal level, voters have a much higher regard for our Senate than they do for the House of Representatives

– notwithstanding that it is in the latter chamber that governments are made and (occasionally) broken, and notwithstanding Paul Keating's personal abuse of Senators as "unrepresentative swill".

Professor Jaensch's paper was of current interest, dealing as it did specifically with proposals by the Rann (Labor) government in South Australia to abolish the Legislative Council in that State. As someone who lived for some years in Queensland, I have some personal experience of how government is carried on in a unicameral environment. It is, only too often, not a pretty sight – whichever side of politics happens to be in office. I had, indeed, formed that view 20 years earlier, when I was for some years (1967-1970) a sort of honorary New Zealander in my then capacity as an Executive Director of the International Monetary Fund and of the World Bank, representing that country – and South Africa – as well as my own. Although government within New Zealand's unicameral system is of a higher order than it is in Queensland, the absence of an Upper House there also has its regrettable consequences, as I had occasion to observe.

A highlight of the Adelaide conference was the paper by Bryan Pape providing members with a brief conspectus of the *Tax Bonus Case* – or, as I think it will always be alternatively known, *Pape's Case*. Readers may recall Mr Pape's paper to the Society in 2005, *The Use and Abuse of the Commonwealth Finance Power*, in which he drew forensic attention to the flagrant manner in which governments in Canberra – of both political persuasions – have for many years now simply ignored s.81 (and the associated s.83) of the Australian Constitution.

As with so many other excrescences on the Australian body politic today, these practices first saw the light of day at the hands of Gough Whitlam, whose Australian Assistance Plan payments to regional bodies, included in the 1974-75 *Appropriations Acts*, had no basis in Commonwealth constitutional power. When this was challenged in the High Court by the State of Victoria, five Justices – including the late Lionel Murphy, the only known criminal ever to have (dis)graced the High Court bench – ruled in Mr Whitlam's favour for a miscellany of disparate reasons. Notably, then Justice Harry Gibbs strongly dissented, as did then Chief Justice Sir Garfield Barwick.

Since then – and not least, I regret to say, under the Howard Government – such practices have become commonplace in Canberra. Commonwealth constitutional arrogance has come to know no bounds.

It was against this background that Bryan Pape, at his own initiative and, importantly, at his own financial risk, brought his High Court action last year to have declared unconstitutional the so-called tax bonus payments (up to $900 each) that were included in the Rudd Government's second major "stimulus" package in February, 2008. Although narrowly unsuccessful (4 to 3) in that request, the Court's judgments when dealing with the Commonwealth's defences represent major victories for the constitutional proprieties. As such, the Pape Case will come to hold an honoured place in the cause of constitutional federalism.

Having begun this Foreword on a personal note, I must now also end on one. When, prior to the 2008 Annual General Meeting of the Society, I informed the Board of Management of my intention to resign from the offices of Secretary and Conference Convenor, I said that I would nevertheless hope to continue to edit and publish two or three more volumes of these Proceedings. I duly did so in respect of Volume 20, and have now done so in respect of this Volume 21.

I have however now informed the Board that, reluctantly, I must call it a day. One element – although only one – in that decision is that I have realized that, if I were to undertake these duties in respect of Volume 22 (the Proceedings of our next Conference in Perth this August), I should find myself producing a book, a principal feature of which will be a *festschrift* in my own honour (see Julian Leeser's remarks on that matter at p. xxxix). Although I have since tried to persuade the Board to abandon that project, I have been unsuccessful in that regard, and I must accept its decision to proceed.

Of course, I am not saying that I literally could not edit and publish the volume containing such material, merely that I would feel decidedly uncomfortable in doing so. It will be hard enough to

have to sit through the papers on the matter, without having to be responsible subsequently for publishing them to the world.

As noted above, however, this is only one element in my decision. There is a sense in which, having reached its 21st birthday, so to speak, our series *Upholding the Australian Constitution* should now go out into the world without further assistance from its immediate parents (including my wife in that description). Since I have previously had it in mind to relinquish these duties in the near future in any case, I think it better to do so now. Nobody is indispensable, and although, at the time of writing, I have not yet found a successor, I have no doubt that over the next six months a worthy one will be found.

As I have said for many years now at the conclusion of each successive Foreword to these volumes, The Samuel Griffith Society was founded to promote debate about the Australian Constitution from a federalist (i.e., anti-centralist) viewpoint. Our 21st Conference, like all its predecessors, was directed to furthering that objective, and it is in that spirit that this volume of its Proceedings is now offered.

Dinner Address

Professor Ivan Shearer, AM, RFD

The Australian Bill of Rights Debate: The International Law Dimension

The debate about the desirability of an Australian Charter, or Bill, of Rights has been vigorous. As a demonstration of vibrant participatory democracy, especially through the consultations of the Committee headed by Father Frank Brennan, the debate has been heartening. More than 38,000 submissions have been made to the Brennan Committee, which is due to report its findings and present its recommendations next month.

You will be relieved to hear that it is not my intention this evening to sift through all the points that have been made for and against the proposal. I intend to outline just one set of reasons that prompts me to be opposed to an Australian Charter or Bill of Rights. These reasons have not, so far as I know, been touched upon in the debate so far. I wish to consider the proposal from the aspect of Australia's obligations under international human rights instruments and how they impact upon Australian law. In doing that I shall also reflect on my recent experience of having been a member of the United Nations Human Rights Committee (2001-2008).

Among supporters of the proposed Charter there has been no dispute that the core rights to be contained in it would be based on the so-called International Bill of Rights. This International Bill consists of the seminal *Universal Declaration of Human Rights*, adopted by the United Nations in 1948; the *International Covenant on Civil and Political Rights* (ICCPR) of 1966, which detailed the traditional "negative" human rights and fundamental freedoms, such as the right to free speech, freedom of conscience and belief, and prohibiting arbitrary arrest and punishment; and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966, which expanded and amplified the "second generation" of human rights, such as the rights to education, health and social security. The *Universal Declaration* is not a treaty instrument; it stands as an authoritative exposition of basic human rights and freedoms and has been regarded as having entered the corpus of general international law. The two Covenants, however, are subject to acceptance by way of signature and ratification; the *ICCPR* is peremptory in nature, whereas the *ICESCR* is programmatic and aspirational. The difference between the two is that, for example, while torture is absolutely prohibited, the right to education and health services is subject to the ability of governments within their existing capabilities to achieve these goals.

Many proponents of an Australian Charter would wish to incorporate further rights, or different formulations of the rights contained in the Covenants. This would be to enter still further into uncertain territory with unpredictable consequences. For the purposes of the argument, however, I will assume a "minimalist" model of an Australian Charter that does no more than reproduce exactly the provisions of the Covenants. I would even exclude from consideration this evening an incorporation of the *ICESCR*, which many have proposed in addition to the *ICCPR*, although my argument would be greatly strengthened if that were to be the case.

Australia is one of 164 parties to the *ICCPR*. Out of a total of 192 sovereign States represented in the United Nations, this scale of commitment to basic human rights is impressive. The universal validity of the norms of human rights contained in the *ICCPR* cannot be disputed. Australia takes its obligations under the *ICCPR* seriously. (This is unfortunately not true of all States parties). It reports at regular intervals to the Committee charged with monitoring compliance: the Human Rights

Committee. Australia, moreover, has taken the additional step of becoming a party to the *Optional Protocol* to the *ICCPR*, which allows for individuals to bring a petition (called a "communication") to the Committee alleging a violation of the *ICCPR* with direct consequences for the petitioner, and where all domestic remedies have been exhausted without success.

I thus come to my main point. How are these international obligations discharged by Australia under our present laws, and how would they *not*, in my view, be enhanced by the proposed Australian Charter?

In the past, the Human Rights Committee has not stated it as a requirement that each party to the *ICCPR* incorporate rights secured by it, or equivalent rights, in any particular form. It has been concerned only to find whether those rights are recognised and enforced in practice, irrespective of the nature of the local legal system or system of government. It is true that a majority of States has a written statement of human rights enacted into law, often constitutionally entrenched. This, however, has not always proved in practice to be a guarantee of observance, as witness such States as Zimbabwe, which has a Constitution enshrining provisions taken from the *Universal Declaration* and the *ICCPR*. Australia has always relied on the common law as providing basic protections of human rights, aided by statutes making provisions in particular areas.

In response to Australia's 4th periodic report in 2000, the Committee, however, recommended that Australia adopt comprehensive national legislation incorporating the *ICCPR*. More recently, in March 2009, reviewing Australia's 5th periodic report, the Committee stepped up the volume. The first of its "principal subjects of concern and recommendations" stated that:

> "The Committee notes that the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000. Furthermore, the Committee regrets that judicial decisions make little reference to international human rights law".

This concern was then followed by a recommendation:

> "The State party should: a) enact comprehensive legislation giving *de facto* effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organize training programmes for the judiciary on the Covenant and the jurisprudence of the Committee".

The Human Rights Committee is entitled to its view, even though this might be regarded as an unwarranted intrusion, especially at this time, into the domestic affairs of Australia. But to recommend a "one size fits all" model of incorporation is to ignore the ability of Australian Parliaments and courts to give effect to human rights in specific cases and in particularised and fully considered ways, adapted to Australia's circumstances.

Take, for example, the decision of the High Court of Australia in the case of *Dietrich v. The Queen*.[1] Dietrich was convicted of serious drug offences and was sentenced to 7 years imprisonment. He had been refused legal assistance by the legal aid administration in Victoria. His trial lasted 40 days. He appealed to the High Court on the ground that his trial breached Article 14 (3)(d) of the *ICCPR*, which provides that an accused person shall have the right, *inter alia*, "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it". The High Court noted that the *ICCPR* had not been implemented directly[2] in Australia and so could not be invoked as such. In any event, the courts in Australia were not competent to decide on the allocation of legal aid funds. Nevertheless, the High

Court held that the common law recognised a right to a fair trial, and that a necessary element of a fair trial in a serious criminal case was access to free legal assistance to those unable to afford it. While the courts themselves were unable to provide that assistance, the courts should, in such cases, issue a stay of proceedings until such time as an indigent defendant facing a serious criminal charge could come back to court suitably represented, no matter what the source of that assistance might be.

Thus the High Court adopted a position consistent with Australia's obligations under the *ICCPR* by applying the essence of those obligations rather than their literal formulation, and by harmonising them with the common law and adapting them to Australian conditions. This approach, in my view, achieves a harmonious and integrated incorporation of human rights norms into the Australian legal order in the most effective manner. In the same spirit, Australian judges are directed to prefer an interpretation of statutes that is in conformity with Australia's human rights obligations, where the language of the statute admits of more than one interpretation.[3]

The second of the four parts to the recommendation above of the Committee directing that Australia adopt a "mechanism" for compliance, does not specify what kind of mechanism should be established by Australia to ensure the compatibility of domestic law with the *ICCPR*. Presumably, this mechanism would be established under the legislation proposed in the first recommendation. But the aim might be achieved, in my view, more consistently with Australia's institutions and common law heritage, through existing monitoring mechanisms without direct enforcement powers, such as the Australian Human Rights Commission. Why was the role of that Commission overlooked by the Committee?

The third recommendation exhorts Australia to "provide effective judicial remedies for the protection of rights under the Covenant". It is difficult to understand how Australia is deficient in this respect, otherwise than through the absence of a written Bill of Rights with inbuilt enforcement provisions. This model would be, for the reasons I have already given, too blunt to achieve a harmonious and integrated implementation of human rights, and moreover, one that could lead to unforeseen consequences.

Perhaps the clearest clue to the Committee's reasoning is to be found in the fourth part of the recommendation: " to organise training programmes for the judiciary on the Covenant and the jurisprudence of the Committee". It might be regarded as more than a little offensive to suggest that the Australian judiciary is in need of such education. Moreover, it is surely self-aggrandizing of the Committee to mandate attention to its own jurisprudence as part of the recommended training programme. It elevates itself to a status tantamount to a final court of appeal for the whole world in the interpretation and application of human rights. Under the proposed Australian Charter, in the form supported by the Human Rights Committee, would the Committee's jurisprudence thus be binding on, or at the very least highly persuasive before, Australian courts?

So, I come to the question of what is the status of decisions of the Human Rights Committee under the *Optional Protocol* (to which 112 of the 164 States parties to the *ICCPR*, including Australia, have adhered)? The *Optional Protocol* itself refers to the "Views" of the Committee, which is not a term normally associated with notions of binding decision. The Committee itself has discussed the question in its General Comment No. 33 (2008). It stated, in part:

> "While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions".

It concluded that:

> "The views of the Committee under the *Optional Protocol* represent an authoritative

> determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the *Optional Protocol*".

The Committee thus adopts a nuanced conclusion as to the status of its views, falling just short of stating them to be binding, but by stating them to be "authoritative" it gives to those views a status far higher than that of mere recommendations for consideration by the respondent State party.

In its Concluding Observations of 2009 on Australia's Report, the Committee took Australia to task for its failure to accept the views adopted in all cases brought against it under the *Optional Protocol*. (Of a total 105 cases registered against Australia as at November 2008, violations were found in 24 cases, no violation in 6 cases, 32 cases were found to be inadmissible, 28 were discontinued, and 15 remained pending.) In those cases in which Australia was found in violation of the *ICCPR* but where Australia, in respect of some of them, found itself unable to accept the views of the Committee, it provided detailed reasons to the Committee for its inability to accept the views. The Committee nevertheless regards these cases as ones where "dialogue is continuing". It does not accept a rejection of its views. In the Concluding Observations of 2009 it stated that "a failure to give effect to its views would call into question [Australia's] commitment to the *First Optional Protocol*", and that Australia "should review its position in relation to the views adopted by the Committee … and establish appropriate procedures to implement them". The Committee has thus further elevated the status of its views in cases brought under the *Optional Protocol*.

It is impossible on this occasion to summarise each case of a violation found against Australia and give a reasoned critique. (Moreover, I was disqualified from sitting on cases involving my own country). A good many of them involved immigration decisions and mandatory detention of asylum seekers. I can only say, compared with many States parties that simply ignore findings against them, that Australia has always been meticulous in responding with detailed reasons in cases where it feels unable to implement the views of the Committee. Would that be possible any longer under a Charter that directly or indirectly gave an elevated status to the views of the Committee?

I give examples of three cases where I think the Committee erred and which go beyond mere matters of evaluation of the facts at hand. One is a case against Australia; the other two relate to other countries.

Faure v. Australia[4]

This was a complaint by a young woman that Australia's "Work for the Dole" programme violated the prohibition of the *ICCPR* against forced or compulsory labour (Article 8). She had entered into a work agreement with Newstart, but after a short period had abandoned her job and failed to keep scheduled appointments with Centrelink. Her allowances were thereupon reduced. The Committee decided that Australia was in violation of the Covenant. It did not decide whether or not the programme constituted forced or compulsory labour (a vigorous separate opinion that it did not was entered by Professor Ruth Wedgwood of the United States), but found a violation in that there was no law in Australia that allowed her to challenge the compatibility of the Work for the Dole programme with the human rights protected by the Covenant. In other words, the Committee was implying that Australia must introduce legislation allowing all such challenges to be made and tested before the courts. This might be thought to give further substance to the "lawyers' picnic" view of the proposed Charter.

To be fair, I must give an example of a finding against Australia with which I (and I would think most people here) would agree. This was the very first case brought against Australia after its accession to the *Optional Protocol*; the case of Toonen.[5] The Committee held that the continued existence of a prohibition in the Criminal Code of Tasmania of sexual relations between consenting males of full

age was in violation of the Covenant's protection against discrimination and violations of privacy. The law had not been invoked in practice for more than 20 years; nevertheless, in the submission of the petitioner, its continued presence on the statute book constituted a kind of Sword of Damocles, potentially liable to fall without warning. Since Australia alone has status under international treaties, Tasmania could not be a party to the case. In fact Australia stated to the Committee that it did not oppose a ruling against it, but for the sake of assistance to the Committee it forwarded a brief from the Tasmanian Government supporting the legislation. Ultimately, the Tasmanian Parliament repealed those provisions of the Criminal Code.

I turn to two cases that worried me deeply when I was a member of the Committee.

In *Haraldsson v. Iceland* [6] a group of fishermen challenged the allocation system for the issue of fishing licences established under Icelandic legislation. They claimed that the system discriminated in favour of existing licence holders and against new applicants. The fisheries allocation system adopted by Iceland in the face of declining stocks and increasing demand for licences had evolved over several years of vigorous debate in Iceland, both inside and outside Parliament. The system finally adopted was the subject of a challenge in the Supreme Court of Iceland; the Court rejected the challenge, by a majority of its members.

The Human Rights Committee decided, by a majority of 12 to 6, to uphold the complaint, on the ground that the discrimination lacked objectivity and reasonableness. I dissented, in a joint separate opinion with my Swedish and Romanian colleagues. Dissenting opinions were filed also by the members from Japan, the UK and the USA. My real objection to the decision was that the Committee should simply not second-guess a law adopted by a democratically elected legislature after exhaustive public discussion and upheld by its highest national court, unless it was very obviously in violation of the Covenant.

A difference of opinion as to what is reasonable or proportionate lacks plausibility when advanced by a Committee which has studied the case for only a few hours. Unfortunately I omitted to take this position explicitly in order to be able to join the two other colleagues in dissent, who preferred to find the case unsubstantiated. I wish now that I had stated my view independently, or in company with Professor Wedgwood, whose dissenting view, based on her evaluation of the limits of the Committee's competence, was filed too late for me to see and join.

My third example is the recent case of *Sayadi and Vinck v. Belgium*.[7] The complainants in that case were a married couple of Belgian nationality who were directors of a Belgian organisation affiliated with the Global Relief Foundation. That Foundation, because of its alleged links with international terrorism, appeared on the Sanctions List maintained by the United Nations under the authority of resolutions of the Security Council. Shortly after the listing of the Foundation, Belgium reported the names of the complainants to the UN as persons associated with the listed organisation, as it was required to do by relevant Security Council resolutions. Shortly prior to this, the Belgian Public Prosecutor had launched a criminal investigation into the activities of the complainants. These proceedings resulted in the termination of the investigation some three years later. Belgium then applied to have the names of the complainants removed from the UN Sanctions List, but without success.

The Committee found a violation of the *ICCPR* in that Belgium had acted prematurely, and therefore wrongfully, in transmitting the names of the complainants to the Sanctions Committee before the conclusion of its criminal investigation, with adverse consequences for the complainants in respect of their reputation, their ability to travel, and access to their bank accounts. In the Committee's view, the obligations of States to carry out decisions of the Security Council under Article 25 of the UN Charter did not prevail over their obligations under the *ICCPR*, and thus over the right of the complainants to be heard in answer to allegations having such serious consequences for their personal freedom.

In my dissenting view (and I regret that I was not joined by certain colleagues whose views I especially respect), Belgium should not have been found in violation of the *ICCPR* in this case. It acted in good faith in reporting the names to the Sanctions Committee, as it was legally required

to do under a resolution binding on it (such resolutions also having superior force as law by virtue of Article 103 of the UN Charter). Should Belgium have waited until the case was established? It took three years to complete inquiries and clear the complainants of terrorist associations. In the meantime, the UN Sanctions Committee may have had good reasons for listing the complainants and the organisation with which they were associated, and thus for causing their activities to be restrained. Irreparable danger to the international community could have resulted from delay. After the mistake became clear, Belgium did all that it could by repeatedly requesting the de-listing of the complainants, but without success. (Why the Sanctions Committee has maintained their listing is not known).

The chief flaw in the Committee's decision in this case, in my opinion, was to see the *ICCPR* as standing alone, and not in its relation with other instruments, especially the United Nations Charter. The members from Japan and the UK saw this point, but attempted to reconcile the overlapping obligations. I did not find their reconciliation convincing. Above all, the majority appears to have taken a blinkered view of the supremacy of the *ICCPR* over all other considerations, reflective indeed of the existence of a "human rights industry" which poses the danger, also in the context of the present debate in Australia, of enthusiastic but uncritical pursuit of otherwise admirable goals.

To sum up:

1. I see great danger in supporting an Australian Charter of Rights; the adoption of a Charter would tend to have the effect, directly or indirectly, of binding Australia to adhere to the decisions of treaty monitoring bodies whose role should be seen as recommendatory only.

2. I consider that Australia's present system of implementation of human rights through specific legislative acts, through decisions of the courts acting within legitimate leeways of judicial choice,[8] and through the monitoring roles of federal and State Human Rights Commissions (to say nothing of an active Australian NGO community) to be entirely adequate and effective. The present system leads to an integrated and harmonious incorporation of human rights within the Australian legal order and leaves untouched the sovereignty of Parliaments.

3. However, I would not be opposed to two alternative steps which may be points of recommendation likely to come out of the Brennan Committee:
   (a) An amendment to the *Acts Interpretation Act* directing the courts to take into account Australia's obligations under international human rights instruments in interpreting and applying statutes and the common law where they are unclear or admit of more than one interpretation. This would be to give legislative force to *dicta* already expressed by the High Court. The drafting would have to be careful not to repeat the wording of section 3 of the UK *Human Rights Act*,[9] which has been interpreted by the House of Lords as mandating a quasi-legislative approach far beyond the legitimate leeways of judicial choice.[10] Where Parliament has made its intention clear the courts must not defeat the legislative will through "judicial creativity".
   (b) The federal Parliament (and State Parliaments) should establish a Committee along the lines of the Joint Standing Committee on Treaties (JSCOT) to examine Bills for possible incompatibility with Australia's human rights obligations. This would be to situate the obligation to respect, and to avoid inadvertent breaches of, human rights as part of the legislative process, where they belong.

But not beyond this!

Endnotes:

1. (1992) 177 CLR 292.

2. The *ICCPR* and other human rights instruments are set out in the Schedule to the *Human Rights and Equal Opportunity Act* 1986, as a guide to be followed by the Australian Human Rights Commission, but are not thereby incorporated into Australian law.

3. See *Minister for Immigration v. Teoh* (1994) 183 CLR 273, at 279 per Mason CJ and Deane J; *Al Kateb v. Godwin* (2007) 219 CLR 562, per Gleeson CJ and Kirby J.
   In *Teoh's Case*, Chief Justice Mason and Justice Deane, in their joint judgment, said:
   > "Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party [citing *Chu Khen Lim v. Minister for Immigra*tion (1992) 176 CLR 1 at 38], at least in those cases in which legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law. It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with established rules of international law."

   Regarding the development of the common law, the same Justices stated:
   > "Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law" [citing *Mabo v. Queensland No.2* (1992) 175 CLR 1, at 42 per Brennan J (with whom Mason CJ and McHugh J agreed on this point); *Dietrich v. The Queen* (1992) 177 CLR 292, at 321 per Brennan J, and at 320 per Toohey J; *Jago v. District Court (NSW)* (1998) 12 NSWLR 558, at 569 per Kirby P.]

4. Communication No. 1066/2001, Views adopted 31 October 2005.

5. *Nicholas Toonen v. Australia*, Communication No. 488/1992, Views adopted March 1994.

6. Communication No. 1306/2004, Views adopted 24 October 2007.

7. Communication No. 1472/2006, Views adopted 22 October 2008.

8. Chief Justice Spigelman of the Supreme Court of NSW has referred to the "Australian common law of human rights" without taking a position on the desirability of a Charter: J Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008).

9. Section 3 of the *Human Rights Act* (UK) 1998 provides: " So far as possible to do so, primary legislation and secondary legislation should be read and given effect in a way which is compatible with [European] Convention rights".

10. *Ghaidan v. Godwin-Mendoza* [2004] 2 AC 557. See especially per Lord Nicholls at 570-572. It must of course be remembered that the UK is bound by judgments of the European Court of Human Rights, and that the approach to statutory interpretation, mandated by section 3 of the *Human Rights Act* and endorsed by the House of Lords, is largely dictated by a desire to pre-empt appeals to the European Court.

Introductory Remarks

Julian Leeser

Ladies and gentlemen, welcome to this, the 21st Conference of The Samuel Griffith Society.

This 21st Conference provides an appropriate time to reflect on the Society's mission, its successes and the challenges ahead. Seventeen years ago this society was founded by Sir Harry Gibbs together with John and Nancy Stone. John Stone, borrowing from Alexis de Toqueville, said at the time that the Society was formed " 'to advance some truth', and 'to foster some feeling' in defence of our Constitution". The fact that there have been 21 conferences means that the Society has been successful in achieving its aims. It has been influential in highlighting and encouraging debate about the problems of judicial activism, the Bill of Rights, republicanism and the attack on the federation.

As one of our members, who cannot be here, said to me "I am sad to be missing the conference because I regard the Samuel Griffith Society meetings as one the most enjoyable and best value weekends of the year". These conferences provide us with an opportunity not only to hear stimulating papers but also to gather together and enjoy the company of friends from a range of backgrounds, States and occupations, all of whom feel proud of our country and want to defend our constitutional system. The friendships made and acquaintances renewed have been an unintended bonus of the work of the Society.

There are continuities and changes involved in any organisation. Since our last meeting several of our members have passed away and it is appropriate to recall their names: Edward Paterson, Judge Paul Healy, SEK Hulme, QC, Rev Fr Moore, Sir Peter Derham, Sir David Hay, and the Hon Peter Phillips. In addition, Frank Devine and Professor George Winterton, who were occasional speakers at our early conferences, have also passed away.

I joined the Society when I was 23. I am now 33. None of us is getting any younger! It is therefore important that we members of the Society reach out to new supporters who may share the Society's values but who may not be aware of its activities. It is a challenge for each of us to encourage new people to become involved in our Society. After all, there are few occasions in Australia where leading jurists, parliamentarians, academics, thinkers and ordinary citizens meet together and discuss ideas based on a shared view of our constitutional system.

This is the first conference which has not been convened by John Stone. After 20 conferences he decided to relinquish the role last year. I did not realise how much work would be involved in organising these events. Luckily I have been generously assisted by our Secretary, Bob Day and his Personal Assistant, Joy Montgomery. They have done the difficult and unglamorous logistical work associated with staging the conference. I would like to record my thanks to them.

I am very conscious of the great honour the Board has afforded me in becoming the Society's second Conference Convenor. I will respect and honour the traditions and high standards set by my predecessor John Stone.

The Board has previously determined that our 22nd Conference next year will be held in Western Australia. At this afternoon's Board meeting I will be outlining some ideas for that conference. There is one idea that, with the permission of our President, I want to share with you now. I should say it is an idea on which I have consulted all but one Board member (who has a conflict of interest). I have received the unanimous and enthusiastic support of all consulted.

I will be putting a proposal to the Board that a portion of next year's conference be set aside for a *festschrift* in honour of the contribution to debates on federalism and public policy of John and Nancy Stone. This is particularly appropriate as Western Australia is their State of origin. This would

be only the second occasion on which the Society has set aside part of its program for the purpose of a *festschrift* to honour one of its founders. This Society would not have started, continued or been as successful as it has been without the work of John and Nancy Stone. John may try to adopt a rear guard action against this proposal, but it is too late. To quote that great political philosopher Graham Richardson, "I have done the numbers".

Now to our program.

Last night we were treated to an interesting new contribution to the Bill of Rights debate by Australia's most distinguished international lawyer, Emeritus Professor Ivan Shearer. We are lucky that an Australian lawyer of considerable fortitude has served on the UN Human Rights Committee – often as a lone voice of reason. Professor Shearer's address reminded us of some of the poor decisions and double standards that have resulted from the work of that Committee. As members of a Society dedicated to the rule of law we should support the good work of this fine Australian.

The theme of a Bill of Rights infuses our conference, with two papers this morning and a third tomorrow morning. Other issues which this conference will traverse include the judicial appointments debate and the threats to the South Australian Upper House. Of particular interest will be this morning's sessions on federalism, including papers from former Commonwealth Solicitor-General David Bennett, which may provide counter-intelligence about how the Commonwealth approaches its quest for increased power, and Bryan Pape, whose efforts in the High Court gave many members of the Society a great deal of pride, and again demonstrate the value of the intellectual debate which this Society continues to promote. This year we are also trialling the post-conference tour innovation. We are delighted that it has received the strong support of members.

It is now my pleasure to invite Ben Davies to chair the first session and introduce the Attorney-General for Western Australia, Christian Porter.

Chapter One

The Brennan Committee[1]

Hon Christian Porter, MLA[2]

With the commencement of the National Human Rights Consultation chaired by Frank Brennan the debate regarding rights documents in Australia is set for a resurgence.

The content of the arguments forwarded by proponents and opponents of rights documents in Australia is relatively well known. As the debate has historically ebbed and flowed, however, it is apparent that, depending on the circumstances which bring the debate to prominence at any given point in time, the terms and focus of the argument advocating the necessity of such documents shifts in important ways. Indeed, one of the peculiar features of modern advocacy in favour of declaratory rights documents, which has seen them instituted in Victoria[3] and the Australian Capital Territory,[4] is the argument that they do not do terribly much.

Newly central to the argument in favour of declaratory rights documents is the assertion that the merely declaratory nature of rights contained in these documents exhibits the desirable quality of not, in any real or meaningful way, diminishing parliamentary sovereignty. This assertion entails an important advantage for those arguing for rights documents, in that it allows proponents to dismiss perhaps the most powerful argument mounted against such documents; that is, the argument that, by facilitating judicial decision making in respect of issues which are inherently issues of public policy, these documents exhibit strong anti-democratic features. Of course, one of the rhetorical *dis*advantages of the "declarations do not affect parliamentary sovereignty" argument is that it makes mounting the case in favour of rights documents a little more difficult, or at least, considerably more obscure. Arguing in favour of legislation by a suggestion that it deliberately has no efficacy in terms of practical legislative outcomes is, at best, intellectually awkward.

That is not to say, however, that proponents of declaratory rights documents in Australia have been in any way dissuaded from this new task. To circumvent the most powerful argument against a Bill of Rights, proponents have found it necessary to advocate a form of rights document where it can at least be asserted that the document will lack any legislative efficacy. As a result, there appears a tortuous logical gap in the argument for declaratory rights documents. Notably, the present form of the argument in favour of such documents begs the obvious question as to why rights legislation should be instituted at all if it will be of no practical effect? This gap has been papered over by reference to the "soft" and unquantifiable effect of rights documents. This argument claims that, while declaratory rights documents have no power of legislative override which could be characterised by their opponents as diminishing parliamentary sovereignty, they do nevertheless have important educative and cultural effects.

The purpose of this paper is not to restate what are well known arguments for and against rights documents, or to evaluate the relative merits of judicial versus parliamentary decision making. It is doubtless that these arguments and others have been put exhaustively before the Brennan Committee. Rather, this paper seeks to raise two matters which pertain to the nature and conduct of the Brennan Committee's inquiry. They are the dual necessities that the Brennan Committee conduct its inquiry in a realistic and honest manner. This is not to presume that the Committee's inquiry is intended to be anything other than fair-minded. But rather, it reflects a sense that in the repetitious presentation before it of the political arguments for and against the Bill, and in the swim

of an almost endless sea of interest groups who see the potential Bill of Rights as a means to achieve some desired ends, the real limitations of what might be achieved by such a Bill, and what it may actually do in practice, particularly in terms of parliamentary sovereignty, could tend to become obscure even to the Committee itself.

Accordingly, this analysis will seek in Part I to provide some examination of the critical claims that have emerged in the modern Australian rights debate; most notably, that merely declaratory rights documents do not have any, or any substantial, effect on parliamentary sovereignty. The dimensions of this claim will then be tested in Part II by an assessment of some examples relevant to the effect of declaratory bills on parliamentary sovereignty in the context of criminal law.

Part I

Exhorting the Brennan Committee to undertake its consultation in a realistic manner is, in part, an observation that the now popular claim that some great advantage lies in an unmeasurable and amorphous educative power of declaratory rights documents to herald a new and previously lacking governmental culture of respect for rights in Australia, is a claim which requires some scrutiny. Perhaps more fundamentally, a realistic inquiry of the potential benefits of a declaratory bill will require some recognition of the legalist utopianism that tends to fuel many advocates' support of such documents.

Much of the enthusiastic support for a Bill of Rights emanates from segments of the Australian legal profession. This enthusiasm in turn finds its genesis in an unrealistic faith in the imagined infinite powers of legal reasoning. The modern legal philosophy of Rawls and Dworkin proceeds from an assumption that, in a well ordered Constitution under which exhaustive legal consideration can be applied to "apparent" conflicts between rights, there will no longer be agonistic choices between different formulations of conflicting rights. But rather, that there is an infinite capacity of legal reasoning to ensure an optimum mix of rights, rationally agreeable to all citizens.

Too many hubristic lawyers now see all the rights that we value in modern Australian society as pieces of a grand jigsaw puzzle, where the endless application of superior legal reasoning under some constitutional formulation of these rights can do what no society has ever done, which is to make all the pieces fit neatly together in such a way that all rational minds must agree the result is optimum.

In the make-believe world of legal philosophy we do not have to choose which of our liberties we value over the other, or which liberties we will ration to allow others to expand. However, for most purposes, and particularly the purposes of committee inquiry, it is better to be realistic. Rights do not naturally dovetail. Rather, they make competing demands, and legal reasoning cannot change that. If this is accepted, then the question becomes whether it is appropriately and fundamentally the task of government or courts to craft some or other mix that is generally acceptable to its citizens, but which is likely to require constant re-evaluation and be subject to change over time.

If the Brennan Committee accepts the idea that as a society we cannot have all our recognised rights simultaneously, without choice between different mixes and practical manifestations of these rights, then the Committee must confront the questions as to what a declaratory bill of rights would actually mean for the way in which Australian society presently chooses to order and prioritise conflicts between rights.

It is at this point that the Brennan Committee will be challenged to conduct its inquiry in an honest and accurate manner on the central question of what a declaratory bill of rights will actually mean for the future of parliamentary sovereignty in Australia.

As contended above, there appears to exist a substantive reluctance on the part of proponents of Australian rights documents to engage in the obvious and traditional public debate regarding how such documents are likely to affect the operation of Parliament. Examples of this reluctance are not difficult to find.

One such example appears in a recent response to an Op-Ed article by Professor James Allan, in which he argued against Australian rights documents. In responding to the case put by Allan, Stephen Keim, SC made the following comments:

> "I begin to part ways with Allan when he makes the argument that, in interpreting a bill of rights, the courts make unwise, irrational, unwarranted decisions that do not reflect the opinions of the Parliament or the majority of voters. I do not agree with this, although I accept that courts, like all our other democratic institutions, are fallible.
>
> "I strongly disagree with the next step in Allan's argument. He argues that a bill of rights takes too much power from the Parliament and gives it to the courts. This is despite the fact that, under the constitutionally entrenched *Charter of Rights and Freedoms* in Canada, the Parliament has the power to overrule any decision of the court. *Proposals being considered for an Australian* Human Rights Act *also leave the Australian Parliament's powers to legislate wholly unaffected*".[5] (emphasis added)

This passage demonstrates the typical form of what has emerged as a central tenet of the case for Australian rights documents. It reflects the now consistently advanced argument, notably that declaratory rights documents leave the legislative powers of Parliament "wholly unaffected".

This passage, and the general position it reflects, indicate that the contemporary generation of rights documents proponents are content to ignore any detailed or meaningful consideration of the potential effect that these documents may have on the existing dimension of parliamentary sovereignty in Australia. Plausibility is given to the "wholly unaffected" proposition by recourse to the accepted fact that declaratory or statutory rights documents are fundamentally distinct from constitutionally enshrined versions of documents with broadly similar content.

However, even if one were to accept this distinction, it does not necessarily follow that such documents leave parliamentary sovereignty wholly unaffected. The argument that declaratory documents are somehow nothing more than "enfeebled versions of their constitutionalised cousins",[6] correctly acknowledges that their declaratory nature means they do not possess the power of legislative override; but, importantly, fails to recognise the potential of such documents to substantially affect parliamentary sovereignty. This is because the argument gives no consideration to the interpretive clauses of declaratory documents and their potentially considerable effect.

Before examining the evidence that interpretive clauses of declaratory rights documents have a potentially substantive effect upon parliamentary sovereignty, it is instructive to note that it is not merely in the media that advocates of rights documents have exhibited the curious ambition to bypass the most fundamental and meaningful component of the rights debate which pertains to parliamentary sovereignty.

The recent Western Australian experience is testimony to the fact that, whether disingenuous or simply superficial, the restricted terms of the rights debate, as proponents appear content to have it proceed, is not limited to the domain of print media (where perhaps a more cursory or tactical advocacy might be more readily expected). Rather, it appears that the wilful blindness to the full effect of declaratory rights documents is a feature even of those forums which would readily be expected to present a balanced and non-partisan account of the arguments for and against declaratory rights documents.

The Western Australian draft *Human Rights Bill* 2007 is a prime example of a Bill produced by parts of a State government then clearly enthusiastic to adopt a rights document and, moreover, provides an example of a formal consultation process which attempted to formulate the debate in terms that would have it proceed in the absence of any meaningful consideration of the critical issue of the effect that such documents may have and are having on parliamentary sovereignty.

The *Report of the Consultation Committee for a Proposed WA Human Rights Act* ("the WA Report")[7] dealt with the issue of declaratory documents and their effect on parliamentary sovereignty in the following manner:

> "The Committee has given careful consideration to Professor Craven's arguments, which were reflected in a number of the submissions which were opposed to the Government's proposal; however, we find them to be at odds with the actual content of the draft Bill. Arguments about shifts in the balance of power in favour of the courts and the courts being able to 'overrule' Parliament are arguments that have been developed in relation to constitutional Bills of Rights, such as that in the United States. These arguments appear to have simply been transposed into 'dialogue' based Human Rights Acts, despite the fundamental differences between the two models. As noted by the Commonwealth Human Rights and Equal Opportunity Commission, one of the most frequently cited arguments against Human Rights Acts is that they transfer power to an unelected judiciary, however, in the context of a 'dialogue model' of human rights protection, this criticism is misconceived". (Submission 309)

> "It is not correct that the draft Bill would allow judges to "overrule" Parliament. The draft Bill would, if enacted, take the form of an ordinary Act which *would preserve the parliamentary sovereignty*. It would not prevent Parliament from enacting legislation that was incompatible with one or more human rights if it wished to do so. Moreover, it would not give people new substantive rights to challenge the validity of existing laws".

That the WA Report, which extended to in excess of 250 pages, should devote so little time to the issue of parliamentary sovereignty, and apparently exhibit wilful blindness to the international and domestic precedents which demonstrate a potentially substantial effect on the legislative authority of Parliament through declaratory rights documents, is unhelpful. That this deficiency should be exhibited in a formal report, funded by the taxpayer as a means of promoting balanced information on the type of document under consideration, is extraordinary.

What the WA Report omits from its analysis demonstrates the approach adopted by contemporary proponents of rights documents as over-simplistic, in that it fails to consider the potentially substantive effect of the declaratory species of rights documents on parliamentary sovereignty and, as will be examined in Part II, completely ignores recent judicial experience on the point.

To anticipate the conclusion of the first part of this analysis, the claim that sovereignty is left wholly unaffected by declaratory rights documents is either a deliberate technique of advocacy, whereby proponents of rights documents have developed a formulation of argument designed to sidestep what are undoubtedly the strongest features of the argument against such documents; or alternatively, it is an argument which is misconceived, because it ignores the growing body of legal evidence that declaratory rights documents have a substantive, rather than insignificant, effect on the legislative capabilities of Parliaments.

This substantive effect occurs by the operation of several mechanisms established by these documents' operative provisions, but chiefly among them is the power of the "interpretive" provisions contained in such documents.

The efficacy (or "potency") of any rights document ultimately depends on the force of its operative provisions.[8] The operative provisions have elsewhere been summarised as setting out: how the Court is to consider other statutes via the mechanisms available (the "interpretive" or "reading down" mechanism, the "declaration of incompatibility" mechanism and the "override" mechanism); the circumstances in which the Court is permitted to exercise its discretion with respect to the question of whether or not a limitation on rights is reasonable; to whom the Bill of Rights applies; and

the power of the Court to take action following a determined breach.[9] As noted above, the newer declaratory or statutory rights documents purport to be more palatable to notions of parliamentary sovereignty, because such documents do not empower courts to declare legislation unconstitutional and hence invalid (like the US *Bill of Rights* and other constitutionally entrenched versions).[10]

Rather, they empower the Court to do two broad things. Where it is not possible to interpret the subject legislation so as to achieve compatibility with the nominated right, there is a secondary function whereby the Court may issue a declaration that legislation is "inconsistent" or "incompatible" with the rights document. It is correct to concede that this does not invalidate the offending legislation nor render it inoperative, as would be the case under constitutional Bills of Rights. However, proponents go a step further in arguing that declaratory Bills of Rights, for the fact of their mere declaratory function, are (in the context of an importance being ascribed to parliamentary sovereignty) an effectively outcome-neutral and harmless academic exercise – or, as has been advanced more recently, a process which gives rise to a friendly "dialogue" between the Judiciary and the Parliament. In practice, it may well be the case that such declarations create an environment in which Parliaments may be compelled to give effect to a declared right by amending or repealing the relevant law. Importantly, however, before the issue of a need for a declaratory function even arises, the declaratory power is preceded by a wide ranging interpretive power established by such documents.

The first and foremost effect of declaratory rights documents is that they require the courts to exercise an "interpretive function" – that is, to construe (to an extent which at least nominally depends on the specific terms of the relevant interpretive clause of the document), as far as possible, legislation in accordance and in such a way as to achieve compatibility between the legislation considered and the declared rights. The now serially overlooked result is that, in actuality, the effect of interpretive clauses is that, under the guise of statutory interpretation, judges have a greatly enhanced capacity to "remake" legislation, and provide for quite different outcomes to arise from any given legislative provision than those that may have been the intended outcome of the originating Parliament.[11] The purpose of the second part of this analysis is to demonstrate, by example, that the actual effect of interpretive clauses is to go a good way beyond the traditional scope and ambience of the Judiciary's assumed role of statutory interpretation.[12] Indeed, these interpretive clauses require Courts to exercise their discretion on an artificial basis toward a discrete overarching objective. This powerful interpretive function projects courts into a far more active role than that to which they have been previously assigned.[13]

In relation to the operative provisions which provide the mechanisms by which declaratory rights documents, in practice, diminish the legislative authority of Parliament, the WA Report[14] devotes very little text to analysis of such themes. Notably, with respect to the "interpretive" provision (arguably the most potent of the operative clauses), the concept is dealt with in no greater level of detail than that exhibited in the following paragraphs:

> "The draft Bill does require courts to interpret legislation compatibly with human rights. However, the court's power to do so is limited to legislation the ordinary meaning of which is 'ambiguous or obscure' or 'leads to a result that is manifestly absurd or unreasonable' (Clause 34(3) of the draft Bill). In this regard, the draft Bill imposes a higher threshold than other jurisdictions, such as the ACT and Victoria (see chapter 6 of this Report for further discussion). It is difficult to see how it could be said to be inappropriate for courts, when faced with unclear legislation, to prefer an interpretation that better protects human rights.
>
> "The draft Bill also gives power to the Supreme Court (and only the Supreme Court) to make a declaration that legislation coming before it is incompatible with one or more human rights; however, such a declaration takes the form of non-binding 'advice' only. Parliament is entirely free to ignore it".

This passage does, helpfully, identify that the interpretive clause that was proposed for the draft Bill in WA was, ostensibly, of a comparatively more moderate kind than that exhibited in comparable declaratory documents in Australia and internationally.[15] However, it rather unhelpfully is not followed by any meaningful analysis of the effects of such clauses generally by recourse to an examination of international and Australian precedent which has a clear bearing on this issue. Nor does the WA Report provide any analysis directed to substantiate the assertion that what was proposed as the Western Australian interpretive clause would have a less significant effect than other comparative clauses in declaratory rights documents. And, as the analysis that follows will demonstrate, it may well be the case that an interpretive clause which limits a court's power to interpret legislation compatibly with the human rights documents only in circumstances where the ordinary meaning of legislation is "ambiguous or obscure" or "leads to a result that is manifestly absurd or unreasonable" is no less efficacious than comparable clauses in other rights documents.

While some interpretive clauses that will be analysed shortly are arguably more direct and less broad than others (because they do not contain a limiting passage relating to use only in circumstances of legislative ambiguity), the fact remains that however the interpretive clause is drafted, it is meant to be used exclusively in circumstances where the court perceives an ambiguity to exist.

The power that is derived from such interpretive clauses is a power which flows from the fact that ambiguity, in even seemingly simple legislative provisions, is not difficult to find. Such ambiguity has traditionally been resolved by recourse to known and understood legal precedent, rather than fresh consideration of expansively drafted rights.[16]

For example, in Victoria, a linguistic ambiguity which activated the interpretive clause in s. 32 of the *Charter of Human Rights and Responsibilities* 2006 (Vic), arose by virtue of the legislative use of the word "likely". The word is self-evidently a simple one, and one unavoidably used in legislative provisions as it is in everyday speech. Of course, like many other English words and phrases it is open to different meanings and, if used in legislation, potentially different interpretations. To the extent that the legislative use of the word can create legislative ambiguity, it is a type of ambiguity that had been effectively cured by years of developed precedent. The knowledge of such precedent that is possessed by any given Parliament means that, by including the word "likely" in legislation, Parliament relies upon the meaning which contextually relevant precedent had determined for it.

Part II

What will follow in this Part is an assessment of examples bearing upon the accuracy of the claim that declaratory rights documents leave the legislative powers of Parliament "wholly unaffected".

Given the assessment above, that advocates of declaratory rights documents have ignored the growing body of legal evidence that interpretive clauses in declaratory rights documents have a substantive, rather than insignificant, effect on the legislative capabilities of Parliaments, a useful starting point for consideration is to proceed in more detail with respect to the case of *RJE v. Secretary to the Department of Justice & Ors*[17] ("*RJE*").

In *RJE* the Victorian Court of Appeal dealt with an appeal against an order made pursuant to s.11(1) of the *Serious Sex Offenders Monitoring Act* 2005 (VIC) ("the *Monitoring Act*"), which section provided that the appellant could be subject to an extended supervision order for a period of 10 years.

Pursuant to the relevant provisions of the *Monitoring Act*, the Court was empowered to make an extended supervision order only where it was "satisfied to a high degree of probability, that the offender is *likely* to commit a relevant offence".[18] (emphasis added). A live and central issue of the appeal was the meaning of the term "likely to commit" in the context of the *Monitoring Act*. Specifically, whether "likely" to commit meant "more likely than not" (i.e., a greater than 50 per cent chance of an offence being committed), or that the term merely sought to indicate a real possibility

that an offence may be committed (i.e., potentially a less than 50 per cent chance). Importantly, prior to the decision in *RJE*, the latter interpretation had been preferred by the Victorian Supreme Court.[19] However, with recourse to the requirements of the interpretive provision of the *Charter of Human Rights and Responsibilities Act* 2006, the Court unanimously allowed the appeal and overturned the previous position (citing a necessary departure from the formerly preferred interpretation of "likely").

RJE is a particularly important decision for any meaningful consideration of the effect of declaratory bills, via their interpretive clauses, on parliamentary sovereignty.

The *Monitoring Act*, by virtue of s.11(1), clearly provided a mechanism by which the Victorian Parliament intended the court to effect indefinite detention of serious sex offenders in circumstances where it was determined the relevant offender was "likely" to commit a relevant offence. To give practical effect to this intent, Parliament drafted the legislative provision using the simple word "likely". The word "likely" is quite capable of conveying several slightly different meanings as a matter of English expression (and thereby at least capable of being considered linguistically ambiguous), but legally it was a word with a settled and unambiguous meaning in the legislative context in which it was employed, which meaning had previously been settled by significant case law – a meaning established by judicial precedent, on which Parliament relied for the purposes of drafting the relevant provision.

In *RJE* the precedent upon which the Victorian Parliament had relied with respect to the legal meaning of the word "likely" was overturned by the Victorian Court of Appeal, which was effectively required to reconsider the use of the word "likely", due to the existence of the "interpretive clause" mechanism contained in the *Charter of Human Rights and Responsibilities* 2006 (VIC), which required the court to "...construe s.11 of the [*Monitoring*] *Act* (so far as it is possible to do so consistently with the purpose of the section) in a way that is 'compatible with human rights' ".[20]

Through the interpretive clause, a word which had previously been ascribed a legally unambiguous meaning by precedent was at once reclassified as ambiguous, and redefined in a manner quite contrary to parliamentary intent. That the parliamentary intent, as to how the relevant provision should operate, was overridden by recourse to the Charter's interpretive provision, is clear from the terms of the judgment. In deciding the new interpretation of the word "likely", the Court commented that although Parliament's intention had presumably been in line with the previous interpretation of the word, "To adopt now the construction which [the Court] prefer[s] is to accept that the intention has changed. But that appears to be the way in which the Charter was intended to operate".[21]

The breadth and depth of such a change in principles of statutory interpretation should not be underestimated.[22] Where courts previously interpreted legislation by attempting to ascertain the intention of Parliament with respect to the operation of a particular legislative provision, now *all* legislation enacted prior and subsequent to the Charter is subject to reinterpretation in light of the Charter. Apart from creating uncertainty in relation to all laws, such a change requires judicial lawmaking on a grand scale because, by referring interpretation away from established precedent and toward newly legislated rights provisions, such clauses see courts become both the arbiters and creators of ambiguity.

The examples that follow also deal with the recent experience of judicial interpretation of rights documents as they operate in the context of criminal justice. The application of human rights to criminal law is highly illustrative for two main reasons.

First, for the simple reason that the imposition of criminal law is intuitively the most immediate incursion of "the State" on the freedoms of individuals; and secondly, that the potential for oppressive action by the State resulting from the former means that, historically, it is also the area in which inherent protections are already most well entrenched. Common law rules of criminal procedure and evidence have been designed throughout the history of the courts as a final frontier against oppression.[23] In no other context is the imposition of the State so necessary, or already so vehemently guarded against; and, in that sense, it is in the context of criminal justice that the imposition of

general or specific rights have the greatest potential to unravel the collective resolved wisdom of both the electorate, through its parliamentarians' policies, and of the Judiciary in its longstanding common law settled over the course of centuries.[24] Indeed, the present balance between the incursive power of the State upon the freedoms of individuals in the area of criminal justice reflects societal reactions to ongoing events which have found their expression in Australia through the legislative responses of Parliaments, and particularly State Parliaments, over the last century. If this is the case, the precise formulation of this balance has not only changed over time, but can also be expected to continue to change. It may be that what has been detectable in recent legislative responses in criminal law is a shift away from a post-war fixation of political discourse on the fear of the state, giving way to increasing demands by modern populaces for greater efforts on the part of governments to enhance the liberty of their citizens by the provision of greater protection from domestic criminal activity.

Whether this is or is not the case, what can be clearly demonstrated is that through even declaratory rights documents, there is considerable scope for contemporary judicial policy-setting in an area which is already well regulated by delicate and sophisticated interaction between legislative provisions and their progressive judicial interpretation, intersecting with common law rules of criminal procedure and evidence. In short, declaratory rights documents effectively require substantive judicial policy-making (whether the courts like it or not) in areas of significant public sensitivity, and which have traditionally found outcomes being led by the legislative responses of democratically informed State Parliaments. In light of the sensitivity of these areas (and often, the need to make changes quickly in response to changing societal trends), these are areas of public policy making that are appropriately left to Parliaments with democratic mandates, through the means of legislation drafted in the context of well understood judicial meanings of words, phrases and doctrines. This creates certainty of outcome and the flexibility of process which is required for effective governance.

A recent case which demonstrates the practical effect of the interpretive clauses of rights documents is the case of *Perovic v. CW*[25] ("*Perovic*"), an unreported decision of the Children's Court of the Australian Capital Territory.

Perovic involved the criminal prosecution of a child accused of a sexual offence, where there had been significant delay between the time at which the child formally became a suspect in the course of the police investigation, and the matter being subsequently brought to trial. The accused's legal representative submitted that the proceedings should be stayed on the basis that, amongst other things, there had been a breach of s.20(3) of the *Human Rights Act* 2004 (ACT) ("the *ACT Charter*"), which section provides for special rights of children in criminal proceedings, including that "a child must be brought to trial as quickly as possible".

In deciding the issue of delay in the context of the relevant provision of the *ACT Charter*, the presiding Magistrate considered a number of international precedents relevant to the application of various international jurisdictions' embodiments of Article 10 of the *International Covenant on Civil and Political Rights*. The Magistrate found that the child was not brought to trial "as quickly as possible" and that this amounted to a breach of the Charter.

Notwithstanding that the *ACT Charter*, as a declaratory rights document, does not provide specific remedies for breach (a fact acknowledged by the Magistrate), in deciding the case, his Honour relied upon the use of the relevant interpretation clause and his "inherent or implied power to prevent its own [the court's] processes being used to bring about injustice".[26] The Magistrate considered that the injustice which would result from the breach of s.20(3) was such as to make it appropriate to stay the proceedings and, accordingly, ordered that the proceedings be permanently stayed.[27]

While there is no doubt that a court has an inherent jurisdiction to control its own process and stay the proceedings if, to continue them, would be unjust, what is interesting is the manner by which the court, in this case, came to consider precedent regarding the length of time before delay will become oppressive such as to warrant a permanent stay. In this case, by reference to international decisions based on human rights doctrines, the Magistrate was either re-interpreting or simply ignoring

existing Australian precedent regarding length of delay which is acceptable in the ordinary course of proceedings.[28] Restated, had the Magistrate been exercising his court's inherent power in the absence of the *ACT Charter*, and in contemplation only of existing Australian precedent regarding delay in the context of the well established concept of a fair trial, it is highly arguable that the decision by the Magistrate in this case to stay the proceedings permanently would have been incorrect and unsustainable.

Significantly, the outcome of the Magistrate's decision in *Perovic* is that the *ACT Charter* provided the basis for a decision to permanently stay the prosecution of a serious criminal offence, in circumstances where established legal precedent would almost certainly have required a different decision. Interestingly, *Perovic* did not involve an interpretive clause necessitating a determination of "ambiguous" parliamentary legislation. Rather, it involved a re-interpretation of well settled case law relating to permanent stays of proceedings based, presumably, on the notion that some ambiguity now attaches to what were previously well settled common law principles, by virtue of the existence of the *ACT Charter*, and by the existence of international decisions which have been made regarding provisions similar to s.20(3) of the *ACT Charter* and which conflict in outcome and substance with existing Australian precedent on the issue.[29] In effect, the Magistrate placed far greater reliance on international decisions made in reference to other rights relevant to the issue of delay and the concept of a fair trial, than on settled Australian High Court precedent.[30]

While *Perovic* involved the re-interpretation (or perhaps by-passing) of established legal precedent, rather than the interpretation of parliamentary legislation, this process will also have a considerable effect on parliamentary sovereignty. This is because it is a process which ignores or re-defines a range of well known and accepted legal standards developed at common law, and that have direct implications for resource allocation. The consequence is that, by re-interpreting these common law principles to make them compatible with legislated rights, judicial officers now possess a new power to reach decisions which inevitably require parliamentary responses in the allocation of resources required to meet new standards, relating to the performance and timeliness of public investigative and prosecution services. Where these new standards were not planned for, or endorsed or approved by duly elected Parliaments, the effect on parliamentary sovereignty will be significant. In this regard, *Perovic* shows that even declaratory rights documents will have substantial implications for public services which are subject to resource allocation by the government in Parliament. Consequently, cases like *Perovic* demonstrate the way in which declaratory rights documents radically expand what were previously inherent limitations on courts to make policy decisions that impact on existing government services and resource allocation.[31]

The experience of criminal law jurisprudence under the *Human Rights Act* 1998[32] in the United Kingdom has similarly demonstrated the potentially enormous impact of declaratory rights documents on parliamentary sovereignty.

In the *Human Rights Act* 1998 (UK), s.3 sets out the "interpretive function", requiring simply that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights".

In the matter of *R v. A*,[33] the UK House of Lords considered the impact of s.3 of the *Human Rights Act* 1998 (UK) on the application of s.41 of the *Youth Justice and Criminal Evidence Act* 1999 (UK), which section intended to place firmer restrictions on the cross-examination of complainants in sexual assault matters about their sexual history generally, or about any previous sexual history with the accused.

The provisions under consideration in *R v. A* are similar to equivalent provisions in the *Evidence Act* 1906 (WA),[34] where the intention is to protect complainants in these cases from being unduly

harassed by counsel and, in doing so, diminish those factors which tend to deter a victim from making a complaint, which would result in offenders escaping prosecution. Further to this, these provisions are intended to avoid the concept being placed before a jury, by relevant questions being led by defence counsel, that a complainant who had engaged in consensual sexual intercourse with the accused, or with some other person in the past, is more likely to give consent to sexual intercourse subsequently, and that the evidence of a promiscuous complainant is less credible.

In *R v. A*, the accused sought to adduce such evidence, arguing that the exclusion of it was incompatible with the right to a fair trial, which right is set out in both the *Human Rights Act* 1998 (UK) and in Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ("the *European Convention*"). The case concerned then, a problem of the kind often encountered under human rights legislation, namely, in this case, "whether a restriction in a statute on criminal evidence designed to prevent traumatising cross-examination of complainants in rape cases threatened the fair trial rights of the defendant".[35] The House of Lords was required to consider the inherent conflict between the interests of the complainant and the accused's right to a fair trial – a conflict which the court admitted on this occasion "is more acute since the *Human Rights Act* 1998 came into force".[36] In agreeing that s.41 of the *Youth Justice and Criminal Evidence* Act 1999 was not compliant with the right to a fair trial generally, the House of Lords, by two somewhat creative steps, demonstrated the ambit of interpretive scope permitted by the power of interpretation under s.3 of the *Human Rights Act*.

The House of Lords decided that:

(1) The general right in Article 6 of the *European Convention* to a fair trial included the right to put forward a full and complete defence by advancing truly probative material;

(2) It follows that "the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material"; and that

(3) It was "possible under s.3 [of the *Human Rights Act*] to read section 41... as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under Article 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under s.41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant" having regard to broader considerations of time and circumstances.[37]

Ultimately, the House of Lords used the interpretive function of the *Human Rights Act* 1998 (UK) to restrict the statutory provision, so that it did not exclude evidence which was considered relevant to the issue of consent and which would, if excluded, endanger the fairness of the trial.[38] In effect, under the guise of the "interpretive function", the House of Lords implied an exception into a statutory provision which was aimed at achieving the opposite of what the House of Lords sought to imply. What resulted is that the House of Lords shifted from the natural and ordinary meaning of s.41, and reinstated considerable scope for judicial discretion regarding the circumstances in which the evidence sought to be adduced in trials for offences of this kind, can be so adduced.[39]

In the case of *R v. Lambert* [2001] UKHL 37 ("*Lambert*") the House of Lords was to consider, from a human rights perspective, the legitimacy of the reversal of the burden of proof legislated by s.28 of the *Misuse of Drugs Act* 1971 (UK).

The facts of *Lambert* were that the accused had been caught with two kilograms of cocaine in his duffle bag. He was charged with the offence of possession of a controlled substance with intent to

sell or supply and, in his defence, asserted that he neither knew, nor suspected, nor had reason to suspect, that the drugs were inside his bag. Section 28 provides that this is "a defence for the accused to prove", constituting in effect a reversal of the burden of proof.

A similar provision is enacted in relation to the offence of possession of a prohibited drug with intent to sell or supply under the *Misuse of Drugs Act* 1981 (WA). Section 11(a) of the Act activates a reversal of the burden of proof, in respect of the mental element of intent, where the quantity of drugs the subject of the offence is not less than the quantity prescribed in Schedule V of that Act. In respect of Methylamphetamine, for example, Schedule V provides that where a person is alleged to have been in possession of a quantity of not less than 2.0 grams, the presumption of intent to sell or supply is activated, and the burden of proof is then transferred to the accused to rebut the presumption. Although the presumption is rebuttable, the provision establishes in effect a reversal of the burden of proof (albeit to a lesser standard, on the balance of probabilities) with respect to that element of the offence.

In public policy terms, these provisions are generally a response by the Parliament to particular offending behaviour of concern to the community at large. In practical terms, the provisions are aimed at holding accused people to account in respect of the defence sought to be relied upon. With respect to offences of this kind, implicit in the element of "possession" is the requirement to prove (in addition to physical possession) a mental element, that is, knowledge and intent with respect to possession of the drug. Without provision for the reversal of the burden of proof, the accused is able to assert that he did not know, nor should have been reasonably expected to know, that the drugs were in his possession, and the prosecution would be required to negate this assertion beyond reasonable doubt.

In circumstances where the prosecution is required to prove possession (physical and mental) beyond reasonable doubt, it would be in many cases an impossibly high standard of proof for the State to be able to establish the mental element beyond reasonable doubt. Depending on the circumstances, as a matter of practice in such matters, it will often be the case that, without more, the mere assertion by the defence of a lack of knowledge would almost certainly cause a trier of fact to identify a reasonable doubt as to the accused's guilt based on their (potentially untested) assertion that they didn't know the drugs were in their possession. These provisions, pertaining to the reversal of the onus of proof in particular, have generated human rights based arguments in the context of the right to be presumed innocent and the right to silence associated with that presumption.[40]

In *Lambert,* the House of Lords held that a reversal of the onus of proof was not compatible with Article 6(2) of the *European Convention*, which declares that "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law". However, rather than making a declaration of incompatibility, the House of Lords utilised the "interpretive function" to impose on the words of the statute a different meaning from that intended by Parliament. The House of Lords considered that the word "prove" in s.28 of the statute could be read as meaning "adduces sufficient evidence", which would require simply that the accused carry the lesser "burden" of adducing sufficient evidence such as to bring the defence into issue such that the prosecution must disprove it beyond reasonable doubt. The effect was that the Court completely negated the Parliament's intention to reverse the onus of proof in such situations.

A further example is the case of *S & Marper v. The United Kingdom*[41] *("S & Marper"),* where an application was brought before the European Court of Human Rights by two British nationals, alleging breaches of Article 8[42] and Article 14[43] of the European Convention.

Specifically, the applicants were seeking the destruction of fingerprints and DNA samples taken by the British police in the course of an investigation which did not result in a successful prosecution. Such retention was permitted in domestic British law.[44]

The applicants submitted that retention of their fingerprints and DNA profiles constituted an interference in their private life in breach of Article 8 of the *European Convention*. After weighing

up: (i) whether the holding of samples constituted an interference in the applicants' private lives; and (ii) whether such interference was justifiable on grounds of the benefits to law enforcement, the European Court of Human Rights ultimately upheld the applicants' appeal, stating:

> "…the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, *fails to strike a fair balance between the competing public and private interests* and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a domestic society… Accordingly, there has been a violation of Article 8 of the Convention in the present case".[45] (emphasis added)

What is noteworthy about this matter is not the quality of the decision ultimately arrived at, but the degree to which the Court's decision involves public policy, through balancing competing rights under the guise of protection of an apparently absolute right. This case involves two equally valid public policy goals in clear and unavoidable conflict. The first goal might be described as that of securing and enhancing citizen's safety by establishing a robust system of detecting and punishing criminal activity (this might be seen as some species of the genus right to life). The second goal may be described as the end of ensuring a level of non-interference with the lives of citizens which might be prompted, or directly affected, by the storage of personal data relating to citizens (this might be seen as some species of the genus right to liberty).

Modern Western societies place value on both of these goals, and the majority of electors might wish for there to be tighter controls on the storage of data by police than presently exist. In another context, the majority may have given their government a mandate to retain a wider range of samples for the purposes of stronger law enforcement. Democratically produced outcomes in this regard may vary, depending on the community charged with the decision to elect, or the time or under what conditions they are required to take the decision. However, a decision as between the appropriate mix of these competing values is not a decision about a right, in the sense of protecting some single value which rational analysis shows us is neutral, universal and eternal. As the European Court itself acknowledged, it was not performing the task of assessing whether there exists in all circumstances a right not to have samples of this nature held. Instead, the Court arrived at a decision by performing an assessment of whether the decision made by a democratically elected Parliament of a member state "…fail[ed] to strike a fair balance between the competing public and private interests".

Conclusion

Whether a proponent or opponent of rights documents, there appears to exist some agreement or acknowledgement that the strongest arguments against such documents are those which argue for a place of primacy in the making of public policy in liberal democracy with the elected representatives of the Parliament. Or, in other words, that the sovereignty of Parliament is a paramount consideration in determining the desirability of rights documents.

It is for this reason that the critical claim, that will require honest and accurate examination by the Brennan Committee, is of the relatively new argument which has emerged in the modern Australian rights debate as response to parliamentary sovereignty arguments against such bills. Notably, it has been asserted in Part I above that modern rights advocates now centrally argue that merely declaratory documents do not have any, or any substantial, effect on parliamentary sovereignty. The Brennan Committee must as a fundamental priority of its inquiry decide whether or not this argument is inherently misconceived.

Part II of the analysis has presented its own view on this claim, by examining specific examples which demonstrate the ways in which rights documents impact significantly on parliamentary sovereignty; through the direct interpretation of legislative provisions, and also through the re-interpretation of previously settled common law doctrines. What can be said in summary of the examples, is that while it may be difficult to envisage all the ways and areas in which parliamentary sovereignty may potentially be affected by the interpretive provisions of rights documents, what is already evident from the short experience of judicial utilization of declaratory rights documents is, that any proposition that the effect of such documents on parliamentary sovereignty is neutral is unsustainable in the face of the emerging and growing body of evidence to the contrary.

Indeed, whether the declaratory rights document directly and obviously subverts parliamentary sovereignty, by the simple mechanism of re-interpreting what would otherwise be a legislative provision of accepted and unambiguous meaning; or whether there has been a re-interpretation of settled common law concepts and principles upon which legislative drafting and governmental decision making is based – it is already the case that the effect of declaratory documents on Australian State and international Parliaments cannot be ignored.

In these circumstances, it is at least honest that debate on the issue focus once again on whether it is desirable that courts should not only possess the capacity to overrule Parliament, but also be left to make an entirely subjective decision on what is essentially a matter of public policy. At the time of writing this analysis, at least some indication exists that the issue of the critical effect of interpretive clauses is a live one for the Brennan Committee. Some media reporting has demonstrated that Father Brennan has been the subject of submissions from the NSW Chief Justice Spigelman, to the effect that the Committee should not contemplate an interpretive clause along the lines of that which exists in the United Kingdom, because it is too broad and allows the interpretation in the United Kingdom of legislation by the courts in a way never intended, or positively not intended, by the Parliament that generated it.

That such a submission appears to have been received by the Brennan Committee is encouraging. However, it is at the same time concerning that the Chief Justice's view seems to have been accompanied by a view that some form of drafting of an interpretive clause is possible which would not have the negative result on parliamentary sovereignty witnessed in the UK, Victoria and the ACT. If this is the way in which the Brennan Committee intends to approach this issue, it should recognise that there has yet to be any evidence of such a draft of an interpretive clause that has been able to prevent the effects detailed in this paper.

Further, it is being suggested that a clause can be drafted which does no more than formalise the common law principle that, in cases of clear ambiguity, legislative interpretation should favour a position that protects common law rights; the questions begs, why risk the imposition of an untested and potentially faulty interpretive clause that could lead to ever expansive judicial interpretations and change public policy outcomes (outcomes which were meant to be achieved by Act of Parliament) if the *only* advantage of running such a risk is to restate a complex interpretive *status quo* that already operates relatively and predictably well.[46]

If the present policy debate continues to ignore the types of matters raised above, or pretends that some perfect interpretive clause can be divined that will prevent the types of outcomes detailed above, then it is quite possible that documents will be brought into existence which, while promising the contrary, will substantially subvert the purpose and functions of parliamentary democracy, and substitute an executive judiciary for the executive Cabinet in significant public policy areas.

Endnotes:

1. The full title of this paper is: The Brennan Committee, Declaratory Rights and Parliamentary Democracy.

2. Mr Porter's paper acknowledges the assistance of Jennifer Porter, described as an LLM student at the University of Western Australia [Editor's note].

3. The *Charter of Human Rights and Responsibilities* 2006 (Vic) came into operation on 1 January 2007; however, the obligations on public authorities such as police, as well as the powers of the courts arising in the Act, were delayed, to commence on 1 January 2008.

4. The *Human Rights Act* 2004 (ACT) came into operation on 1 July 2004.

5. Stephen Keim, *Bill of rights is ours to decide*, *The Australian*, Legal Affairs, 24 April 2009.

6. Allan, J, *The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism*, Melbourne University Law Review, Vol 30, No. 3, May 2007, pp. 906-922 at p.911.

7. *Report of the Consultation Committee for a Proposed WA Human Rights Act*, November 2007, p.52.

8. Allan, J, *op. cit.*, p.908.

9. *Ibid.*.

10. Other examples include the New Zealand *Bill of Rights Act* 1990 (NZ) and the *European Charter of Human Rights*. Despite the common perception that the doctrine of parliamentary sovereignty (perhaps because of its UK origins) applies in Australia, it must be remembered that because of the existence of the Australian Constitution, no Parliament, whether State, Commonwealth or Territory has unlimited or plenary legislative power. That is, legislative power (and hence, parliamentary sovereignty) is limited by the Constitution and, therefore, that limitation of itself protects people's rights. This is the essence (often overlooked) of having a constitutional democracy.

11. Allan, J, *op. cit.*, p.909.

12. *Ibid*..

13. Ashworth, A, *What Have Human Rights Done for Criminal Justice in the UK?*, University of Tasmania Law Review, Vol 23 (No. 2), 2004, p. 161. See also Kavanagh, A, *The Elusive Divide between Interpretation and Legislation under the* Human Rights Act *1998* (2004) 24 Oxford Journal of Legal Studies, 269.

14. *Report of the Consultation Committee for a Proposed WA Human Rights Act*, November 2007, p.52.

15. See Draft *Human Rights Bill* 2007 (WA), s.34; *Human Rights Act* 2004 (ACT), s. 32; *Charter of Human Rights and Responsibilities* 2006 (Vic), s.32(1); *Human Rights Act* 1998 (UK), s.3(1); and *Bill of Rights* 1990 (NZ), s.6.

16. Although Parliament is the pre-eminent source of legislation, it is often the case that, due to either legislative complexity or sometimes doubtful (or multiple) meanings of apparently simple phrases and words, the court has a role in refining and translating Parliament's intention. Irrespective of whether or not there is explicit legislative instruction to do so, the court is bound by general principles of interpretation that hold that the court is unlikely to have recourse to external sources for interpretive guidance where the meaning of the legislation in question is clear. Conversely put, while the proposed Western Australian interpretive clause may have been drafted in slightly different terms from other such clauses, it may not have been any different in the effect that is now becoming discernible from comparative clauses in other rights documents. This is because all the proposed Western Australian clause did was to formalize a principle that was being acted upon in any event; notably, that the courts will not have recourse to a *Human Rights Act* (or any other external source) for the purposes of interpreting the meaning of a clause(s), unless the ordinary meaning of the legislation under consideration is "ambiguous or obscure" or "leads to a result that is manifestly absurd or unreasonable".

17. *RJE v. Secretary to the Department of Justice, Attorney-General for the State of Victoria and Victorian Human Rights and Equal Opportunities Commission* [2008] VSCA 265 (18 December 2008).

18. *Serious Sex Offenders Monitoring Act* 2005 (VIC), s. 11(1).

19. See *TSL v. Secretary to the Department of Justice* (2006) 14 VR 109.

20. *RJE, loc. cit.,* per Nettle JA at 105.

21. *Ibid.*, per Nettle JA, at 114.

22. Lord Woolf CJ, discussing the parallel section of the *Human Rights Act* 1998 (UK); *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2002] QB 48.

23. *Rights*, in Miller, D, Coleman, J, Connolly, W, Ryan, A, *The Blackwell Encyclopedia of Political Thought* (Oxford: Blackwell Publishers, 1991), p.103.

24. It was always expected that it would have a major impact on this area, more in respect of criminal procedure than the substantive criminal law or sentencing: Ashworth, A, *op. cit.,* p.170.

25. *Perovic v. CW,* No.CH 05/1046 (Unreported, 1 June 2006), Children's Court ACT.

26. His Honour referred to the decision of *DPP v. Shirvanian* (1998) 102 A Crim R 180, which dealt with the power to stay proceedings.

27. The case goes further than the Supreme Court decisions of *R v. Upton* [2005] ACTSC 52 and *R v. Martiniello* [2005] ACTSC 9, where delay in prosecution of adult defendants was considered to breach the right to be tried without unreasonable delay under s. 22 of the *Human Rights Act*. In those cases, a stay of proceedings was granted, but the proceedings could be re-instated upon payment of the defendant's legal costs by the prosecution, rather than the matter being permanently barred.

28. The factors which need to be taken into account in deciding whether a permanent stay is needed, in order to vindicate the accused's right to be protected against unfairness in the course

of criminal proceedings, cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused: *Barker v. Wingo* (1972) 407 US 514; *Bell v. Director of Public Prosecutions* [1985] AC 937, as explained in *Watson*, and *Gorman v. Fitzpatrick* (1987) 32 A Crim R 330. In any event, a permanent stay should be ordered only in an extreme case, and the making of such an order on the basis of delay alone will accordingly be very rare: *Re Cooney* (1987) 31 A Crim R 256 at 263-4.

29. In support of the contention that the Magistrate was substantially ignoring or re-interpreting settled Australian precedent on the issue of what is fair and just in relation to the question of how long a delay can be before it becomes oppressive such that the trial could be deemed unfair, see *Jago v. Director of Public Prosecutions* 87 ALR 577 per Mason CJ and Toohey J's reasons for judgment, which include that the Australian common law does not recognise the existence of a "special right" to a speedy trial. The test of fairness involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial: see Barton (CLR at 102, 106).

30. What constitutes a fair trial in Australia has been relatively well settled by a variety of cases. In short summary, trials must exhibit several fundamental features to be termed fair, and absent those features an appellate court may declare a trial unfair (see *Wilde v. R* (1988) 164 CLR 365 (18 February 1988)).

31. Dunn, J, *The Perils of Judicial Policy Making: The Practical Case for Separation of Powers*, First Principles Series, No. 20, September 23, 2008, The Heritage Foundation.

32. The *Human Rights Act* 1998 (UK) came into operation on 2 October 2000.

33. [2001] UKHL 25.

34. Sections 36 and 36BC.

35. The Right Honourable the Lord Walker of Gestingthorpe, KB, *A United Kingdom Perspective on Human Rights Judging*, (Victoria: The Judicial Review; 8(3)), September 2007, p.297.

36. [2001] UKHL 25, per Lord Slynn at 5.

37. *Ibid.*, at 45.

38. The Right Honourable the Lord Walker of Gestingthorpe, KB, *op. cit*..

39. Ashworth, A, *op. cit.,* p.163.

40. The Right Honourable the Lord Walker of Gestingthorpe, KB, *op. cit*., p.302.

41. *S and Marper v. The United Kingdom* (December 4, 2008) (Application nos. 30562/04 and 30566/04), European Court of Human Rights.

42. Article 8, *Right to respect for private and family life*:

"1. Everyone has the right to respect for his private and family life, his home and his

correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

43. Article 14, *Prohibition of discrimination*:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

44. See s.82 of the *Criminal Justice and Police Act* 2001 (UK)

45. *S & Marper v. the United Kingdom*, *loc. cit.*, at [125].

46. Pelly, M, *Don't give judges room on rights: CJ*, *The Australian*, 28 August 2009.

Chapter Two

Human Rights Bureaucracies

Miranda Devine

Some people choose their opinions according to the cheer squad theory. If they like the people expressing an opinion, they'll agree.

Hence the intellectual power of the movie star.

At a speech for the Centre for Independent Studies in Sydney recently, American satirist PJ O'Rourke was asked why something couldn't be done about Hollywood's pervasive left-wing bias; what was needed were some right-wing actors to balance the books.

O'Rourke shook his head about the prospects of conservatives on a recruiting drive on Hollywood Boulevard.

"I have only two words to say to you", he told his questioner. "Mel Gibson".

Be careful what you wish for.

When it comes to a Bill of Rights, the cheer squad mentality of Australian opinion forming prevails. It tends to be a bleeding heart cause. Lefties love the idea of a Bill of Rights because they want it as a vehicle for shoving unpopular ideas down the throats of the majority.

As John Howard says, their approach is hopelessly élitist:

> "The notion that typical citizens, elected by ordinary Australians, cannot be trusted to resolve great issues of public policy, and that the really important decisions should be taken out of their hands and given to judges who, after all, have a superior capacity to determine these matters".

Having said that, I must confess to have been a fan of the idea. And not just because I am an élitist.

I was born in America and grew up with the first ten amendments to the US Constitution, which form their Bill of Rights, in the architecture of my brain. I ascribe the extraordinary openness, independence and self-reliance of the American character to this very clear emphasis on individual rights. The Bill of Rights is embedded deep in every American psyche.

Even when my family left the US and moved to Tokyo, my primary school friends and I used to punctuate our arguments with the ultimate punch line: "It's a free country".

While not a big fan of the right to bear arms, which is the Second amendment, as a journalist, the First amendment enshrining freedom of speech and a free press seemed a wonderful innovation.

For one thing, it made my job a lot easier. You could stick your microphone in the face of anyone on the Chicago lakefront and they would talk happily and in perfect sound bites.

You could ring the CEO of a company or the local mayor, and she would think nothing of picking up the phone and answering your impertinent questions.

Politicians and public servants did not hide behind institutionalised barriers to journalists' questions. They felt obliged to answer, and knew that it was not the *Boston Herald* they were answerable to, but the people. Journalists were the conduits.

Americans instinctively feel it is their right and civic duty to speak to the press. In return, journalists believe it is their right to access information, and their duty to accurately report it.

Unlike in Australia, they are not supplicants owing favours in return for information doled out on a need-to-know basis.

In my experience, American journalists took the responsibilities of their craft far more seriously than did journalists on Fleet Street, where I once worked for a few dismal months on *The Sun*. I attributed the superiority of American journalism to the fact that freedom of the press had been elevated by the Founding Fathers to a special place in the Constitution.

But context is everything.

The American Bill of Rights was drafted in a very different world, by men of the Enlightenment who aspired to freedom for the common man, and believed authority derived from reason and natural law. Its main author, James Madison, "the Father of the Constitution", initially opposed a Bill of Rights. He agreed with Alexander Hamilton it was dangerous, since "enumeration of some rights might be taken to imply the absence of other rights" – which is why they had to include the Ninth amendment, protecting any rights not mentioned in the Bill of Rights.

Which is what happens when you let lawyers lose on codifying rights – they never stop.

But today in Australia the whole notion of a Bill of Rights has been hijacked for fashionable left wing pet causes, from gay marriage to so called "carbon pollution". It's just a vehicle to impose the progressive left agenda, as espoused by the Getup crowd, onto a reluctant populace, and usurp the role of elected governments.

The human rights bureaucracies which already exist in Australia give you a clue to their agendas. Marcus Einfeld, former President of the Australian Human Rights Commission – now serving time at Her Majesty's pleasure – is their pinup boy.

As Julian Leeser points out, the Human Rights Commission's "Work Out Your Rights" campaign is almost indistinguishable from the Labor Party's "Your Rights At Work" manifesto. And when Sex Discrimination Commissioner Elizabeth Broderick conducted a national "listening tour" recently, the people she "listened" to were the organised groups such as Getup and the Australian Liquor, Hospitality and Miscellaneous Workers' Union.

Sir Ronald Wilson, Einfeld's predecessor, brought down the *Bringing Them Home* Report, which popularised the idea of a Stolen Generation. It succeeded only in ensuring that a new "generation" of children would be left in intolerable situations of abuse and neglect, because authorities were too timid to intervene for fear of creating another Stolen Generation.

The Human Rights Commission's Social Justice Commissioner, Tom Calma, has opposed the Northern Territory intervention, on the basis that it does not meet the standards of international Conventions on the rights of children not to be discriminated against on the basis of race.

He admits these are not "easy tests to meet". He supports the aim of the intervention, to protect children from neglect and abuse, and yet is willing to wreck it for what he must see as a higher purpose.

But as PJ O'Rourke might say, the Getup crowd should be careful what they wish for.

A Human Rights Bill can also become a vehicle for causes they despise.

In the September issue of *Quadrant* magazine, out next week, is a beautiful example of unintended consequences in a piece by Angela Shanahan, about the consequences for abortion of a Bill of Rights.

It features a submission to the National Human Rights Consultation Committee last month by law lecturer Rita Joseph.

Joseph points out that any move towards a Bill of Human Rights in Australia will mean a change to abortion law, to accord with our international obligations to protect the right to life of the unborn child.

"Legal protection for unborn children is one of the founding principles of modern international law… As one of the Nuremberg judgments, this principle was mandated to be codified in the International Bill of Rights", writes Jospeh.

"Abortion constitutes arbitrary deprivation of life in breach of international human rights law".

In 1959 the UN General Assembly declared recognition, in the *Universal Declaration of Human Rights*, that the child "by reason of his physical and mental immaturity" is entitled to "special safeguards and care, including appropriate legal protection before as well as after birth".

In other words, the "right" of a woman to choose to abort her unborn child does not trump the right of the child to live.

You can bet the Bill of Rights cheer squad will be silent on this.

We are told often that we are the only democratic nation in the world that does not have a Bill of Rights, and that this is a great failing.

But Victoria's rights charter, which is being held up as a model for a federal Bill of Rights, demonstartes the kinds of complications which arise.

Frank Brennan, the Jesuit priest who heads the consultation committee and is something of a bleeding heart, has actually attacked the charter for forcing a doctor, who was conscientiously opposed to abortion, to refer a patient to a doctor who would perform the procedure. In this case, the charter has overridden the rights of the doctor to have freedom of conscience.

He described Victoria's charter not as an upholder of human rights, but "a device for the delivery of a soft-Left sectarian agenda [to be discarded when] the rights articulated do not comply with that agenda".

And that is the problem. Whoever's ideology prevails at the time will have their rights elevated over the rights of those outside the cheer squad.

So, as attractive as is the idea of an American Bill of Rights, I don't trust those who aspire to meddle with a system which has served us pretty well.

We have the foundations necessary to preserve human rights – a representative government, an independent judiciary and a free and fair press.

There is no water boarding at Long Bay jail as far as I am aware, much as we might wish it for certain terrorism suspects. I'm sure Marcus Einfeld would let us know.

Which brings me to my last cliché of the morning, a favourite of good conservatives: if it's not broke, why fix it?

Chapter Three

Rights in the Constitution

Dr David Bennett, AC, QC

Like Sherlock Holmes' famous dog that didn't bark in the night, the best thing about our Constitution is what it does not contain – a Bill of Rights. Unfortunately it does contain some express rights and the High Court has found some implied general principles, and the Constitution has been weakened by both.

It is important to bear in mind the opening remarks by Gleeson CJ in *Roach v. Electoral* Commissioner,[1] where he said:

> "The Australian Constitution was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies. Although it was drafted mainly in Australia, and in large measure (with a notable exception concerning the Judicature – section 74) approved by a referendum process in the Australian colonies, and by the colonial Parliaments, it took legal effect as an Act of the Imperial Parliament. Most of the framers regarded themselves as British. They admired and respected British institutions, including parliamentary sovereignty. The new Federation was part of the British Empire; a matter important to its security. Although the framers were concerned primarily with the distribution of legislative, executive and judicial power between the central authority and the States, there remained, in their view of governmental authority affecting the lives of Australians, another important centre of power in London".

One of the few direct attempts to create direct civil rights in the Constitution is s. 117, which prohibits a State from discriminating against residents of another State. Initially this was given a very limited interpretation. In *Henry v. Boehm*[2] the High Court (Stephen J dissenting) considered Australian legislation which provided that, in order to be admitted as a lawyer in that State, one needed to reside in South Australia for the three months prior to application. It was held that this did not discriminate against residents of other States, because the requirement to reside in South Australia for three months applied equally to South Australian residents and residents of other States. That decision was effectively overruled by the High Court in *Street v. Queensland Bar Association*.[3]

The real problem with s. 117 is that it may unduly restrict certain types of State activities. Thus, for example, if a State were to impose a State tax (which obviously would fall primarily on local residents) in order to provide single bed accommodation for local residents in its hospitals, such legislation might well be struck down under s. 117. In *Street's Case* itself, there had been for some time a view held among some of the legal profession in Queensland that the admission of southern barristers would inhibit the development of a strong Bar in Queensland, because the major commercial cases would all be argued by barristers from Sydney and Melbourne. The wisdom of this view is debatable, and I do not wish to debate it. My point is that the case was necessarily decided without reference

to the desirability or otherwise of the particular discrimination. That issue was simply irrelevant. Bills of Rights which contain wide generalisations similarly do not give any opportunity for the consideration of the merits of particular applications in particular cases.

Section 80 requires that trials on indictment for offences against laws of the Commonwealth be heard by juries. This provision has proved to be both too wide and too narrow. It is too narrow, in that it can be avoided by the simple expedient of the Commonwealth providing that a particular offence shall be prosecuted summarily rather than on indictment. The result of the line of cases reaching this conclusion is that it is a simple matter for the Commonwealth to preclude trial by jury for specific offences if it chooses to do so.

The provision is too wide in a different respect. In *Brown v. R*[4] the High Court held that a State provision which permitted an accused person to elect for trial by judge was invalid in its application to Commonwealth offences. It is one thing to say that a person has a right to a trial by jury, it is quite another to say that a system under which a person can elect for trial by judge is not permitted, especially where, for example, the defendant has been excoriated in the media.

Section 75(v) provides that the High Court has original jurisdiction in all matters in which a writ of prohibition or *mandamus* is sought against an officer of the Commonwealth. As a matter of English these words are very straightforward. They do no more than confer jurisdiction on the High Court where certain remedies are sought. The High Court has held, however, notably in *Plaintiff S157/2002 v. The Commonwealth*,[5] that the effect of the provision is to confer a right to obtain an order of prohibition or *mandamus* where a Commonwealth officer commits a jurisdictional error (which includes a denial of procedural fairness). In *Bodruddaza v. Minister for Immigration and Multicultural Affairs*,[6] this was taken so far as to enable the Court to strike down a statutory limitation period for prerogative relief in migration matters of 28 days, which period could be extended by up to 56 days, to 84 days, at any time before the expiry of 84 days. This comparatively generous limitation period was held to conflict with s. 75(v) of the Constitution because it was capable of inhibiting the ability of the High Court to grant prerogative relief notwithstanding jurisdictional error.

Sections 7 and 24 of the Constitution provide that the Senate and the House of Representatives respectively shall be chosen directly by the people. Section 30 allows the Parliament to determine the qualification of electors. Clearly there has to be a reconciliation, so that Parliament cannot fix the franchise in such a way that the Senate and House of Representatives are not "chosen directly by the people". The issue arose in *Roach v. Electoral Commission*,[7] where the High Court held that a provision precluding any person serving a sentence of imprisonment on the date of an election from voting was invalid, but that a provision limited to the exclusion of persons serving sentences in excess of five years was valid. This decision was reached notwithstanding that, at the time of the Constitution, all six of the Australian colonies had provisions restricting the right to vote of persons serving sentences for imprisonment (although the provisions differed from colony to colony). One could be forgiven for thinking that this was one of the matters the Constitution had deliberately left to the Parliament, but the High Court chose to draw a wider implication from the general words requiring the two bodies to be "chosen directly by the people".

I will not deal in this paper with the implied freedom of political communication which the High Court has managed to find in the Constitution, nor with the complex issues arising out of s. 51(xxxi).

The major implication found in the Constitution has arisen from the division between Chapters I, II and III, which deal respectively with the legislature, the executive and the judiciary. In *R v. Kirby, ex parte Boilermakers' Society of Australia* ("the *Boilermakers' Case)*,[8] the High Court held that this division meant that Parliament could not confer judicial power on a non-judicial body, nor could it confer non-judicial power on a Chapter III court. This may well be a sensible general approach, but it causes difficulties when one has a matter to be decided which falls close to the line between judicial and non-judicial.

In such a case, the effect for years has been that the Parliament selects at its peril what it believes the decision to be. If it is wrong, and something which is just on the judicial side of the line is given to a non-judicial tribunal, or something which is just on the non-judicial side of the line is given to a Chapter III court, the legislation is invalid. This extreme doctrine is the result of treating an implication in the Constitution as creating an absolute rule. Fortunately, in recent times the doctrine has been modified by the Chameleon doctrine, which enables the court to say that in borderline cases a conferral of power may take its colour from the body on which it is conferred, so that it is non-judicial if conferred on a non-judicial tribunal and judicial if conferred on a Chapter III court. In very recent cases some members of the High Court have criticised this doctrine on the basis that it might undermine the *Boilermakers'* principle. This is another illustration of the danger of treating principles as having absolute effect.

There are real questions as to how far the High Court in the future will find implications in Chapter III of the Constitution, dealing with the judiciary. Litigants in person regularly seek to argue cases based on an argument that Chapter III guarantees some sort of due process, or more generalised justice, which the litigant claims not to have received. As special leave to appeal is normally refused in such cases, the High Court has not yet considered the general issue, although it touched upon it in *APLA Limited v. Legal Services Commissioner (NSW)*.[9]

My general conclusion is that the framers of the Constitution were wise in not including a general Bill of Rights. Where they did try and include civil or political rights, they created provisions which have led to much difficulty and some undesirable consequences. It is to be hoped that the High Court will not be anxious to find more rights of this kind concealed between the lines of the Constitution.

Endnotes:

1. *Roach v. Electoral Commissioner* [2007] HCA 43.
2. *Henry v. Boehm* (1973) 128 CLR 482.
3. *Street v. Queensland Bar Association* (1989) 168 CLR 461.
4. *Brown v. R* (1986) 160 CLR 171.
5. *Plaintiff S 157/2002 v. The Commonwealth* (2003) 211 CLR 476.
6. *Bodruddaza v. Minister for Immigration and Multicultural Affairs* (2007) 81 ALJR 905.
7. *Supra*.
8. *R. v. Kirby, ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.
9. *APLA Limited v. Legal Services Commissioner (NSW)* (2005) 224 CLR 32.

Chapter Four

The *Tax Bonus Case*[1]

Bryan Pape

> *"The High Court is the only guarantee that the Constitution could not be arbitrarily flouted by any government, however popular. … It is to prevent the evasion of the Constitution".* (Sir John Downer)[2]
>
> *"(T)he respective positions of the Commonwealth and the States should be defined legally rather than politically. The Constitution did not set up a system of co-operative federalism or organic federalism".* (Sir Daryl Dawson)[3]
>
> *"As the process of modernization proceeds, revenue collection becomes centralized into the higher level of government".* (Popitz's Law)[4]
>
> *"In Australia nothing useful will be tried out so long as the Commonwealth continues to sit like a cuckoo in the nest claiming an excessive proportion of the whole national income".* (Colin Clark)[5]

After reviewing the implications of the High Court's reasons in the *Tax Bonus Case* (*TBC*)[6] with respect to the appropriation section and executive power, some observations are made on the next phase to rejuvenate the federal union. Much may still depend on questions of standing and the effectiveness of the Auditor-General. At the very least, the *Tax Bonus Case* has clarified the meaning of s. 81 of the Constitution. Three cheers for the High Court.

Synopsis

The *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) ("the Act") was assented to and commenced on 18 February, 2009. It provided for the payment of a lump sum of $900, $600 or $250 to persons who had taxable incomes ranging from up to $80,000, $80,001 to $90,000, and $90,001 to $100,000, respectively. They also needed to have had a tax liability of at least $1 for 2007-08. The total bonuses to be paid were estimated as $7.7 billion, out of an economic stimulus package of $12.2 billion.

I was supposedly entitled to $250. Having unsuccessfully fought against it being paid, it was later deposited into my bank account. A writ of summons and statement of claim was issued on 26 February, 2009 seeking a declaration that the Act was invalid. Next day it was served on the Commissioner of Taxation. On 13 March, Justice Gummow directed that the matter proceed by way of a special case, with the Commonwealth being joined as the second defendant. It was listed for hearing before the Full Court on Monday, 30 March at 2.15 pm. The Attorneys-General for NSW, WA and SA intervened. The remainder stayed in their stalls. Written submissions were filed by the parties and the interveners. To both a greater and lesser extent the interveners were allies of the plaintiff, although all supported the Commonwealth's reliance on the taxation power under s. 51(ii) and challenged in part his standing.

The Court acted on the plaintiff's submission that the case gave it an opportunity to "take out a clean sheet of paper" in considering the meaning of s. 81. Earlier judicial interpretations had erroneously focused on the minor premise, namely the meaning to be given to the words "for the purposes of the Commonwealth". Gummow, Crennan and Bell JJ held that the earlier interpretations were wrong in implicitly relying on the major premise, that s. 81 referred to spending. Once found, the troublesome minor premise of the meaning to be given to "the purposes of the Commonwealth" evaporated. The Garran view, which had prevailed for more than a century, was held to be wrong.

The impugned Act was upheld by a majority of 4:3, on the grounds that it was a valid law in reliance upon the executive power under s. 61 and the incidental power under s. 51 (xxxix). Future debate as to its width is likely to carry with it overtones of the Supreme Court of the United States striking down President Roosevelt's New Deal legislation in the 1930s. There the court was concerned with juxtaposition of two ideas; first, in 1934, in upholding a State Act dealing with a moratorium on mortgage loans, saying that "while emergency does not create power, emergency may furnish the occasion for the exercise of power".[7] Secondly, in the following year, in what is known as the *Sick Chicken Case*, it unanimously struck down federal legislation, holding that extraordinary conditions do not create or enlarge constitutional power.[8]

The use of the executive power to support legislation throws up for consideration in future cases the ambit of constitutional facts to establish what might answer the description of "emergency" situations. If the *TBC* had not proceeded by way of an agreed special case, and the constitutional facts about the global financial crisis (GFC) had been vigorously contested, the government's planned April payment of the tax bonus could have been thwarted. On one view, it is not a "global financial crisis" but a "government financial crisis" because of the projected shortfalls in taxation receipts.[9]

It might be that the *TBC* will be seen as an aberration, and confined to its peculiar uncontested facts as to the status of the emergency. If it later emerges that the so-called "financial emergency" was little more than a "storm in a teacup", similar protestations in future cases could be disregarded, like the shepherd boy who cried "wolf". (c.f. The Hon P J Keating, "the recession we had to have").

In upholding the validity of the impugned legislation by a majority of 4:3, the judgment relied on the executive power and the incidental power. It rejected the Commonwealth's primary submission, that the Act could be upheld through the use of the appropriation section, by 7:0.

Six Justices considered the use of the taxation power and all rejected it. Nevertheless, two would have upheld the validity of the Act if part of it had been severed. (That is to say, that the amount of the bonus was limited to the lesser of the 2007-08 tax liability and the amount of the bonus of $900, $600 or $250. In other words, if you were otherwise entitled to receive $900 and had a tax liability of $1 for 2007-08, all you would receive as a tax bonus would be $1. This would have affected about 11 per cent of taxpayers). The other four Justices rejected the application to sever the Act, which in essence was an application to enact a notional *Tax Bonus for Working Australians Act (No. 3)* 2009.

Three Justices considered the Commonwealth submissions seeking to uphold the validity of the Act by relying on the "trade and commerce power" under s. 51(i) and the "external affairs power" under s. 51 (xxix). All three rejected them.

So far as the issue of the plaintiff's standing was concerned, once the Court held that the plaintiff had a "matter", the issue of standing fell away. In short, it didn't arise: a 7:0 result in favour of the plaintiff against the two defendants and the three interveners on the question of standing.

The dissenting judgment of Heydon J "belled the cat" on the stance of the Commonwealth in the proceedings:

> "The preferred arguments of the defendants in these proceedings advanced wide constructions of s. 61 of the Constitution read with s. 51 (xxxix) and of s. 81 read with s. 51 (xxxix). These were arguments capable of producing very extreme results. If correct, they would cause the 'incidental' legislative power in s. 51 (xxxix) to be wider

> in its effects than any of the non-incidental legislative powers, and perhaps wider than all of them taken together. What s. 1 of the Constitution calls a 'Federal' Parliament would have a power to enact legislation of the kind usually associated with non-federal parliaments".[10]

Having broken up the party at No. 81 Constitution Avenue, will it now move down the avenue to No. 61? The "Delphic" expression of French C J might be tantamount to posting a "Beware" sign on the door of those who seek to enter No. 61:

> "The exigencies of 'national government' cannot be invoked to set aside the distribution of powers between the Commonwealth and the States and the three branches of government for which the Constitution provides, nor to abrogate constitutional provisions".[11]

Ramifications

Appropriations: Those who adhered to the views of Sir Robert Garran and Justice Murphy in the *Australian Assistance Plan Case (*the *AAP Case)*[12] (e.g., the 150 Members of the House of Representatives and the 76 Senators, which of course included the 42 members of the Federal Executive Council) might be a little disappointed by the result. It is worth recalling what Murphy J said in the *AAP Case*:

> "If the plaintiff's contentions were accepted, it would mean that the Parliament's use of its appropriation power has been unconstitutional since federation".[13]
>
> "From the material supplied to the Court and an examination of the Appropriation Acts, it appears that there were many current programmes [that is, in 1974-1975], some of which had been in operation for many years and which are not clearly referable to any head of legislative power in the Constitution other than s. 81.
>
> "These include substantial appropriations in the Departments of Education, Tourism and Recreation, Science, Health, Housing and Construction, Agriculture, Special Minister of State, Prime Minister, Media, Urban and Regional Development, Environment and Conservation, Labor and Immigration, and Social Security.
>
> "The appropriation for those purposes not within the scope of enumerated powers would, on the plaintiff's contention, be unconstitutional. Hundreds of items of appropriation since federation and many hundreds of millions of dollars would have been unlawfully appropriated and spent.
>
> "The chilling effect that such an interpretation would have on governmental and parliamentary initiatives is obvious. It is not a formula for operating a Constitution. *It is one for stultifying government*. If the surplus revenue issue is to be re-opened, the States would be encouraged to challenge items of appropriation in order to enhance the possibility of surplus revenue".[14] (Emphasis added).

What Justice Murphy said in the *AAP Case* about the stultification of government has now been consigned to the constitutional trash can. As French C J said:

> "Substantive power to spend the public moneys of the Commonwealth is not to be found in s. 81 or s. 83, but elsewhere in the Constitution or statutes made under it".[15]

Or as Heydon J said:

> "Section 81 does not create a 'legislative power' to confer on the Executive the power to spend what is appropriated".[16]

Executive Power: This issue, of the development of the jurisdiction of executive power, must be seen against the background of the present case, because it proceeded by way of a special case on agreed facts. Future challenges to the Commonwealth's use of the executive power and incidental power may not be so successfully resisted. "The question of the reviewability of factual assertions of the Executive grounding the exercise of its powers under s. 61 does not arise in this case, having regard to the accepted facts".[17]

Importantly, there is a difference in the views of the members of the Court on the interpretation to be given to the executive power under s. 61. The dissentients were more than concerned with the approach which the majority took:

> "The constitutional questions presented in this matter are deeper and more enduring than the particular and urgent circumstances that caused the enactment of the particular law. They raise issues that are fundamental to the constitutional structure of the nation, and transcend the immediate circumstances in which the questions were posed".[18]

> "The executive power of the Commonwealth is the executive power of a polity of limited powers".[19]

> "It is for the Court, not the political branches of government, to decide whether the means chosen to achieve particular political ends are constitutionally valid, and it is for the Court to identify the criteria that are to be applied to determine whether those particular means are constitutionally valid".[20]

Standing: Regrettably, my earlier lamentations on standing in 2005[21] continue. In the *Tax Bonus Case* it was unnecessary for the Court to decide these questions. In short, where federal jurisdiction is invoked and there is a "matter", questions of standing are subsumed within that issue.[22] Where the States turn a "blind eye" to the Commonwealth usurping their activities by the use of s. 96 tied grants, there is nothing the citizen can do. It is extremely doubtful that a State Attorney-General would consent to bring a relator action, as happened in the 1945 *Pharmaceutical Benefits Case.* Sir John Downer's observation that the High Court is the only guarantee that the Constitution would not be arbitrarily flouted was based on the implied premise that the States would actively institute proceedings in the Court to protect their interests. Experience has shown this premise to be false.

The decision of the High Court in declaring that it was beyond the constitutional competence of the Parliament to authorize it to give an advisory opinion on the validity of an Act of Parliament revealed a gap which has not been remedied. In *Re Judiciary Act* 1903-1920 & *Re Navigation Act of the Constitution* 1912-1920, the High Court held that there was "nothing in Chapter III [which deals with the Judicial power] to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.[23] Regrettably, the rights of a citizen in a federal system have received little examination.[24] Professor Geoffrey Sawer noted that "the practice of advisory opinions has been of great public value in Canada and can be useful in any federation where the legal validity of important legislation is constantly open to doubt".[25]

It is both useful and timely to refer to s. 94 of the Constitution, which relevantly provides:

> "(T)he Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth".

In this context, "may" effectively means "must", because if the Commonwealth has no lawful authority to spend, now that s. 81 has been closed, how can it be a proper use of the s. 96 grants power[26] to tack or tie on conditions which, in substance, allow it to expand its powers not otherwise provided for in the Constitution? In this context it is important to note that nearly 90 per cent by value of the physical public assets are held by the States and Territories (see Annexure A): that is to say, the schools, hospitals, roads, railways, buses, trains, ports, power stations, gaols, etc. The Commonwealth's physical assets are mainly defence assets, e.g., warships, submarines, aircraft, tanks and artillery. Yet the Commonwealth raises about 82 cents in the dollar of all taxation levied. This is an extraordinary blight. If the Commonwealth were to be constrained in its power to tax, its capacity to engage in so-called nationhood activities would be correspondingly limited.

We have now progressed from the old use of the s. 96 grants power, being the Commonwealth's "card of entry" as Sir Robert Menzies called it, to a higher level of centralized Commonwealth control known as "executive federalism". I speak of the development of the National Partnership Agreements between the States and the Commonwealth. These numerous inter-governmental partnership agreements[27] are tantamount to a fusion of the States and Commonwealth into an unwarranted form of organic federalism.

Essentially the Commonwealth raises more revenue than it needs, which economists characterize as vertical fiscal imbalance (see Annexure B). To say that this has resulted in both a financial and accountability mess is not to overstate the situation. The Commonwealth must withdraw, and confine itself to the activities listed in the Constitution. It necessarily follows that the Commonwealth must reduce its level of income taxation to allow the States back into this field. Prime Minister Menzies "was in favour of a return of income tax to the States provided that the advantages of a single system of administration and assessment could be preserved".[28] Interestingly, it was South Australia in 1884 which introduced the first income tax in Australia. It also bears noting that the 1942 Uniform Tax Legislation was supposed to have ended on 30 June, 1947. The States must then be each responsible for fixing their respective rates of income tax. No objection ought be taken to the Commonwealth administering the collection of State income taxes.

Conclusion

From its silence, it seems that the Commonwealth has so far studiously ignored the reasons of the High Court in the *Tax Bonus Case* with respect to its unlawful use of s. 81. As Murphy J would put it, the Government has been *stultified*. When its primary submission to support the validity of the tax bonus legislation has been rejected by all seven Justices, it might reasonably be expected that a revised 2009-10 budget be submitted to the Parliament. If not, then the Auditor-General, on his own initiative, should report to the Parliament on those items of unlawful expenditure which in his opinion should be now cut from the 2009-10 budget.

Annexure A

Summary of Estimated Net Assets of the States and Territories
and the Commonwealth for the Year Ended 30 June 2010

	States & Territories	Cth*	Total
	$bn	$bn	$bn
Assets			
Financial	93	304	397
Non-financial	774	106	880
	867	410	1,277
Liabilities			
Superannuation	113	122	235
Other	243	319	562
	356	441	797
Net Assets / (Deficiency)	511	(31)	480

*Includes Reserve Bank of Australia

Source: Balance sheets prepared under Australian Accounting Standard 1049 for the Non-financial public sector plus the Reserve Bank of Australia as at 30/06/2008 as an estimate for 2009-10.

Comparison: BHP Billiton Group's net assets as at 30 June, 2009 were $ US41bn ($A 49bn).

Annexure B

Budgeted Commonwealth Revenue and Expenses
for the Year Ended 30 June 2010

Revenue				
Income tax			191	
Indirect taxes	- GST	44		
	- Other	30	74	
Miscellaneous taxes				3
			268	
Sundry revenue			23	291
Expenses				
General			338	
Less: Grants to States				
Current grants		74		
Capital transfers		18	92	246
Operating surplus before grants to States				**45**
Less: GST grants				44
Specific purpose grants			48	92
Operating deficit				(47)

Source: Statement 9: Budget Financial Statements, 2009-2010. *Budget Paper No. 1: Budget Strategy and Outlook, 2009-10*.

Endnotes:

1. Sub-titled "Or did the Commonwealth cry 'Wolf'?".

2. J C Bannon, *Supreme Federalist: The Political Life of Sir John Downer* (2009), at pp.188 -189.

3. Sir Daryl Dawson, *The Constitution – Major Overhaul or Simple Tune-up?* (1983) 14 Melbourne University Law Review 353 at p. 367.

4. Johannes Popitz, *"Der Finanzausgleich", Handbuch der Finanzwissenschaft,* vol. 2 (1927), Tubigen: JCB Mohr.

   [Johannes Popitz was born on 2 December 1884. After a career in the federal government, he became Minister of the Treasury in the state government of Prussia in 1933. As a conservative, he joined the political resistance group of CF Goerdeler, was condemned to death in 1944 and executed in Berlin on 2 February 1945. See, Charles B Blankart, *The process of government centralization: a constitutional view*, *Constitutional Political Economy* (Vol 11, 2000), 27-39 at n 2.]

5. Colin Clark, *Principles of Public Finance and Taxation*, Arthur Capper Moore Research Lecture, 26 June 1950, (1950, Federal Institute of Accountants), p.30.

6. *Pape v. Commissioner of Taxation and Anor* (2009) HCA 23.

7. *Home Building & Loan Assn v. Blaisdell*, 290 US 398 (1934), 426. "The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions*";* per Hughes CJ.

8. *ALA Schechter Poultry Corp et al v. United States*, 295 US 495 (1935) at 528.

9. *Updated Economic and Fiscal Outlook* (February 2009), at p.17. http://www.budget.gov.au/200809/content/uefo/download/Combined_UEF O.pdf.

10. *Pape v. Commissioner of Taxation and Anor* (2009) HCA 23 at para [397].

11. *Ibid.*, at para [127].

12. *Victoria v. Commonwealth & Anor* (1975) 134 CLR 338.

13. *Ibid.*, at p. 417.

14. *Ibid.*, at p. 418.

15. *Pape v. Commissioner of Taxation and Anor* (2009) HCA 23 at para [111].

16. *Ibid.*, at para [607].

17. *Ibid.*, at para [133].

18. *Ibid.*, at para [260].

19. *Ibid.*, at para [335].

20. *Ibid*., at para [350].

21. Bryan Pape, *The Use and Abuse of the Commonwealth Financial Power*, in *Upholding the Australian Constitution*, Proceedings of the Seventeenth Conference of The Samuel Griffith Society (2005), at pp. 270-274, 280.

22. *Pape v. Commissioner of Taxation and Anor* (2009) HCA 23 at paras [50] and [51].

23. (1921) 29 CLR 257 at p. 267.1.

24. See Peter H Schuck, *Citizenship in Federal Systems*, *The American Journal of Comparative Law*, (2000) Vol. 48(2), at pp. 195-226.

25. Geoffrey Sawer, *Cases on the Constitution of the Commonwealth of Australia,* (3rd ed., 1964), Case [57] and Notes at pp. 636-7.

26. "It was intended solely as an emergency measure to bail out a State in financial difficulties through no fault of its own"; per Kenneth Wiltshire, *Reforming Australian Governance: Old States, No States, or New States?*, in AJ Brown and Jennifer Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (2007), at p. 187.

27. Intergovernmental Agreement on Federal Financial Relations, http://www.coag.gov.au/intergov_agreements /federal_financial_relations/docs/IGA_federal_financial_relations.rtf.

28. Geoffrey Sawer, *The Commonwealth and the States*, Current Affairs Bulletin (1971) Vol 47 (4) at p. 55. See too Appendix A to *Resumption of Income Tax by the States* (report by Commonwealth and State Treasury Officers, January 19, 1953).

Chapter Five

Professor Jonathan Pincus

Mutual Recognition and Regulatory Competition[1]

Mutual recognition was legislated in Australia in 1992. It is proving to be a mere way station on the path towards the voluntary euthanasia of the States as regulators. The case for the continuation of mutual recognition is that, in the absence of regulatory competition, nationally-uniform regulations may be worse, even for big businesses, than are the inconveniences of mutual recognition.

1. Introduction and outline

Businesses that operate in more than one State prefer there to be no differences in the regulations that they encounter in the various States. However, nationally uniform regulation may mean more – rather than less – burdensome regulation of business.

The Business Council of Australia seems to regard mutual recognition as desirable, but generally inferior to complete uniformity or strict harmonisation.

An attraction of mutual recognition is that sometimes it may be obtained more quickly than either national uniformity or harmonisation. In Australia, fewer than three years elapsed between policy announcement and legislation. However, the process of working through difficult areas has not been so speedy.[2]

Mutual recognition within Australia of regulations relating to goods and occupations was legislated in 1992, and extended to include New Zealand in 1997. It was designed to reduce the costs incurred by multi-State businesses in satisfying more than one State's set of regulations; and to reduce barriers to inter-State movements of holders of occupational licenses. There were few exceptions, exclusions and exemptions.

For whatever reasons, mutual recognition is not a current focus of governments; quite the contrary. An *Intergovernmental Agreement for a National Licensing System for Specified Occupations* was signed by COAG (Council of Australian Governments) on 30 April 2009. The national licensing system will initially include relevant business and occupational licences in air-conditioning and refrigeration mechanics; building and building-related occupations; electrical; land transport (passenger vehicle drivers and dangerous goods only); maritime; plumbing and gasfitters. This Agreement implemented a *National Partnership Agreement* of February 2009, and followed the July 2008 meeting of COAG, where it was "...agreed that the seamless national economy initiatives were amongst the most significant and far-reaching of the potential reforms identified by COAG".

Under this "voluntary" *National Partnership Agreement*, which was urged by the Commonwealth, and carries the promise of Commonwealth-funded rewards, the parties committed to "...continuing to reduce the level of unnecessary regulation and inconsistent regulation across jurisdictions; delivering agreed COAG deregulation and competition priorities; and improving processes for regulation making and review". The States and the Territories "...will have responsibility to work together, and for many specific reforms to work jointly with the Commonwealth, to implement a coordinated national approach" in areas including occupational health and safety laws, licensing of tradespeople and health workforce.

The COAG agreements and processes of 2008-2009 are for centralised regulatory reform; and one move short of a Commonwealth takeover. Mutual recognition was the first step on a path leading

to that end point. Mutual recognition seems to involve a paradox: through mutual recognition, the States are simultaneously certifying that there are no essential differences in their regulations, while acting as though there are sufficient differences to justify their maintaining their own, different regulations. In granting "recognition" to the regulations or occupational registrations of another jurisdiction, a State is effectively certifying that the other jurisdiction's regulations or registration requirements meet acceptable standards.

If "your regulations are as good as mine", then why persist with different but similar regulations? Why not uniformity?

If uniformity were the dominant consideration, then mutual recognition is deficient. However, businesses complain not only of the lack of uniformity of regulations in the various States, but also of the burden of regulation generally, including Commonwealth regulation. Here, mutual recognition may have unappreciated advantages for business: inter-jurisdictional regulatory competition can in some circumstances reduce the overall burden of regulation, and without necessarily causing a damaging "race to the bottom".[3] Harmonisation and national uniformity eliminate regulatory competition within Australia, whereas mutual recognition does not. Where there is scope for regulatory competition, States that "get the regulations right" will gain at the expense of the others, through the attraction of more economic activity. This incentive vanishes if there is one regulator only.

This kind of argument is not easy to make in general, and is not readily illustrated with convincing factual evidence.

Section 2 of this paper sketches the arrangements governing mutual recognition within Australia and between Australia and New Zealand; and the rationales for mutual recognition of various kinds. The paradox of Australian mutual recognition is detailed in Section 3. Section 4 is about competitive federalism and mutual recognition. The case in favour of creating a seamless national economy is examined in Section 5 and, as usual in economics, I find costs as well as benefits. A passing glance is given to the High Court decision in *Betfair*.

2. Mutual recognition in Australia

> "The purpose of mutual recognition is to promote economic integration and increased trade between participants. It is one of a number of regulatory techniques available to governments to reduce regulatory impediments to the movement of goods and provision of services across jurisdictions".[4]

In 1990, Prime Minister Hawke noted that by 1992 the European Union would have created a trans-national economy more seamless than the Australian national economy.[5]

The context was the arguments and circumstances that led to the adoption of the National Competition Policy. After a series of Special Premiers' Conferences, in 1992 the Commonwealth, State and Territory governments signed the *Intergovernmental Agreement Relating to Mutual Recognition Agreement*, committing the parties to "establish a scheme for implementation of mutual recognition principles for goods and occupations for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia".

The Agreement was given legislative form as the *Mutual Recognition (Commonwealth) Act* 1992, with the States either adopting the Commonwealth legislation or referring powers. A Trans-Tasman counterpart was passed in 1997. It was hoped that the schemes would operate with a minimum of bureaucracy.

Under the Act, goods that could lawfully be sold in one jurisdiction, having been produced there, or imported into it, could also lawfully be sold in a second jurisdiction, without meeting the second jurisdiction's requirements regarding production, presentation and inspection. This provision was

designed to remove what are called "indirect barriers" to the sale of goods. (However, a good that does not comply with the standards of a jurisdiction in which it is offered for sale must be labelled with State or country of origin information.)

For occupations, mutual recognition works through a process of "deemed" registration: registration in an occupation in one jurisdiction is sufficient grounds for registration in the *equivalent* occupation in another jurisdiction. However, anyone in a registered occupation wishing to work in a different jurisdiction needs to notify the relevant registration authority in that jurisdiction, except in occupations for which registration is nationally recognised.

Mutual recognition relates to occupations, not activities. Where a single license authorizes several activities in one jurisdiction, some of which have no equivalent in another, then equivalence can be achieved by limiting the scope of the mutually recognized licence, via the imposition of conditions.[6]

A safeguard is that any jurisdiction can refer to the relevant Ministerial Council a question about the standard applying in another jurisdiction to a good or to the practice of an occupation. Within twelve months the relevant Ministerial Council can determine, by two-thirds vote, what standard is appropriate to apply in all jurisdictions. The good or occupation in question remains subject to mutual recognition while the council deliberates. (Similar provisions relate to new goods, with the difference that a jurisdiction can temporarily exclude new goods from sale – e.g., on doubts about safety – that otherwise would be covered by mutual recognition.)

Also, a regulator can decline to register applicants from a particular jurisdiction. If an appeals tribunal upholds the decision to refuse registration, that itself can be taken to be a declaration that occupations are not equivalent, or that the difference in standards created risks for people or the environment. This would trigger referral of the question of standards to the relevant Ministerial Council.

There are some exceptions to mutual recognition (e.g., relating to health, safety, and the environment; and the manner in which an occupation is carried out); exclusions; and exemptions (e.g., firearms, pornography, endangered species, catch size).

It is useful to delineate various kinds of mutual recognition schemes, and identify the Australian one.

In his second reading speech, the Minister noted that:

> "The underlying premise for mutual recognition [within Australia] is that the existing regulatory arrangements of each State or Territory generally provide a satisfactory set of standards. Thus, on implementation of mutual recognition, no jurisdiction will be inundated with products that are inherently dangerous, unsafe or unhealthy, nor will there be an influx of inadequately qualified practitioners".[7]

Thus, Australia and New Zealand adopted a "comity" or "jurisdiction of origin" version of mutual recognition. Under this principle, each provider of a good or service can operate under the regulatory framework of its jurisdiction of origin. There was relatively little "pre-filtering" or harmonisation of core Australian regulatory provisions.

Any "duty of care" of an Australian State government should not extend to preventing a citizen from moving to another Australian State which offers what the first State regards as inadequate regulation. Under the principle of the "State of origin" or comity, should the "duty of care" extend to preventing a citizen from buying goods that are legal in the State of origin of the good; or services that would be legally supplied, if supplied in the State of origin of the supplier? If so, then mutual recognition of the Australian type does require States to be vigilant and effective in a most difficult set of tasks, which is to monitor the effects and enforcement not only of their own regulations, but also of the States (or countries) to which mutual recognition has been granted.

Comity distinguishes Australia from what happened, within the European Union, for services. Patrick Messerlin[8] has stated that mutual recognition within the European context requires the

effective harmonisation of the core provisions of regulations; and that this core is defined by negotiations between the countries or States involved. This implies a considerable dampening of inter-jurisdictional regulatory competition.[9]

However, after fourteen years under the legislation for mutual recognition, harmonisation has been initiated in Australia, partly in reaction to perceived "skill shortages". In 2006, COAG decided that Ministerial Councils should develop equivalence-tables for selected trades and, subsequently, for vocationally-trained registered occupations. This process proved transitory and, as noted above, is in the process of being displaced by a national licensing regime.

3. The paradox of Australian mutual recognition

The burden of this paper is that the case for continuing with mutual recognition, and not proceeding to harmonisation or uniformity, depends fundamentally on the case for inter-governmental competition within the federation. Without strong support from the argument in favour of preserving inter-governmental competition, then mutual recognition becomes a mere way-station on the path towards the euthanasia of the States as regulators in the spheres in which mutual recognition operates.

The primary purposes of mutual recognition are two-fold:

> 1. To eliminate, or at least reduce, the protection that State-based regulations afford "local" producers against competitors producing in or located in other States—this benefits customers and consumers directly (e.g., through greater choice or lower prices).
>
> 2. To eliminate, or at least reduce, any unnecessary or unjustified costs for the suppliers of goods and services, including labour services, of operating in more than one State, or of moving "residence" from one State to another – this benefits consumers and customers indirectly, as well as some suppliers of services, directly.

The motivation of mutual recognition is the creation of a seamless national economy, subject only to the frictions caused by justifiable differences in regulations in the various States. Yet the use of mutual recognition itself throws doubt on whether the resultant regulatory differences can continue to be justified.

The differences that matter, for the granting of mutual recognition, are those seen in the effects that are being sought through the regulations of one State compared with those of the other State; that is, differences in the degree to which the legitimate objectives of State regulation are met.

For a State responsibly to grant mutual recognition to a person registered to operate in another State as a social worker, say, implies a belief that there are no significant differences in the standards of customer protection afforded by the "importing" State compared with the "exporting" State (or that it is the responsibility of the client or customer to notice the differences). In other words, by granting mutual recognition the State is signalling that it is indifferent (or largely so) between its own regulation and the regulation imposed by the other State.[10]

However, if the differences between the regulations of the relevant States are implicitly acknowledged by the relevant States to be neither great nor significant, when judged in terms of the effects that are being sought through the regulations, then it seems that the differences in regulation are mere nuisances: that is to say, the adoption by all mutual-recognition States of the regulation of any one State, randomly chosen, would not make much difference to the outcomes, when judged in terms of the effects that are being sought, by each State, through their differing regulations.

So, mutual recognition seems to involve a paradox: mutual recognition permits differences in regulations across the States, but it should only do so if the different regulations make trivial differences in the attainment of the effects that properly motivate the regulations themselves.

In these circumstances, the obvious response of the Business Council of Australia or similar bodies, is to say the following: *Why not have uniform regulation? Choose one of the existing State regulations, any one, from amongst those of the States that have granted mutual recognition in the specific regulatory area. This would help create a truly seamless national market, and do so without any appreciable damage to the objects of regulation.*

A possible way out of this paradox – and maybe the only plausible route – is to appeal to the benefits of inter-governmental competition. The case to be argued is that, without inter-governmental competition in the setting of regulations, the regulations could be much "worse" than the existing set, and could result in larger unnecessary and unjustifiable costs to business or to the community at large, than occurs under mutual recognition.

4. Competitive federalism

For regulatory competition to be an advantage to business generally, it should reduce the burden of regulation on businesses. (Moreover, costly regulation may hamper small business more than big business.) What then are the likely effects of inter-jurisdictional competition via regulatory frameworks and practices? Does mutual recognition of the Australian kind merely (temporarily) preserve regulatory competition among Australian jurisdictions, or does it enhance it? (The negation of regulatory competition, national uniformity, is discussed in Section 5.)

These effects can be important: Messerlin[11] suggested that, under the "principle of jurisdiction of origin", the comparative advantage of a jurisdiction's service providers is determined by the jurisdiction's regulations, when combined with firm-specific technology.

In the absence of a cash reward from the Commonwealth, a State government may be motivated to alter its regulations to improve the welfare of its citizens generally – in the economic sphere, this requires an increase in economic efficiency. Its legislators and regulators may, for example, learn about better regulation from the experience of other jurisdictions, or from bodies like the Productivity Commission. Or governments may be more narrowly motivated, to increase the political support offered by specific types of households or businesses. These may either already be resident in the State or – and this is where my discussion will focus – induced to move into the State.

Businesses can "vote with their feet", by moving to a more attractive regulatory environment. In fact, the State imposing less costly regulation may still attract the factory, even if production costs are higher in that State. Professionals and trades-workers may be similarly attracted.[12]

Whether this change in location improves overall economic efficiency is an important question, not central to this paper. What matters here is whether mutual recognition enhances the rewards for successful regulatory competition, or not.

Within the ordinary commercial market-place, the comity version of mutual recognition means that a manufacturer located in, say, New South Wales can more readily than otherwise sell goods into Victoria, thereby providing more market competition within Victoria. Also, wholesalers and retailers can more readily source their supplies from inter-State, than previously. Similar remarks relate to occupations.

However, mutual recognition may also influence the choice of location of business and household. That is, mutual recognition not only facilitates greater goods-market competition and occupational mobility within Australia – which are the stated objectives – but also indirectly affects the degree of regulatory competition among the States.

Because the advent of mutual recognition did not require prior harmonisation of regulation in Australia, it did not remove or greatly reduce the scope for regulatory competition. Rather, my tentative conclusion is that for services, but maybe not for goods, mutual recognition in Australia may have enhanced the extent of inter-jurisdictional competition that is manifest through regulatory frameworks and practices.

Turning first to services: as there are no residency requirements for deemed registration for occupations, mutual recognition facilitates jurisdictional "shopping and hopping". Overseas professionals, say, psychologists, desiring registration in Australia, under mutual recognition may find it easier or faster initially to register in New Zealand than in any State; once registered, they can subsequently obtain Australian registration via mutual recognition. That is, it is reasonable to conclude that mutual recognition increases the incentives for a State to compete through offering a different regulatory environment.

Mutual recognition seems an attractive arrangement when a State wants to set a standard – say, by specifying the training required before licensing for an occupation – but recognises that there may be other acceptable ways of achieving approximately the same standard. Subject to the kinds of safeguards mentioned earlier, it seems that market choices should then be given free rein through mutual recognition, so long as consumers can know and evaluate the differences between the training given in one State and the other.

Mutual recognition may also stimulate the provision of more efficient training. For real estate agents, on-line training that is now available in Victoria for registration in Victoria provides competition to longer-established training providers in New South Wales. However, the New South Wales-specific aspects of New South Wales-based training may be sufficient to ensure its continued existence; and the training provided in New South Wales may better suit some budding real estate agents, including some planning to practice only in Victoria.

For goods, it is harder to make a plausible case that mutual recognition will enhance regulatory competition. Assume for example that, without mutual recognition, it would have been best for a firm to set up one factory in Victoria to serve the Victorian market, and another in New South Wales to serve that market. A single factory, having a larger scale of output, may have lower unit costs of production than those of two separate factories. But the operator of a single factory incurs the costs of two sets of regulations. For two separate factories to be the better choice for the firm (without mutual recognition), the benefits of scale of production should not be so large as to dominate the costs of regulation; and I will assume that is the case.

Under mutual recognition, this firm may instead choose to serve both the Victorian and New South Wales' markets from a single factory sited in one State or the other. The firm would locate where overall costs were lower, including costs of production and costs of meeting only one set of regulatory requirements. If the production cost conditions were similar in the two States, then the State offering the less costly set of regulations would more likely attract the single factory.

This is a somewhat contrived example, and may not be of great practical importance. I find it hard to devise more convincing cases.

Thus I reach the tentative conclusions that mutual recognition, which may bring advantages to consumers of the kind listed earlier (more variety, cheaper products), may also incidentally enhance inter-jurisdictional competition in the regulation of services; but maybe not of goods.

What then of a "race to the bottom"? In the taxation history of Australia, there is one famous example, the death of death duties. However, I cannot find a parallel Australian instance of a race to the regulatory bottom. Of course, spokespersons for various interests, offended or otherwise adversely affected by the application of mutual recognition, sometimes claim that the standards of another State (or Territory, or New Zealand) are so low as to threaten unjustified harm to their fellow citizens. However, the Productivity Commission, in its recent investigation of the Trans-Tasman scheme, did not come up with convincing instances.

Or a "race to the top"? The role of Ministerial Councils, in setting standards when there is a dispute, suggests that this is a distinct possibility under mutual recognition[13] (and maybe even more likely under national licensing systems – a possibility recognised in the Regulation Impact Statement for that system).[14]

And, as a general safeguard against a competitive race to the bottom (or top), our federal system provides the central government and Opposition, both ever eager to attract voters by selective

incursions into areas ordinarily left to the States, with an opportunity for redressing the balance between the costs and benefits of specific types of regulation, by promising to take it over.

5. Seamless national market

So far I have written this paper mostly as though it were advice to the Business Council of Australia and similar business lobby groups – be careful what you wish for. However, there are broader issues involved.

Two objectives – nation building, and national economic efficiency – have been advanced to support the case for the creation of "seamless national markets" and, in particular, for national uniformity of economic regulation.

When there are two goals, economists reflexively suggest that the single-minded pursuit of one goal can come at the expense of progress toward the other goal. Everything has its opportunity costs; the world abounds with trade-offs.

But in some instances, one goal may be pursued regardless of the cost to the other. A recent High Court case, *Betfair,*[15] is relevant. I took the Court to say that it should develop the law so as to deal with community and economic developments and (especially and maybe surprisingly) when they are embodied in government policy pronouncements, government actions, or governmental policy frameworks. An important passage was that:

> "[I]t must always be remembered that we are interpreting a Constitution in broad terms, intended to apply to the varying conditions which the development of our community must involve" (citing O'Connor J, at par. 19).

Relevant developments seemed to be three:

> 1. The *Ha* judgment (that the "exclusivity of federal power to impose duties of excise is not limited to the more modest purpose of protection of the integrity of the tariff policy of the Commonwealth").
>
> 2. The "new economy" – the significance of which I take to be that (actual or potential) customers and suppliers are no longer necessarily located in the same, fixed geographic area, like a State.
>
> 3. National Competition Policy (the significance of which I take to be that the policy of all Australian governments is that competition should be restricted only if the benefits of restriction exceed the costs that restrictions impose, when both are judged from the point of view of the whole community and not merely of sections of the community).

With those things in mind I read the judgment[16] to say the Australian Constitution should be interpreted as creating a nation; and this requires that there be an integrated national economy, and not a collection of fragmented State, regional, or local economies. The "political economy" aspect or purpose of Chapter IV, and especially of ss 90 and 92 of the Constitution, when read together, mean or imply that the Constitution was designed, amongst other things, to create national markets in order to assist with the creation of the Australian nation. Consequently, jurisdictional differences in regulations should be permitted only in very limited and shrinking circumstances.

A possible implication is that the creation of a nationally-integrated economy should be pursued regardless of the effects on national economic efficiency.[17]

In effect, the judgment ignored the kind of argument put by Messerlin, namely, that competition occurs not only between suppliers of marketed goods and services, but also between locations. That is, it was assumed that regulatory diversity in a federation was solely an impediment to competition, rather than being a form of competition itself.

The argument is sometimes made that the gains from national regulations grow larger, when the market spontaneously becomes more national. For example, the Productivity Commission[18] and the High Court in *Betfair* seem to accept this argument. But Henry Ergas[19] has made the counter-claim: when communications and transport costs fall, and businesses and consumers are more "foot-loose", less tied to local suppliers and demanders, then the payoff is increased to a jurisdiction from getting regulations "right". That is, when the costs of communications and travel are reduced, businesses will respond more to differences in the costs of regulation, so that the incentives for inter-jurisdictional competition are increased, not decreased.

What then is the relationship between the creation of a seamless national market, and national economic efficiency? Alternatively, what are the costs and benefits of inter-jurisdictional regulatory competition? Here, the empirical economic literature is not very helpful.

The Productivity Commission[20] was unable to make any quantitative estimate of the benefits of mutual recognition. And due to the nature of business records, it could not come up with an estimate of the costs imposed on businesses by inter-State differences in regulations. The Business Council of Australia[21] reported estimates of costs imposed on specific business firms by differences in selected State regulations, but attempted no overall estimate of costs.

In the paper cited earlier, Patrick Messerlin claimed that those EU countries that went their own ways and liberalised their regulations, were rewarded with higher growth rates of GDP. What he did not examine was whether these superior results were at the greater expense of growth in other EU countries. That is, Messerlin did not ask whether the delay in the progress towards a seamless EU market was costly to the EU as a whole (that is, "beggar-thy-neighbour"). Moreover, I am sceptical that econometrics can reliably estimate the net benefits of differences in policy and institutions across time and space. And ultimately, the purposes of economic, political and social life are as various as the people, and not readily captured in aggregates like GDP.

Using non-econometric techniques, which allow for values other than those that manifest as GDP, the Productivity Commission[22] has estimated net benefits could flow to the Australian community from the implementation of its suggestions for improved regulation of consumer matters, of between $1.5 billion and $4.5 billion a year. Although some of these large gains would be produced by correcting what the Commission identified as the inconsistencies, gaps and overlaps arising from the shared responsibility between governments, the major source of gain (as I read the report) was from the hypothetical implementation of a generally superior set of policies. That is, the Commission's estimates do not distinguish what benefits would flow from there being a more integrated national market, from those that would flow if all governments adopted roughly similar but better policies.

(For my taste, the Productivity Commission did not pay sufficient attention to the ideas that there is no one best way to aggregate individual preferences over matters like the trade-off between riskiness of consumer products and their prices; or that there may be no one best regulation.)

The COAG decision on national licensing was not backed by any quantitative estimate:

> "While it is difficult at this stage of the development of the national licensing system to quantify costs, overall the costs of putting in place a national scheme, regardless of the model used, are expected to be outweighed by its aggregate benefits to business, governments and consumers. The new scheme is anticipated to increase the mobility of licensed labour, reduce red tape and enhance efficiency. This will arise from the use of best practice principles of licensing coupled with more uniform standards and increased transparency of information available to regulators, business and consumers on the status and training of licensees".[23]

6. Conclusions

Henry Ergas[24] has provided a useful guide for locating various cooperative ways to reduce differences in regulations (below). On the right are referrals of power to a central government or to a "lead" State, to harmonise or nationalise the regulations; on the left are mutual recognition and other voluntary agreements between governments to reduce the extent of regulatory differences.

He has also provided a summary of the advantages and disadvantages of the various routes. (The advantages are in the middle row, and the disadvantages, the bottom row). For mutual recognition, the first disadvantage is the continuation of some costly differences in regulations, across jurisdictions. The second disadvantage that Ergas lists – a "race to the bottom" – is a possible, albeit unlikely concomitant of the main advantage of mutual recognition, which is that mutual recognition retains an element of intergovernmental competition. Of course, voluntary arrangements of the kind shown in Ergas' picture and table are not the only way to achieve uniformity of regulation. There seem to be few constitutional constraints preventing the Commonwealth from excluding the States from most regulatory fields.

In his insightful chapter on "The Federal Constitution", Alexis de Tocqueville, describing and analysing the US system in the 1830s, asserts that:

> "The federal system was created with the intention of combining the different advantages which result from the magnitude and the littleness of nations…".

He goes on to elaborate on the advantages of "littleness" by pointing out that:

> "In great centralized nations the legislator is obliged to give a character of uniformity to the laws, which does not always suit the diversity of customs and of districts; as he takes no cognizance of special cases, he can only proceed upon general principles … since legislation cannot adapt itself to the exigencies and the customs of the population, which is a great cause of trouble and misery".[25]

De Tocqueville, however, also wrote that:

> "I am of the opinion that, in the democratic ages which are opening upon us … centralization will be the natural government".

In Australia, the Labor Party has always been anti-federalist. Recently, this attitude seems to have become bi-partisan at the federal level. In the fiscal arena, centralization of revenue collection has increased – especially with the imposition of the GST, which is a Commonwealth tax. Greater efforts have also been made to supervise and control the pattern of State spending from Canberra: the independence and responsibility of the States, as spenders, has been reduced. As to revenues, the traditional theory of taxation supports the centralization or cartelization of taxes imposed on mobile tax bases and, as the costs of transport and communications fall, tax bases are becoming more mobile and so the traditional case strengthens. The only strong counter-argument – based to some extent on public choice theory – is that the decades of living on handouts from the Commonwealth have degraded the quality of State politics and policies. And that counter-argument becomes irrelevant, if the States did not exist.

Mutual recognition is a cooperative, partial solution to the inconveniences caused by the States in their roles as independent regulators of goods and occupations, and was designed to beneficially enhance competition in private markets for goods and services. It is based on the idea that the States

and Territories all meet their regulatory responsibilities to more or less the same degree. So mutual recognition carries a self-destruct button: if the various State regulations and regulatory regimes are effectively the same, and if differences cause costs, then why not abolish the differences?

The only possible but not decisive reply is that, when there is but one source of regulation, there can be no guarantee that the ensuing regulation will be less costly than what occurs under mutual recognition. There will no inter-jurisdictional differences, to be sure; but the one-and-only regulation may be worse, for business and others, than the competitive diversity that arises under federalism.

Endnotes:

1. This paper draws on an unpublished paper delivered at an IPAA conference in 2008, and has benefited greatly from comments from Henry Ergas, Patrick Messerlin and Kerry Corke.

2. See Productivity Commission 2009, *Review of Mutual Recognition Schemes*, Research Report, Canberra.

3. A comparison of the economic merits of mutual recognition and harmonization is beyond the scope of this paper.

4. http://www.coag.gov.au/mutualrecognition/index.cfm.

5. For background, I have drawn on the *Review of Mutual Recognition Schemes, op. cit.*.

6. *Review of Mutual Recognition Schemes*, *op. cit.*, p. xxxiv.

7. Free, R (Minister for Science and Technology), Second Reading Speech, *Mutual Recognition Bill* 1992, House of Representatives *Hansard*, 3 November, 1992, p. 2432; cited in Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra, p. 32.

8. Messerlin, P, *Economic and Regulatory Reforms in Europe – Past Experiences and Future Challenges*, Richard Snape Lecture, 30 October, 2007, Productivity Commission, Melbourne, p. 26.

9. There is a third style of mutual recognition, more liberal than comity. It permits suppliers of goods or services a free choice of which jurisdiction's regulations to comply with. The Productivity Commission made a parallel proposal when it suggested that certain corporations should be permitted to choose to opt into coverage by ComCare, and opt out of State-based schemes for workers' compensation. See *National Workers' Compensation and Occupational Health and Safety Frameworks*, Productivity Commission 2004, Report No. 27, Canberra.

10. The protection of the rents of bureaucrats and others in the home State, while no doubt a strong motivation for the retention of a State's own regulation, does not qualify for the purposes of the argument, which is concerned with the long-term interests of the whole community, not mere sections of it.

11. Messerlin, P, *op. cit.*.

12. If one State's changes have dramatic effects, then it is more likely that inter-jurisdictional competition will lead others to copy. However, regulatory competition does not necessarily

suppress diversity in regulation.

13. Huddart, Hughes and Brunnermeier, in a model of competitive stock market regulations, conclude that "trading concentrates on high disclosure exchanges[,] prompting exchanges to engage in a 'race for the top' in setting their disclosure requirements to maximize trading volume". See Huddart, S, Hughes, JS and Brunnermeier, M, *Disclosure Requirements and Stock Exchange Listing Choice in an International Context*, Journal of Accounting Economics, 1999, pp. 26, 237-269.

14. One of the objectives of the national licensing system is to "ensure that licensing arrangements are effective and proportional to that required for consumer protection and worker and public health and safety, while ensuring economic efficiency and equity of access".

15. *Betfair Pty Limited v. Western Australia* [2008] HCA 11, 27 March 2008; at http://www.austlii.edu.au/au/cases/ cth/HCA/2008 /11.html.

16. Especially paragraphs [10-19], and parts of [21-49] and [85-105].

17. The argument has been made that the Constitution of the European Community, with its over-riding of local and national preferences (and therefore, allegiances), can be interpreted as a bulwark against war: see Brennan, G and Hamlin, A (2002), *Experience Constitutionalism*, Constitutional Political Economy, Vol. 14, No. 4, pp. 299-311.

18. *Review of Australia's Consumer Policy Framework*, *op. cit.*, Vol. 1, p. 18.

19. Ergas, H, *Harmonisation in a Federal System*, Presentation to the Australia and New Zealand School of Government Conference on *Making Federalism Work*, Melbourne, September 2008.

20. *Review of Mutual Recognition Schemes*, *op. cit.*.

21. Business Council of Australia, *Towards a seamless economy: Modernising the regulation of Australian business*, accessed via http://www.bca.com.au/content/99520.aspx.

22. *Review of Australia's Consumer Policy Framework*, *op. cit.*.

23. *National Licensing System for Specified Occupations*, *op. cit.*, p. 15.

24. Ergas, H, *Improving the delivery of public services in the federation*, Menzies Research Conference: *The Future of Federalism*, at http://www.mrcltd.org.au/research/Ergas-final.pdf.

25. de Tocqueville, Alexis, *Democracy in America*, 1855, translated by Henry Reeve (Barnes & Co., New York), Vol. 1, p. 173.

Chapter Six

The Virtues of Upper Houses*

Professor Scott Prasser

Introduction: The growth of executive government

Lord Hailsham identified over three decades ago the growth of executive power and the development of what he called an "elective dictatorship" when he observed:

> "Until recently the powers of government within Parliament were largely controlled either by the Opposition or by its own backbenchers. It is now largely in the hands of the government machine, so that the government controls the Parliament, and not Parliament the government. Until recently, debate and argument dominated the parliamentary scene. Now it is the whips and party caucus. More and more, debate is becoming a ritual dance, sometimes interspersed with catcalls ... we live under an elective dictatorship, absolute in theory, if hitherto tolerable in practice".[1]

This "elective dictatorship" is manifested in the way Premiers and Prime Ministers, through a more centralised and "politicised" bureaucracy, control more and more aspects of government than in the past. The expansion of politically appointed ministerial staff, now numbering in their hundreds at the federal level, further enhances executive government control. Reinforced by tight party discipline in most Westminster democracies, but especially so in Australia, parliamentary oversight and the very notions of responsible government have been undermined or at least severely compromised. Parliamentary sitting times, especially at the State level in Australia, remain low, and question times of limited value given the perceived partisanship of the Speaker and the range of processes in place.

One explanation for the emergence of "elective dictatorships" includes the increasing focus on government leaders, and the almost endless election campaigns, that are now a feature of modern democracies. Consequently, executive government has become more anxious to control the political agenda and the institutions of government, to minimise mistakes and to maximise political outcomes. The expansion of Departments of Premier and Prime Minister that now so dominate the management of governments reflects the executive's mania for control. Today, leaders do not just want to have their finger on the pulse, but are eager to control the flow of all government business. Such centralising trends, while evident in other Westminster democracies, have been practised with greater enthusiasm in Australia, as measured by size, roles, powers and resources now devoted to these central agencies.

The issue of executive government dominance is a concern not just because of the issue of accountability, but also because this growth has been accompanied by an increase in government intervention in society. At a time when government is seeking to intrude into more and more areas of life, the ability for review and oversight, especially through Parliament, has declined.

Of course, concern about executive government control over Parliament is not new in Australia or elsewhere. LF Crisp concluded in the 1960s that in Australia the situation of executive government dominance was worse than Westminster systems elsewhere:

> "Among British Parliaments around the world the Australian has perhaps suffered a more substantial eclipse than most ... Today great and far reaching decisions for the welfare and security of every day citizens are taken and applied every day by the executive ... The initiative and the power of decisions are with the government ... most decisions of consequence are effectively made elsewhere – in the Prime Minister's suite, or in Cabinet, in caucus rooms or in party executives and conferences; in the departments ... the commissions and ... boards; in the interest group executive meetings and ... major banks, businesses and industrial concerns".[2]

Donald Horne, in his famous book *The Lucky Country*, released during the 1960s, concluded that "in Australia, Parliaments are now mainly of ritualistic significance".[3] Subsequent assessments supported these negative views. Professor Reid's numerous studies stressed the limitations of backbenchers in shaping legislation, or in Parliament exercising oversight of the executive.[4] Parliament had been "undermined by the executive".[5] Reid argued that although Australia's parliamentary processes and institutions had adopted "almost a complete panoply of Westminster-type ceremony, furnishings and Parliamentary dress,"[6] these were used as a "cloak of legitimacy" by executive governments intent on "suppressive actions" over parliament.[7]

And it was not just academics who were concerned about this decline. Frank Green, Clerk of the House of Representatives warned during the 1950s of the "tyranny of Cabinet".[8] So too has Harry Evans, Clerk of the Senate (1988-2009), who complained about the growth of executive power and the need for a bicameral system to restrain this trend.[9]

In the United Kingdom there were numerous complaints about the decline of Parliament. Such concerns became more prevalent during the 1960s, when Britain's evident economic decline raised doubts about many of its institutions, including Parliament and the civil service. In 1964 there was even a special publication questioning the value of British parliamentary institutions.[10] Anthony Sampson's surveys of modern Britain during the 1970s traced the limitations, if not the complete decline of the House of Commons.[11] Sampson's more recent assessments suggested that under the Blair Labour Government "Parliament was still counting for less".[12]

The issue is that these trends have become more overt and persistent. Prime Ministers and Premiers have become more adroit at control, and less willing to pretend otherwise. Exacerbating these trends has been the takeover of the personnel of Parliament as executive government has expanded. It is hard for Parliament to exercise control or oversight of executive government if a large proportion of its members work for the government. Across both federal and State governments in Australia nearly one in five parliamentarians now hold such posts. Executive government has hijacked the personnel of the legislature, thus reducing its capacity to oversight executive actions while also reducing the effective operation of the separation of powers between the executive and legislature. Table 1 highlights the growing proportion of parliamentary members now serving in executive government positions.

Table 1: Proportion of Parliament serving in executive government roles as Ministers or parliamentary secretaries (per cent)

	1910	1990	2007
C'wth	9	13.3	18.5
NSW	6.9	12.3	21.5
Vic	11.1	15.2	27.3
Qld	6.9	20.2	32.6
WA	8.7	23.1	25.3
SA	6.6	18.8	24.6
Tas	9.4	20.4	25.0
ACT	-	23.5	29.4
NT	-	36.0	44.0

Responses to the executive challenge

External review mechanisms: One response to the expansion of executive government has been to seek redress of this imbalance through the creation of new extra-parliamentary institutions that would supplement existing bodies, such as Auditors-General to scrutinise executive government actions and decsions. Hence, there has been a growth in administrative law and freedom of information legislation, and new institutions of review such as ombudsmen (in various areas) and anti-discrimination agencies. More recent suggestions include a Bill of Rights.

In addition to these external mechanisms, other developments in Australia spawned the growth of another very special type of external review mechanism. These were the anti-corruption bodies established in several jurisdictions to oversight executive government that were the result of the spate of corruption inquiries and Royal Commissions that occurred across Australia during the 1980s. These bodies included the Independent Commission Against Corruption (New South Wales); the Anti-Corruption Commission (now the Corruption and Crime Commission) in Western Australia; and the Queensland Criminal Justice Commission (now the Crime and Misconduct Commission).

The Queensland Government's recent response to concerns about ministerial probity, lobbying and relations between former Ministers and staff to the government of the day, reflected this prescription of enhancing existing external review mechanisms.[13]

While such external review bodies offer some benefits, there are serious flaws with these new and traditional external mechanisms of review as a means of addressing executive government dominance.

One problem is that executive government controls both the resources and appointments to these bodies. While there are sensitivities concerning any overt manipulation or "stacking" of such bodies, there are numerous examples where executive government has sought, often with success, to reduce the resources and powers of these bodies, or to make appointments with those more amendable to the government's viewpoint.

Another limitation is that these bodies usually depend on executive government itself taking the initiative to ensure that their proposals are properly implemented.

The fate of several State Auditors-General, and changes to their legislation that reduced their ambit of investigations, highlighted the vulnerability of such external review bodies when faced with determined executive government opposition. Even the aforementioned anti-corruption bodies have not always done well. Queensland's Criminal Justice Commission, established as a result of the 1989 Fitzgerald Royal Commission, had a harrowing time under successive Labor and Coalition governments when some of its inquiries adversely impinged on executive government activities.

Moreover, such external bodies, dubbed the "fifth" wheel of modern government, do not sit well with Westminster government and its underlying assumptions of responsible government and the winner takes all approach to holding all the levers of power after an election. In Queensland, with its unicameral legislature, such traits are even exacerbated, so that disputes between the Criminal Justice Commission and executive government and the relevant parliamentary committee responsible for its oversight declined into a simple contest of party politics.[14]

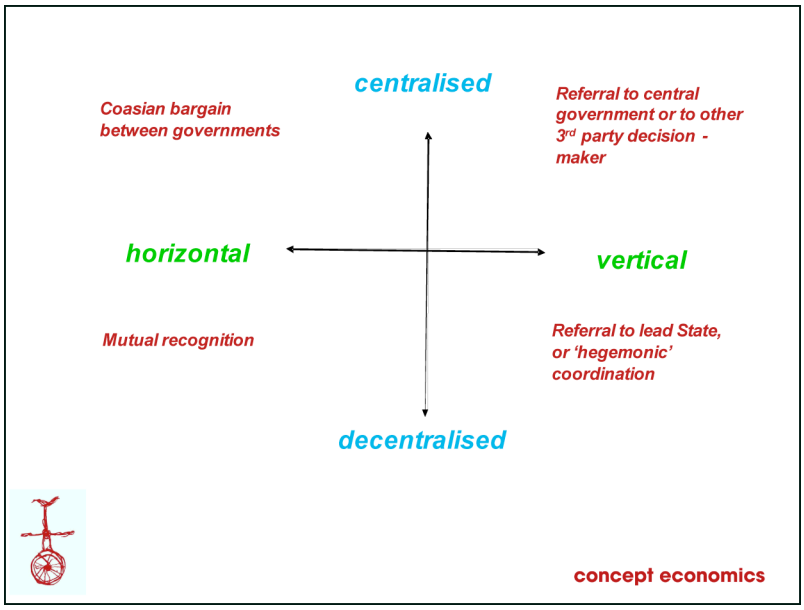
Sadly, this was where the much praised Fitzgerald Royal Commission[15] missed the mark. Although it suggested that corruption could only flourish where there was poor governance, its prescriptions did not get to the heart of the matter – executive dominance over Parliament. Regardless of the range of worthwhile reforms that have been introduced into Queensland's Parliament, public service and the establishment of many new external review mechanisms, Queensland's unicameral Parliament is too easily dominated by the party that forms the government, so that change only occurs if executive government concurs.

The other limitation of these external review bodies is that they are non-elected, and thus lack a certain degree of democratic legitimacy. Even when connected to Parliament through formal reporting requirements, the governing party ensures that their impacts can be severely limited.

So, addressing executive dominance must focus on where the problem lies, and where democratic practice meets institutional structures – namely Parliament. There can be no counterweight to executive government dominance by extra-parliamentary bodies alone, unless accompanied by improved parliamentary oversight and restraint of executive government to ensure that such bodies can operate freely and effectively.

The case for Upper Houses: Thus, the other suggestion to improve executive government accountability is to develop a viable bicameral parliamentary system, with Upper Houses appropriately structured to act as a countervailing influence on executive government exuberance, stupidity and arrogance. Parliamentary review has a legitimacy that no external body can achieve.

Bicameralism has long been a feature of western liberal democracies. As S E Finer observed, one of the key checks on executive government in liberal democracies, along with separation of powers and in some instances a federal system, has been "the division of the legislature into upper and lower houses".[16] The exact configuration of this division has varied from jurisdiction to jurisdiction. The House of Lords in the United Kingdom can delay, but not stop legislation from the House of



Delegation to centre	*Hegemonic coordination (lead State)*	*Territorial bargaining*	*Mutual recognition*
Most effective when spill -overs are very large and widespread but complex side -payments are needed	Can reduce transactions cost (e.g. avoid duplication of analysis)	Most effective when small number of roughly balanced units with 2 -way spill -overs	Allows consumers and producers to vote with their feet
Outcomes highly dependent on decision -rule and can be inferior to no harmonisation	Bias arising from restricted range of interests taken into account	Invites hold -ups and hold -outs, and induces strategic voting with inefficient outcomes	Can create high transactions costs from multiple overlapping rules and concerns about race to the bottom

concept economics

Commons. Upper Houses in Europe have a range of different powers. In the United States, the Senate has considerable powers, and is seen as the most important part of the legislature in providing a check on executive government. In Australia, the Senate has almost co-equal powers with the House of Representatives, except concerning the ability to initiate budget proposals.

Within Westminster democracies there are different arrangements for Upper Houses in terms of their powers, mode of election and their roles. The Australian Senate has been elected since its inception, while the Canadian Senate, like the House of Lords despite recent so called "reforms", is still an appointed body.[17] And of course, across Canadian provinces, Upper Houses have been abolished,[18] while in Australia only one State (Queensland) has taken this action. Furthermore, within a single national jurisdiction like Australia there were and are considerable differences in Upper Houses, both across the States and between the States and the Commonwealth.[19]

Issues concerning Upper Houses: Arguments for improved bicameralism and reinvigorated Upper Houses can be classified into four main areas, reflecting the fundamental functions which modern representative assemblies are generally expected to perform.[20]

The first of these concerns democratic representation. Modern elected assemblies, whatever their design, powers and jurisdiction, are expected to be representative. Thus, when it comes to debate about whether Parliaments ought to be unicameral or bicameral, the argument often turns on disputed views about what representative democracy means, why it is a good thing and how it is best put into practice. Upper Houses offer the opportunities to provide representation that goes beyond the simple single-member and single-party constituency. Upper Houses can be constituted so as to represent regional interests, and to avoid the problems of malapportionment when such principles are applied in Lower Houses, that too often become entangled with governments seeking to retain power rather than to seek wider representation.

The second issue concerns the capacity of modern representative assemblies to provide effective public forums for political deliberation. Here the question is whether a second chamber can improve the quality of democratic deliberation by providing an additional forum for public discussion and debate. The evidence is that where governments have very clear majorities, as they mostly do in Lower Houses to form governments, opportunities for sustained debates, and even adequate time to consider issues, are rarely provided. Upper Houses, by requiring issues to be debated further and again, can, even if government numbers prevail, provide second thoughts and some review. This has long been the argument for the House of Lords. It applies with even more force in relation to elected Upper Houses.

The third issue has to do with the specific function of legislating, and particularly with the influence which the design of legislative institutions (as either unicameral or bicameral) has on the quality of legislation produced. The idea of an Upper House as a "house of review" is especially pertinent here. Often governments, after bringing legislation to the Upper House, have had to make numerous amendments on the basis of negotiations with Oppositions and minority parties. This has made for better outcomes in terms of both good legislation and good policy. In Queensland, legislation rushed through the State's government dominated unicameral legislature has often had to be reintroduced with numerous amendments, to make up for its poor initial drafting and lack of consultation with key interest groups. This was the case with the proposed ambulance levy introduced by the Beattie Government. The original legislation had to be withdrawn because of interest group opposition. Multiple amendments to the legislation were required as flaws became evident after implementation of the policy began.[21]

Last, there is the issue of scrutiny of the executive government. In systems of parliamentary responsible government, Parliaments play a special role in ensuring that executive power is exercised by individuals who are democratically accountable. However, the problem, as many have observed about modern Westminster democracies, is how strict party discipline has enabled executive governments to dominate Parliament, secure in the support of their backbench party members and

hence protected from intrusive probing by Parliaments that they mostly control. In this context, arguments about unicameralism and bicameralism often entail questions concerning the effectiveness (or ineffectiveness) of Parliaments in performing these functions. Upper Houses, if elected on a different but democratic basis like proportional voting, have the potential to ensure a wider range of elected representatives in Parliament from a more diverse range of parties. Also, such voting systems have the potential to prevent government parties from having a majority of seats in the Upper House, and hence executive government does not have the numbers to push through its legislation unconditionally. Even when governments do have a majority in such Upper Houses, it is usually narrower than in the Lower House, thus making some compromise with other parties more publicly desirable, if not always necessary.

Previous limitations of Upper Houses: Despite the existence of Upper Houses, there was in Australia considerable lack of interest in their activities and potential roles as mechanisms to improve executive accountability until recent times. There were several reasons why Upper Houses were not seen as appropriate responses to executive government dominance.

First, there was the view that, as most Upper Houses at the State level in Australia were elected until the 1970s on limited franchises, they did not have the legitimacy to hold executive government to account. The same argument applied to the House of Lords and the Canadian Senate.

Second, there were the realities of modern political party politics. Even when Upper Houses were elected, as has been the case of the Australian Senate since its inception, there was limited interest in its activities. Political action was concentrated in the Lower House. This was where governments were chosen and where the political leaders were based. By contrast, the Senate, like many Upper Houses, was for a long time considered a political backwater, peripheral to the political process, and more a means of rewarding the party faithful than providing positions for the party capable.

Third, there was the view that Upper Houses, elected as they were on limited or different franchises from their Lower House counterparts, should not be able to restrain the Lower Houses that were deemed to be more representative of the people's will. The Labor Party in particular saw Upper Houses as a hurdle to their "reform" agendas.

This debate was also tied into the "initiative" and "resistance" debate concerning Australian politics. The suggestion was that the ALP was the party of "reform" or "initiative", while non-Labor parties were the forces of "interests" and "resistance", who used their particular dominance of Upper Houses, gained by a different electoral system, to resist ALP "reform proposals". Queensland Labor Premier E G Theodore used this argument when his government abolished the Legislative Council in 1922:

> "It is known what the Legislative Council has done in recent years in order to prevent popular measures becoming law – measures which were desired by the people. Governments have been returned with a decisive majority and a definite mandate to carry their policy into operation and have been thwarted by the Legislative Council".[22]

Similar arguments were used by Prime Minister Whitlam when the Senate failed to pass the *Supply Bills* in 1975. It is not insignificant that in Australia only Labor governments have successfully abolished an Upper House (Queensland in 1922), or sought to abolish them elsewhere, such as in 1961 in New South Wales (unsuccessfully), and as is currently the case with the Rann Labor Government of South Australia. Abolition of the Senate remained part of Federal Labor's platform until 1978.

Fourth, and related to this argument, is the view that Upper Houses are redundant. Why have another House to review legislation that has already been passed by a chamber that has been democratically elected, is the usual argument. Also embedded in this view is that having an Upper House means more politicians and thus more costs to the taxpayer.

Fifth, there are views about the nature of democracy. Critics of Upper Houses see simple majorities as all that matters. Notions of representing different interests, including regional concerns, which is the basis of representation in the Senate in both Australia and the United States, are discounted.

Recent developments in favour of Upper Houses: Several factors have caused a more positive appraisal of Upper Houses in Australia in recent years. Foremost amongst these is that Upper Houses like the Senate have become more politically important. The proportional voting system and expansion in its size have allowed the emergence of minority parties and independents that have held the balance of power at certain times. Consequently, successive governments have been required to negotiate with these minority parties, and even the Opposition, to obtain the passage of key legislation. For instance, the first Howard Coalition government, although elected with a large majority and a mandate for certain policy proposals, had to negotiate with the Australian Democrats to ensure the passage of its new industrial relations legislation.[23] The second Howard government significantly modified its original proposals for the goods and service tax (GST) following negotiations with the Australian Democrats. "Senate" politics have become much more central to the political process than previously.

Another factor is that the Australian Senate has often been the setting for parliamentary inquiries which governments would not countenance in the House of Representatives as they would be too embarrassing. Such inquiries have shed significant light on alleged government maladministration, and highlighted new policy issues that would not have occurred otherwise.[24]

Developments concerning the Upper Houses across State jurisdictions also brought renewed interest in the roles of Upper Houses, and have undermined previous criticisms about the democratic legitimacy of State Upper Houses. By the 1980s most State Upper Houses had been reformed into more democratic institutions. The old stigmas were no longer relevant. As Associate Professor Bruce Stone concluded:

> "Legislative Councils have been transformed ... They have been comprehensively democratised ... (and) other major innovations. These changes have encouraged the Legislative Councils to become increasingly active and credible in the performance of key parliamentary roles".[25]

Moreover, in jurisdictions without an Upper House, such as Queensland, there has been increasing acknowledgment that the State suffers from a democratic deficit. As noted above, although the Fitzgerald Commission prompted the establishment of an array of new external review mechanisms, it left much of this to the existing system to implement. Recent scandals enveloping the Beattie and Bligh Labor governments, concerning Ministers, former Ministers and staff and lobbying, independence of the Auditor-General, and the operations of the public hospitals system[26] and rushed legislation, have highlighted the continuing executive dominance of Parliament, the lack of accountability, and the limitations of the many new external review mechanisms that Queensland, post-Fitzgerald had established.[27] As a consequence there has been renewed interest in establishing an Upper House in Queensland.[28]

Recent activities of Legislative Councils of New South Wales, Western Australia and Tasmania that have reversed executive government decisions, opened up public debate on issues and exposed a number of major executive government induced policy problems, have also given State Upper Houses greater legitimacy.[29] The debacle in New South Wales concerning the costing and contracting arrangements associated with Sydney transport tunnel projects would not have been disclosed to the public if it were not for the activity of that State's Upper House. In South Australia the Upper House has been responsible for forcing the government to alter its laws concerning gambling.

Internationally, there has been a marked revival of interest about the nature, functions and desirability of second chambers. The Blair Labour Government, in perhaps taking its cue from Hailsham, finally initiated some small first steps to democratic reform of the House of Lords, though there is still a long way to go before the House of Lords becomes anything like a democratic institution like its United States or Australian counterparts.[30] Further changes are still on the table.[31] In Canada, the Harper Government has proposed a review of the parliamentary system, with at last considering transforming the national Senate into an elected body.[32]

Conclusions

In summary, when political power is consolidated into the hands of a small number of people, Lord Acton's aphorism seems to hold true: it tends to corrupt.[33] However, appropriately constructed Upper Houses place a constraint upon the consolidation of governmental power into the hands of a small group of like-minded people – of whatever political persuasion – thereby tending to limit and divide the exercise of governmental power, with all of the constitutional and liberty-supporting consequences that this can have. John Stuart Mill put it well when he concluded that:

> "The consideration which tells most, in my judgment, in favour of two chambers … is the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult. It is important that no set of persons should, in great affairs, be able, even temporarily, to make their *sic volo* prevail without asking anyone else for his consent. A majority in a single assembly, when it has assumed a permanent character – when composed of the same persons habitually acting together, and always assured of victory in their own House – easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls makes it desirable there should be two Chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year. One of the most indispensable requisites in the practical conduct of politics, especially in the management of free institutions, is conciliation: a readiness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views; and of this salutary habit, the mutual give and take (as it has been called) between two Houses is a perpetual school; useful as such even now, and its utility would probably be even more felt in a more democratic constitution of the legislature".[34]

Given the increasing powers of executive government and the limitations of external review mechanisms, then Upper Houses, if appropriately constructed in terms of systems of election, size and powers can offer an effective democratic means for improving accountability and exercising restraint on executive government, and lead to improvements in the process of public policy development.

Endnotes:

* Parts of this chapter are based on work by S Prasser, J R Nethercote, and Nicholas Aroney, *Upper Houses and the Problem of Elective Dictatorship*, in N Aroney, S Prasser and J R Nethercote (eds), *Restraining Elective Dictatorship –The Upper House Solution?,* University of Western Australia Press, Perth, 2008, pp.1-8.

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25. Bruce Stone, *State Legislative Councils – Designing for Accountability*, in N Aroney, S Prasser and J R Nethercote (eds), *op. cit.*, pp. 175-195.

26. G Davies (chair), Report, *Queensland Public Hospitals Commission of Inquiry*, Queensland Government Printer, Brisbane, 2005, found misuse of freedom of information laws by both Labor and non-Labor governments, and excessive secrecy, lack of ministerial accountability and politicisation of the public service.

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28. The Liberal National Party at its 2009 conference called for a review to establish an Upper House. See *Changing a Culture*, editorial in *The Australian*, 18 July 2009.

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30. See M Russell, *Is the House of Lords Already Reformed?*, in *The Political Quarterly*, Vol 74, No 3, 2003, p. 311.

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Chapter Seven

The Attack on Australia's Democracy?

Professor Dean Jaensch, AO

Following the 2006 election in South Australia, Labor Premier Mike Rann reiterated his party's long held policy to abolish the Legislative Council.

This paper assesses his pledge: its generation almost 100 years ago, and why abolition has been a core Labor policy for so long. It also addresses the past structure of the Council; whether this merited criticism; the transformation of the Council in the 1970s; and the roles the Council carries out in the modern system of responsible government. It explains why a policy of abolition should be resisted and, finally, it analyses the reform proposals of the Rann government.

The historical context is crucial, and this involves three relatively discrete periods.

At the time of the inauguration of full responsible government in 1857, one key axiom of mid-Victorian constitutional theory, within the Westminster system, was the necessity for bicameralism. The Lower House should represent the people. The Upper House should consist of "the Education, Wealth and more especially the Settled Interests of the country … that portion of the community naturally indisposed to rash and hasty legislation".

Five years of debate in the Colony leading to the Constitution resulted in a compromise. The House of Assembly incorporated full male adult suffrage, including Aboriginal males, and a system of representation which was close to equality of the value of the votes. This sparked dire warnings from the conservatives. Samuel Davenport in 1862:

> ".....recalled the feelings of mortification he experienced [when] … this fine province will share no better fate than other communities which have transferred the representative power, without equipoise, into the hands of the most numerous and least instructed".

In fact, there was an "equipoise". The conservatives built the Legislative Council to be a bulwark against radicalism. They originally sought a second chamber which would be a nominated house. But they compromised to accept a fully elective chamber. They built in two means of defence for their interests. First, the members of the Council would be elected on the basis of a restricted property franchise. Second, the Council would have an absolute veto power over all legislation, including the budget.

In the 1880s, a third defence was added. When the electoral system was amended to divide the colony into four electorates, it included a severe malapportionment in favour of the country areas and of country property.

In the context of colonial politics, this was a democratic bicameral system which was ahead of the other colonies, and far ahead of Britain and the other nations of the Empire. Within the contemporary context of the colonial years, from 1857 to 1890, the Legislative Council was, and acted as, a house of review. That is, it was a brake on "rash and hasty legislation" – interpreted in terms of property.

Throughout the colonial years there were constant battles between the House of Assembly and the Legislative Council. These took on a greater intensity after the formation of a party system during 1890-1910. The disagreements between the more radical and the more conservative forces now

incorporated a lens based on Labor versus anti-Labor. Increasingly, this party confrontation centred on the Legislative Council.

For the next 65 years after 1910, the Legislative Council's election base was far from democratic, and it could not claim to be a house of review. By 1915, the elections for the Council were based on five electorates, each returning four members. Labor was virtually constrained to just one electorate in the city, while the Liberal Party had strong support in four electorates, three of which were in the country areas. The effect of this is shown by the results of eighteen successive elections: the Labor Party could not win more than four of the 20 seats from 1918 to 1973.

Further, the restricted property franchise was increasingly out of touch with modern concepts of a fair and democratic election system. As a result, the Legislative Council was not a house of review. It was a house of partisan bias, dominated by the Liberal and Country League (LCL); in fact, by the conservative wing of that party.

In summary: at its formation in the 1850s, the Legislative Council reflected the theory of Victorian parliamentary structures and processes – bicameralism, based on a belief in the need for a second chamber which would be a house of review. In the context of the time, the "review" was based on the principle that "property" should be defended, and any legislation of the House of Assembly should be scrutinized by the representatives of property, and especially rural property.

By the 1970s, this theory was no longer justified, neither in theory nor practice. For nearly 120 years, the conservative majority in the Council had refused to pass any legislation which it saw as against its interests, and refused to consider any substantial modifications to its power base – the restricted property qualifications for voters, and the severe rural malapportionment.

The Labor Party and Labor governments continually complained about the intransigence of the Council, and its refusal to allow reform. As a result, Labor settled on a firm policy of the abolition of the Council. It was not only the Labor Party which had complaints. Non-Labor governments also found that their legislation could fail to pass the scrutiny of the conservative majorities in the upper house. Tom Playford, the Liberal and Country League Premier from 1938 to 1965, had major problems with his party colleagues in the Council.

What convinced the dominant conservatives in the Council to accept reform in the mid-1970s was evidence that their base was being eroded. The formation of a Liberal Movement Party by Steele Hall, drawn from the more progressive faction of the LCL, threatened the LCL hegemony, and Labor party support was eroding the LCL domination in two of the rural electorates. Further, the Council had become such a biased and partisan chamber that the Labor Party could argue abolition with considerable justification.

The result was a unique agreement between Labor Premier Don Dunstan and the leader of the conservative majority in the Council, Ren de Garis. The electoral base of the Legislative Council was transformed. Adult suffrage was applied, and the electoral geography was changed to a single State-wide electorate, thus removing any possibility for malapportionment. This meant that two major complaints of the Labor party had been removed. A third reform was the introduction of proportional representation (PR) for Council elections.

At first sight, there was no longer any basis for the Labor Party to be critical of the Council or of its actions. After the reforms, the electoral base of the Upper House had been transformed to the point where it was far more democratic than that for the House of Assembly.

But there were two unintended consequences. The first has been that the PR system allowed for a close reflection of the electoral choices of the public in the Council. Since the reforms in the mid-1970s, neither Labor nor Liberal has held a majority of the 22 seats in the Council. It has been a hung Parliament, with a balance of power held by a range of minor parties and independents. Given the arithmetic of the PR system, and the growing support for minor parties and independents in all elections, it is very unlikely that either major party will win a majority in the Council in the foreseeable future.

The second unintended consequence has been that the Legislative Council had the ability to be a real house of review. Prior to the reforms, when the Liberal Party held a permanent majority in the Upper House, the Council was either an intransigent, party-based opposition to Labor governments, or an "echo" for Liberal governments – albeit a muted echo, on some occasions. It was not an independent house of review.

From 1975, the Council has had the structure to be a real house of review, and for over three decades has acted as such.

The unintended consequences resulted in the Labor Party re-emphasising its commitment to abolition. Since the reforms of 1975, Labor has been in government for 24 of the 35 years. During that period it has had to face the problem of convincing minor parties and independents in the Council to get its legislation through. It was no surprise, then, that Premier Rann announced that abolition of the Council was back on the agenda.

Is this policy justifiable? It was, in the period from 1910 to 1975. It is not justified in 2009. A uni-cameral structure would decrease the quality of parliamentary democracy and responsible government. Given the fact that both Labor and Liberal are disciplined parties, albeit enforced by differing methods, and given that the electoral contest in the House of Assembly is likely to result in a majority for one party (although South Australia has the record for the number of hung Lower Houses), the result would be domination by one party with few, if any, checks and balances.

Abolition of the Council would have the potential seriously to damage the quality of responsible government. The existence of a second chamber, based on a proportional representation system, has the potential to be a check and a balance. But there need to be means to ensure that a second chamber has both the opportunity and the basis to be, as far as possible, an independent house of review.

Would the Rann agenda for reform (as distinct from abolition) increase the potential for this? I will assess each of the proposals.

First, reduction of the term of office of a member of the Council from eight to four years.

The "double" term of membership is a relic of colonial years, when property-owners sought to keep democracy at bay. There is no justification for this in 2009, especially as the electoral system for the Council is now even more democratic than that for the Assembly. A term of eight years is too long without the people having the right to judge their representatives. Under the double term, it is possible for a member of the Council to remain in the house for eleven years without facing the electors. Further, a term which continues through a general election for the Assembly may not be a reflection of the opinions of the voters at that election.

This proposal merits support.

The second proposal of the Labor government is to reduce the membership of the Council from 22 to 16. This would cause serious problems in the processes of the Council. First, given the system of proportional representation for electing the Council, it would be unlikely for either Labor or Liberal parties to win more than six seats, with five a more probable result.

This would produce a very limited pool of talent, of a maximum of six available for the selection of a President and three Ministers. It is the case that Labor, especially, has been using the Council as a reward for long service to the party or the union movement, and there has been an increase in the number of "party hacks". As the role of a Minister needs a certain level of "quality", the pool from whom they are selected needs to be broad.

This proposal does not merit support. The membership of the Legislative Council should remain at 22.

Third, the government proposes an amendment to the deadlock provisions in the Constitution. The South Australian Constitution currently provides for a means of resolution of deadlocks between the Assembly and the Council, but in such a form that the deadlock would most likely not be resolved. The provision has never been invoked. It offers two choices to the Governor: either a double

dissolution, or the issuing of a writ for the election of two additional members for each Council district. Given that there is now only one district, the latter would be unlikely to resolve a deadlock.

The referendum proposal offers a system of resolution of deadlocks based on the existing system in the Australian Senate. In brief, if a Bill has twice passed the Assembly, and has twice failed to pass the Council, the Governor may issue a writ for a double dissolution of Parliament. If, after the election, the deadlock remains, it may be resolved by a joint sitting of the Parliament.

This procedure would enable the Legislative Council to continue to act as a real house of review, able to propose amendments to, and oppose, government legislation. But continued opposition would provide a trigger for a double dissolution. The resolution of the deadlock would then involve two processes. First, the electorate would have the right to decide, in a double dissolution election, the party makeup of the membership in both houses. Second, if the party result of the election is such that the Bill again passes the Assembly and fails to pass the Council, then a joint sitting would resolve the deadlock. This process would place the "final" decision in the hands of the electorate, a process which would be democratic.

This proposal merits support.

Labor's fourth proposal is that the President of the Council be granted a deliberative vote rather than the current casting vote. This would benefit a major party in the case of a close election result, by providing a further government vote on the floor of the Council. However, given that the Speaker of the House of Assembly has only a casting vote, there seems no logical argument to support a change in the Council, beyond partisan advantage.

This proposal does not merit support.

One further point needs emphasis. It has been reported that the referendum on reform will be a single decision by the voters to accept or reject the whole package of four proposals. This is unacceptable, and raises the question of whether the Labor government's reform proposals include an element of partisan advantage.

The four questions should be put to the voters as separate questions, as was the case in the 1988 federal constitutional referendum.

My interpretation is that a combination of the reduction of the membership to 16, a deliberative vote for the President, the proposed deadlock provisions, and a double dissolution at every election, would provide more opportunity for either major party to increase its ability to control the Parliament. As it is my opinion that the quality of responsible government increases where there is a "hung" Parliament, any stronger potential for major party control should be resisted.

Regardless of the result of the referendum, I would propose three further reforms to the Council which would not require an amendment to the Constitution.

It is the convention that three Ministers are drawn from the Legislative Council. This increases the potential for party confrontation, and government versus Opposition confrontation in the House, an aspect which is inimical to a function of a house of review.

I would propose that there be one Minister drawn from the Upper House, with the portfolio of Minister for Government Business in the Legislative Council. This would centre ministerial and cabinet responsibility – responsible government – in where it should be: the House of Assembly, the "house of government". It would allow the Council to concentrate on its prime role of a house of review.

The second reform would be to inaugurate a full committee system in the Council, with all proposed legislation transferred to a committee after introduction in the house. This would allow a better, and hopefully less party confrontational approach to the assessment of all legislation. It would also allow the Council to encourage interested parties and the public to be directly involved in the process.

The third reform is to abolish the "above the line" voting system for the Council. In 1985, the proportional representation system was amended to provide for "above/below the line" voting. The

electors had a choice of voting below the line, and indicating a preference number for every candidate, or voting above the line by simply placing the number 1 next to a list of candidates. This system was introduced ostensibly to make the process easier for electors, and to reduce the number of accidental informal votes, due to a large number of candidates.

A simple single vote for a party above the line automatically applies a full preference distribution added to the initial party choice of the elector. This list system, combined with a high proportion of voters who have a strong party identification with one or other of the major parties, produces a high proportion of seats which are very safe. They are the "gift" of the party, rather than the informed choice of the voters. In fact, it can be argued that this was the purpose of the change, rather than minimizing informal votes.

This election system should be reformed so that the electors have the right to allocate their own preferences. The problem of a potential for informal votes due to the large number of candidates on the ballot paper could be eased by introducing a modified optional preferential vote, based on the Hare-Clark system.

In conclusion, the Legislative Council has had a checkered career: from a house of review within the context of mid-Victorian political theory and practice; through a long period of partisan domination when it was not a house of review, but a house of a faction of a party; to a real, independent house of review which bolsters the principle of responsible government in the State.

It merits retention, with the prime aim of any reform proposals to strengthen it as a house of review.

Chapter Eight

The Magical Powers of Judges and University Administrators

Professor James Allan

I arrived in Australia a little over four years ago. I arrived here to work in a university law school. Law schools in Australia are places where the vast preponderance of people vote Labor – if not something further to the left than Labor. And at one of those morally self-indulgent human rights conferences that, in my line of work, I'm obliged to attend from time to time, I soon encountered a rather bizarre Australian practice. This is the practice of starting a talk or speech by observing and repenting of some past supposed misdeed committed by one's forefathers – or, heck, it doesn't even have to be one's own forefathers. It's enough if the misdeeds were those of people you yourself have absolutely no connection to whatsoever.

And here's the nifty bit. This observe-and-repent ritual comes totally without any cost to the speaker. You don't actually have *to do* anything that will atone for what you see as some past wrong. There's no real cost to you at all. Absolutely no one's life needs to be improved or made better. You don't even have to mean what you say. Just start your speech or talk with the perfunctory formulation and you can take your place with the elect – those whose moral sensibilities are so clearly superior (or so they think) to everyone who refuses to play this game.

Heck, some few people – those who appear to believe that uttering a few formulaic words to begin is indeed the doing of God's work – even manage to feel good about themselves. Not a single *other* person's life is improved in any way, though, except for the speaker's fleeting sense of moral sanctimony.

This is all too good to be true for me to miss out on the game. So, please, let me start this talk by acknowledging .... the traditional members of the Anglican Church, dispossessed of their Book of Common Prayer liturgy, of sane leadership (think Ridley College), and of use of the magnificent Tyndale-inspired King James Bible – to say nothing of their core beliefs.

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That important ritual out of the way – and bear in mind that Samuel Griffith's father was a Congregational Minister, which means the Anglicans ought to be a safe target in this crowd – and I'd like to thank the chairman for his very kind introduction. Indeed it was overly kind. I'm in the line of work where the ultimate goal is to write a book or article that people will still be reading in a hundred years. Think of it as an *ersatz* attempt at achieving a poor sort of immortality. And to a remarkable degree the achieving of this seems to be influenced by chance, luck, fate, call it what you will.

The best précis of this that I've heard was given by the American travel writer, now moved back to Britain, Bill Bryson. My wife and I went to hear him in Brisbane a few years back on his book tour for that very good book he wrote, *A Short History of Nearly Everything*. Not his usual fare, but good all the same. And for Bryson, Brisbane was the final stop on a gruelling Australian book-selling tour.

So he decided to tell the audience a few tricks of the trade, read a few passages from various of his books, and then field questions. But it was his first comment to us that is relevant here. Bryson told us that the same sort of questions come up again and again and again. And that an author needs to develop a set of stock replies. For instance, one of the most common questions Bryson gets is this:

"Bill, what do you want people to be saying about you in a hundred years?" To which Bryson always replies: "Isn't it remarkable that he's still sexually active".

I'm much of Bill Bryson's opinion on that score.

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I'm standing up here tonight because of the kind invitation of Julian Leeser. A few months back I was in my office and the phone rang. It was Julian. He greeted me warmly, flattered me to the extent I knew to be on my guard, and then he said, "Jim, we'd like you to give the after dinner talk at this year's Samuel Griffith conference".

I was flattered. Julian continued, "Of course, we want you not to be boring, we're hoping for funny really, not too long, with a fair degree of irreverence thrown in".

Having sat at my desk in Brisbane listening to this I figured, well, I can give that a shot. But then the kicker came when I asked Julian what he wanted me to speak on. What was the substantive topic he had in mind?

"The Crown", answered Julian.

I can assure you all that there was a stunned silence on the line. I eventually told Julian I'd call him back the next day. When I did I said to him, "Julian, you can have my attempt at funny and irreverent, or at short and about the Queen, but you'll need a better man than I to give you funny and irreverent and about the Queen". Which is why I'm speaking tonight about the Magical Powers of Judges and University Administrators.

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Let me begin the substance of my talk by warning you all that this will be an uncharitable talk. I mean that in the sense St. Paul used the word "charity" in his first letter to the Corinthians, where (at the risk of riling up any Anglican Bishops by quoting from the King James Version) Paul says that charity "vaunteth not itself, is not puffed up".

My talk tonight will be about a certain sort of top judge and university administrator who could never, in the Pauline sense, be described as charitable. Think of the judge who deep down thinks his moral sentiments – his ability to update the Constitution, to keep his finger on the pulse of changing social values and *mores*, to know what is in keeping with the underlying spirit of myriad international treaties, not to mention with an all-encompassing justice and fairness – are (let's be blunt) superior to anyone else's. And think of the academic no longer publishing in her chosen field of expertise, preferably one prone to falling victim to every passing fad when it comes to "student centred learning", "criterion-based marking", "deep not superficial learning", and endless more fatuous phrases disguising empty ideas. This academic has opted to move into "university management", has familiarised herself with the intricacies of Australia's Soviet-style university managerialist culture, where one size really is made to fit all – and that size flows from the top down, never the other way round.

Think of that sort of judge and university administrator and you'll have an idea of the object of my uncharitableness tonight.

In fact, there's a story I need to relate to you of a judge not unlike the one I've just described. This judge not only has a Philosopher-King complex, he sees himself as immensely popular – perhaps someone with photos lining his wall showing him and every famous person imaginable. This judge knows everyone. Let's call him "Miguel". One day Miguel gets into a cab in Canberra. Of course he knows the cab driver. After a bit the cabbie remarks to Miguel that, although he's a popular man, he really isn't as popular as he thinks he is. He doesn't know everyone. Miguel demurs. A wager is made. And the cab driver bets $10 that Miguel doesn't know the Prime Minister. Soon they are being welcomed into Parliament House by Kevin Rudd.

The cab driver asks for another chance, double or nothing. This time he names President Obama. The following week the two men fly into Washington and within the hour Barack Obama is greeting his old friend Miguel. The cab driver is incredulous. He asks for one last bet. Two thousand dollars says Miguel doesn't know the Pope.

Later that week they both fly into Rome, make their way to the Vatican and there before them is a huge crowd. The Pope is up on a balcony. The cab driver asks Miguel how he can prove he knows the Pope. "Give me ten minutes and if I'm not up on the balcony with the Pope, you win". And with that Miguel disappears into the crowd.

Nine minutes later he emerges on the balcony with the Pope. And he looks down to see the cabbie passed out in the crowd. So Miguel rushes back down, makes his way through the throngs, and finds his way to the cabbie. He slaps him around until he regains consciousness. "Are you okay?", asks Miguel.

"Well, I could take it when you knew Rudd. And I could even take it when you knew President Obama. But when the guy behind me just asked, 'Who's that up there with Miguel.....?' "

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Likewise, there's the story of a particular Vice Chancellor. Feeling herself to be necessary to the smooth running of one of Australia's leading export industries – that's how she sees her job – and needing to get back from a meeting in Canberra that discussed the latest 5-year plan for her industry, she decided to charter a plane. The only plane available was a small one, and to get it she had to agree to take two other paying customers, a backpacker and an elderly Methodist Minister.

An hour out from their destination the plane started to shake rather violently at 22,000 feet. It was buffeted every which way. And then there was a loud crash, some smoke, and an eerie silence. There was only one pilot for the small plane and he came on over the intercom. He told the three passengers that the engines had died and that there was nothing he could do. The plane, alas, had only three parachutes for the four people in the plane. The pilot said two were back with the passengers and he had the other, which he was taking and using immediately. Then the intercom went dead and the three passengers could see the pilot jump out.

At that moment the Vice Chancellor turned to the other two and she said, "I am an incredibly important person. All sorts of Deputy Vice Chancellors, Pro-Vice Chancellors, Executive Deans, Heads of Schools, Teaching Co-ordinators, myriad consultants and more all report to me. *I am the pinnacle of the knowledge tree*. There are even a few actual academics where I work. And they all need me. I deserve one of the parachutes". And with that, she grabbed a parachute and jumped out of the plane.

At that point the elderly Minister turned to the backpacker and he said, "Son, I've had a long and full life. I've done the best I can with the qualities and attributes given me. And I think it's only right that you take the last parachute. I will go down with the plane".

The backpacker looked at the Minister. "That's very kind of you, sir", said the backpacker. "But the *pinnacle of the knowledge tree* just grabbed my backpack. That means we can each have a parachute".

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I trust that I haven't so far conveyed the impression that certain top judges and university administrators might, on occasion, be prone to vaunting and puffing themselves up. Heaven forbid, that's the last thing on my mind.

In fact, a few members of those august callings – or job-skill categories – are so talented, so chock full of ineffable abilities of near mystical proportions, that I think it's fair to say that members of this select fraternity (or sorority, to keep in line with the Politically Correct demands laid down at the

2020 Summit) can be described as possessing magical powers. Yes, ladies and gentlemen, there are a few of them that really do have magical powers, or at least see themselves as possessing them.

Having given that assurance, let me go out on a limb for a minute and offer a few points of substance. Not many, of course, I'm well aware of the dangers of an after dinner speaker saying anything much substantive.

Anyway, we do have a problem with our universities in this country. I am a big fan of the former Howard government on many fronts. But it did nothing to fix the universities, in some ways making things worse. The culture of managerialism is far, far worse than anything I have encountered in teaching at universities in New Zealand, Canada, the US or Hong Kong. And I know the UK isn't nearly as bad as here either. I work in an environment that is a centralist's dream. One-size-fits-all *diktats* come down from on high and specify how many assessments you must give, how you can assess students, how you treat graduate students, how many hurdles they need to pass through each year. We get told we must use "criterion-based marking" – jargon for assuming university students are in primary school and you are holding their work up against a list of points to be ticked-off. Not the cream of the crop, who can come at issues in myriad ways – indeed, two great papers can give near opposite answers – your job being to put them in a rough and ready ranking order. The casual visitor to an Australian university could be mistaken for thinking he was visiting a GM plant (with the same level of profitability as GM has too), what with all the talk of "line management", "core competencies", "non-reductive research" and a list of jargon so long I won't bother you with it.

As I have said before, and will be saying again in a longish piece in the October issue of *Quadrant*, I will be urging my own children not to go to university in Australia. We are lucky enough also to be citizens of Canada and New Zealand, and in my view both those countries offer a better undergraduate university experience.

And what of the judiciary? We are in many ways very, very lucky with our judiciary here in Australia, at least at the top level. Our High Court is a model of interpretive self-restraint compared to my native Canadian Supreme Court. If you took former Justice Michael Kirby – the one who was nearing, what, a 40 per cent rate of dissenting, and who is seen by many as the judge most inclined towards interpreting constitutional documents (and some statutory ones) in the light of his own sense of changing moral values – if you took him and put him on the Canadian Supreme Court he would, in my view, be the most interpretively conservative judge there. So in a sense one can understand his frustrations, when he goes to international conferences and sees his preferred methods of interpretation are moderate by the standards of all of his Canadian colleagues, and many of his British and American ones.

But I see that as us being lucky here. We have a very good High Court.

What will happen if we get a statutory Bill of Rights is another matter. What has happened in the UK is that the judges have said that their statutory Bill of Rights has ushered in (and I quote) "a new legal order". It has allowed them, when reading other statutes, to say that they can now read words in, ignore Parliament's clear intent, do this when there's not even the hint of any ambiguity – pretty much do anything provided the outcome is, in their view, more in keeping with a rights-respecting outcome (the key point being that it is in *their view*). I like to call this Alice-in-Wonderland interpreting, because it was Humpty Dumpty there who liked to say that for him, a word means what he wants it to mean. All of us, I think, will have to make our views known to our MPs when the Attorney-General's Consultation Committee on the Bill of Rights reports back – that's the Committee chaired by the person who was on the record, before being appointed, as being in favour of a statutory Bill of Rights, and it's the Committee with not a single known sceptic as a member. And we all know that with that sort of composition it would be a brave person who bet on anything other than this Consultation Committee recommending some form of statutory Bill of Rights, though possibly a more watered-down one than Victoria's.

Put something like that in place and how our judges decide cases will almost certainly change. They will become the font of rights proclamations in that they – the unelected judges – will be the ones who tell us when our rights have and have not been infringed. All Parliament will have left is the power to say, "Okay then, but we're going to take away your rights anyway". And experience shows that that sort of power is never used, not once in 27 years by Canada's federal Parliament, and not once in nine years by the UK's.

And once that happens the whole way of interpreting everything else, most importantly the Constitution, will change too. Not immediately, but slowly and over time, bolstered by the many cheerleaders in the legal academy and the special interest groups who know they can't get their agendas approved of by the majority of their fellow citizens, but who suspect that they may be able to get them past the committee of ex-lawyers that sits as the highest court. Give the judges that sort of power and, as Canada makes so clear, many of them really will start to think they have extra-special moral antennae, more finely attuned moral attenae, heck even a little bit of black magic.

But don't let me finish tonight on a sour note like that. Instead let me finish on a slightly risqué note. I want to end by recounting the story of the young man from New South Wales who was dating the lovely girl from Victoria. This is the story, I suppose, of the free-trader dating the protectionist. And for some time they go out, gradually growing ever more comfortable in each other's company, each becoming more and more infatuated with the other. But not before she takes him home to meet her parents will the girl succumb to his charms and allow her honour to be, well, overcome, shall we say.

And finally she sets the date. "Come to Melbourne, darling. Meet my parents for the very first time, have dinner with them and me. And then we can go downtown afterwards and I will be yours, in every way".

Well, it goes without saying that our young man was quite enticed by the whole prospect, and not just of meeting her parents. He booked his flight to Melbourne, got in a cab to go there, and on the way to meet his girlfriend's parents it dawned on him that he might be wise to stop at a pharmacy or chemist and pick up some contraceptive protection. So he has the cab stop at a chemist on the way and goes in and asks to buy some condoms. "Six, 9 or 12?", asks the chemist.

The young man hums and haws for some time but eventually, hoping for the best, buys the dozen, gets back in the cab, stops again for a bottle of wine and some flowers and arrives at the house of his girlfriend's parents.

On his arrival he is immediately whisked in to eat. And as they all sit down the young man volunteers to say Grace. What follows is the longest, most turgid Grace, touching on the themes ranging from forgiveness to original sin. And when the young man finally finishes Grace, his girlfriend leans over to him and whispers, "Darling, I didn't know you were so religious".

And he replies, "Well, I didn't know your dad was a chemist".

Chapter Nine

A Note on Referendum Majorities

John Nethercote

Majorities simple and absolute: Parliament and the amendment of the Constitution of Australia

At the 2002 Conference of The Samuel Griffith Society, His Honour Mr Justice Kenneth Handley, AO, then of the Court of Appeal of the New South Wales Supreme Court, delivered an address on the counting of the vote at a referendum to alter the Commonwealth Constitution under s. 128.[1] He dealt with a part of s. 128 which reads as follows:

> "And if in a majority of the States a majority of the electors voting approve the proposed law [to alter the Constitution], and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent".

The essence of Justice Handley's proposition was that informal votes were, nevertheless, votes. Thus, for a proposal to alter the Constitution to be successful under s. 128, the numbers voting in support of the change had to exceed all others – informal votes as well as "No" votes – by at least one. In the Justice's words, "informal votes had to be counted in order to determine whether 'a majority of all the electors voting' approved the law".[2]

What the Constitution says

This short paper takes up another part of this story, but on the same theme. Its purpose is to explain that the principle contained in the Constitution's provision for determining the success or otherwise of a proposal for change – that the numbers voting in favour should exceed all other votes being cast – is reflected in the antecedent proceedings in Parliament leading to the referendum, but with the significant qualification, to be considered below, that under specified circumstances, a proposed law may be presented to the electors, voting as a whole, and as States, although it has passed only one House by the required absolute majority.

No proposal to alter the Constitution can be put before the people unless it is supported by an absolute majority in at least one House of the Parliament. Section 128 provides, *inter alia*, that the "proposed law for the alteration thereof [of the Constitution] must be passed by an absolute majority of each House of the Parliament ..". The succeeding paragraph addresses a situation in which there is a disagreement between the Houses about a proposed law to alter the Constitution. It stipulates that where either House passes a proposed law to alter the Constitution by an absolute majority, and the other House "rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree", and it is again passed by an absolute majority after an interval of three months, and the proposed law is again rejected, amended unacceptably or simply does not pass, the proposed law can be submitted "to the electors in each State and Territory qualified to vote for the election of the House of Representatives". (In other words, the deadlock procedures contained in s. 57 do not apply to bills to amend the Constitution.)

The proposed law, as submitted to the electors, can be in the form "as last proposed by the first-mentioned [that is, the initiating] House, and either with or without any amendments subsequently agreed to by both Houses".

If a proposed law is to go forth to the people it must be passed twice by "an absolute majority", either by each of the two Houses where they are in agreement, or by the initiating House where there is a disagreement.

The requirement for an "absolute majority" is unusual in the Constitution. The general rule for voting in both the Senate and the House of Representatives is a "majority of votes". Thus, s. 23 states:

> "Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative".

The comparable provision for the House is embodied in s. 40:

> "Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then shall have a casting vote".

These two sections embody the widely recognised principle of parliamentary voting in the 19th Century in Parliaments created in the Westminster mould. The *British North America Act*, s. 49, by way of illustration, states that:

> "Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote".

There is a similar but not identical provision for the Canadian Senate:

> "Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all cases have a vote and when the voices are equal the decision shall be deemed to be in the negative"(s. 36).

(This provision ensures that provincial voting strength is not affected by arrangements for the presiding officer; as noted above, the second sentence of s.23 of the Australian Constitution makes similar provision.)

The strength of the simple majority principle in a Westminster Parliament was vividly illustrated in 1911 in the *Parliament Act* of that year. This was the legislation which essentially removed the powers of the House of Lords over money bills, and reduced powers over other legislation to a suspensive veto of two years (two successive sessions). In these circumstances it might have been thought that a special majority would be required; for example, an absolute majority in the House of Commons, given that the views of the other House were to be overridden, to guard against surprise or chance majorities in the House of Commons. But there is no such qualification or precaution: it is sufficient only that the legislation pass the House of Commons in the usual manner on the prescribed number of occasions with the necessary intervals between votes.

"Absolute majority" – discussion at the constitutional conventions

The "absolute majority" requirement of s. 128 was adopted quite consciously by the framers of the Australian Constitution. The matter was actively considered when it came before the first Convention

in Sydney in April 1891. When it was introduced James Munro, Premier of Victoria, noted that "there must be an absolute majority of the two houses. That is right enough; . . .". There was even a little exchange which had the effect of leaving the matter beyond doubt:

> "An Hon. Member: It must be an absolute majority of the House!
> Mr. MUNRO: They may have an absolute majority of the members present.
> An Hon. Member: No; of the whole house!".[3]

When the Convention at Adelaide (April 1897) returned to the matter of altering the Constitution there were a number of changes. The most important was provision for the people to vote at referendum on alterations to the Constitution, changes to be approved by a majority of the people and a majority in a majority of the States. This provision replaced another in the 1891 text clearly derived from the Constitution of the United States – namely that amendments, once agreed by the two Houses of the Parliament, could not become law until ratified by specially elected State conventions.

The requirement for "an absolute majority" in both Houses remained. None other than Alfred Deakin was immediately on his feet. Though he thought it "a small matter", he nevertheless contended, given the terms of the proposed clause (clause 121), " that there should be an absolute majority of the Senate and House of Representatives is surely unnecessary" because the "question of reform is practically remitted to the people". He wanted "an absolute majority" to be replaced simply by "a majority", thereby bringing the votes in the two Houses within the scope of normal parliamentary procedure as stipulated earlier in the Constitution.[4]

It does not need any prizes to guess that Deakin's strongest supporter would be Isaac Isaacs:

> "I should like to point out the meaning of the clause. There is power given for the intervention of the people on the question of the amendment of their Constitution, but that power is merely by way of veto. Unless the proposed amendment of the Constitution first succeeds in passing an absolute majority of both Houses of the Legislature the proposition never reaches the people for their determination at all".[5]

In continuing, he complained that "[i]t is possible for an absolute majority of either House to prevent the people from expressing their views on the amendment of the Constitution. I think that is wrong . .". He thought "a mere majority" would amount to "too easy a mode" of altering the Constitution, but not in circumstances where "the decision of the Legislature is not intended to be final". Given the proposed "sanction of a majority of the States and people", "[n]ow, surely that is safeguard enough".[6]

But the terms proposed (that is, the absolute majority) had some robust defence. Some big names came forward. Sir Edward Braddon, Premier of Tasmania, argued that:

> "I think the feeling in regard to this clause has been that it should be made as difficult as possible to amend the Constitution. The idea underlying the clause is to provide that, while an amendment of the Constitution is not made absolutely impossible, the Constitution shall not be so easily capable of amendment that in any fluctuation of public opinion, any change of feeling on the part of the people in some crisis of a temporary character, it might be changed . . . I do not think this is too much to ask in such an important matter as an amendment of the Constitution, and, while I would not say the Constitution should be such as could only be amended by force of arms, I hope we shall provide all necessary safeguards against its being lightly amended".[7]

Another luminary, Dr John Cockburn, Minister for Education in South Australia, thought likewise:

> "An amendment of the Constitution should not be made too easy, but on the other hand it should not be made too difficult. In America it is too difficult. . . . What is provided for is an absolute majority, and that only means one more than half of the House. It means that there is to be no catch vote, and it is well to provide against that. I cannot imagine a case where a majority of the house wishes to see an amendment carried that the majority cannot be got together to vote. . . . .The decision should rest on the deliberate will of the House instead of on a catch vote".[8]

The President of the Legislative Council of Victoria, Sir William Zeal, went so far as to argue for absolute majorities at the second and third readings. When Barton, the Leader of the Convention, replied: "It is not necessary. Supposing they have some different mode of procedure", Zeal responded: "If Mr. Barton does not consider my amendment necessary I withdraw it".[9]

The matter did not arise again at the September 1897 meetings in Sydney, but it was a big item at the February 1898 meetings in Melbourne. Victoria again sought to delete the requirement for an absolute majority. McMillan of New South Wales repeated the previous argument:

> "It seems to me that such an enormous change as that of an alteration of the Constitution should certainly require an absolute majority of each House of Parliament. We do not want to make the Constitution too rigid, but, on the other hand, we should not go to the opposite extreme. I do not approve of the rigidity of the American Constitution, and I think that we should have a means of making an alteration if thought desirable; but, at the same time, it seems to me that a matter of such paramount importance should receive the assent of an absolute majority of both Houses of the Legislature".[10]

Deakin, on this occasion, said, in view of the previous discussion [in Adelaide], he did not propose "to request the Convention to reconsider the point, because this is a comparatively minor matter . . .".[11] The Convention then proceeded to discuss the question of ratification of alterations to the Constitution by the people: as Isaacs put it, "a very wise provision".[12]

Isaacs then asked, what would happen if the Houses disagreed? If a proposal received the requisite majority in one House but not in the other? Should one House have the power to prevent a proposed amendment coming before the people?

Isaacs had his own answer. He argued that an alteration to the Constitution could be sought on the basis of an absolute majority in one House alone (Senate or House of Representatives), because the vote in Parliament was not final; it was preliminary to a popular vote, in which there had to be not only a majority of the people but popular majorities in a majority of the States. He supported his case with reference to what he called "the now admitted inherent defect in the American Constitution" (see below).[13]

Isaacs' amendment was negatived (31-14). His supporters included not only Victorians Deakin, Higgins, Peacock, Quick, Trenwith and Sir George Turner, and South Australians Holder, Kingston and Cockburn, but, significantly, the New South Wales Premier, G H Reid, and his protectionist opponent, William Lyne.[14]

As will be well known, the new text of the Constitution settled at Adelaide did not achieve the required statutory majority in NSW. At the subsequent Premiers' Conference of January-February 1899, the alteration clause was again considered, and this time Isaacs' view prevailed notwithstanding that he himself was not present.[15] The unanimous decision of the Premiers was that, "Neither House alone should have power to prevent a reference to the people of a proposed alteration of the Constitution. A proposed alteration, if twice passed by one House, and twice rejected or obstructed by the other, might be submitted by the Governor-General to the people".

The result was s. 128 as it now exists in the Constitution.

The flexibility thus allowed has only been activated on one occasion. In 1974, proposed alterations supported only by the House of Representatives were voted on at the same time as the simultaneous elections for the two Houses in that year. All proposals failed.

There have been other occasions when amendments supported only by the Senate, when the government has not had a majority there, have been proposed. These have never been put before the electors; a notable case was in 1913-14, when Labor had a substantial majority in the Senate and was keen that proposals defeated in referendums held simultaneously with the 1913 federal elections should again be submitted. The Governor-General refused to do so, on the basis that he could only act on the advice of his Ministers.

So far as I can discover, among the many proposals to alter the Constitution, none has sought to abandon the absolute majority principle at the parliamentary stage. The arguments advanced during the 1890s have held their ground. This is in contrast to unsuccessful attempts to reduce the need for popular "majorities in a majority of the States" from four, as it is at present, to majorities in at least half the States.

The Final Report of the most recent Constitutional Commission, headed by Sir Maurice Byers, QC, recommended that alteration of the Constitution could be initiated by "not fewer than half the States", providing the States involved represented "a majority of Australians overall". Of relevance to this paper is that the recommendation, including the draft bill to effect it, did not include any provision for voting in the various Houses of the State legislatures.[16]

Parliamentary practice

The constitutional provisions relating to amendment of the Constitution are appropriately reflected in the procedures of the House of Representatives and the Senate. Thus, in the case of the House of Representatives:

> "If, on the vote for the third reading [of a Constitution alteration bill], no division is called for and there is no dissentient voice, the Speaker draws the attention of the House to the constitutional requirement that the bill must be passed by an absolute majority and directs that the bells be rung. When the bells have ceased ringing the Speaker again states the question and, if no division is called for and there is no dissentient voice, the Speaker directs that the names of those Members present agreeing to the third reading be recorded by the tellers in order to establish that the third reading had been carried by an absolute majority".

An absolute majority is likewise required where the House agrees to an amendment by the Senate to a bill to alter the Constitution.[17]

Odgers' Australian Senate Practice also addresses the requirement for an absolute majority. It observes that:

> "[a]n absolute majority is required only for the third reading, and it is possible for a Constitution alteration bill to progress to a third reading without an absolute majority during the early stages of its passage. This allows the Senate freedom to consider a Constitution alteration bill at earlier stages while enforcing the constitutional requirement at the stage of the final passage of the bill".

The standing orders provide that a roll call must take place immediately before the third reading of a bill to alter the Constitution. It notes that a roll call does not oblige a Senator to vote.[18]

The United States Constitution and Bryce's comments

The US Constitution figured in discussions about a framework for amendment of the Australian Constitution. Article V provides as follows:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . .".

Only one provision of the US Constitution is exempt from the above procedure: it is the provision that, "No State without its consent shall be deprived of its equal suffrage in the Senate".

In practice, all amendments to the US Constitution have been accomplished at the initiative of the Congress and ratified by three quarters of the State legislatures.

The framers of the Australian Constitution had, as a major source of information about American constitutional practice, James Bryce's *The American Commonwealth*, first published in 1888. It is thus of interest to note what Bryce had to say about the question of amendment to the Constitution:

> "Ought the process of change to be made easier? Say by requiring only a bare majority in Congress, and a two-thirds majority of States? American statesmen think not. A swift and easy method would not only weaken the sense of security which the rigid Constitution now gives, but would increase the troubles of current politics by stimulating a majority in Congress to frequently submit amendments to the States. The habit of mending would turn into the habit of tinkering. There would be too little distinction between changes in the ordinary statute law, which require the agreement of majorities in the two Houses and the President, and changes in the more solemnly enacted fundamental law. And the rights of the States, upon which congressional legislation cannot now directly encroach, would be endangered".[19]

Bryce also made some observations about practice in two continental practices of the time:

> "The French scheme [Third Republic], under which an absolute majority of the two Chambers, sitting together, can amend the Constitution; or even the Swiss scheme, under which a bare majority of the voting citizens, coupled with a majority of the Cantons, can ratify constitutional changes drafted by the Chambers, in pursuance of a previous popular vote for the revision of the Constitution, is considered by the Americans dangerously lax. The idea reigns that solidity and security are the most vital attributes of a fundamental law".[20]

He concluded with an insight which certainly has some bearing upon the course of Australian constitutional history:

> "From this there has followed another interesting result. Since modifications or developments are often needed, and since they can rarely be made by amendment, some other way of making them must be found. The ingenuity of lawyers has discovered one method in interpretation, while the dexterity of politicians has invented a variety of devices whereby legislation may extend, or usage may modify, the express provisions of the apparently immovable and inflexible instrument".[21]

Endnotes:

1. Justice Kenneth Handley, AO, *When "Maybe" means "No"*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 14 (2002), pp. 141-6.

2. *Ibid*., p. 142.

3. *Official Report of the National Australasian Convention Debates*, Sydney, 2 March to 9 April,1891, (Sydney, 1986), 8 April 1891, p.885.

4. *Official Report of the National Australasian Convention Debates*, Adelaide, 22 March to 5 May, 1897, (Adelaide,1897), 20 April 1897, p. 1021.

5. *Ibid*..

6. *Ibid*..

7. *Ibid*..

8. *Ibid*., p. 1022.

9. *Ibid*., p. 1023.

10. *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January to 17 March, 1898, p.176.

11. *Ibid*., p.716.

12. *Ibid*., p.717.

13. *Ibid*., p. 718.

14. *Ibid*., p. 765.

15. J A La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, p.243; see also W G McMinn, *George Reid*, Melbourne University Press, 1989, chapter 17.

16. *Final Report of the Constitutional Commission* (Chair: Sir Maurice Byers, QC), vol.2, Canberra, AGPS, 1988, para. 13.1 (i), p.851.

17. I C Harris (ed.), *House of Representatives Practice*, 5th ed., Department of the House of Representatives, 2005, p. 379.

18. Harry Evans (ed.), *Odgers' Australian Senate Practice*, 12th ed., Department of the Senate, pp. 260-1; see also pp. 224-5.

19. James Bryce, *The American Commonwealth*, vol. 1, London, Macmillan and Co., 1888, p.490.

20. *Ibid*..

21. *Ibid*., p. 491.

Chapter Ten

Parliamentary Will v. Statutory Bill: The Important Role of Legislatures in Progressive Social Change

Hon John Hatzistergos, MLC

Courts are, for the proponents of rights charters, the saviours of society from the pernicious power of government and legislature. When politicians make laws or take executive action outside the values set down in a charter, courts will heroically force them into accordance with its human rights principles.

Courts in this scenario are at the forefront of the defence of the rights and interests that are central to our democracy. But does this picture really match reality? Does it in fact ignore the central democratic institution, the Parliament? In an effort to rebalance our perspective on this issue I would like to suggest that it is via Parliaments, and the legislative will of parliamentary representatives, that major social advances and the extension of basic rights to all of society have been effected, rather than through the courts.

Parliamentary reform for the rights of excluded members of society

The primacy of the parliamentary legislature as the lawmaking body in Western democracies has been examined by the American sociologist William M Evan, who also looks at the role of courts: while also identified as a source of lawmaking, their legitimacy stems primarily from the fairness of their decision-making processes, not their role in policy making, for which they generally lack authority.[1]

The legitimacy of Parliaments for determining questions of how society is to be governed and settling laws, and the relatively minor authority that courts wield in this area, are important to remember when examining the role of the legislature and the courts in recognising and advancing the rights of excluded members of society in Western democracies.

In doing this it is important to emphasise an identifiable phenomenon – the efforts of people and Parliaments to produce legislative change to adequately recognise or protect vulnerable sectors of the community – is observable across all significant campaigns for the expansion of rights to disenfranchised members of the community.

To me this illustrates the formidable responsibility that continues to be vested in the legislature by the community – to rebalance the scale of advantage, by legislative action, to ensure that unfairness and disenfranchisement are redressed for the benefit of the marginalised and consequently the community as a whole.

What the following cases also reveal is the centrality of Parliament as the engine room driving reform and social change. The idea that courts as an institution can play this same role, a purpose for which they were not designed and which they cannot achieve without significant restructure, is not backed up by the historical record. When looked at in their context, the hopes that charter advocates hold for a transformation in the courts' role in society are reduced to pure fantasy.

I also want to use these historical examples to show the benefits of change through legislation rather than through litigation. Professor Helen Irving has stated that rights "should be able to evolve, and the best way to do this is through the political process. The political process is accountable, and it is flexible. It allows for compromise, where litigation is usually a matter of winning or losing".[2]

Rights are not generic concepts waiting to be found. In fact, they often conflict. Take freedom of speech and the right to privacy, freedom of religion and the right to equality and freedom of movement and the right to private property.

Basic to our system of representative democracy is the identification and accommodation of conflicting social interests in the process of making laws and governing the state. The sophisticated electoral system of preferential and proportional representation, of our bicameral Parliament, standing committees and inquiries, together with institutions of a free press and ministerial accountability, all work together to ensure that complex political conflicts are resolved smoothly, and competing rights, values and interests are weighed up and decided in a democratic way.

To put it simply: parliaments are institutions specially designed for consultation on, discussion and resolution of difficult political questions. On the other hand, the judicial branch of government is set up in a different manner to achieve different ends: the adjudication of private conflicts and the application of law.

By transforming social and political questions into legal ones, a Charter of Rights threatens to harm the integrity of both institutions. It blurs the Parliament's authority to decide important political questions which the public has entrusted to it, and for which it has evolved a sophisticated democratic infrastructure. It also forces the Courts to start making decisions on these same issues, responding to questions which they are ill-equipped to answer and for which they do not have the democratic legitimacy.

Right of all men to vote regardless of their property rights

It is also informative to remind ourselves about the struggle to gain universal suffrage[3] in Britain. Suffrage, or the right to vote, is a key element (some would say the key element) to political, and therefore legislative, power in representative democracies.

The extension of the right to vote across the British population shows the central role of Parliaments in social progress. While the earliest rules about who could vote restricted the franchise according to the value and size of a person's property – meaning only men could qualify – agitation to extend the franchise finally resulted in the first Great Reform Act in 1832.

Within a few years, a popular movement supporting manhood suffrage (often referred to as Chartism) achieved significant support. It contained a broad representation of the national economic and social structure in 19th Century England, including skilled artisans and middle class radicals. They understood the power of the legislature to effect social change, and it was Parliament that they targeted with their campaigns, via the instrument of the petition. In contrast, history does not record any attempts to achieve these important reforms by initiating legal proceedings.

In June 1839 the Chartists presented their petition to the House of Commons with over 1.25 million signatures. A second petition was presented in May 1842, signed by over three million people. In April 1848 a third and final petition was presented, accompanied by a mass meeting on Kennington Common in South London.

The power of this political movement, coupled with parliamentary processes that resulted in legislative answers to the Chartists' demands, brought about the social change that the movement had envisaged.

The second Reform Act in 1867 expanded the franchise to borough householders, including many working men, and the 1884 Reform Act extended the same franchise to the counties, bringing the franchise to over 5 million men. The introduction of the secret ballot in 1872 freed voters from landlord and employer influence. The 1918 *Representation of the People Act* extended the vote to all men over 21 and most women over 30.

Women's right to vote

By the late 19th Century the issue of universal suffrage, and more specifically the right of women to vote, was firmly on the agenda in England[4] and in many other young parliamentary democracies. The common thread in these movements was the insistence that Parliaments should be answerable to all those they seek to govern, and that this expectation should be reflected in legislation.

The milestones leading up to the enfranchisement of women in New Zealand[5] – claimed as the first self-governing nation to grant the vote to all adult women – reveal striking similarities with those leading to universal male suffrage in England and similarities with women's suffrage movements in the US, Britain and Australia.

In New Zealand the campaign for women's suffrage included the efforts of individual women writing and speaking in public; the activities of the Women's Christian Temperance Union; women's trade unions;[6] the presentation of numerous petitions;[7] the formation of cause-specific organisations;[8] and the drafting of several Bills preceding the enactment of the final legislation providing universal suffrage for New Zealand women.[9]

In Australia the *Franchise Act* 1902 conferred universal suffrage for white men and women with respect to federal elections. Aboriginal enfranchisement had occurred in part in the States in the 1850s, but federally required a more complex process to ensure the rights of all Aboriginal men and women to participate, culminating in 1962 amendments to the Commonwealth *Electoral Act* that provided the right to vote in federal elections to Aboriginal Australians.

Legislative action to end slavery

The abolition of slavery has been one of the great moments of progress in the modern era. It was achieved not by the interpretation of legal principles by courts, but by the formation of abolitionist movements, by parliamentary debate and legislative action, and in the case of the United States of America by executive declaration and military victory.

In England the abolitionist movement became a powerful political force at the end of the 18th Century, made up of diverse religious and humanitarian groups and represented in Parliament by the Anglican evangelist William Wilberforce. Following broad based campaigns the movement attained success in having the slave trade in the British Empire banned with the passing of the *Slave Trade Act* 1807 by the British Parliament. Continued campaigning resulted in the passing of a further piece of legislation, the *Slavery Abolition Act* 1833, which set in place the process for the abolition of slavery itself throughout the British Empire.

Similarly, the abolitionist movement grew in America in the early 19th Century, leading to legislative change across States of the north to abolish slavery. In 1808 the importation of slaves was banned by Congress,[10] although this did not stop the natural increase in the slave population or slave smugglers taking advantage of lax enforcement.

In the end, of course, America had to fight a civil war to end slavery and guarantee freedoms to its African-American population. The victory of the Union forces ensured that President Lincoln's Emancipation Proclamation of 1862/63 granting liberty to slaves in the Confederate States could be enforced, and would eventually be strengthened further with the Thirteenth Amendment, abolishing slavery and involuntary servitude in 1865.

What was the role of the courts in this epochal development? While the British common law did assist the cause to some extent with Lord Mansfield's decision in the *Somersett Case*[11] of 1772, which has been interpreted as holding that slavery was not lawful in England, it is also true that the extension of the fundamental right of freedom from slavery to the populations of the United States and Britain relied on the generation of popular political support and the enactment of legislation through parliamentary processes. Popular movements drove change through the engine room of the Parliaments, allowing social conflicts to be mediated, and questions of progress to be negotiated,

advanced and implemented. The courts at best played a role in clarifying the legal context in which these debates took place, but cannot be said to have actively pushed the process forward.

Civil rights laws

After the abolition of slavery following the Civil War, the next great advance in the right of people of colour in America came out of the civil rights movement of the 1950s, '60s and '70s. One of the primary aims of this movement was legislative change, which was achieved in the *Civil Rights Act* 1964 and the *Voting Rights Act* 1965, changes that enforced rights for marginalised peoples, including women, blacks, Asians and Latinos.

The Montgomery bus boycott, together with the decision in *Brown v. Board of Education*, are often cited as catalysts for the civil rights movement. Together with the championing of legal methods by the National Association for the Advancement of Colored People (formed in 1910), the non-violent protest by the Congress of Racial Equality (formed in 1942), and the mobilisation of black students in the south and white liberal students in the North in the 1960s, the infrastructure of the Civil Rights movement became formidable.

In the America of the civil rights era, such collective action culminated in legislative action, by way of the introduction, under the Johnson administration, of the *Civil Rights Act* in 1964 – which barred discrimination on the grounds of race, sex, religion or national identity – and the *Voting Rights Act* – which codified the 15th Amendment[12] and finally enfranchised African-Americans of the south in 1965.[13]

Ultimately, there can be no doubt that the consequences of these laws for the integration of the hitherto marginalised women and blacks and, subsequently, mature workers and people with disabilities into the workforce was significant. As noted by Dowd Hall:

> "Government intervention (by enacting the *Civil Rights Act*) and grass-roots action made 1965-1975 the breakthrough period for black economic progress, especially in the South. That victory inspired Latinos and others to make similar demands and adopt similar strategies. As a result, legal protection of individuals from workplace discrimination was extended to a large majority of Americans, including not only people of color and all women, but also the elderly and the disabled".[14]

The courts obstructing rights

While there are notable and oft-cited cases of court decisions which have had a significant political and social impact – *Roe v. Wade*, *Brown v. Board of Education*, *Mabo* and *Wik* for instance – it should also be remembered that courts also play a role in limiting social change and taking a more conservative approach to issues which charter advocates may wish to advance.

Gun control laws: One example of this is the decision of the US Supreme Court in *District of Columbia v. Heller*, which has been characterised[15] as the first Supreme Court decision in history to strike down a gun control statute under the Second Amendment,[16] so that a State law that effected a functional prohibition on the possession of handguns in one's own home was invalidated.[17]

For those familiar with the controversy that has followed the majority decision of Justice Scalia in that case, it will probably come as no surprise to you that I am attracted to the arguments of the commentators who have objected to this decision on the basis that judge-made law and judicial veto of democratically-sanctioned criminal statutes, where there is no constitutional text that requires such judicial intervention, is bad law.[18] In this context, I agree with those who suggest that legislating from the bench is undesirable.

There are of course recent counter-examples to the rights-limiting function of some courts, and it should be no surprise that courts can play both limiting and expansive roles when it comes to decisions on rights. In *Roach v. Federal Electoral Commissioner*[19] (*Roach*) the High Court struck down the Howard government's *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 to the extent that it denied voting rights to prisoners serving full-time sentences. Their decision was based on an implied guarantee of the right to vote inherent in the political system laid down in the Constitution, where members of Parliament were to be "directly chosen by the people".[20]

This was a finding that directly contradicted the express will of the Parliament, enacted in legislation. It was a significant intervention into national political life by the Justices of the High Court, and had an immediate electoral impact on the 25,790 people imprisoned in Australian correctional centres at the time.[21] There is no explicit guarantee of the right to vote in the Constitution to justify the High Court's decision, and instead it relied on an analysis of the structure of the Australian polity set out in the way that the Constitution was drafted.

The High Court's decision in this matter occasioned controversy and public debate and, as on previous occasions like the handing down of the *Wik* decision, it showed how ill-suited courts are to manage this kind of intervention into the public sphere. Unlike the Prime Minister, the Chief Justice of the High Court is not institutionally equipped to come out and engage in media debate about the effects of his court's decision, and there are legal constraints on him justifying it beyond the published reasons laid out in the official judgment. Compared to the daily frequency of decisions made in Parliaments on socially and economically controversial topics, it is beneficial for the High Court to be constrained from entering into these areas to the relatively few cases where it is necessary to remedy breaches of the Constitution. This situation would be reversed under a Charter of Rights regime, where the High Court would be called upon to routinely and frequently make interventions into political areas.

Socially progressive lawmaking is the responsibility of the legislature, as elected representatives are best placed to make laws suited to the community values of the moment. Anti-discrimination laws, for reasons I will now explore, are an excellent example of how the legislature can be responsive to contemporary social conditions.

Anti-discrimination laws in Australia

Commonwealth racial vilification laws: In the main, contemporary human rights laws have been the purview of the legislature – especially in the context of agreement among Western nations in the aftermath of the Second World War that respect for human rights and the protection of minorities was properly a global concern.

The enactment of anti-discrimination statutes in Western democracies can be closely aligned with major shifts in the post-World War Two social, political and legal environments of the developed world, including Australia. While time will not permit a comprehensive examination of the context for the enactment of discrimination statutes in this country, the comments of the Commonwealth Attorney-General about the *Racial Discrimination Act* and *Racial Hatred Bill* should be highlighted.

It is a summary of how anti-discrimination laws – in this case the federal racial vilification laws – can address demands of the Australian community to enact socially progressive laws, reflective of both a global human rights framework and local concerns with the consequences of the failure of Australian society to properly recognise the rights of our racial minorities.

The Attorney-General said the following in the House on 15 November 1994 (about the Bill, which contained both civil and criminal provisions):

> "The *Racial Discrimination Act* does not eliminate racist attitudes. It does not try to, for a law cannot change what people think. But it does target behaviour – behaviour that causes an individual to suffer discrimination. ..

> "The *Racial Hatred Bill* is about the protection of groups and individuals from threats of violence and the incitement of 'racial hatred', which leads inevitably to violence. …. This Bill is controversial. It has generated much comment and raises difficult issues for the Parliament to consider. It calls for a careful decision on principle.....…
>
> "The Bill is intended to close a gap in the legal protection available to the victims of extreme racist behaviour. No Australian should live in fear because of his or her race, colour or national or ethnic origin. The legislation will provide a safety net for racial harmony in Australia, as both a warning to those who might attack the principle of tolerance and an assurance to their potential victims.
>
> "Three major inquiries have found gaps in the protection provided by the *Racial Discrimination Act*. The National Inquiry into Racist Violence, the Australian Law Reform Commission Report into Multiculturalism and the Law, and the Royal Commission into Aboriginal Deaths in Custody all argued in favour of an extension of Australia's human rights regime to explicitly protect the victims of 'extreme racism'.
>
> "The 1992 report of the National Inquiry into Racist Violence found that while State and Territory criminal law punishes the perpetrators of violence, it largely is inadequate to deal with conduct that is a pre-condition of racial violence. The report documented 60 such incidents. The Law Reform Commission report and the Royal Commission also dealt extensively with examples of extreme racist behaviour. .....
>
> "Racism should be responded to by education and by confronting the expression of racist ideas. But legislation is not mutually exclusive of these responses. It is not a choice between legislation or education. Rather, it is in the government's view, a case of using both. .....
>
> "In this Bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. …..".

This quotation accurately encapsulates the responsiveness of the legislature in advancing the rights of excluded members of our society. The fact that they are quoted in the decision of the full Federal Court which upheld findings that internet publications of Mr Toben vilified Jews within the meaning of the Commonwealth vilification laws is further evidence of the effectiveness of the legislature in enacting socially progressive laws.

The Attorney-General's comments also reveal the complex environment in which anti-discrimination legislation operates and the multitude of different interests and rights that it must deal with, respond to and reconcile in multicultural societies like Australia. As well as setting out norms and penalties, both Commonwealth and State legislation also established government agencies to oversee anti-discrimination initiatives (with the Australian Human Rights Commission operating federally and the Anti-Discrimination Board in New South Wales), in recognition of the fact that merely deciding on and enforcing rules is not enough, but that community education and cultural change is necessary.

These sorts of measures are far beyond the capacities of courts, designed as they are for the resolution of legal conflicts and not sophisticated policy development in a complex, conflicting and rapidly changing social environment. Another important aspect of NSW anti-discrimination legislation is the provision of exemptions for organisations, including churches and educational institutions, as well as a mechanism for the Government to grant exemptions on a case-by-case basis.

This is a way of managing the conflict between general norms prohibiting discriminatory practices and the particular interest of different community groups to retain autonomy to act in accordance with their own beliefs. The exemption system is also used to allow the operation of organisations which seek to advance the interests of disadvantaged groups, who need to specifically target these groups in a beneficial way but who would be in breach of anti-discrimination provisions in doing so. For example, a transport company that has special provisions to encourage women truck drivers, an industry in which women are under-represented, recently received an exemption under this system.

The complex, targeted nature of this legislation, accommodating the needs of different groups from the heterogeneity of Australian society and resolving conflict between them, is a good example of the work that Parliaments can do to achieve social progress while maintaining social cohesion. It is the unique nature of Parliaments that enables such a resolution to be reached, and is a function that cannot be achieved by courts in their consideration of legal conflicts. Outsourcing responsibility for the advancement of rights to the courts runs the risk that accompanies the replacement of a fine-tuned, sophisticated tool with a blunt one that has been built for different purposes.

Conclusion

Parliament is an institution central to our democracy and it is an institution worth defending. What I have argued here is a defence of Parliament's role in setting out the laws by which a society operates, with all the legitimacy conferred upon it by its democratic mandate, in opposition to those who wish to see Parliament bound up by a Rights Charter and subjected to the direction of the courts as to what it can and cannot do. Faith in the democratic legislative function of Parliaments has borne fruit for those who have fought for the advancement of marginalized groups over the centuries, and it has been Parliaments who have overseen the extension of rights and freedoms beyond the élites to the greater mass of the world's populations.

The examples given here, of the abolition of slavery, the extension of manhood suffrage, women's rights to vote and the civil rights movement in the USA all illustrate the importance of the political and parliamentary processes in achieving real and lasting social change. Reform comes through legislation, not litigation. Despite the great hopes that are put on test cases and the argument of public interest matters before the courts in an attempt to generate wider social reform, the kinds of change generated by litigation and different inflections of established legal principles pale in comparison to the transformations effected by parliamentary activity. The *Slavery Abolition Act*, the *Reform Act*, the *Civil Rights Act*, and Australian legislation such as the *Anti-Discrimination Act* and our recent mental health reforms have all created greater, more durable progressive change than the judgments of courts in the same areas.

Lawyers bear the scars of litigation and we know that the idea of social progress through adversarial litigation, where community values are converted to legal battlefields, is a formula for dysfunction.

We do not live in a perfect society and never will. There may well be laws perceived by some in our community to be unjust. It is however wrong to suggest that they can be remedied by enacting Charters with wide ranging values and all will be well. The remedies and accountability should rest with the democratically elected Parliament preserving and respecting the traditional role of the Courts and the balance between our institutions of governance.

Endnotes:

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2. Helen Irving, *Bill of rights talk*, Fabian Society, 25 July 2007.

3. Cannon J (ed), *The Oxford Companion to British History*, Oxford University Press, 2002, pp. 192-193, 896-897 and http://www.parliament.uk/about/livingheritage/transformingsociety.cfm.

4. *Ibid*., p. 897.

5. See generally http://nzhistory.net.nz/politic/womens-suffrage and http://www.Christchurch.org.nz/Women.

6. In NZ the Tailoresses' Union of New Zealand was active in the suffrage campaign.

7. In 1893, 13 petitions requesting that franchise be conferred on women, signed by nearly 32,000 women, were compiled and presented to the House of Representatives.

8. The Women's Franchise League was established in Dunedin (NZ) in 1892. The National Council of Women, established in 1896, grew out of the networks of campaigners for voting rights for women.

9. See the *Electoral Act* 1893.

10. Foner, Eric, *Forgotten step towards freedom*, *New York Times*, December 30, 2007.

11. *R. v. Knowles, ex parte Somersett* (1772) 20 State Tr 1, judgment of the Court of King's Bench.

12. Amendment 15 – Race No Bar to Vote. Ratified 2/3/1870.
"1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
"2. The Congress shall have power to enforce this article by appropriate legislation".

13. Morris, A, *Civil Rights Movement*, in Ritzer, G (ed), Blackwell Encyclopaedia of Sociology, Vol 11, Blackwell Publishing, 2007, pp. 507-511, and *Activism and Reform*, in Cayton, Gorn, Williams (eds), Encyclopaedia of American Social History, Macmillan, 1993, pp. 223-227.

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15. By Lund, N, *Heller and Second Amendment Precedent*, 13 LCLR 335.

16. Amendment 2 – Right to Bear Arms. Ratified 12/15/1791.
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17. Levinson, S, *For Whom is the Heller Decision Important and Why?*, 13 LCLR 315.

18. As discussed in Merkel, WG, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LCLR 349.

19. *Roach v. Electoral Commissioner* [2007] HCA 43, downloaded from http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html on 29 August 2009.

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Chapter Eleven

Judicial Appointments: The Case for Reform

Hon Bruce Debelle, QC

Although the role of a judge is to be an independent arbiter, not only between citizen and citizen, but also between citizen and government, curiously it is the government that appoints judges. For a long time, there has been little questioning of that process although individual appointments have been subjected to criticism. More recently, the topic has been more frequently agitated. This paper proposes an alternative means of appointment designed to secure appointments on merit.

The current process

The practice by which judges and magistrates are appointed is, in all essential respects, the same throughout the Commonwealth. Appointments made to Federal Courts, that is to say, to the High Court of Australia, Federal Court of Australia, Family Court of Australia and the appointment of federal magistrates are usually made by the Attorney-General recommending to Cabinet a name or series of names of potential appointees. The appointment is made by the Governor-General in Council. A similar practice is adopted for the appointment of judges and magistrates to the courts of the States and Territories. The recommendation of the Attorney-General and the deliberations of Cabinet, like all deliberations of Cabinet, are secret.

In some jurisdictions, the convention is that the Attorney-General in each jurisdiction will consult a number of persons or bodies before making a recommendation to Cabinet. The persons consulted usually include the Chief Justice of that State or Territory, the head of the court to which the appointment is to be made, the President of the Law Society or Law Institute in that State or Territory, and the President of the Bar Association in that State or Territory. However, there is no statutory requirement that the process of consultation should occur. Others might be consulted but, because the process is secret, that cannot be known.

Need for change

The importance of maintaining public confidence in the courts and in the judiciary cannot be questioned. The maintenance of the rule of law depends to a large extent on maintaining that public confidence. It is desirable to ensure that appointments to courts are made from those who have the skills and qualities necessary to discharge the difficult and important task of determining disputes between citizen and citizen and citizen and government. In that way, public confidence in the judiciary can be maintained.

Principle dictates that a protocol should be established that prescribes the procedures to be adopted for the appointment of judges and magistrates.

That principle derives from the separation of powers and, in particular, the constitutional principle that judicial officers are independent of both Parliament and the Executive Government. That is a hard won and fundamental principle of our democratic system.[2] It is integral to maintaining the rule of law. An independent judiciary is a bulwark protecting citizens from an over-weening government. Governments and Ministers and government departments are constantly involved in litigation. In order that justice is not only done but also seen to be done, it is desirable that the appointment of

a judicial officer is not coloured by a perception of political patronage. A statutory protocol will assist governments to avoid unfair criticism based on accusations of cronyism or improper political patronage.

At a more practical level, it is unlikely that an Attorney-General, busy in the hurly-burly of political life, will have a detailed knowledge of all the most suitable persons for appointment. The Attorney will be likely, therefore, to consult with others, but that consultation may not always include those best able to advise. There does not seem to be any settled practice of consultation and enquiry. While the Attorney-General should be free to make use of whatever sources of information are available, there is much to be said for the view that the Attorney should be obliged to consult several obvious sources.[3]

Proposals have been advanced by several Chief Justices of the High Court and by other judges at senior levels for an improved method of appointment. In 1977, Sir Garfield Barwick, then Chief Justice of the High Court of Australia, recommended a form of judicial appointments commission, a proposal that has received some support.[4]

The present process can lead to controversy, in some instances controversy without foundation. While it must be acknowledged that most appointments have been of legal practitioners fit for judicial office, it cannot be denied that some appointments have been made of persons whose character and intellectual or legal capacity have been doubted, and whose appointments have been identified as instances of political patronage.[5] Not all appointments in recent times have been made exclusively on merit or from the field of best available candidates.[6] There is another aspect to the same issue. On occasions, outstanding lawyers, well suited by demonstrated ability and achievement to hold judicial office, and willing to do so, have been passed over in favour of less qualified persons.

The process is, therefore, prone to controversy. It is likely to remain controversial because it is not possible to ascertain by what process an appointment has been made. This unnecessary controversy has a real capacity to undermine public confidence in the judiciary. It is desirable, therefore, that a statutory protocol be put in place for appointment on merit that will assure the community that the candidates for appointment are persons who have the qualities and skills to discharge the duties required of the office. The protocol will result in an improvement in the quality of those appointed. It will avoid suggestions of political patronage or criticism that the appointment has been made for reasons other than merit.

In this way, the community will have greater confidence in the system of appointment, thereby instilling additional confidence in the courts.

The job description

Persons appointed as judges and magistrates should, so far as lies within human control, be persons who have demonstrated merit to discharge the duties of a judge or magistrate. The goal is to ensure that the appointments are made from the best field of candidates suitable for the court to which the appointment is to be made. The community deserves no less.

An understanding of the work performed by judges and magistrates and the skills and qualities required by them will inform discussion as to an alternative method of appointment.

Broadly speaking, the work performed by judicial officers can be divided into trial work and appellate work.

Trial work involves criminal or civil trials. Judges in Supreme Courts and in District or County Courts conduct both criminal and civil trials. Broadly speaking, the trial work in the Supreme Court is of greater substance and complexity than that in District or County Courts. Judges in the Federal Court of Australia and in the Family Court of Australia conduct civil trials. Magistrates also conduct both criminal and civil trials. As a general rule, magistrates hear cases of lesser substance and complexity than in the other courts that have been mentioned, but the importance of their contribution must not be underestimated.

An important aspect of the work of judicial officers conducting trials at all levels is deciding difficult questions of procedure and of evidence and of law. Often questions of evidence and procedure have to be determined promptly in the course of the trial but without interrupting the continuity of the trial. That task requires not only a depth of legal knowledge, but also trial experience that assists in determining if the point has substance and, if so, the making of an appropriate and prompt ruling. The skills and abilities to make prompt and correct rulings is especially important in jury trials and, in particular, jury trials of criminal cases. Generally speaking, the differing nature of the work at the different levels in the hierarchy of courts requires a higher degree of competence at the higher levels in that hierarchy. However, it cannot be denied that both magistrates as well as judges in District Courts and County Courts often have to deal promptly in the course of a trial with difficult questions of evidence and procedure.

The qualities of a judicial officer are, of course, not confined to a sound knowledge of the law and legal practice and a capacity for quick and correct decisions. Judges, especially trial judges, are dealing with members of the public, either as parties or as witnesses. They must be alert to the stress upon the parties to the action as well as be sensitive to the proper concerns of witnesses, some of whom are giving evidence under compulsion. They also have to deal with legal practitioners of varying ability. On occasions, a self-represented litigant will be appearing before the court. It is obvious that a judge must also have the qualities of courtesy, patience and the ability to listen. In short, the judge must have a suitable temperament for the task.

Another important aspect of the work of the trial judge is to deliver well-reasoned judgments without delay after the hearing. In this respect also, the judge requires a sound knowledge of the law as well as a secure grasp of legal principle. The judge must weigh the evidence and make findings to determine the facts in relation to which the judge will apply relevant legal principle and determine the dispute between the parties. The need to deliver judgments promptly requires conscientiousness and diligence and hard work as well as a sound judgment and decisiveness.

Appellate judges, like trial judges, must also be able to deliver well-reasoned judgments without delay. The task of the appellate judge differs in that appellate judges usually sit as a court of three. The High Court usually comprises five or more judges according to the requirements of each case. Appellate judges do not try cases. Appellate courts are courts of review; that is to say, they review the case on appeal and determine whether it has been decided according to law. A wide range of questions come before appellate courts. Judges in those courts must, therefore, have a profound knowledge of the law and the underlying principles of law in order to resolve the question before them.

It is manifest from this brief outline of the task of judicial officers that an essential requirement of any judicial officer is a sound knowledge of the law. That is one reason why the legislation regulating the persons who may be appointed to judicial office prescribes a minimum period of practice before a person becomes eligible for appointment as a judge or magistrate.

Obviously, the qualities of a judicial officer are not confined to legal ability. He or she must have personal qualities to deal patiently and courteously with the parties to litigation and the witnesses. Other personal qualities are integrity, impartiality and a strong sense of fairness.[7] The goal is the appointment of a skilled, impartial and courteous arbiter. The primary consideration should be merit.

Candidates for judicial office must, therefore, have professional qualities and personal qualities appropriate to the kind of judicial work he or she will have to discharge. A distinction should be drawn between professional and personal qualities.[8] The failure to distinguish between them tends to conceal the self-evident fact that professional qualities can be assessed only by professional persons. The professional qualities for appointment are uncontroversial. They are:

- legal knowledge and relevant experience;
- intellectual and analytical ability;

- sound judgment and impartiality;
- commitment, industry, conscientiousness and diligence.

The personal qualities are:

- integrity;
- independence;
- a strong sense of fairness; and
- a willingness to listen both courteously and patiently as well as to understand the views of others.

It might not be possible to reach ready agreement as to the individual components of the list of desired personal qualities but, when considered as a whole, they are uncontroversial. In other words, while reasonable individuals might reasonably disagree as to the required personal qualities, when viewed as a whole, the goal is the same, namely, a fair, impartial and courteous arbiter. As one former judge has noted, unsurprisingly, personal criteria are expressed in a variety of ways by different people but there is little material difference between them.[9]

Absent from these criteria is the requirement that the judicial officers should be a representative of any section of the community. Also absent is any requirement that judicial officers should reflect the division in the community between the sexes. Judges and magistrates are not appointed to represent interest groups in the community. They do not have a platform. Judges and magistrates have but one task. It is summarised in the Judicial Oath. It is to do justice according to law without fear or favour, affection or ill will. There is a risk that the community will perceive that a person appointed to represent an interest group might not be acting with complete impartiality when hearing any issue affecting that interest group. It is essential to the proper administration of the law that a fair-minded lay observer does not reasonably apprehend that the judge or magistrate might not bring an impartial mind to the resolution of the question to be decided.[10] As the former Chief Justice of the High Court of Australia, Chief Justice Gleeson, said in January 2008:[11]

> "The citizens of a modern democracy demand not only that judicial power be exercised independently and according to law, but also that judicial decision-making be demonstrably rational and fair".

Judges are not appointed to decide cases in accordance with a political or other agenda. Judges are not meant to court popularity. Sectional interests are represented by politicians in the Parliaments, not by a judge in the Courts. Impartial justice is the antithesis of representative justice.[12]

Nothing in these last paragraphs is intended to suggest that judges should not come from a broad community base if that can be achieved in a manner that is consistent with the appointment of judges applying the criterion of merit.

In recent years the number of women appointed as judges and magistrates has significantly increased. That increase has resulted from the increase in numbers of women studying law and entering the legal profession, and especially the increase in the number of women practising as barristers. In recent years, the percentage of female judicial officers has continued to increase, and there is nothing to suggest that that trend will not continue. It is undesirable that there should be any prescription as to the number of women who should hold judicial office. Such a prescription would be demeaning both to female lawyers and to judicial office.

Reference has already been made to the professional qualities required of trial judges, namely, to decide questions of procedure, evidence and law, questions that are often difficult, and to decide them promptly during the course of the trial without interrupting the continuity of the trial. A former judge has described these skills in these terms:[13]

> "In order to perform these tasks to an acceptable standard a person must have a thorough knowledge of the laws of evidence and the capacity to apply them, on the spot, in practice; a thorough knowledge of the rules of procedure and a capacity to apply them, also on the spot; and a capacity to decide difficult legal and factual questions correctly and promptly. It can be seen that it is the capacity to apply specific kinds of legal knowledge correctly and quickly which is of the essence of each of these. Assuming the necessary intellectual capacity and legal knowledge, the only satisfactory way, of which I am aware, of acquiring this essential capacity is by having to practise it over a sustained period".

It is not fair to litigants that this capacity be acquired by practice "on-the-job" as a judge. Experienced barristers have, by dint of their own experience, an extensive familiarity with such questions. The proper representation of their clients' interests requires that they must be alert to ensure that the trial proceeds according to law, to object to the improper presentation of evidence, or to be able to argue in support of evidence to be led on behalf of that individual client. They must, therefore, have a sound knowledge of the law. At the same time, that knowledge must be tempered with a sound judgment as to whether it is appropriate to take the objection or make the submission. In this way, capable barristers hone their professional skills.

Other aspects of an experienced barrister's practice equip him or her for judicial work. The competent barrister will present submissions at the close of a case in a way that will serve the interests of the client and is consistent with the evidence and legal principle. Barristers who have demonstrated to their peers that they possess a sound knowledge of the law and legal principle will be asked to give opinions in writing on difficult legal issues, a task similar to the task of writing a reasoned judgment. Personal qualities such as soundness of judgment, diligence and integrity are as important to the attainment of success as legal skills and competence.

Success at the bar is, therefore, the result not only of a sound knowledge of the law and legal principle, but is also the result of sound judgment and skill in applying that knowledge. One distinct advantage of a legal profession divided between barristers and solicitors is that professional peers assess the professional and other qualities of the barrister. It is solicitors who advise the client as to the most suitable barrister to present the case on hand or to give an opinion on the question in issue. While no doubt other factors might influence the choice of barrister, it is essentially the result of the judgment of the peers of that barrister. Barristers and solicitors alike are aware of the comparative abilities of particular barristers. This process of informal peer review is not confined to the professional qualities of an individual barrister. Barristers and solicitors also assess the personal qualities or lack of them of any individual barrister. In addition, judges quickly come to distinguish between those who have the required professional skills and personal qualities and those who lack them. A skilled advocate will not necessarily possess the qualities desired in a judge. Leaders of the profession and judges are able to make that judgment.

In this way, it becomes quite apparent to judges and the profession which barristers are fit for judicial appointment. This phenomenon is not confined to barristers. Some solicitors and academic lawyers also demonstrate the qualities required for judicial office. For example, an academic lawyer or solicitor experienced in corporate law and corporate litigation may demonstrate qualities that equip that person to sit in a specialist commercial court. In that sense, it can be said that some individuals, and especially barristers, select themselves for appointment because they have demonstrated the professional and personal qualities required for judicial office. However, not all barristers, solicitors or academics wish to take judicial office. Regard must be had to that fact when considering a protocol for judicial appointment.

A Judicial Commission

One proposal to improve the procedure for appointing judicial officers has been the establishment of what has been called a Judicial Commission, a process recently implemented in England. The Commission would be a body comprising lawyers and lay members. Shortly stated, the function of the Commission would include inviting applications from qualified candidates, assessing the merit of those who apply and recommending a short list of candidates suitable for appointment. Government will have the option of inviting the Commission to re-consider, and ultimately to make its own appointment notwithstanding the Commission's recommendations. If the government decides to take this course, the Attorney-General should be required to table a statement in Parliament giving reasons for selecting a candidate not supported by the Commission.

The establishment of a national Judicial Commission is not a realistic proposal for this country. One factor weighing heavily against the proposal is the federal structure of our constitutional arrangements. Appointments are made by the separate governments of the Commonwealth, the States and the Territories. A single Judicial Appointments Commission for all jurisdictions throughout Australia will be very difficult to achieve and is not necessarily the ideal. The establishment of such a Commission would need the support of the Commonwealth and all State and Territory governments. All governments would have to share the cost of running the Commission. It would need offices presumably in Sydney, Melbourne or Canberra. Its geographical remoteness from some of the States and Territories could lead to inefficiencies and difficulties in decision-making with respect to appointments in those distant States and Territories. It is unlikely to attract either the necessary support or financial assistance from all of the States and Territories.

In England, a relatively large number of appointments is made in each year by one government to courts and other tribunals throughout the land. In contrast, in Australia appointments are made by the Commonwealth government as well as by the governments of the States and Territories. In addition, the number of appointments in any one year in each of the jurisdictions is considerably less than in England. That is especially so in the smaller States and Territories, where the number of appointments in any one year will be quite small. The number of appointments made in each jurisdiction is unlikely to justify the cost of establishing a Commission in each jurisdiction. A separate Commission in each jurisdiction does not seem realistic.

Another important reason why I do not support a Judicial Commission is that it is unelected and unaccountable. It is also open to the objection that the emphasis shifts from the appointment of judges and magistrates to the appointment of the members of the Commission.

For these reasons, an alternative process is to be preferred.

The proposal

Instead of a Judicial Commission, I propose a protocol which is based upon and recognises the utility of the existing practice of Attorneys-General consulting with the Chief Justice and leaders of the legal profession. Any proposal for reform should not unduly circumscribe the power of the Executive government to make judicial appointments. Instead, it is desirable to put forward a process that recognises that power, and at the same time enhances its performance by a process designed to enable governments to appoint the most suitable person to judicial office.

While differences exist between the States and Territories as to the number of courts, those differences do not materially affect the kind of protocol which should exist for appointments to State and Territorial courts. Each State (other than Tasmania) has a Supreme Court, a District Court or County Court, and a Magistrates Court (or Local Court as it is called in New South Wales). In Tasmania, as well as in the Australian Capital Territory and in the Northern Territory, there is a Supreme Court and Magistrates Court. Some States have other specialist courts such as Industrial Courts and Land and Environment Courts.

The suggested protocol would require government to make its appointment from a short list of three or four persons named by a panel. The precise number on the list may vary according to the Court to which the appointment is to be made. While the composition of that panel will vary according to the Court to which the appointment is to be made, the panel will comprise, as a minimum:

- the head of the court to which the appointment is to be made;
- the Chief Justice, if he or she is not the head of the court to which the appointment is to be made;
- the President of the Law Society or the Law Institute in that jurisdiction; and
- the President of the Bar Association in that jurisdiction.

If the President of either of the professional bodies is a potential candidate, each professional body could nominate an alternate. That panel can also include an academic lawyer nominated by the Deans of the Law School or the Law Schools in each State or Territory.

One advantage of this panel, therefore, is that it comprises a judicial officer who will provide a degree of continuity, balanced by the changing membership of the Presidents of the two professional bodies. The advantages of this proposal also include the fact that the President of each of the professional bodies holds office as a result of election by his or her peers. The President can consult with the relevant professional body. The presidency of the professional bodies is a position held for one or two years, depending on the rules of the particular body. The fact that Presidents of the professional organisations change annually or bi-annually, will result in fresh views being continually brought to the panel.

An important question is whether the panel should also include lay members. One view is that it is not necessary. First, for the reasons already expressed, the professional and personal qualities of the candidates will, in all likelihood, be known to the members of the panel or, if not, to a majority of the members. Importantly, the knowledge of the individual members of the panel will have been gained over a period of years. A lay person could not acquire that depth of knowledge. Secondly, the view of the community as to the person most suitable for appointment is a view that is expressed by the fact that it is the elected government who determines the person to be appointed; that is to say, it is the government as the elected representative of the community which makes the decision to appoint. Finally, the best assessment of the merit of a candidate for judicial office is to be made by his peers. The most suitable persons to appoint a surgeon to perform difficult surgery are other medical practitioners, especially surgeons. The same reasoning applies to appointment of judges and magistrates.

On the other hand, lay members may offer a wider perspective unaffected by the professional standing of each candidate. The inclusion of lay members may help to allay concerns about the narrowness of the background from which judicial officers are chosen.[14] On balance, I do not believe it necessary to include lay members.

Advertising the post

Generally speaking, governments have not by advertisement or otherwise called for applications for appointment to judicial office in Supreme Courts or in District or County Courts.[15] However, in most jurisdictions in Australia, it has become established practice to advertise for applications for appointment as magistrates.

Advertising for expressions of interest in appointment has the advantage of broadening the field of potential candidates, in that it alerts the panel to those prepared to make themselves available for appointment.[16] At the same time, the procedure does not necessarily result in good candidates

applying.[17] It is well known that meritorious candidates will be unwilling, for a variety of reasons, to submit their names for consideration. The confidentiality of the process cannot be assured. A barrister will be reluctant to submit his or her name because of an apprehension that disclosure of the application will adversely affect his or her practice. Such a concern is justifiable.

On balance, I favour the process of calling for applications, as that procedure will encourage the community to be confident that all suitable persons have been considered. Nevertheless, because those suitable for appointment might not apply, the panel will be at liberty to consider and nominate for appointment persons who have not applied for appointment.

Those who express interest in appointment are entitled to confidentiality lest disclosure of that fact should affect their practice. The list of those who express interest should not be available for public inspection.

Interviewing candidates

Interviewing candidates has been part of the process of appointing magistrates in most Australian jurisdictions.[18] However, as a general rule, that has not been the practice in the case of appointments to other judicial office. While the practice of interviewing candidates for the Magistracy should continue, it is not a suitable practice in the case of appointment to higher courts lest it become a means of seeking to ascertain the views of candidates on contentious issues.

A statutory protocol

Legislation should be enacted by the Commonwealth Parliament and by the Parliaments of the States and Territories to establish a panel for the appointment of judges and magistrates. The precise composition of the panel may vary from jurisdiction to jurisdiction and according to the court to which the appointment is to be made. The panel in each instance will put forward a list of three or four names for consideration by the Executive government. The government must appoint from those nominated or ask the panel to reconsider the nominations. The panel may nominate the same persons or new persons. In either event, the government must then appoint from those nominated for appointment.

The panel should comprise at least:

- the head of the court to which the appointment is to be made;
- the Chief Justice if he or she is not the head of the court to which the appointment is to be made;
- the President of the Law Society or the Law Institute of that jurisdiction; and
- the President of the Bar Association of that jurisdiction.

Each of those persons could be represented by an alternate. There is no ideal size for the panel. It may also include a legal academic and a representative of the community appointed by the Attorney-General.

Before applications are considered, the Attorney-General will by public advertisement call for expressions of interest by those willing to be appointed a judge or magistrate. All expressions of interest will be confidential and not available for public inspection. The panel will be at liberty to nominate for appointment a person or persons who have not responded to the advertisement.

In the case of the appointment of magistrates, the panel may interview such number of the candidates as it thinks necessary. Interviews will not be held in the case of appointment to courts other than Magistrates Courts.

In the case of appointments to the Federal Court of Australia, the Family Court of Australia, or the Federal Magistrates Court, the panel would comprise at least:

- the head of the court to which the appointment is to be made;
- the President of the Australian Bar Association; and
- the President of the Law Council of Australia.

Consideration might be given to including on the panel the Chief Justice of the State or Territory in which the appointee will be permanently sitting. In each case, each of those persons may be represented by an alternate. The two professional bodies would be required to consult with the professional bodies in the State or Territory in which the appointee will be predominantly sitting.

Section 6 of the *High Court of Australia Act* 1979 requires the Attorney-General of the Commonwealth to consult the Attorneys-General of the States before making an appointment to fill a vacancy in the High Court. Given the unique position of the High Court of Australia as the ultimate Court of Appeal, s. 6 of the *High Court of Australia Act* 1979 should be amended so that the process of consultation be extended to include at least:

- the Chief Justice of the High Court;
- the President of the Australian Bar Association; and
- the President of the Law Council of Australia.

Each of those persons is likely to be aware of persons suitable for appointment to the High Court. All three would be at liberty to consult others. The Presidents of the two professional bodies would be at liberty to consult with their respective constituent bodies.

Two criticisms

Two criticisms are levelled at any interference with the present process. The first is that either a Judicial Appointments Commission or a protocol of the kind suggested in this paper will result in the self-perpetuating process depriving courts of what the Honourable Michael Kirby calls the "light and shade that comes from the present system".[19] In the same vein, Professor Crawford has asked if Sir Ninian Stephen or John Bray would have been appointed by a Judicial Appointments Commission.[20] Whatever might result from a Judicial Appointments Commission, I have every confidence that the proposal advanced in this paper would readily result in appointments of judges of the quality of those mentioned, since the ability of both was well known to their peers.

The second criticism is that a Judicial Appointments Commission or a panel is not politically accountable. The plain fact is that governments themselves are not accountable for the appointments they make. They are usually out of office by the time an appointee has demonstrated unfitness for office. When has a government been called to account for an appointment of a judicial officer?

Neither criticism counters the advantage of a process designed to identify the most suitable persons for appointment.

Conclusion

Both the general public and the legal profession ought to be assured that the appointment has been made of a person of merit with the qualities, professional and personal, for the court to which the appointment is to be made. The present process does not provide that assurance. The process suggested in this paper is more likely to do so.

Endnotes:

1. In forming my views, I gratefully acknowledge the valuable assistance of Justice Richard Chesterman of the Court of Appeal in Queensland and Justice Hasluck of the Supreme Court of Western Australia. The responsibility for error is mine alone.

2. While Parliament was curtailing the powers of the Monarch in the constitutional struggles in England in the 17th Century, the courts were defining their independence from both Parliament and the Monarch. That independence was recognised by the *Act of Settlement*, 1689.

3. AM Gleeson, QC (as he then was), *Judging the Judges* (1979) 53 ALJ 338 at 339.

4. Sir Garfield Barwick's *State of the Judicature Address* (1977) 51 ALJ 480 at 494.

5. Evans and Williams, *Appointing Australian Judges*, *A New Model* at p. 3. The concern as to patronage is not confined to Australia. It was a cause for election of judges in the early States of the United States of America. For Canada, see the report of the Canadian Bar Association, *The Appointment of Judges in Canada* (1985), at p. 9.

6. Sackville, *The Judicial Appointments Process in Australia: Towards Independence and Accountability* (2007) 16 JJA 125 at 128.

7. In 2004 the Lord Chancellor in England published criteria for judicial appointment. They were:
   - legal knowledge and experience;
   - intellectual and analytical ability;
   - sound judgment;
   - decisiveness;
   - communication and listening skills;
   - authority and case management skills;
   - integrity and independence;
   - fairness and impartiality;
   - understanding of people and society;
   - maturity and sound temperament;
   - courtesy; and
   - commitment, conscientiousness and diligence.

   Those criteria do not distinguish between professional and personal qualities required of a judicial officer.

8. GL Davies, QC, *Appointment of Judges*, p. 6.

9. GL Davies, QC, *op cit*.

10. *Johnson v. Johnson* (2001) 201 CLR 488 at [11].

11. Chief Justice Gleeson, *The Role of a Judge in a Representative Democracy*, speech to Judiciary of the Commonwealth of Bahamas, 4 January 2008.

12. Chief Justice Doyle, *The Eighth Robert Harris Oration: The Judiciary and the Community*, 18 Australian Bar Review 95 at 100.

13. GL Davies, QC, *op. cit.*, at 9.

14. GL Davies, QC, *Why We Should Have a Judicial Appointment Commission*, at p. 8.

15. In recent times, advertisements have been published for appointment to fill a vacancy in the Family Court of Australia and for the Chief Justice of Victoria.

16. Sackville, *op. cit.*, at 140.

17. Advertisements for the office of the Chief Justice of Victoria attracted a host of applicants from the gaol at Darwin.

18. Sackville, *op. cit.*, *passim*.

19. Justice Michael Kirby (as he then was), *The Judges* (Boyer lectures, 1983).

20. J Crawford, *Australian Courts of Law* (1982), p. 53.

Chapter Twelve

How Judicial Appointments Reform Threatens our Democracy

Alan Anderson

Let me begin by acknowledging the traditional owners of the land: King George III and his heirs and assigns.

Judicial appointment mechanisms are a topic of intense interest to lawyers, for all the wrong reasons. To the practising lawyer, judicial appointment is a prize, a status symbol, public recognition of professional merit and an entitlement to a generous pension in retirement.

It is therefore understandable that the obsession of lawyers is with the "fairness" and "transparency" of the process: what must one do to earn a place on the Bench? Similarly, judges are concerned to maintain the lustre and status of their position by ensuring that suitably eminent practitioners are elevated to sit beside them.

Yet this perspective pays scant regard to the role of the judiciary in our system of government, as opposed to its role in the hierarchy of the profession.

Current arrangements

Our current constitutional arrangements stipulate the appointment of federal judges by the Governor-General in Council, which has traditionally meant in practice that Cabinet considers nominees advanced by the Attorney-General and makes a recommendation to the Governor-General, whose ratification of its selection is a formality.

When Daryl Williams established the Federal Magistrates Court in 2000, he established an alternative appointments process involving advertisements for applicants, followed by interviews with a panel consisting of the Chief Federal Magistrate, a senior public servant, and a representative of the Attorney, who in Williams' years was sometimes a departmental liaison officer from his office, which is to say another public servant. The panel then made recommendations to the Attorney.

When Philip Ruddock became Attorney-General, he made sure to send an adviser, my predecessor, Julian Leeser, to the interview panel as his representative. And when I commenced service with Ruddock, I participated in one such round of interviews, then unofficially returned to the system employed for the higher courts: discreet consultation by the Attorney's office with relevant parties such as legal professional bodies, current and former judicial officers and others, followed by a request from the Attorney to the chosen candidate.

Recently there has been much clamouring from legal professional bodies, and even from some sitting judges, for the establishment of a Judicial Appointments Commission, populated by serving or retired judges, legal academics and heads of legal professional bodies. Most recently, the idea was floated by Chief Justice French.[1]

These proposals are advanced under the rubric of enhancing transparency and eliminating "political appointments". Presumably the legal bodies agitating for a Commission envisage the sort of transparency and lack of political controversy that is evident in, for instance, the process of appointing silks in Victoria.

The proposals found partial expression in the changes implemented by the Rudd Government earlier this year. Under the new system, a clone of Daryl Williams' system for Federal Magistrates'

appointments, applicants are invited to apply for judicial positions on the Federal, Family and Federal Magistrates Courts.

They are assessed by a panel consisting of the Chief Justice of the relevant court, a senior public servant and a retired judge, which draws up a shortlist for submission to the Attorney. However, this panel has no legislative basis and in practice the process of appointments remains shrouded in secrecy.

While this change falls short of the establishment of an independent Commission, as advocated by the legal bodies, and while the Attorney reserves the right to depart from the short-list, it is none the less a radical departure from established practice.

The role of judges

It is important to consider judicial appointments not from the perspective of an ambitious legal practitioner or élitist judge, but in the context of the role of the judiciary in our system of government. While the legislature enacts laws, and the Executive administers them, the judiciary is the final arbiter of what those laws actually mean.

Traditionally, this role has been seen as one of constrained power, circumscribed by the language of statute and the supremacy of Parliament.

In *The Federalist Papers*, Alexander Hamilton noted that:

> "The judiciary … has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society.....".

and concluded that:

> "The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution".[2]

Since Hamilton wrote those words, events have transpired which call into question his sanguine appraisal of the risk posed by the judicial branch. New schools of judicial interpretation have evolved, some of them demonstrating little respect for the text of laws promulgated by the legislature.

Surely the most unconsciously amusing example of this is the US Supreme Court's judgment of *Griswold v. Connecticut*,[3] in which judges found a constitutional right for unmarried couples to buy prophylactics, hidden in "penumbras, formed by emanations" of explicit constitutional guarantees.

Anyone who favours this approach to textual interpretation need not listen to the rest of this address; you can just come up here and divine its content from the shadow it casts.

Yet with the enactment of a Charter of Rights in Victoria, and the push by legal professional bodies for a national Bill of Rights, there is little doubt that Australia is following the rest of the Anglosphere into a world in which the personal policy preferences of judges, masquerading as judicial interpretation of the law, will increasingly affect the operation of government.

At their most expansive, human rights instruments confer extensive and ambiguous positive rights – to adequate housing, to healthcare and education, even to intangibles such as "dignity at work" – which the courts oblige the government to honour.

Hence in post-apartheid South Africa, home to a Constitution drafted by a cohort of human rights *illuminati*, courts have been happy to find an obligation upon the government to reprioritise the allocation of government health and housing resources to favour the needy litigants before them.

Even as the legal lobby calls for the depoliticisation of judicial appointments, it favours the increasing politicisation of the judicial role, through the expansion of such ambiguous "rights" and adjudication on whether the legislature's laws are consistent with these rights.

The Law Council of Australia has been the most enthusiastic supporter of the Charter of Rights. Its tendency to meddle in politics led me to provide a quick analysis to the Attorney in 2006, showing that over two-thirds of its media releases that year related to David Hicks, Guantanamo Bay, or alleged abuses of the "human rights" of illegal immigrants.

This is a body which holds itself out as an apolitical participant in any prospective judicial appointments panel or Commission.

It is in this context that we must view, with a healthy dose of scepticism, legal professional bodies lamenting "political appointments".

The Oxford English Dictionary advances as its first definition of the word "political":

> "Of, belonging to, or concerned with the form, organization, and administration of a state, and with the regulation of its relations with other states".

Understood in this way, the judicial role is entirely political. It is fundamental to the proper operation of our system of government. Accordingly, the appointment of judges is, by definition, political.

The manner in which judicial officers carry out their duties is thus a legitimate subject of political debate. Should judges interpret the law through painstaking fidelity to text coupled with deference towards the clear intent of the legislators and constitutional draftsmen? Or should they seek to mould the law to enhance its consistency with the growing suite of amorphous "human rights" championed by much of the legal fraternity?

Regardless of your view on these questions, I would argue that a government which did *not* take an interest in them was fundamentally failing in its responsibilities to the Australian people. The role of the Executive in making judicial appointments is the principal lever which the Constitution has provided for the people to influence a central aspect of the way that they are governed.

Many of you will recall from 1998, in the wake of the High Court's contentious *Wik* decision on the survival of native title over pastoral leases, judges and lawyers complaining that Attorney-General Daryl Williams was failing in his duty to defend the judiciary against political attack.

Indeed, any criticism of a judicial decision by a politician is greeted with howls of protest from legal bodies, who claim that it is an attack on judicial independence.

Yet methods of judicial interpretation, and the decisions to which they give rise, are not merely a topic for academic discussion, as the *Wik Case* demonstrated. So when we hear condemnation of political appointments to the Bench, we need to clarify what is meant by that term.

It is certainly not acceptable for a government to assess the party-political affiliations of a prospective judicial officer as relevant to appointment. But I would submit that it is entirely legitimate for a government to have regard for a candidate's judicial philosophy.

Publicly, governments have maintained that there is only one criterion for judicial appointment: merit.

It is questionable whether this was ever a clear-cut concept. With the politicisation of the judicial role in the English-speaking world, which has flowed from the growth of human rights instruments and jurisprudence, the concept of an objective metric of "merit" is a fiction.

If you subscribe to what is commonly referred to as a "judicial activist" outlook, you cannot truly believe that a crusty, old, black-letter lawyer is "meritorious". And vice versa. Evaluating the "merit" of candidates for the judicial role is entirely meaningless if we ignore the great schism that has opened between competing judicial philosophies, which profoundly affects the way that the judicial role is conducted. It has meaning only if we accept the legal professional bodies' view of the world, in which we should merely assess the eminence of a practitioner to ensure that the prize of judicial office is awarded to the most deserving candidate – not the one who would do the best job in the context of our system of government.

Julian Leeser once suggested to me that, after taking into account legal ability and experience, the three qualities to look for in a judicial officer are courtesy, industry and orthodoxy. Governments of alternative complexion have displayed very different preferences. That is their prerogative. The important thing is that they be held accountable for those preferences.

All of this magnifies the importance of my principal question: how can the independence of the judiciary, which critics of so-called political appointments cite as their primary concern, be reconciled with the principle of representative government?

My thesis is that the draftsmen of our Constitution answered that question quite adequately a century ago. Let us consider the traditional system, and conduct a brief survey of the alternatives.

Judicial appointments under the Australian Constitution

Being a good textualist, I will start my exposition with the text of our Constitution.

Chapter III provides:

> "The Justices of the High Court and of the other courts created by the Parliament:
> (i) shall be appointed by the Governor-General in Council;
> (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
> (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office".

It is very clear from these provisions that the draftsmen intended the determination of judicial appointments to be a matter for the Executive. Had they intended for a panel of current and former judges to appoint their successors, the draftsmen might easily have so provided.

The reason they did not was eloquently explained by Governor-General Michael Jeffery in 2006, addressing the Judicial Conference of Australia:

> "While the Constitution guarantees federal judicial officers' independence, the political accountability of the Executive for judicial appointments forms the nexus between the judiciary and the fundamental principle of government by popular consent".[4]

Recognising the need for judicial officers to adjudicate cases free from political influence, the Constitution confers on them security of tenure and salary. Once appointed, judges can, and frequently do, disappoint the government that appointed them, with no personal consequences.

Yet our Constitution takes heed of Lord Acton's dictum: "Power tends to corrupt; absolute power corrupts absolutely".

Accordingly, it does not entrust the final arbiters of the law with the task of appointing their own successors. The draftsmen presumably concurred with former Attorney-General Philip Ruddock, who described such a system as "a self-appointing judicial élite."[5]

The Constitution recognises that a system of representative government requires that all branches of government derive their authority from the consent of the governed. Accordingly, the appointment of judges by the elected government creates the nexus of which the Governor-General spoke, between the votes we cast and the judges who judge us.

It is a more tenuous link than that between the electoral process and our legislators. It must be more tenuous, if judicial independence is to be maintained. But it must be present, if the principle of representative government is to be maintained.

Degrees of democratic separation

One might retort that the link has not been severed by the current changes, or even by the establishment of a Commission. After all, if the Executive decides to delegate its responsibilities, it is still accountable for that decision.

Yet in practice this argument is disingenuous. The more layers that one interposes between the electorate and the decision-maker, the weaker the accountability of elected representatives for the decision.

To understand this concept in the context of judicial appointment mechanisms, I introduced in a 2005 paper for the Centre for Independent Studies the concept of degrees of democratic separation.[6]

At zero degrees of democratic separation one has the judicial equivalent of Athenian democracy: a direct vote on the question at hand. Under this idealised model, all citizens would judge every judgment: we would all vote on the guilt of each criminal, for example, which would make for wonderful reality television, but perhaps not for very efficient administration of justice. The jury system may be construed as a limited expression of this model.

The first degree of democratic separation is what exists in some US jurisdictions: the direct election of judges. While this provides for a high level of democratic accountability, it compels aspiring judges to engage in the cut-and-thrust of democratic politics, an unedifying spectacle at the best of times. Such a process is unlikely to provide confidence for litigants that justice is being administered fairly, as the suspicion will always be that the judge in question delivers judgments with one eye fixed firmly on the electorate.

The second degree of democratic separation is that which applies under the traditional Australian model: the voters elect the government that appoints the judges. (Strictly speaking we elect the representatives from whom a government is formed, but in practical terms the electorate knows it is choosing between two alternative governments).

By combining this appointment process with guaranteed tenure and salary, the system provides for a high level of independence at the expense of some measure of democratic accountability. Judicial appointments are not subject to a direct popular vote; they are relegated to the same status as the host of other policy issues that can influence a voter's decision at the ballot box.

An optional extra is the sort of confirmation hearing process which applies to US federal judges, where judicial nominees are grilled by a panel of grandstanding Senators on everything from their view of abortion to their membership of college clubs, before being subjected to a vote, so that their authority will be permanently undermined by the eminent legislators who voted against their confirmation. It is unclear to me that this practice adds anything of value to the appointments process.

The third degree of democratic separation is the system that now prevails in the United Kingdom, which in 2005 established a full blown Judicial Appointments Commission. The changes in Australia, establishing ostensibly non-political panels to shortlist candidates, can be seen as a less entrenched version of the same: the people elect the representatives who choose the commissioners or panelists who select the judges.

It is hard to see how this system affords any greater independence to judges, although it may alter the behavioural pressures on lawyers who aspire to be judges. Whatever the gains, they come at the cost of almost all democratic accountability. The Government has very ostentatiously washed its hands of the responsibility to identify appropriate judges, and has a perfect alibi should a judge appointed during its administration manifestly fail.

In my submission, this extra intervening layer is an unjustifiable extreme on the spectrum of democratic separation, which constitutes the stage for the delicate balancing act between judicial independence and democratic accountability.

Motives of "reform" advocates

The flimsiness of the arguments for "reform" demands a frank appraisal of the motives and incentives of its advocates.

I have already alluded to one motivation: the desire for advancement and status by members of the legal élite. Lest I be accused of courting controversy with this proposition, let me cite a more authoritative source:

> "I'd doubt … that people who promote the idea of some kind of commission to advise governments about appointment of candidates are motivated principally by difficulties about identifying possible candidates. I think their objectives are rather different. I think their objectives are to extend their influence".[7]

Thank you, former Chief Justice Murray Gleeson.

A second, more sinister motivation is a desire to exploit the weakened democratic accountability of Commission-appointed judges to advance an unpopular political agenda by legislating from the Bench.

Anyone who has mixed in legal circles, but who has also been exposed to suburban Australia, would be conscious of the yawning gap between public opinion and legal élite opinion, on topics ranging from immigration and native title to criminal sentencing, Aboriginal customary law, drug offences and gay marriage. Around the Anglosphere and beyond, certain elements of the legal profession have seen the courts as an appropriate forum to effect social change in these areas, in purported advance of public opinion.

Yet such attempts, taken too far, have led to popular revolt. In the United States, where activist judges introduced school-bussing and discovered an unwritten constitutional right to abortion, it is a mainstay of Republican political campaigns to talk about the appointment of strict constructionist judges. Judicial appointments are a key motivator of the Republican base, contributing to the more conservative Supreme Court of today. The United States illustrates the effectiveness of democratic accountability at constraining judicial adventurism so long as a third degree of democratic separation is excluded.

When Australia's High Court reached the high water mark of its judicial creativity, with the *Wik* decision, it was widely rumoured that Cabinet had blocked an appointment proposed by Attorney-General Daryl Williams and nominated, in Tim Fisher's words, a "capital-C conservative" instead.

Believers in the project of social reform from the Bench recognise that the accountability of governments for judicial appointments is their greatest obstacle. The more divorced élite legal opinion becomes from that of the general public, the greater the risk that the democratic process will lead to an appointments backlash of the sort the United States has seen.

Small wonder that these true believers flock to the banner of a Judicial Appointments Commission, with the commissioners drawn from their own ranks.

For parties of the Left, facing the necessity to deliver radical social reforms to appease their memberships yet wanting to hold the centre ground, waging social policy warfare through judicial proxies is immensely attractive. Vesting appointment responsibilities in an ostensibly apolitical panel or Commission makes it even more attractive, as the remaining line of accountability is severed.

Such an approach is, in my submission, an abdication of a government's basic responsibilities. As former Chief Justice Murray Gleeson wrote:

> "No doubt, many judges have strong opinions about matters relating to judicial appointments, whether permanent or temporary. Even so, judges do not appoint one another. The responsibility for making decisions about judicial appointments, including

numbers and circumstances of appointments, rests with those who have the responsibility of paying the salaries and providing the necessary resources of the appointees, and who have political accountability for bad or unpopular decisions about appointments".[8]

Advocates of social reform may feel that the loss of this accountability is a small price to pay for the shining policy victories that beckon. Yet this is a short-sighted view.

Recent years have seen a modest decline in the high regard in which our courts are held by the public at large. The creation of a self-appointing judicial élite, dispensing its Olympian wisdom from on high to effect policy change without the troublesome imperative of convincing the electorate, will greatly exacerbate that institutional damage.

In the long-term, I believe it would lead Australian conservatives to shrug off their respect for traditional institutions and engage in political debate over the merits of particular judicial appointments. Seizing on instances of populist outrage at low sentences, or the overturning of immigration decisions, they would attack the judges and the Commission as biased and politicised. Ultimately, confronted with a self-appointing élite that frustrates their policy agenda, they would be tempted to call for the direct election of judges. I suspect this call might be very attractive to large segments of the community.

Of course, there is a third motivation behind those who call for reform of judicial appointments. Labor Attorneys-General have made some appalling appointments in recent years. The leader of the pack is Rob Hulls, whose notorious penchant for affirmative action led one member of the Bar to quip that the prerequisite for appointment was a lack of testicles. I would add to that membership of Liberties Victoria, the activist group from which Hulls has drawn a number of appointments.

I can understand why conservative members of the profession might find it attractive to wrest the appointments power away from an Attorney-General who espouses an undergraduate, Marxist philosophy of law as a class weapon. However, this attraction rests on the flawed assumption that the appointments Commission, or panel, will remain relatively depoliticised.

Given the underwhelming record of Australian conservatives at halting the long march of the Left through our public institutions, I consider this assumption to be irresponsibly optimistic.

Conclusion

In conclusion, I submit that the direct appointment of judges by the Executive is a well-crafted feature of our Constitution which should be preserved.

The reality of the judicial role is increasingly distant from that of dry legal technician, amenable to objective assessment of merit on the basis of how quickly one can craft a high quality judgment. Our judges are called upon to make ever more subjective determinations by reference to amorphous rights and values.

In this context, the need for democratic accountability of those who determine judicial appointments is greater than ever.

Endnotes:

1. French CJ, *In praise of unelected judges*, Address to the John Curtin Institute of Public Policy, 1 July 2009.

2. Alexander Hamilton, Federalist No. 78, *The Federalist Papers*, 1788.

3. 381 US 479 (1965).

4. Governor-General Michael Jeffery, *Address at the opening of the Judicial Conference of Australia Colloquium*, 6 October 2006.

5. Attorney-General Philip Ruddock, *Address to the Australian Bar Association Judicial Appointments Forum*, Sydney, 27 October 2006.

6. Alan Anderson, *The Rule of Lawyers*, Policy Magazine, Centre for Independent Studies, Summer 2005.

7. *Judicial appointments spark review call*, *The Australian Financial Review*, 10 March 2006.

8. *Forge v. ASIC* (2006) 80 ALJR 1606.

Concluding Remarks

Sir David Smith, KCVO, AO

I think I may safely say that this has been yet another incredibly successful conference, and we all are indebted to a number of people for that.

This time last year we learned that John and Nancy Stone wished to hand on their joint responsibilities for managing the affairs of the Society and organising and running its conferences. What followed was a seamless transition into other hands.

One of our Board members, Bob Day, took on the task of Secretary of the Society, with the able assistance of his secretary, Joy Montgomery. Julian Leeser took on the task of Conference Convenor, and was able to enlist the assistance of Ian Callinan, John Stone and Bob Day. Thanks to all of these people, there was a smooth transfer of the Society's records and operation from Sydney to Adelaide, and the holding this weekend of what I have already described as yet another incredibly successful conference.

The themes of the conference were Bills of Rights, federalism, Upper Houses of Parliament, the counting of referendum majorities, and judicial appointments.

The Bills of Rights papers were set against the inquiry currently being conducted by the Brennan committee. The federalism papers were set against Chapter III of the Constitution – The Judicature; State and Territory differences in the regulation of goods and the licensing of occupations; and the High Court's judgment in *Pape v. Commissioner of Taxation*. (Here I must acknowledge the Society's admiration of our member, Bryan Pape, for his courage in mounting this most important case). The papers on the role of Upper Houses of Parliament were set against the current proposal to abolish South Australia's Legislative Council, and the abolition of Queensland's Legislative Council in 1922. In the papers on judicial appointments we heard the arguments for and against reform of the process. We were also given a short paper on the various ways in which majorities might be counted in bringing into operation ss. 57 and 128 of the Australian Constitution.

All of our conference themes were highly relevant to current political debates, and all of our speakers gave us significant contributions to those debates. We are indebted to them all, and on your behalf I thank them most sincerely.

As I reminded members of the Society in my concluding remarks at last year's conference, our inaugural president, the Right Honourable Sir Harry Gibbs, exhorted us to participate in the process of public education and debate on the Constitution. With the publication, in due course, of the proceedings of this conference, and with their inclusion on the Society's web site alongside the proceedings of all of our previous conferences, the Society will continue to live up to the charge which Sir Harry placed upon us in his launching address to our first conference on 24 July 1992.

In closing this twenty-first conference I wish you all safe journeys home.

Appendix

Contributors

1. Addresses

Professor James ALLAN, a Canadian by birth, was educated at WA Porter Collegiate, Scarborough, Toronto and at Queen's University, Ontario (BA, 1982; LLB, 1985), the London School of Economics (LLM, 1986) and the University of Hong Kong (PhD, 1994). After working at the Bar in Toronto and in London, he has since taught law in New Zealand, Hong Kong, Canada and the United States before appointment as Garrick Professor of Law at the University of Queensland in 2004. The author of numerous articles in professional legal journals, he says that, since moving to Queensland, he "has been revelling in a country not burdened with a Bill of Rights".

Professor Emeritus Ivan SHEARER was educated at St Peter's College, Adelaide and at Adelaide University (LLB, 1960; LLM, 1964) and Northwestern University, Chicago (SJD, 1968). After admission to practice in the Supreme Court of South Australia in 1961, he entered academic life – first at the University of Adelaide (1963-74), next as Professor of Law at the University of NSW (1975-92), and then as Challis Professor of International Law at Sydney University (1993-2003), before becoming (2004) Emeritus Professor at that University. During these years he also taught overseas, at All Souls College, Oxford, at the US Naval War College and Indiana University. During 2001-08 he was a member of the UN Human Rights Committee, and during 2004-08 a senior member of the Administrative Appeals Tribunal. He is the author of numerous articles in professional journals, and of several books on international law and the law of the sea.

2. Conference Contributors

Alan ANDERSON was educated at St Peter's College, Adelaide and at the University of Adelaide (BEc Hons, 1999; LLB Hons 2001). After working briefly as a software engineer and then as a solicitor in Melbourne (2002-06), he served for two years (2006-07) as a policy adviser with, first, Attorney-General Philip Ruddock and, second, Treasurer Peter Costello. He is presently employed in Sydney by a global managing consulting firm. He is the author, both in his own right and as a "ghost" writer, of numerous journal and newspaper articles on legal, political and social issues.

David BENNETT, AC, QC was born in England and came to Australia in 1951; he was then educated at Scots College, Sydney and at the University of Sydney (BA, 1961; LLB Hons, 1964) and Harvard University (LLM, 1965; SJD, 1970). After a brief period as a solicitor he went to the Bar in 1967, being appointed QC in 1979. During more than 30 years (1967-1998) practising as a barrister in all State and Territory jurisdictions, he held office in a number of legal professional bodies, including the NSW Bar Association (President 1995-97), the Australian Bar Association (President 1995-96), the International Commission of Jurists and the Medico-Legal Society of NSW (President 1988-90), among others. In 1982 he was elected to the Australian Academy of Forensic Science (President 1999-2001), and in 1998 became Commonwealth Solicitor-General, relinquishing that post in 2008. Apart from his record as a barrister, including on many occasions before the High Court of Australia, he is also the author of numerous articles in professional legal journals.

The Hon Bruce DEBELLE, AO, QC was educated at St Peter's College, Adelaide and at the University of Adelaide (LLB, 1960). Admitted to the South Australian Bar in 1962, he practised there as a barrister (QC, 1982) until his appointment as a Justice of the Supreme Court of South Australia in 1990. On retirement from that post in 2008 he was appointed an Acting-Justice of the Supreme Court of NSW. During his time at the Bar he served as a Commissioner in the Australian Law Reform Commission (1978-84) and held office in such bodies as the Law Society of South Australia (President, 1989-90) and the Law Council of Australia; subsequently he served as Deputy Chair (2004-06) and Chair (2006-08) of the Judicial Conference Australia. His interests outside the law have included serving as a local authority Councillor (1970-77); as Vice-President of the SA Rugby Union (1982-87); as a Trustee of the World Wildlife Fund Australia (1984-87); and as Chairman of the Australian String Quartet (1998-2001).

Miranda DEVINE was educated at the International School of the Sacred Heart in Tokyo, Japan; Loreto Convent, Kirribilli, Sydney; Macquarie University, Sydney (BSc (Maths), 1985); Northwestern University, Chicago, Illinois (MS (Journalism), 1987). She is a columnist with the *Sydney Morning Herald* and previously has worked as a columnist, assistant editor and police reporter with the *Daily Telegraph*, Sydney; as a feature writer with the *Boston Herald*, Boston, USA; as a reporter on a News International exchange at the *Sunday Times* in London, UK; and as a trainee technical officer at the CSIRO Division of Textile Physics, Sydney.

Hon John HATZISTERGOS was educated at Cleveland Street Boys High School, Sydney and the University of Sydney (BEc, 1982; LLB, 1983; LLM, 1994). After a period as a solicitor in private practice (1983-87) and the Commonwealth Department of Public Prosecutions (1987-89), he went to the Sydney Bar in 1989. After election for the Labor Party to the NSW Legislative Council in 1999 he has served in numerous ministerial portfolios, including as Minister for Justice (2003-05 and again in 2007-09), Minister for Health (2005-07), Attorney-General (2007 to date), Minister for Industrial Relations (2008) and Vice-President of the Executive Council (2009). He is the author of numerous articles in professional legal journals, as well as newspaper articles, on a wide range of topics.

Professor Dean JAENSCH, AO was educated at Clare High School and Adelaide Boys High School, and at Adelaide Teachers College (1955-56) and the University of Adelaide (BA Hons, 1967; MA, 1968; PhD, 1974). After a period as a school teacher (1957-68) he moved into academia, initially at the University of Adelaide (1969-71), then at Flinders University. After holding there a succession of posts he was appointed Professor of Politics in 1997. For the past 35 years he has been an active political commentator in the press, radio and TV. He is the author of some 20 books, and numerous articles in professional journals, mainly on Australian politics.

Julian LEESER was educated at Cranbrook, Sydney and the University of New South Wales (BA Hons, 1999; LLB, 2000). He was an elected delegate for Australians for Constitutional Monarchy at the 1998 Constitutional Convention, and subsequently served as a member of the "No" Case Committee for the Republic referendum. He has since served as Associate to then High Court Justice Callinan (2000), as Adviser to the then Minister for Employment and Workplace Relations, Hon Tony Abbott (2001) and as Special Adviser to the then Attorney-General, Hon Philip Ruddock (2004-06), with responsibility for constitutional law and court administration. A solicitor, he serves as Executive Director of the Menzies Research Centre and was recently narrowly defeated for Liberal Party pre-selection in the NSW federal electorate of Bradfield. In his spare time (sic) he is working on a biography of the late Sir William McMahon.

John NETHERCOTE was educated at Blakehurst High School, Sydney and the University of Sydney (BA, 1968). After joining the Commonwealth public service in 1970, he worked over the years for the Public Service Board, the Royal Commission on Australian Government Administration, the Public Service Commission of Canada and the Defence Review Committee. He joined the staff of the Senate in 1987 and his assignments there included Secretary to the Senate Standing Committee on Finance and Public Administration and overseeing publication of Odgers' *Australian Senate Practice* (6th edition). He also edited *Parliament and Bureaucracy* (1982) and was a joint editor of *The Constitutional Commission and the 1988 Referendums* (1988) and *The Menzies Era* (1995). Since retirement from the Senate staff he has written extensively for *The Canberra Times* on public service matters and edited *Liberalism and the Australian Federation* (2001). His latest work (with Scott Prasser and Nicholas Aroney, joint editors) is *Restraining Elective Dictatorship: The Upper House Solution?*

Bryan PAPE was educated at Wagga Wagga High School and the University of New South Wales (BComm, 1969) and was admitted to the NSW Bar in 1977, where he practiced, mainly in taxation litigation, for nearly 25 years. During this time he also served as a full-time member of the Taxation Board of Review No. 1 (1981-1984) and as a part-time member of the Australian Accounting Standards Board (1992-1994). In 2000 he took up appointment as Senior Lecturer in Law in the University of New England. He has had a long and active interest in public affairs, including in the New England Federal Electorate Council of the National Party. In early 2009, on his own initiative and at his own financial risk, he mounted a case in the High Court of Australia where, representing himself, he sought to have the Rudd Government's Tax Bonus legislation declared unconstitutional. Although narrowly unsuccessful (4 to 3) in that regard, the Court's judgments when dealing with the Commonwealth's defences represent major victories for constitutional propriety. As such, the *Pape Case* will come to hold an honoured place in the cause of constitutional federalism.

Professor Jonathan PINCUS was educated at St Joseph's College, Brisbane, the University of Queensland (BEcHons,1964) and Stanford University (MA,1970; PhD, 1972). He has since been a Fellow of the Institute of Advanced Studies, Australian National University (1974-85) and held chairs at Flinders University (Economic History, 1985-91) and the University of Adelaide (George Gollin Professor of Economics, 1991-2002). The author of several books and numerous articles in the professional journals, he was also joint Editor (1988-95) of The Australian Economic History Review. During 2002-08 he was Principal Adviser Research with the Australian Productivity Commission.

Hon Christian PORTER, MLA was educated at Hale School, Perth, at the University of Western Australia (BEc, 1990; BA Hons, 1993; LLB, 1996) and the London School of Economics (MSc, 2000). After admission to the WA Bar in 1996 he worked as a commercial litigator at Clayton Utz (1996-1999), as an adviser to the federal Minister for Justice (2001), and as a Senior State Prosecutor in the Office of the Director of Public Prosecutions for WA (2002-2007). During 2006 and 2007 he also lectured at, respectively, Edith Cowan University and the University of WA Law School. In February, 2008 he was elected for the Liberal Party to the WA Parliament at a by-election; at the general election later that year he was re-elected and was immediately appointed as Attorney-General in the new government. He is the author of a number of publications, conference papers and submissions to public inquiries.

Professor Scott PRASSER was educated at Ipswich Grammar School and at the University of Queensland (BA Hons, 1975; MPA, 1983) and Griffith University (PhD, 2004). After a period in the Queensland Public Service (1981-85) he entered academia, initially as a Senior Lecturer at RMIT (1985-89) and then at the University of Southern Queensland (1989-98). After a further

period (1998-2003) in the Queensland Public Service, principally in the Department of Premier and Cabinet, he returned to academia at the University of Sunshine Coast (2003-09). In 2009 he became Professor, and Director of the Public Policy Institute, at the Australian Catholic University in Canberra. He has many journal articles and several books to his credit.

Sir David SMITH, KCVO, AO was educated at Scotch College, Melbourne and at Melbourne and the Australian National Universities (BA, 1967). After entering the Commonwealth Public Service in 1954, he became in 1973 Official Secretary to the then Governor-General of Australia (Sir Paul Hasluck). After having served five successive Governors-General in that capacity, he retired in 1990, being personally knighted by The Queen. In 1998 he attended the Constitutional Convention in Canberra as an appointed delegate, and subsequently played a prominent role in the "No" Case Committee for the 1999 Republic referendum. While a visiting Scholar in the Faculty of Law of the Australian National University, his research did much to clarify the role of the Governor-General in Australia's constitutional arrangements, culminating in his book *Head of State* (2005). In 2006 he became, and remains, President of The Samuel Griffith Society.

John STONE was educated at Perth Modern School, the University of Western Australia (BSc Hons, 1950) and then, as a Rhodes Scholar, at New College, Oxford (BA Hons, 1954). He joined the Australian Treasury in 1954, serving in a number of posts at home and abroad, including as Australia's Executive Director in both the IMF and the World Bank in Washington, DC (1967-70). In 1979 he became Secretary to the Treasury, resigning from that post – and from the Commonwealth Public Service – in 1984. He has since been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate (1987-90) and Shadow Minister for Finance. In 1996-97 he was a member of the Defence Efficiency Review, and in 1999 a member of the Victorian Committee for the No Republic Campaign. A principal founder of The Samuel Griffith Society, he has served on its Board of Management since its inception in 1992 and is Editor and Publisher of its Proceedings. Today he writes frequently for *Quadrant*. In 2008 he became a member of the Mont Pelerin Society.