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Editor: Mr. Justice Kirby

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constitutional reform: a thaw?

> It is very doubtful whether man is enough of a political animal to produce a good, sensible, serious and efficient constitution. All the evidence is against it.
>
> George Bernard Shaw, c 1948

end of empire. Constitutional reform is in the news. At the Australian Premiers Conference on 25 June 1982 it was announced that the Australian States and the Commonwealth had agreed to sever all remaining legal links with London — including residual State appeals to the Judicial Committee of the Privy Council in London. The link with the Crown alone will be retained. In Canada, even more fundamental developments have occurred. When the Queen signed into law the Canada Act 1982 in mid-April, she put the final touch upon a lengthy procedure for total 'patriation' of the Canadian constitution, severing the last remaining, formal links between Canada and the Westminster Parliament. Since the British North America Act 1867, amendments to the Canadian constitution were achieved by formal request to the United Kingdom Parliament. Now a new amendment provision (Section 38) requires resolutions of the two Federal Houses of Parliament and of the unicameral Provincial assemblies in seven Provinces, having between them half of the total population (not electors) of Canada. Certain amendments affecting the Queen and her representatives, Provincial representations in the Federal Parliament, some language questions, the composition of the Supreme Court of Canada and the amendment provisions themselves require supporting resolutions from all 11 Canadian legislatures.

Perhaps equally dramatic in constitutional terms is the incorporation in the Canada Act of an entrenched statement of human rights known as the 'Canadian Charter of Rights and Freedoms'. Other important provisions (for example dealing with Aboriginal peoples and energy resources) are also entrenched. Representatives of the province of Quebec boycotted the ceremony at Ottowa where the new constitution was inaugurated. Their absence was noticeable. But the Queen said:

> Differences persist. In this vast and vigorous land, they always will. The genius of Canadian federalism, however, lies in your consistent ability to overcome differences through reason and compromise.

Commenting on the new constitution, Professor Sawer, doyen of Australian law teachers, has suggested that the introduction of the Charter of Rights and Freedoms, justiciable and enforceable in the courts, is likely to influence 'the drafting of any similar Australian exercise'. Professor Sawer points out that, notwithstanding the provisions of Section 128 of the Australian Constitution, permitting constitutional change without reference to London, the Canadians had done rather better than us, since 1867:

> More than 20 amendments were made . . . including 18 in the present century — a much better score than that achieved by the Australian domestic procedure, which has produced only eight amendments since 1900. . . . After being lengths ahead in the 'patriation stakes' for 82 years, the Australians have now fallen behind. The Canada Act is a complete and final handing over of all constitutional questions to Canadians, leaving no residual power in London. In Australia, the various amending powers of the Commonwealth and State Parliaments and electors may not altogether quite add up to a complete 'patriation' of constitutional arrangements.
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> *Canada Today*, 42 no. 3, Canberra 1982

that flood again. According to news clippings now reaching Australia, fears are being expressed about a flood of litigation based on the new Canadian Constitutional rights. In a British Columbia newspaper of 3 May 1982, former Australian Law Reform Commissioner Professor Duncan Chappell, now at the Simon Fraser University in Vancouver, cautioned against overreaction by police and other commentators.

> Contrary to what the critics have said, I don't foresee any crime waves, reduction in police powers or dramatic loss of convictions. It is not an Americanisation of the Canadian legal system, but it will involve some changes in police procedures and practices.

According to Professor Chappell a 'lynch pin' provision of the charter in the area of law enforcement is the introduction into Canadian law of the notion of excluding evidence illegally or unfairly obtained where admission of it would bring 'the administration of justice into disrepute'. This notion is not new to Australia. The decision of the High Court of Australia in *Bunning* v. *Cross* (1978) 19 ALR 641; 52 ALJR 560 and the provisions of the Criminal Investigation Bill 1981 presently before Federal Parliament, express similar ideas.

australian moves. Shortly before the Canadian events, the Australian Prime Minister, Mr. Fraser, referred to constitutional reform in the inaugural Edmund Barton lecture delivered for the Liberal Club of the University of Sydney. Speaking at the University on 19 March 1982, Mr. Fraser ruled out talk of an entirely new constitution for Australia by the Australian Bicentenary in 1988:

> There is no prospect of a new constitution by 1988 as some are suggesting. Nor is a totally new constitution in any way required. The effort to achieve such an objective is indeed one of the most divisive proposals that can be contemplated in Australia. There are many real and pressing problems which Australia faces in the next few years — a new constitution is not amongst them. It is a matter which can only distract the nation's attention from the issues of substance. . . . A new constitution is not a priority nor a goal for Liberalism in Australia. Our goal is a continuation of the process of evolutionary constitutional reform where change is needed.

Mr. Fraser claimed success for constitutional reform proposals initiated by Liberal Governments. He pointed out that of the 17 amendments proposed by such governments since Federation, 7 had been successful. He said that his government had introduced more successful amendments to the constitution than any government in Australia's history. By way of contrast, he said that of 19 amendments urged by Labor governments, only 1 had succeeded. Responding to some media

criticism of undue caution in this speech, the Prime Minister, in a letter to the Melbourne *Age* (25 March 1982, 12) made it plain that he was seeking to draw a distinction between thorough *review* of the Australian constitution and a total *re-write:*

> It is important that a clear distinction be drawn between support for a review of our constitution and support for a new Constitution. I believe that anyone who blurs the difference between reviewing and re-writing Australia's Constitution is a poor servant of the cause of constitutional reform.

privy council reform. The same theme was taken up by the Federal Attorney-General, Senator Peter Durack Q.C., in an address on 30 April 1982 to the Committee for Economic Development of Australia. Senator Durack likened the making of an entirely new constitution to an endeavour to 'reinvent the wheel'. But he conceded the need for reform in a number of areas. Those mentioned by him included:

- powers with respect to industrial relations law making;
- abolition of appeals from State Supreme Courts to the Privy Council;
- introduction of four year terms for Federal Parliament;
- some review of the Senate's powers in respect of blocking supply.

Senator Durack conceded that the Judicial Committee of the Privy Council had made notable contributions to Australian jurisprudence over the years. However, he said that its lack of familiarity with modern Australian society and laws was a 'fundamental drawback' to a continuing place for the Privy Council in the Australian court system:

> The policy of the Commonwealth Government is that all Australian appeals should be settled in Australia by the High Court. The anomaly of two final courts of appeal cannot be long maintained. . . . The inability of the States to repeal or update anachronistic British laws still applying as part of the law of the States, is another matter of practical concern. The continued role of British Ministers in advising the Queen on Australian matters which concern the States is now anomalous. . . . A difficulty has been that the States who are the parties mainly affected have so far been unable to agree among themselves on the content of the measures to be taken to abolish residual links, and the way those measures should be implemented. If progress is not achieved, the Commonwealth Government will have to consider what steps it should take on the matters requiring the most urgent attention.
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> P.D. Durack *The Future of the Constitution,* 30 April 1982

action for reform. A few lines of action are now in train to promote discussion of Australian constitutional reform:

- On 12 May 1982 it was announced by the Prime Minister that he had written to the Premiers of the Australian States and the Chief Minister of the Northern Territory seeking their views on another session of the Australian Constitutional Convention. He indicated that a matter to be debated at a future session would be four year terms for Federal Parliament. Previous sessions of the Constitutional Convention, established by the Whitlam Government, were held in 1973, 1975, 1976 and 1978. Prime Minister Fraser pointed out that each of the three 1977 referendum questions had arisen out of the Constitutional Convention. Commenting on the moves to revive the Australian Constitutional Convention, Senator Gareth Evans, Federal Labor spokesman on legal matters, said that the Labor Party supported this initiative. However, he added a few words of caution:

  > We all know that the achievements of the Conventions since 1973 have been few, that the pace of change has been grindingly slow and that the prospects of agreement on some major issues remain . . . remote . . . But the whole stability and sanity of our system of government depends on the effort to achieve cross-party consensus . . . stable and rational national government is impossible so long as the Senate retains its full range of present destructive powers. Four year parliaments — Mr. Fraser's and Senator Durack's current reform hobby-horse — will not solve the basic structural problems.

  Addressing the Committee for the Economic Development of Australia in Melbourne, Senator Evans said that

questions of constitutional reform will prove to be 'of much more than academic interest to business'.

- A second development is the continuing work on the process for constitutional law reform commissioned by the NSW Law Foundation. A second meeting of the advisory committee of consultants to the Foundation took place in Sydney on Monday 10 May 1982. A report was given on the progress towards the publication of a book evaluating options for constitutional law reform in Australia. This book will provide the process for a series of public seminars and meetings to be held in all parts of the country early in 1983. The Law Foundation project has participation from across party lines. According to Senator Evans, in an address in Perth on 13 May 1982, the momentum for constitutional reform is growing:

> There is much that people from all sides of politics could agree on if we could only stop the slanging and get down to constructive discussion. Of course, as the Prime Minister and Senator Durack have been saying, it is unrealistic to hope for a wholly *new* Constitution by 1988. But we should keep this as a target date for significant progress . . . The momentum is there, and is growing

towards the thaw? On 12 May 1982 at a function in Melbourne a 'Challenge to Australia' was issued by three distinguished Australian citizens, Sir Macfarlane Burnet, Sir Mark Oliphant and Sir Barton Pope. A common theme of the essays offered by these distinguished writers (Burnet shared a Nobel Prize, Oliphant is a world famous nuclear scientist and Pope is a successful industrialist) was disenchantment with Australia's Parliamentary political and industrial institutions. At the invitation of the authors, the ALRC Chairman, Mr. Justice Kirby offered a critique on the Challenge. According to him, we should be cautious about the sport of denigrating our politicians:

> I always refuse to join the brigade of those who denigrate and diminish our Parliaments and our Politicians. They are the ministers of democracy. There is no acceptable alternative. We should look to them to improve themselves and their institutions and above all to modernise the machinery of Parliament . . . However . . . we do ourselves a disservice if we continue to heap opprobrium and contempt upon our political leaders. The price we will pay for this attitude is the disinclination of some people of quality to offer themselves for political life, a lowering of self-esteem and self-image amongst those who take part and an enhancement of the spirit of resignation that will prevent reform and improvement of the system. All true democrats should be seeking to improve and uphold our Parliaments. They are, after all, remarkable institutions that bring together representatives from all parts of the country and all walks of life. . . . It is when we look at the dictatorships that flourish in this world, at the military juntas and the alternatives, that we must count our constitutional blessings.

The ALRC Chairman said that Australia had been described as, constitutionally speaking, 'the frozen continent'. He said that the problems identified in the 'Challenge to Australia' would need constitutional and legal reform.

> The genius of English-speaking people is to find routine, institutional means of delivering changes. They will not come by revolution. They will come by evolution of our constitutional system, including by changes approved at referenda.

The 'Challenge', being written by scientists and industrialists, is quite different to the 1951 'Call to the Nation' written by bishops and judges. The chief challenges identified as being before Australia include:

- world population explosion;
- disarmament of the armoury of war;
- future energy shortages;
- unemployment and compulsory leisure;
- economic nationalism;
- decline of the political system.

Copies of the Challenge can be obtained from 2 Hutt Street Adelaide SA 5000.

other moves. Meanwhile, other developments should be noted including the May 1982 decision of the High Court of Australia relevant to the scope of the Federal constitutional power with respect to external affairs and moves in Victoria for constitutional reform, following the change of government

in that State. See *Koowarta* v. *Bjelke-Petersen & Ors,* 11 May 1982.

The High Court decision, upholding, by majority, the validity of the Racial Discrimination Act 1975, based on an international treaty, was hailed in some quarters as a great break-through in Federal legislative powers and a profound constitutional change. Writing in *The Age* on 19 May, Professor Colin Howard (Univ. of Melbourne) cautioned against overstating rulings of the High Court, pointing out that most international agreements are not of comparable significance to the capacity of Australia to fulfil international obligations in the maintenance of the most fundamental of human rights. The editorial in the *Age* 13 May 1982 commented on the growing scope of international treaties and the dangers they might present, if unlimited, to a significant shift in constitutional powers.

> It is unlikely that the present High Court would go that far. While Justices Mason and Murphy were prepared to give bona fide international agreements a clear path in Australia, Justices Stephen and Brennan, their colleagues in the majority decision, argued that this should follow only in matters of genuine international concern which affect Australia's relations with other countries . . . So long as the Court maintains the wary approach . . . [the] decision is unlikely to lead to an undesirable concentration of power in Canberra.

Finally, in Victoria the election of the new Cain government (see [1982] *Reform* 46) has led to moves towards constitutional reform in that State. Such reform was promised at the election by the successful Labor team. Soon after Parliament was called together, the Premier, Mr. Cain, foreshadowed legislation to abolish the bias in favour of country regions in elections for the Victorian Legislative Council. Commenting on the announced intention, the Melbourne *Age* (23 April 1982) was firm:

> No issue in Victorian politics has proved to be such an enduring problem as the rural Gerrymander. Labor governments have fallen because of their attempts to reform it, Country party governments have fallen because of their refusal to reform it, and the Liberals have suffered three party spills . . . because of their vacillation in deciding which side to support. It is appalling that such a basic democratic principle — the right of every citizen to have a vote of equal value — should still be an issue of political debate in 1982 . . . The legislation foreshadowed . . . to abolish the Gerrymander once and for all ought to be supported by all Victorians . . . This is an issue on which Labor clearly has a mandate for reform.

Commenting on the same topic, the *Australian Financial Review* (13 April 1982) made a novel suggestion which gets back to some of the points made in the 'Challenge to Australia':

> It is well known that one of the defects of the democratic system is that it tends to keep out of Government men and women of ability who have not the time or inclination to participate in internal party politics. It might well be advisable for the Victorian Labor Government to consider a really radical reform of the Legislative Council which could make it a genuinely useful chamber of advice and review as well as a source of ministerial recruitment.

NSW lawyers report

> Lawyers as a class have for centuries been the target of criticism, sometimes well-deserved. At this time when society is in the throes of rapid change, and nothing is taken for granted, it should not be surprising that the voices of the critics should be loud in the land.
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> Chief Justice Sir Harry Gibbs' address to law graduates, May 1982

cautious reform. Changes in the regulation and structure of the legal profession in New South Wales have been recommended by the NSW Law Reform Commission. The recommendations were contained in two reports of the NSWLRC tabled in the New South Wales State Parliament on 6 April 1982. The reports are:

- NSWLRC, First Report on the Legal Profession, *General Regulation and Structure* 1982 (NSWLRC 31)
- NSWLRC, Second Report on the Legal Profession, *Complaints, Discipline and Professional Standards,* 1982 (NSWLRC 32).

The main recommendations contained in the two reports suggest:

- more public participation in the regulation of the legal profession;
- abolition of stringent divisions between barristers and solicitors;