

## Chapter Five

### The Chattering Classes at Prayer: Constitutional Conferences and Conventions

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Preparations for the celebration of the centenary of the Australian Constitution were desirable and necessary, and the process inevitably fell into the hands of those most concerned with the Constitution, the constitutional lawyers. Since 1990, when a conference was arranged in Melbourne to commemorate the Australasian Federation Convention of 1890, and a subsequent conference in Sydney to commemorate the first Australian Convention of 1891, there has been a series of conferences which have taken upon themselves the title of "convention", so as to emulate the conventions of the 1890s, as well as a number of supplementary conventions.

These have been mainly the work of the Constitutional Centenary Foundation (CCF), which came into being with the support of Commonwealth and State governments after the Sydney conference. Its chairman is Sir Ninian Stephen, Governor-General 1984-89 and former Justice of the High Court, and its deputy Chairman is Cheryl Saunders, Professor of Constitutional Law at Melbourne University and head of that institution's Centre for Comparative Constitutional Studies. Professor Saunders was one of the main moving spirits of the earlier meetings, and since its inception the most significant influence in the CCF.

The CCF was founded chiefly to organise celebration and discussion of the constitution-making of a hundred years ago, and also to discuss proposals for changes and reforms to the Australian Constitution. Inevitably, both because of its creation under a Labor Government inclined towards eventual transition to a republican form of government for Australia, and because of the popularity of republicanism in academic circles and amongst the political élites, the republican issue has dominated much of the debate. This was accentuated from 1993 when Paul Keating, as Prime Minister, appointed a committee under Malcolm Turnbull to examine ways of achieving a transition to a republic. Originally, Sir Ninian was asked to head this committee, but he declined -- in part because, having sworn an oath of loyalty to Queen Elizabeth II and served as her viceroy in Australia, he felt it inappropriate to head a committee which was intended to come up with proposals for her removal.

For whatever reasons, the committee as eventually constituted was committed to a rapid transition, preferably so that the centenary of the Constitution would be celebrated as the moment of transition to a republic. While its report was a useful summary of the issues, from its publication nearly all public discussion centred around its favoured model of a republic, one in which most existing features of our Constitution would remain, other than the replacement of the existing Monarch and Governor-General by a Head of State who would be a President elected by a two-thirds majority of the Houses of Parliament, and removable in the same manner. At the same time there was, and has been since, a great deal of debate about the powers of the presidency.

In all this debate two things have emerged. First of all, there has been a distinct trend towards electoral support for a transition to a republic at some time in the future (not necessarily during the present Queen's reign, or even before her death), and this can certainly by now be said to enjoy definite majority support, though the majority may be only two or three points above 50 per cent. Second, there has always been an overwhelming majority of those in favour of a

republic -- and probably the same is true of the electorate as a whole in the event of a decision for a republic -- who insist that a President must be elected by the people. That is, there is clear and strong opposition to a republic in which the President would be appointed or elected by some behind-the-scenes deal between Government and Opposition in which the people are not consulted.

This has for quite some time been recognised by the realists of the republican movement. Most recently, the fact that any proposal for a republic with a President not directly elected by the people would be unlikely to receive majority support has been stated by the most powerful numbers man of the Labor Party, Senator Robert Ray. But it is clear that the overwhelming feeling of those who have dominated the process of advocacy and preparation for a republic is that they must get their way, such that a stuffed shirt must get the job. An experienced politician, or a popular nominee from outside the establishment of the élites, would never be acceptable.

This fundamental agenda has dominated the whole process of the centenary conferences, called conventions, which have taken place since the report of the Turnbull committee. These conferences have been organised by the CCF, and their composition largely determined by its Board and by the various State-based organising committees which have worked with it. In effect, they have become selected groupings reflecting the orthodoxies of the political élites, replete with the kind of academics, lawyers, journalists, judges (retired or not), bureaucrats and young people of the *bons enfants* kind -- the respectable, obedient and well-behaved young who conform to the ideas of the current establishment. There has been some unorthodoxy, and even some quite sincere attempts on the part of the CCF and its organising committees to introduce a degree of diversity. Some dissidents have been given a run, even though there have been some quite serious attempts to silence protests about the way the whole thing has been put together.

The two most recent exercises in this genre have been typical of the direction the whole process has been going. These were the "conventions" held in April and September, 1997, in Adelaide and Sydney respectively, shadowing the 1897 conventions of elected delegates. The use of the terms "convention" and "delegate" in the case of the recent meetings has been an indication of what has been going on.

There has been an attempt to give an air of legitimacy to these conventions, as if they had some kind of democratic credentials or other authority behind them; to this has been added the apparatus of syndicates or working groups with rapporteurs, plenary sessions, resolutions and a final communiqué. The reality is of course that the final communiqué and the resolutions have no status or authority whatsoever, and are persuasive only to those who want to pretend that the new conventions have some kind of standing. They have some standing, of course, since many establishment figures have attended, contributed to and endorsed them; but since there is no popular authority involved, there is no reason why the electorate as a whole should have any more regard to their proceedings than to those of a university seminar or, to borrow the jargon of the '60s, a "teach-in".

The partially-elected Constitutional Convention, the postal ballot for which, with voluntary voting, takes place this coming December, will have rather greater claim to authority. But this will be confined to the issue of republic versus monarchy, although there will be valiant efforts by some delegates to drag other issues into debate.

Thus the conventions were set up as charades. Those few at them who challenged their proceedings and the unrepresentative nature of their participants were greeted with considerable hostility, especially by those republicans present who accepted only one interpretation of any constitutional issue (for example, whether the Governor-General can properly be referred to as

our Head of State); who would contemplate only the stuffed-shirt model for appointment to a presidency; and who, above all, would not accept that there might be some debate as to when, as well as to whether, it might be appropriate for Australia to become a republic. There were indeed a few thugs who did their best to discredit and harm professionally any dissidents.

All this had unfortunate results. With all the well-meaning people present, it was to be expected that the proceedings would amount to a kind of secular prayer meeting, with high ideals, vision for the future and agreement on the nature of our Constitution all leading to an uplifting consensus on the future. In effect, the idea was to determine the nature of any future constitutional proposals to be put to the people in the context of the centenary, and to ensure that this would reflect the preferences of the Australian Republican Movement and its fellow travellers. Since the overwhelming majority of the participants selected were from various elements of the political class who could be relied upon to favour republicanism along the favoured lines, along with the rest of the orthodox politically correct agenda of the last 15 years, with a few tame monarchists thrown in to give the impression of diversity, the outcomes were predetermined.

This was clearest of all at the Adelaide meeting in May. It should be said at the outset that, talking afterwards to some of those responsible for the selection of participants and the determination of the agenda, there seems to have been an undue influence from the politicians, bureaucrats and legal profession of South Australia, certainly still the most politically correct of all State establishments these days. It is as if total dependency in economic terms on the Commonwealth somehow encourages self-indulgence and unreality in political terms.

The composition of the conference was overwhelmingly upper middle class, professional, and totally unrepresentative of public opinion. None of the large and growing constituency of Mrs Pauline Hanson, cannibal or not, was present. By contrast, a smaller minority party, the Australian Democrats, was more than proportionally represented. It seemed to be they who persistently referred to the untried and untested South African Constitution, which was for some mysterious reason appended to the background papers circulated to invitees, as a model for Australia. This Constitution, though unexceptionable in its high moral sentiments, is enthusiastically supported by many who have only a very unclear conception of the rule of law.

The concerns of youth were represented by intelligent, highly presentable young people who had been selected by teachers and other adults, and who had gone through the mill of earlier school or other conventions and thus were able to present the views of their elders as if they were the views of the young. Some of us were praying for a few revolting Trotskyites or anarchists to present the views of the unorthodox young, who are always the source of new thinking; anything but clean-cut, carefully coiffed young intoning "Tomorrow belongs to Me".

Some of the propositions presented to the plenary meeting, which reappeared in some form in the final communiqué of the convention, were adopted unanimously, some with strong dissent; some were rolled, since they expressed an unfashionable scepticism about the High Court or support for a strong federal system. The result was that a totally unrepresentative assembly produced a totally meaningless summary of the views of the people who organised the convention.

Some of the future challenges were indirectly stated. Thus "access to the law", which emerged from a working committee of which the rapporteur was the Chief Justice of the Western Australian Supreme Court, the Hon. David Malcolm, really meant that legal aid in the form preferred by lawyers ought to be part of the Constitution. There was a strong phalanx of lawyers, as always at such meetings, voting for their professional advantage, as well as many longwinded academics.

The second day of the convention was devoted to putting together various constitutional "principles" which should underlie a Constitution for the 21st Century. There was a concerted attempt by various groups, most notably members of the Australian Republican Movement, to bring the issue of republicanism and rejection of the British monarchy to the forefront at all times. And everywhere there were shopping lists of the kind which various special interests, like local government, will try to introduce into the ten days of the partially-elected Constitutional Convention.

The most sensible of the speeches made to the convention was that of Associate Professor Campbell Sharman, of Western Australia, who summed up:

"Constitutional reform is not about enshrining wish-lists or pompous phrases about the future -- although a little pomposity at the beginning of a Constitution is quite acceptable. Nor, in my view, is it to respond to challenges, however exciting and revolutionary they may appear to be. Constitutional reform should be about fixing practical problems that affect the operation of government. The guiding light must be to ensure that people get what they want most from government: open, honest and accountable government that is responsive to the wishes of citizens."

Needless to say, Sharman's words were ignored.

Everybody was in favour of democracy, equality and special treatment and recognition for Aborigines. Indeed, as was frequently observed, everybody was in favour of motherhood -- and this was the predominant spirit of the discussion. Not everybody was in favour of federalism. The old nostalgia for centralism still flourished, but at least one of the main supporters of unitary government, Gough Whitlam, was realistic enough to observe that since there was Buckley's chance of convincing the smaller States, whose consent would be necessary, to vote in favour of the abolition of the States, the conference might as well forget about it.

Perhaps the low note of the conference was the official dinner, sponsored by the AMP Society, whose representative delivered a 15-minute commercial to the assembled diners. Perhaps we might end up with the AMP Constitution of Australia. He was accompanied by a decidedly non-vegetarian meal, a troupe of Aboriginal dancers in red nappies, and a young and resolutely politically correct choir. It was really an appalling demonstration of patronising behaviour towards Aborigines, in which de-culturated and politicised Aborigines participated.

The dinner was dignified by an oration from Emeritus Professor Geoffrey Bolton, currently at work on a biography of Sir Edmund Barton, who also entered the contemporary political cockpit by suggesting that it was the custom of those in the past who had disagreed with High Court judgments to accept the "umpire's decision" unprotestingly, by contrast with the uncouth nature of comments on contemporary decisions of the Court. Reactions in labour movement circles to such decisions of the High Court and the Privy Council as those on bank nationalisation, on section 92 generally, or the Barwick High Court's decisions on income taxation avoidance schemes, were not mentioned.

The nature of the recommendations/resolutions of the conferences was unsurprising. Read one politically correct agenda and you've read them all. Three days of discussion led to proposals like, "Australia will be governed by the rule of law". It was repeatedly asserted that Australia should be a democracy. Since there were no advocates of dictatorship, Communism or fascism present, this occupied an inordinate amount of discussion time.

The real issue before the conference was of course that of a republic. Malcolm Turnbull and his acolytes brought this up at every opportunity, and did their best to persuade the meeting that it should produce a strong recommendation to the forthcoming partly-elected Constitutional

Convention that we should proceed immediately to the sacking of Queen Elizabeth and the Governor-General and the replacement of the latter by an appointee of the federal Parliament. While just about everybody agreed that a republic was inevitable (few advocates of monarchism were invited; many of those decided that they had better things to do), there was at least some doubt as to the kind of republic we ought to end up with. Most versions sounded uncannily like the present system, but with no politicians.

The Sydney convention in September was not as bad as the Adelaide convention, which was the chattering classes at their triumphal and sentimental worst. Indeed, it was clear that there had been a learning process going on -- or perhaps simply the high tide of political correctness had passed -- and a certain awareness of reality was creeping in.

A clear demonstration of irrelevance of these non-elected and unrepresentative conventions to actual political issues was provided by one participant, who proposed in a working group meeting that the preamble to the Constitution should include a commitment to a form of assimilation of immigrants, who should be expected to learn English, not form enclaves and conform to Australian customs. This proposition, which would be endorsed by at least 80 per cent of the electorate (including immigrants), would hardly have commanded three votes at the convention. Not surprisingly, it was quickly passed over.

On the other hand it was surprising that one proposition was almost unanimously rejected. This was moved by an Aboriginal participant, and proposed that the Constitution should recognise Aboriginals as a sovereign people entitled to self-determination. It almost won by default, since it seemed that no one would have the courage to point out how unacceptable a proposition it was -- but when somebody (I) finally did, there was a relieved and decisive rejection. It would have been passed by acclamation in Adelaide. Many participants, including some strong defenders of free speech, later observed how objectionable this kind of proposition would be, but admitted that they did not dare speak up against it -- a pitiable fact.

Similarly, although both Aboriginal and ethnic participants were opposed to the proposal that there be a clear and unqualified right of free speech stated in the Constitution, despite their fears and sensitivity the majority of the convention insisted that we could trust the courts to deal with abusers, and that it was not safe to limit the right of free speech in principle. There had earlier been some debate as to whether basic values of the community should be included in the Constitution, but this also was wisely passed over, since it is impossible to define or obtain unanimous agreement on such values.

The generally more sensible and fruitful tone of the proceedings was assisted by the absence of the republic issue from the main debate -- the organisers had decided that, since this was to be dealt with at the official Convention, it was pointless to waste time on it in Sydney. Those who think constitutional reform is mainly about imposing their own model of a republic on a reluctant community were thus side-lined.

There was little or no argument against a proposal to replace the oath (affirmation) of loyalty to the person of the monarch which is appended to our Constitution with a new oath of loyalty and support for our Constitution and laws. Since this would allow for a continuation of a constitutional monarchy drawing its authority from the people, the one or two monarchists present did not object.

This form of a loyal oath was also considered sufficient reason to agree, as just about every participant did, that the clause of the Constitution which forbids holders of dual citizenship from being members of Parliament should be dropped. However, it remains the case at present that there are numerous British and Irish passport holders sitting illegally in Parliament.

The chairman of the convention, Sir Laurence Street (former Chief Justice of NSW) at first nimbly shuffled aside the insistence of one eager Christian testifier that God should be invoked in a new preamble to the Constitution; more sophisticated religious present realised that this would be incompatible with the values of tolerance and diversity of views. An acceptable compromise, which would not offend the large number of believers in the community, was suggested by Mark McKenna (author of *The Captive Republic*) in an excellent jargon-free proposal for a new preamble which would reiterate for historical purposes the old preamble, with its reference to God. Even intolerant atheists have no difficulty in accepting that the founding fathers believed in God. But not the born-again: no compromise was allowed, and the meeting had to vote against the placing of the fundamentalist Christian God over all.

For the rest, the assembled worthies had a good time debating various more or less improbable reforms to the Constitution, like limiting the powers of the Senate, and in general playing at being parliamentarians. They sat comfortably on the padded benches of the NSW Legislative Assembly, below the bemused gaze of occasional troops of school children, who were no doubt disappointed that there was no shouting or screaming of abuse, the normal mode of behaviour of the NSW Parliament.

It is clear that the Constitutional Centenary Foundation is failing abysmally in its objective of educating the people of Australia to think like the political élites, but succeeding admirably in educating the political élites in the recognition of their total lack of sympathy with and disconnection from the feelings of the electorate.

In the event, the final communiqué of the Sydney so-called convention reverted to the same kind of empty clichés as the Adelaide convention.

Most of the criticisms of the nominated membership of next year's Constitutional Convention have been misplaced, coming as they do from those who are committed republicans, who believe that the most important of all constitutional reform priorities is the redefinition of our Head of State.

But on one count alone the complaints are justified. Who on earth thought that a group of young people consisting almost entirely of law students would be in any way representative of Australian young people, republican, monarchist, anarchist or purely indifferentist? All that can be said with any confidence about law students in general is that they will be motivated either by a kind of goofy belief in social reform by legal bullying, or by greed for future income and power (often both). They will mostly be polite, conscientious students, thoroughly accustomed to and happy about deferring to and being manipulated by their elders and mentors, and if they think of themselves as progressive it will be the "progressivism" of tedious professors and priests. If not, they would not be studying law.

The young who might have something useful to say now, or who will in the future prove to be the real innovators and agents of change, are not looked upon by their elders, whether baby-boomers or prematurely middle-aged Generation-Xers, as worthy of approval. They are the silent -- or if not silent, as yet not widely noticed -- dissidents.

At least the partly-elected Constitutional Convention might produce some surprises. The individual nomination fee (\$500) was not so high as to preclude quite a few people throwing their hats into the ring. So the ballot will not be confined to the boring and predictable lists of the Australian Republican Movement and the Australians for Constitutional Monarchy. What is more, the method of voting, bitterly opposed by the Labor Party and its Democrat pilot fish, for the Convention will reduce the advantage of the organisations and their lists. A postal ballot makes a large ballot paper with many names and groups much more manageable -- we will in

general be filling it out at the kitchen table or study desk, or even at work, often in consultation with family and friends.

Voting will be as secret or as open as we want it to be. It can be done at leisure, and in the course of debate as to the merits of each group, candidate or combination. Apart from a few nationally known names (although many of these are not as universally known as they fondly think), much of the choice will devolve on group lists, which will be judged by many purely according to their names, and on the details of each candidate which will be distributed with the ballot papers. Unhappily, the great majority of the candidates who have nominated individually or in groups, including those who are part of the two major republican and monarchist groups, are ratbags.

In ordinary elections the great majority of voters vote for their preferred party. The requirements of actual knowledge are not great. It is sufficient to follow a ticket or pick a box on the Senate paper with the name of your preferred party. Much less will be known about the candidates for the Convention, and there will be no party labels. It is quite probable, nevertheless, that the Labor Party will endorse the ARM; the Liberal Party will endorse neither side.

Apart from that, what will we know about all these groups and individuals? The Electoral Commission will publish a booklet, to accompany the ballot paper, providing some information. But apart from excluding obscenity and unwanted references to other candidates, there will be no control over what they say about themselves. There is nothing except exigency of space to stop a candidate making any number of unsubstantiated claims about his or her credentials (and perhaps even sex or race). The examination of the claims and assertions of each candidate and group will have to be mainly the work of the media. Fair presentation of all these claims will impose a heavy burden of truthfulness and objectivity on everyone in the media, especially those who have already taken strongly committed positions in favour of any one proposal or group.

Probably, as the ballot approaches, each newspaper will publish its own form guide to the groups and candidates which will be used by many voters as they fill out their ballot papers. There will also be a barrage of propaganda, talk shows and debates on television and radio. We know already that the ABC, fair and impartial as always, will support the Australian Republican Movement and perhaps one or two independent republicans. The populist talkback shows will run hot, and their candidates will be unpredictable.

The greatest uncertainty will be the response rate to the giant ballot paper and the postal vote. It is a common experience for union postal ballots held by the Australian Electoral Commission to have a return rate of ballot papers as low as 5 per cent of the post-out. This will be the real touchstone of the value of the February Convention.