We the people

The existing preamble to the *Commonwealth of Australia Constitution Act 1900*

"WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:"

The following suggestions for a new preamble are contained in the CCF's report, "*We the people of Australia...*"

The report is reproduced in full at the Constitutional Centenary Foundation's website, at www.centenary.org.au

We, the Australian people, on this day a century from our federation as a Commonwealth and having chosen to become a republic, now acknowledge our achievements and our aspirations.

Coming from many lands, today we stand united in one land.

We acknowledge the special place of the first Australians in our history and in our future.

We believe that what unites us is equality in our diversity and that tolerance is the basis of our security as a free people.

May good fortune favour our prospects.

- Mr Andy Gregson, Neika TAS

We are a nation that believes in a fair go for all our citizens.
We are made up of people from all corners of the world.
We join with the original people of our land.
We formed a new nation without the ancient hates and biases.
We stand united as one people one flag one nation.
'AUSTRALIA'

- Mr Ronald F Duff, Morley WA

We, the people of Australia, humbly relying on the blessing of Almighty God, having a rich cultural heritage from all the peoples of the earth, resolve, through the free association of ourselves as a democracy, to regulate the affairs of our people in our various States and Territories as a sovereign nation under the Rule of Law as founded upon this, the Australian Constitution.

- Peter Janssen, Moorooka QLD

# of Australia.."

We, the people of the Commonwealth of Australia, humbly relying on the blessing of Almighty God, pledge ourselves to work together for the common good with the due observance of justice, fairness and compassion,

so that the dignity, freedom and rights of each individual may be assured,

so that the foundations for a democratic and caring society will be established,

where government is based on the expressed will of the people,

and every citizen, regardless of race or colour, is equally protected by the law without fear or favour.

- Mr Alan Barron, Grovedale VIC

We, the people of Australia, from the six States and two Territories, form one indissoluble democratic nation under Almighty God. We acknowledge that the Commonwealth has evolved into an independent and sovereign nation under the Crown and recognise our federal system as a representative democracy with responsible government.

We recognise the prior ownership of our country by our Indigenous people and that they are entitled to rights by virtue of their status. We will continue to nourish and conserve our unique environment for future generations and to practise sustainable development.

It is our responsibility to uphold the rule of law and to defend our nation. We affirm the rule of law and the equality of all before it. We are united by our rights, rejecting discrimination on the grounds of race, sex or religion. We are multicultural, sharing a common language and tolerating and respecting our differences.

We, the people of Australia, have agreed to reconstitute our system of government as a republic. Asserting our sovereignty, we commit ourselves to this Constitution.

- Ms Kirstie Gill, Brisbane QLD (aged 14)

We, the people of Australia have agreed to reconstitute our system of government as a republic.

We acknowledge the uniqueness of our land and the special place of its Indigenous people.

We recognise that we are a blend of many cultures.

We ask the blessing of Almighty God that we may live in harmony with our land and its people - that we may respect our country's law and achieve justice for all.

- Ms Mary Burgess, Davistown NSW

The following preamble template was developed for consideration by the Constitutional Centenary Foundation panel, broadly reflecting the ideas expressed by participants in the quest:

We the people of Australia,
Who came together in 1901 as a Federation under the Crown with the blessing of God,
Which has since become an independent nation,
Now renew our Constitution [as a republic].
In the spirit of reconciliation, we acknowledge the Indigenous Australians as the original occupants and custodians of our land,
United by pride in our diversity,
Our belief in equality and freedom,
And love of this unique and ancient land.
We commit ourselves to this Constitution.

Members of the CCF preamble panel also drafted preambles, reflecting different approaches from the inclusion of all or most of the recommendations of the Constitutional Convention. Their suggestions include:

We the people of Australia, who, relying on the blessing of God, agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, which has since become an independent nation, now agree to reconstitute the Commonwealth of Australia as a republic.

We acknowledge the unique heritage of the Indigenous Australians who first inhabited this land, and we respect their culture.

We appreciate the contribution made to Australia by its Indigenous peoples and by all those who have since come to this land. We are united in our diversity in a land where the equality of all is honoured and freedom is cherished.

We enact and commit ourselves to this Constitution.

- Miss Elizabeth Bruce (panel member)

The people of
New South Wales, Victoria, South Australia and
Queensland, Tasmania and Western Australia humbly relying on the blessing of
Almighty God, agreed to unite in one indissoluble Federal Commonwealth of Australia under this Constitution and the Crown of the United Kingdom of Great Britain and Ireland.

Having become an independent nation in our first century, we now reconstitute the Commonwealth as a republic under this Constitution to promote the general welfare and secure for all the people of Australia justice, liberty and peace.

- Mr David Marr (panel member)

Constitutional poetry

By Professor Jeremy Webber*

Australians are contemplating significant constitutional reform to coincide with the centenary of Federation. This reform is being driven by the move to a republican form of government. It may also include the adoption of a new preamble – a new and inspirational introduction – to the Constitution.[1]

Last year's Constitutional Convention gave considerable impetus to this movement for reform, but it also signalled a subtle change in the nature of the debate. In the past, constitutional reform has tended to be the preserve of the specialist, with proposals concentrating on technical adjustments of little interest to the Australian public generally.

The Constitutional Convention served to broaden the debate and, in particular, to place more emphasis upon the symbolic dimensions of constitutional reform. Increasingly one hears suggestions that the Constitution should reflect more closely the national character. It should declare who we are as a people. It should, in the words of the 1987 report of the Advisory Committee to the Constitutional Commission, "embody the fundamental sentiments which Australians of all origins hold in common".[2] It should speak with the poetry that we commonly associate with the American Constitution or the French Declaration of the Rights of Man and the Citizen.

The opening words of the Australian Constitution are often compared – unfavourably – to such texts. The US Constitution begins with the proclamation:

> *"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America."*[3]

The French Declaration of the Rights of Man and the Citizen begins:

> *"The Representatives of the French People constituted in National Assembly,*
> *Considering that ignorance, forgetfulness or contempt of the rights of man are the sole cause of public misfortune and governmental depravity,*
> *Have resolved to expound in a solemn declaration the natural, inalienable and sacred rights of man,*
> *So that this declaration, perpetually present to all members of the body social, shall be a constant reminder to them of their rights and duties..."*[4]

The Australian Constitution is not too bad, frankly, but it is nevertheless much more laboured than the American equivalent, and not terribly poetic:

> *"WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:*
> *And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:"*

To many, this literary void is yet another example of the Constitution's anachronism – another consequence of the fact that our Constitution was drafted at a time when Australia was not quite a nation. Surely we can do better now.

I want to raise a number of concerns with this line of argument. In particular, I want to speak against the idea that a Constitution should seek to define the nation, translating the country's deepest commitments into concentrated poetic terms. I am in favour of a Constitution that is more open and matter-of-fact than that.

More generally, I want to explore the relationship – often uneasy and tension-ridden – between symbolic and functional aims in constitutional reform. The specialist discussion tends to avoid discussion of symbolism, as though constitutional reform were simply about the formation of practical rules for the running of government. Whether we like it or not, however, constitutional reform is shot through with symbolic implications and it is time we took those implications seriously.

The uncomfortable role of symbolism

Symbolism plays a great, though often unacknowledged, role in constitutional reform.

In the current Australian debate, its influence is most obvious in proposals for a new constitutional preamble. The Constitutional Convention resolved that a new preamble should be drafted, one that would express a number of values deemed to be of fundamental importance to Australians. These would include: "recognition of our federal system of representative democracy and responsible government"; "acknowledgment of the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders"; "recognition of Australia's cultural diversity"; and a variety of other things including, possibly, "affirmation of the equality of all people before the law" and "recognition of gender equality". The role of the new preamble would be plainly symbolic. In fact, the Convention's communiqué suggested, "care should be taken to draft the preamble in such a way that it does not have implications for the interpretation of the Constitution". Indeed, the text would prohibit judges from using it to interpret other provisions of the Constitution.[5]

The impact of symbolism is not confined to such overtly emblematic gestures, however. The move towards a republic is itself driven by entirely symbolic aims. This is patent from the arguments marshalled in its favour. Consider, for example, the terms in which Paul Keating expressed his support for the republican cause in 1995. The creation of the republic would be an act, he said:

> *"... of recognition: in making the change we will recognise that our deepest respect is for our Australian heritage, our deepest affection is for Australia, and our deepest responsibility is to Australia's future ... Our Head of State should embody and represent Australia's values and traditions, Australia's experience and aspirations..."*[6]

Public figures have gone to some trouble to argue that the republic would not affect the business of government or Australians' daily lives. Indeed, the republican debate is particularly striking in that the chief arguments in favour of change are purely symbolic, while the chief arguments against it are predominantly functional. It is a particularly stark example of the tension between symbolic and functional aims.

But there are many other, more prosaic issues – predominantly functional in character – that also carry strong symbolic overtones, overtones that we often neglect. Those symbolic elements can deflect or undermine the functional aims. They require careful attention.

This is even true, for example, of that most prosaic of constitutional topics: federalism – the apportionment of legislative power between State and Commonwealth governments. This symbolic element has not been obvious in Australian debates over federalism, but it has played a major role in other countries. The new South African Constitution, for example, studiously avoids the language of federalism, even though it creates an essentially federal structure. 'Federalism' is rejected precisely because it had become, in many people's minds, a cipher for continued ethnic division. Other countries have shied away from the term, though not the practice, of federalism because they see it as undermining national unity. The new Constitution of Ukraine is an excellent example. The Autonomous Republic of Crimea has very extensive and constitutionally guaranteed autonomy, yet Ukraine is nevertheless proclaimed to be a "unitary state".[7]

The interaction of symbolic and functional aims is perhaps most pronounced, however, in debates over a constitutionalised Bills of Rights. Lawyers almost always treat these instruments as though they were intended to be nothing

more (and nothing less) than legal mechanisms for the protection of rights and liberties. But they also carry a very great symbolic charge. They are commonly seen as charters of citizenship, defining the rights that all citizens have. They are taken to embody the contract between citizens and their governors, specifying the limits on governmental power. There is nothing surprising in this. Assertions of rights are intrinsically connected to ideas of citizenship, especially if one takes a broad 'social' conception of citizenship.

"A nation's life is much richer than the terms we use to express it; it involves much more diversity and contestation. If we try to define Australia, we are very likely to end up with a caricature, a dumbed-down version of what this country is all about."

Usually the symbolic and the functional arguments are closely aligned, but this is not necessarily so. They can come into disjunction, so that the symbolic arguments displace and may even frustrate the objectives underlying human rights protections. This is most evident in the uses made of the language of equality.

Most people, if asked to explain the fundamental objective of a guarantee of equality, would say that it was designed to protect against government-imposed disadvantage – that it was motivated, then, by a fundamental concern with individuals or groups suffering disadvantage within a society. But the language of equality can also be deployed in very different ways, in a manner that evinces a desire for uniformity and a hostility to difference within society. This can be seen in the two potential meanings for the phrase: 'Every citizen should be treated in the same manner; every citizen should be in the same position with respect to the state.' This can reflect a genuine concern with disadvantage. But it can also reflect a much more troubling concern with what it means to be a nation: one doesn't have a country unless every citizen is treated in precisely the same way; one doesn't have a real country unless everyone is the same kind of citizen. It can embody, in other words, a fundamental yearning for homogeneity.

This latter meaning can, for example, pose a significant barrier to Indigenous rights, and indeed we have seen the language of equality deployed against Indigenous rights in just this manner. This use of equality has nothing whatever to do with a concern with disadvantage, but a very great deal to do with an abhorrent form of nationalism. The language of equality is a very important string to the One Nation bow.

The problem is that at a symbolic level the language of equality tends to place a heavy emphasis on uniformity. Presumptively, to treat people equally is to treat them identically. We may all agree that this cannot be the case in practice. In some situations identical treatment will magnify rather than minimise inequality. We are unlikely to achieve greater equality, for example, if we withhold unemployment benefits from all people, male and female, who cease work because they are pregnant. But those arguments always tend to work by way of exception. The basic presumption is that identical treatment is equal treatment. This can pose significant obstacles to the accommodation of difference, both in the broader political debate and, potentially, in the application of a Bill of Rights.

But what about those aspects of the Constitution that are not intended to have specific legal effect – that aim, as far as possible, to be purely symbolic, that are simply poetic. I am thinking of those provisions designed to "embody the fundamental sentiments which Australians of all origins hold in common".[8] Are there any reasons for caution with respect to them?

I believe that there are. I think that we should not attempt to use our Constitution to try to define what all Australians believe, or what this country is all about. Such efforts almost always misfire. Either they end up overdefining the nation, so that they include things that all Australians manifestly do *not* believe, or they veer into platitudes, so that they affirm values that are common to any industrialised democracy. Some of these values may be worth affirming, but they hardly amount to a definition of what makes this country Australia. But if the first option is taken, one is likely to end up with a narrow and exclusive definition of citizenship. A nation's life is much richer than the terms we use to express it; it involves much more

diversity and contestation. If we try to define Australia, we are very likely to end up with a caricature, a dumbed-down version of what this country is all about.

We are also likely to fall quickly into anachronism. Nations live, and in living they change. They cannot be reduced to writing. Consider what would have happened had we written a definition of this nation into the Constitution even as recently as the 1950s. Would we have been content with that definition now?

Does this mean we should rigorously avoid all symbolism, all poetry? I don't believe so. There are ways that we can capture, in Janet Holmes à Court's phrase, "the scent of eucalyptus" in our Constitution and that we can manage appropriately the relationship between symbolism and function in constitutional reform.

Appropriate uses of symbolism

Even if we wanted to, we could not eradicate symbolism from our Constitution. Language always carries connotations, implications and points of resonance. These leave their impact on constitutional interpretation, just as they do on any use of language.

There are many reasons, for example, why s. 92 of the Australian Constitution was held to forbid the nationalisation of industry. These undoubtedly included the judges' own hostility to state ownership and the general problem of determining when a constitutional provision protects not only its ostensible object (trade between the States), but also the conditions on which that object was premised (the existence of a free market). But despite the undoubted importance of those reasons, one also suspects that the result was made more likely by the stirring language in which s. 92 was drafted, requiring as it does that trade between the States be "absolutely free".

One might try to limit such effects by differentiating between the operative and symbolic parts of a Constitution. This differentiation occurs in France, where one document – the Declaration of the Rights of Man and the Citizen – has little practical impact but a strong symbolic role, and another – the Constitution – governs the practical workings of government.

One might try to accomplish the same thing in Australia. In fact, the Convention's proposal for a new preamble does aim for this kind of outcome. It tries to do so by forbidding the courts from using the preamble in constitutional interpretation, thereby attempting to quarantine the symbolism from the operative parts of the Constitution. One can question, however, the wisdom and the efficacy of that attempted separation.

First, the very effectiveness of symbolism can depend upon it being taken seriously, and this may mean that one has to allow it to have some consequences. Indeed this makes intuitive sense. There does seem to be a difficulty in claiming certain principles to be fundamental to our political life, but then forbidding anyone from taking them into account.

But second and more importantly, the attempt to quarantine the preamble depends upon a simplistic understanding of constitutional interpretation – a belief that constitutional provisions *can* be separated from broader interests and concerns. This is not so. Interpretation of the division of powers, for example, is inevitably coloured by broader conceptions about what federalism – the relationship between the States and the Commonwealth, indeed the very structure of the Australian nation itself – is all about.

A constitutional text needs to be interpreted, its provisions need to be elaborated to speak to specific cases and its various elements need to be woven into a consistent whole. The broad concepts – like federalism, the rule of law and democracy – that we use to understand our countries' governments inevitably shape our interpretation of their Constitutions.

The broad considerations that courts inevitably use when interpreting the Constitution are precisely the kinds of considerations that the Convention proposes to write into the preamble. If adopted, those phrases will have a measure of real democratic legitimacy; they will be deliberate statements of important values for this country. Isn't it appropriate that the courts do refer to these recitals? Indeed, how can they be stopped from doing so? It would be more straightforward and more transparent if they did. We should focus on what we should write into that preamble, not chase the chimera of trying to exclude constitutional interpretation.

I know that some actors in the Convention wanted to have a Bill of Rights enshrined in the Constitution, and only settled for the possible recognition of equality in the preamble as second best. They may still harbour the hope that the courts will use the preamble to create, by judicial interpretation, a robust guarantee of equality. The adoption of a Bill of Rights by stealth would not be appropriate and, if that is the objective, equality is best left out of the preamble. If the democratic process cannot produce a Bill of Rights by conscious action, one should not be created by covert means supplemented by judicial fiat. But even if recognition of equality is included in the preamble, I doubt very much that the courts would use it as the basis for a new set of rights. The role of preambles is clear in Anglo-American constitutional theory; they do not create independent rights and obligations and there would be no democratic warrant for departing from that practice here.

The attempt to prevent the courts from drawing upon the preamble in constitutional interpretation is therefore misconceived. There may be other reasons, however, to separate the symbolic from the functional elements of the Constitution (to the extent that this is possible). The yardstick of symbolism is often very different from that of function. For example, those concerned with symbolic recognition may focus primarily on the amount of attention they receive in the document. Did they get four clauses when someone else got 24? Were they relegated to the back of the document? For those concerned with Constitutions as functioning documents, such considerations are irrelevant. It may simply take more space to say what needs to be said.

One can see glimpses of this kind of disjuncture in the Australian debate. The 1988 report of the Constitutional Commission rejected a proposal for a revised preamble in part because it heard such different opinions on what should be included and what excluded.[9] Once one includes Aboriginal people, why shouldn't one recognise multiculturalism? Once one recognises multiculturalism, why shouldn't one recognise those who fought in the war? A long contest for recognition then ensues. I do not believe that these problems are so intractable that one should simply suppress them. But the complex problems of symbolic calculation may be more easily resolved if one can deal with them in a document that is set apart from and therefore unconstrained by functional objectives.

To this point, I have tended to deal with symbolism as though it were an awkward intrusion into the constitutional process – something that should be managed rather than embraced. But the simple fact that symbolism does intrude, so insistently, should alert us to the fact that it is there for a reason. We should reflect, in short, on the functionality of symbolism, if we wish to deal with it sensibly.

So why are symbols an indispensable part of people's grappling with Constitutions?

To begin, symbols can be extraordinarily important in rendering concrete ideas that are otherwise abstract and diffuse and in emphasising that they matter. One doesn't have to grasp an entire complex argument – or a complex set of constitutional provisions – to be concerned about one's country; the symbols stand for a set of institutions or issues that are crucial, that one cares deeply about, but that can be worried about and elaborated over time.

Symbols are important as objects of attachment, objects of allegiance. This too plays an important role in our reasoning. Iris Murdoch, when speaking of the act of doing philosophy, emphasises the close linkage between passion and reason, how it is our passions, our commitments, that drive the quest for greater rigour and insight. We fasten on a set of issues – often associating them with a set of classic problems or situations – and our preoccupation with those issues holds our attention, as we try to work them through over time.

Countries are a lot like that. They too hold our attention, often through the use of certain symbols or images (the sunburnt country, the bush, mateship, the Eureka stockade, Australia in Asia, the settlers' encounter with the dreamtime) and that very attachment forces us to worry over what our country should mean, what it should be doing, where it should be heading. That too is the role of the somewhat more complex symbols that exist within Constitutions. They too serve as objects of allegiance – and as concepts that stand at the very centre of our engagement as citizens and as constitutional lawyers, even in our specialist debates.

to definitions that soon seem skewed and partial precisely because they focused on concerns that were central at one moment, but were soon displaced or qualified by others.

"We should shy away from attempts to proclaim 'the fundamental sentiments which Australians of all origins hold in common'. We do not share the same values, and we do not have to in order to be part of the same political community."

So what sort of symbolism should we write into the Constitution? What sort of constitutional poetry should we have?

I believe it is a mistake to attempt to write a definition of Australia. This country is too rich and varied for that, too subject to contestation and disagreement, too subject to change and reinvention. We want to draft a Constitution that retains that sense of openness and diversity, and that allows the country continually to invent itself. We want a Constitution that suggests broad orientations, not one that assumes that we have already arrived.

Our symbolism, then, should be open in its implications, expressed in language that is rich in connotations and productive of interpretations, so that it can accommodate, in symbolic terms, the growth of the country.

Constitutions are written for the long haul and they need to allow for the process of reconsideration and elaboration that occurs in the life of any country. Couching one's symbolism in more general and evocative terms is less likely to lead to anachronism. It is less likely to lead

This argument for an openness of symbolism is not, in itself, an argument for extensive constitutional provisions that then provide a broad scope for judicial review of legislation. On the contrary, it tends to run in the opposite direction, arguing that we exercise some reticence in drafting constitutional poetry – that we don't try to write it all down.

We should shy away from attempts to proclaim 'the fundamental sentiments which Australians of all origins hold in common.' We do *not* share the same values, and we do not have to in order to be part of the same political community. Indeed, it would be a pretty bland Australia if we did. Instead, we should struggle for a form of patriotism that is at the same time more open and more complex – one that locates the definition of the country in how that country is lived, not in what it claims about itself. And, of course, that means that it locates its definition through time, not in any particular moment.

Conclusion

At its most basic level, this paper has been about the importance of taking symbols seriously. Constitutions are both symbolic and functional documents, and it is time we began to treat them that way.

Doing so is not easy, however. The symbolic and functional demands can be very different, and indeed can be in tension. A certain measure of institutional specialisation – a separate preamble or solemn declaration upon the creation of the republic - may be part of the solution, although we should not pretend that we can banish symbolism from the constitutional text itself.

And what kind of symbolism should we seek to achieve? I will end with a passage from the classics scholar, Gilbert Murray, who speaks of how inadequate our attempts to define the ends of our own lives are. In terms applicable to attempts to define countries as well as individuals, he says:

> *"... such words all ring false because they are premature or obsolete attempts to define, and even to direct, wants that are often still subconscious, still unformed, still secret, and which are bearing us in directions and towards ends of aspiration which will doubtless be susceptible of analysis and classification when we and they are things of the past, but which for the present are all to a large extent experiment, exploration, and even mystery."*[10]

In our constitutional drafting we should make sure that we leave sufficient room for that experimentation, exploration and even mystery. That way we will keep faith with the open and evolving character of our communities – and, not incidentally, with their democratic character.

* *Professor Jeremy Webber is the Dean of the Faculty of Law at the University of Sydney.*

This is an edited version of his inaugural lecture, delivered at the University in October 1998.

Endnotes

1. *These were the two elements presented in the Constitutional Convention Communiqué 13 February 1998.*
2. *Constitutional Commission Report of the Advisory Committee on Individual and Democratic Rights under the Constitution AGPS Canberra 1987, at 30.*
3. *Constitution of the United States, preamble.*
4. *Translation from J Waldron (ed) Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man Methuen London 1987, at 26.*
5. *Constitutional Convention Communiqué 13 February 1998.*
6. *Hansard, 7 June 1995, at 1435-1436.*
7. *Constitution of Ukraine, Article 2*
8. *Constitutional Commission Report of the Advisory Committee on Individual and Democratic Rights under the Constitution AGPS Canberra 1987, at 30.*
9. *Ibid, at 109-110.*
10. *G Murray, 'Poesis and Mimesis' Humanist Essays Unwin London 1964, at 91-92.*

Australian citizenship: years of change

Over the 50 years since the implementation of the *Nationality and Citizenship Act 1948* (Cth), thinking about the meaning of Australian citizenship has progressed from an understanding of citizenship as membership of a society that was British in culture and ethnicity, to concern to define the rights and responsibilities associated with full membership of a culturally diverse Australian society.

Ann-Mari Jordens* writes that these changes in thinking have occurred in response both to pressures within Australia and internationally.

Britain granted the status of British subject to the peoples of countries that had formed part of its empire. Following the 1939–45 war, the need was felt in some British Commonwealth countries for their own citizenship. Canada, with its ethnically and culturally diverse British and French populations, became in 1947 the first to create a separate citizenship. Although in Australia there was no popular pressure to create a separate citizenship status, the federal Cabinet decided in late 1945 that Australia would follow the Canadian model. The Australian *Nationality and Citizenship Act 1948* (Cth) came into force on January 26, 1949. From that date Australians became both Australian citizens and British subjects and remained British subjects until that status was abolished in 1984.

Concepts of national identity are revealed most clearly in citizenship legislation because it defines who belongs and who is excluded from the nation. The creation of a separate Australian citizenship did not change the prevailing conception of the 'imagined community'[1] of Australians, which was still seen essentially as Anglo-Celtic, male and white. On the contrary, this normative conception of the Australian citizen was reflected and reinforced by the Act. Until 1987, the Act defined an 'alien' as 'a person who does not have the status of British subject and is not an Irish citizen or a protected person'. The image of an Australian enshrined in the Act, therefore, was that of an Anglo-Celt. It also affirmed the inferior legal status of women in the family. Until 1969, children of married women could only attain their citizenship status through their fathers and only in 1984 was the definition of 'responsible parent' amended to provide equal rights to both parents. Before then a father could take a child out of Australia without its mother's permission

Citizenship policy was administered in a way that reinforced the understanding of Australia as a 'white' nation. Non-Europeans, no matter how long they had lived in Australia, were ineligible to apply for citizenship (although their Australian-born children gained it automatically). After 1956, non-Europeans who had lived in Australia for 15 years were allowed to apply for citizenship, although European aliens could apply for citizenship after living in Australia for five years and British nationals after one.

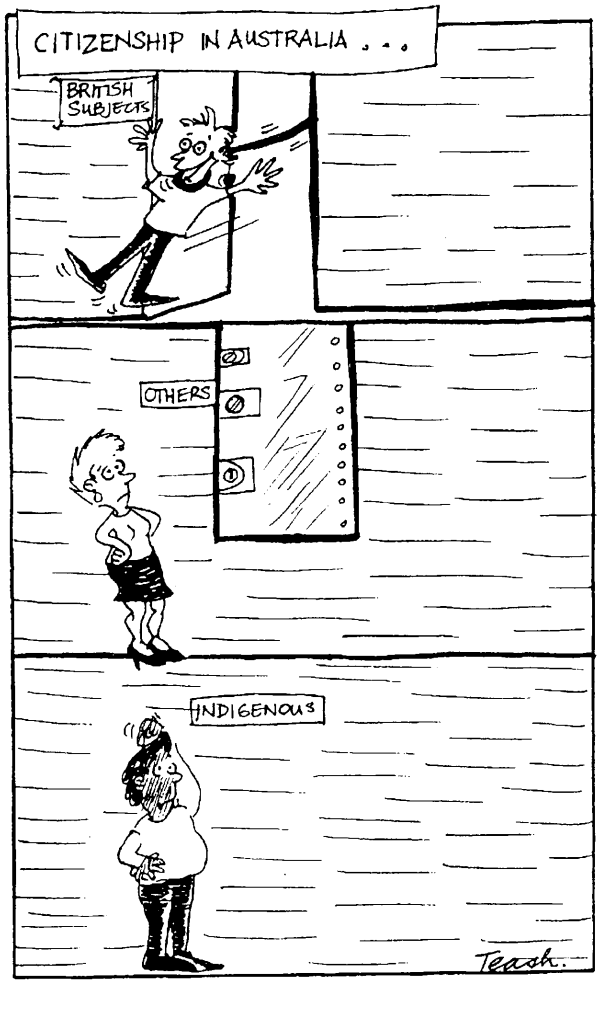
Responsibility for administering Australia's citizenship legislation was given to the Department of Immigration. Even it had no idea what it meant to be an Australian citizen as distinct from a British subject. In 1953, the

Secretary of that department, Tasman Heyes, asked his officers to clarify the difference between Australian citizenship and British subject status. The task was quite beyond them. At Heyes' request the desirability of having a Charter of Australian Citizenship was put before the community leaders who comprised the 1955 Citizenship Convention. They were similarly baffled and passed the ball back to the Minister for Immigration, Harold Holt, who dropped it into the too-hard basket where it stayed for many decades.

Agents of change

This lack of thinking about the meaning of Australian citizenship did not, however, mean that there were no forces in the community impelling change.

Aliens. Because responsibility for administering Australia's citizenship legislation was given to the same Commonwealth department responsible for overseeing Australia's postwar program of mass migration, thinking within the bureaucracy was firmly focused on strategies to encourage migrants to become citizens, not on what it meant to be an Australian citizen. For the first 30 years after the Second World War, therefore, non-British migrants were the principal agents of change in citizenship legislation.



The acceptance of Australian citizenship by aliens was seen as an indicator of their successful assimilation - of their social, political and cultural absorption into the mainstream community. To encourage this process the government gradually eased the requirements demanded of aliens seeking citizenship. In 1954 and 1962 it removed most of the obstacles caused by the complexities and insensitivities of the application procedures.[2]

British migrants were not agents of change. They were not the focus of citizenship promotion campaigns conducted by the Department of Immigration. Although citizenship was made particularly easy for them to obtain, they were the group least likely to apply for it. They had little incentive to acquire Australian citizenship because they could enter Australia without a visa, access all Australian social welfare benefits on arrival, and vote in Australian elections without being citizens.

Labor's changed vision 1972-75. Throughout their 22 years in power the Liberal-Country Party coalition governments consistently affirmed Australia's identity as a 'homogeneous' nation. This concept of Australian national identity was becoming increasingly untenable after 30 years of migration from a wide range of European nations and, after 1966, from a number of non-European countries.

The Labor government, elected in 1972, introduced an entirely new concept of Australian national identity - that of a multicultural society. It clearly identified systemic discrimination as the principal cause of the failure of many migrants to become Australian citizens and looked to a number of international instruments to set benchmarks for the rights of Australians. In 1973 it decided to ratify the United Nations covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and its Convention on the Political Rights of Women. It also agreed to ratify the convention adopted by the International Labour Conference in 1958 abolishing discrimination in employment. The principal consequence of these changes was the reconceptualisation of Australian citizenship from membership of a society essentially

British in culture and ethnicity, to a rights-based notion of citizenship. It emphasised this change by renaming the *Nationality and Citizenship Act* as the *Australian Citizenship Act* in 1973.

The Labor government also set about dismantling the network of discriminatory legislation, which had sustained the conception of Australia as a nation of essentially British culture and ethnicity. As well as declaring its intention to abandon all discrimination on the grounds of race and ethnicity in the selection of migrants, in May 1973 it announced that the *Aliens Act 1947* would be amended to eliminate the requirement that aliens notify the authorities annually of changes in their address, occupation and marital status. The federal government also amended the provisions of the *Crimes Act 1914* (Cth) allowing naturalised Australian citizens to be deported. In July 1973 the Minister for Immigration announced the end of pro-British discrimination. In future, Britons would require visas to enter Australia and like all other applicants for citizenship would be required to have lived in Australia three years before applying, attend naturalisation ceremonies and take the oath of allegiance. The *Commonwealth Electoral Act 1918* was to be amended to prevent British non-citizens from enrolling as voters.

Indigenous Australians

Citizenship status. The settlement of non-Europeans was prevented until 1966 through the administration a racially discriminatory migration policy. Indigenous Australians, who also were neither ethnically nor culturally British, were prevented from participating in the community of the nation both by excluding them from Commonwealth legislation that endowed non-Indigenous Australian citizens with social, political and civil rights, and by State legislation that deprived them of such rights.

From 1844, the naturalisation laws of the Australian colonies were directed towards aliens and, with the exception of Western Australia, made no mention of Aborigines. Prior to 1921, Indigenous Australians denied citizenship under colony or State law had to apply to become naturalised British subjects in Australia in the same way as aliens. Under the *Nationality Act 1920* (Cth), all Aborigines and Torres Strait Islanders born after January 1, 1921 gained the status of British subjects. In 1949, therefore, they automatically became Australian citizens under the *Nationality and Citizenship Act 1948* (Cth).

Social rights. Australian citizenship was a pure formality for Indigenous Australians. They had none of the rights and responsibilities of Australian citizenship as laid down in Commonwealth legislation. Section 51(xxvi) of the Australian Constitution empowered the Commonwealth parliament to make laws in respect to "the people of any race, other than the aboriginal race in any State for whom it is deemed necessary to make special laws". Until 1955, the Commonwealth administration took the view that it had no power to make laws giving social rights to Aborigines living in the States. That year the federal Attorney-General, Sir Garfield Barwick, interpreted this section as allowing general laws, such as those giving social service benefits, not to be regarded as 'special laws'.

Despite this ruling, Indigenous Australians were still marginalised and excluded from the social rights granted to Australian citizens. The *Social Service Consolidation Act 1947* (Cth) granted age or invalid pensions and maternity allowances only to those Aborigines who had applied to be exempted from State legislation governing Aborigines (that is, had renounced their Aboriginality and isolated themselves from their communities). In States that did not provide for exemption, Aborigines had to satisfy the Director-General that "by reason of the character and the standard of intelligence and social development of the native, it is desirable that a pension should be granted to him". This assessment of worth (and of assimilation) also determined the payment of unemployment or sickness benefits. Even when granted, pensions and allowances were not paid personally to Indigenous applicants but to "an authority of a State or to some other authority or person the Director-General considers suitable for the purpose". Child endowment was not paid to nomadic Aborigines or those dependant on the Commonwealth or State for support. Despite the Attorney-General's 1955 ruling, the *Social Services Act 1959* perpetuated these inequities. The situation was not remedied until s. 51 (xxvi) of the Constitution was amended following the 1967 referendum, when Australian citizens voted overwhelmingly to allow the Commonwealth to legislate for the benefit of Aborigines as well as other Australians.

Civil rights. Legislation restricting the citizenship rights of Aborigines varied from State to State and Commonwealth legislation did nothing to protect their civil rights; not even Indigenous parents' rights to be legal guardians of their children. The Commonwealth *Marriage Act 1961* deferred to States which required adult Aborigines to obtain the consent of authorities to marry. Aborigines had their freedom of movement restricted by s. 64 of the *Migration Act 1958*. Like children, they could not leave or be taken out of Australia without the permission of the Minister for Immigration. This was repealed by the Labor government in 1973.

Political rights. Indigenous and non-Indigenous Australians did not have the same political rights. At Federation, no Aborigine was entitled to vote for the Commonwealth parliament unless they were entitled to vote in a State. Their entitlements varied from State to State. This provision was preserved by the *Commonwealth Electoral Act* in 1949 and 1961, which added that Aborigines who had served in the Defence Force were entitled to enrol. In 1962, this Act was amended to allow Aborigines to enrol for federal elections irrespective of their voting rights in the States. Enrolment was, however, not compulsory. It was not until the *Commonwealth Electoral Legislation Amendment Act 1983* that Aborigines were obliged to enrol and vote like all other Australian citizens.

Citizenship responsibilities. Aborigines did not have the same responsibilities as other Australian citizens. The *Defence Act (No 2) 1951* only applied to forces comprised mainly of Aborigines. The *National Service Act 1964* exempted Aborigines from registration for the conscription scheme introduced that year for all Australian citizens.

Political and legal change. The first Indigenous organisation advocating citizenship rights was formed in 1919. By the 1930s there were a number of similar organisations, but their moderate tactics failed to engage the States in dialogue or debate. They did, however, attract support from non-mainstream white individuals and organisations such as the Communist Party and the nationalist writers of the Jindyworobak movement. The Commonwealth argued that the Constitution made Indigenous rights a matter for the States. The first national citizenship movement began in 1958 with the formation of the Federal Council for Aboriginal Advancement and its leaders became more militant. Indigenous leaders now argued that political rights were meaningless unless other civil, economic and social rights were also in place.

By redefining Australia as a multicultural nation and ratifying a number of international instruments which set new benchmarks for citizens rights in Australia, the Whitlam government (1972-75) created a political environment favourable to the Indigenous cause. It was not until that government passed the *Racial Discrimination Act 1975* (Cth) that Aborigines gained rights to equality before the law. This Act, which incorporated Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, conferred on Indigenous Australians the right to manage their own property and was binding at both Commonwealth and State levels.

Since the 1970s, Aborigines have struggled for land and cultural rights. The latter were guaranteed by legislation passed in 1981 protecting Aboriginal art and folklore. Both campaigns have benefited all Australians by forcing a recognition of the validity of cultural difference, drawing attention to group rather than individual rights, and requiring officials to refer to international conventions, which show that Anglo-Celtic norms do not always measure up to international standards of citizenship. Indigenous Australians are now the principal agents of change in Australian thinking about citizenship.[3]

Citizenship and the Constitution

Citizenship of Australia is not mentioned in the Constitution, it is a mere legal inference. Citizenship is, therefore, not a constitutional concept. As the history of Australia since 1901 has clearly demonstrated, the Constitution has not ensured adequate political representation to the two groups who had no voice in the discussions which led to the framing of the Constitution, and who were largely invisible to the men who formulated it - Indigenous Australians and women. Although they have had the vote since 1902, women have never enjoyed equality of representation in the Australian parliament, and there has been only one Aboriginal member (a second will take his seat in mid 1999). Since TH Marshall first published his work on citizenship in 1948,[4] it has been generally accepted that social and civil rights are just as important as political rights in ensuring full and equal participation in the community of

the nation. The history of Indigenous Australians since 1962 illustrates this clearly.

The *Australian Citizenship Act 1948* provides little more than a bare definition of citizenship and tells us nothing about its legal consequences. Although its preamble refers to the rights, obligations and liberties of Australia and its people, it nowhere explains what these are. As neither the Constitution nor the Australian Citizenship Act define the legal consequences of the legal status of citizenship, it is necessary to search through various pieces of legislation and separate pronouncements by the High Court of Australia to determine what they are. Kim Rubenstein, who has undertaken this task, comments that "the consequences are not always clear nor logically consistent".[5]

In his 1993 Deakin Lecture at the University of Melbourne, former Governor General Sir Ninian Stephen described the Australian Citizenship Act as "a masterpiece of legislative incoherence". He recommended that both it and the Constitution be rewritten so that all Australians might understand their rights and responsibilities and the nature of the Australian political system. Rubenstein argues that the legal consequences of the legal status of citizenship could be clarified by a statement in the Australian Citizenship Act. However, as the legal status of citizenship is not essential for full membership of the community, extreme care should be taken not to "disinvest non-citizens of rights and status they are entitled to, not as Australian citizens, but as citizens in the common cause of humanity".[6]

It seems anomalous that the Constitution, the founding document of Australian nationhood, does not include the concept of citizenship. The document clearly needs to be reviewed in the light of the changes which have occurred in Australian society, culture and values since 1901. At the very least, the Constitution should confirm the Commonwealth's right to legislate and define citizenship, as this has never been conclusively determined.[7] As a preamble to the Constitution does not have legal force, a charter of the rights of citizenship embedded in the Constitution along the Canadian model would provide the strongest legal basis for the rights and duties of Australian citizens, and would be the most democratic and educative option. Given the current state of confusion in Australia on the meaning of citizenship, and the need for bipartisan political support for any revision to the Constitution, this seems, at the moment, only a remote possibility.

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Her most recent books, Alien to Citizen. Settling Migrants in Australia 1945-75 Allen and Unwin in association with Australian Archives Sydney 1997 and Redefining Australians. Immigration, Citizenship and National Identity Hale and Iremonger Sydney 1995, were the product of a Research Fellowship held in 1992-93 in the Administration, Compliance and Governability Program within the Urban Research Program, Research School of Social Sciences, Australian National University.

Endnotes

1. *The term 'imagined community' is derived from B Anderson Imagined Communities: Reflections on the Origin and Spread of Nationalism Verso London 1983 (reprint 1991).*

2. *For changes in citizenship legislation see A Jordens Alien to Citizen. Settling Migrants in Australia 1945-75 Allen and Unwin in association with Australian Archives Sydney 1997, at 171-87.*

3. *For the most detailed account of restrictions on Indigenous rights see Bringing them Home Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 1997; See also A Davidson, From Subject to Citizen. Australian Citizenship in the Twentieth Century Cambridge University Press 1997, at 188-215; A Jordens Redefining Australians. Immigration, Citizenship and National Identity Hale and Iremonger Sydney 1995, at 8-13; A Jordens 'An administrative nightmare: Aboriginal conscription 1965-72' (1989) 13 Aboriginal History 124.*

4. *TH Marshall Citizenship and Social Class and other essays Cambridge University Press 1950.*

5. *Kim Rubenstein 'Citizenship in Australia: Unscrambling its meaning' (1995) 20 Melbourne University Law Review 517.*

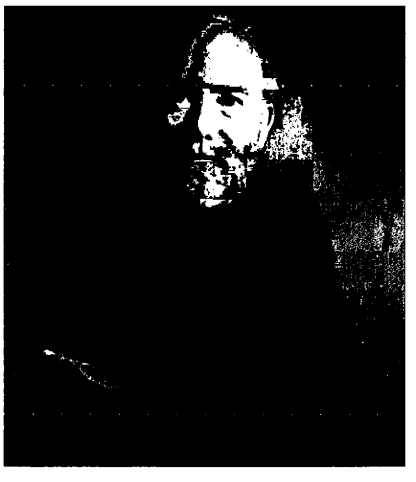
6. *ibid, at 527.*

7. *ibid, at 505.*

Indigenous Australians and the Constitution

The Admiralty's instructions to Lt. James Cook, issued in 1768, included the following:

"You are also with the consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain, or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors."[1]



By Emeritus Professor Garth Nettheim*

Possession of the eastern half of what is now Australia was claimed on August 22, 1770 at Possession Island. The "consent of the natives" was neither sought nor obtained. Nor was it sought when British sovereignty was subsequently extended to other parts of Australia. Nor was it sought when the self-governing colonies federated under the *Commonwealth of Australia Constitution Act 1900* (Imp).

As Michael Detmold has written "No entry has been made by Aborigines into the new legal order ...The Australian Commonwealth will not be a just commonwealth until the nature of the Aboriginal entry and its legal consequences are recognised."[2]

Detmold considers the possibility that Indigenous peoples may have entered the Australian polity implicitly, if not explicitly:

> *"It is clear how in contract, difference comes together in lawful reconciliation. The coming together of Aboriginal and European on the continent of Australia in 1788 was not in any obvious sense contractual. Of course it might have been - there might have been a treaty - but political philosophy has long seen that the contractual basis of community is more often implicit than explicit ... [I]t is not that there was actually an implicit treaty establishing the relation between Aboriginal and European. It is simply that when a society becomes minded to lawfulness (the opposite of tyranny) it is able to look back at the coming-together and reconstruct it so as to treat the parties with that lawful equality of difference of which contract is a paradigm. That time of course for Australia arrived in Mabo (No 2)."*[3]

But Detmold regarded the Mabo decision as inadequate "to constitute an Australian community in the matter". While the High Court "recognised Aboriginal difference in the matter of a different conception of title, they imposed the European valuation of it in the matter of the conditions of its extinguishment".[4]

But can we say that Aborigines and Torres Strait Islanders have accepted that they are members of the community of Australia? At least some

Indigenous Australians continue to question this proposition, not only by express assertions of continuing Indigenous sovereignty or the advocacy of the Aboriginal Provisional Government, but by conduct such as refusal to provide census information, or to register as electors, or to vote.

A conference in Canberra in mid 1993, organised by the Constitutional Centenary Foundation and the Council for Aboriginal Reconciliation, was told that the issue remains a live issue and that any revision of the Constitution needed to make provision for Indigenous Australians to decide whether they choose to be part of Australia (as distinct from a colonised minority) and, if so, on what terms.

"Considerable attention has been given to proposals for a revised preamble to the Commonwealth Constitution acknowledging such matters as the distinct place of Aboriginal peoples and Torres Strait Islanders and their prior ownership and occupation."

Some of those terms might include specific provisions to be added to the Constitution. Over recent years, considerable thought has been given to amending existing provisions or adding new provisions to the Commonwealth Constitution to accommodate Aboriginal peoples and Torres Strait Islanders.

Preamble

Considerable attention has been given to proposals for a revised preamble to the Commonwealth Constitution acknowledging such matters as the distinct place of Aboriginal peoples and Torres Strait Islanders and their prior ownership and occupation. The three major 'social justice package' proposals[5] recommended the inclusion of such preambles. The Australian Reconciliation Convention in May 1997 supported a preamble which would recognise "the Aboriginal peoples and Torres Strait Islanders as its Indigenous peoples with continuing rights by virtue of that status". The Constitutional Convention held in Canberra in February 1998 supported a preamble which would, among other things, acknowledge "the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders". Stronger language has been used in a number of preambular paragraphs that have been drafted over the years.

The 1967 referendum

The one substantial change to the Australian Constitution in regard to Indigenous Australians occurred 30 years ago with the deletion of s. 127 and the amendment of s. 51 (xxvi), the race power *(see below)*. Section 127 had provided: "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted." *(Editor's note: For further information on this and other amendments to the Constitution see 'The Australian Constitution: a time line' on page 55)*

The race power

Section 51 (xxvi) had conferred power on the Commonwealth parliament to make laws with respect to "The people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws". The italicised words were deleted in 1967 so that the Commonwealth parliament gained a clear concurrent power to pass laws with respect to Indigenous Australians.

But successive Commonwealth governments have been wary about using this power to override State laws and policies. In the 1970s it was twice invoked in regard to Queensland, once by the Whitlam government and once by the Fraser government. On each occasion, the Bjelke-Petersen government of Queensland managed to ignore or sidestep the Commonwealth Acts. Brennan and Crawford have suggested a "hidden Constitution" under which the Commonwealth power has "continued to be limited and residual".[6] While the Keating government secured enactment of the *Native Title Act 1993* (Cth) (the NTA) in the face of strong opposition, the electoral defeat of that government in 1996, and the 1998 amendments - which greatly weakened the NTA by placing significant aspects of native title at the mercy of State and Territory governments - may serve to reinforce the proposition that the power in s. 51(xxvi) is to be used sparingly.

The power has, however, been given a broad interpretation by the High Court, notably in *Western Australia* v *Commonwealth*.[7]

There have been suggestions that the power should be interpreted as a power to pass only laws which are *for the benefit of* Aborigines and Torres Strait Islanders, at least since 1967. The argument was rejected by a majority of the High Court in the *Hindmarsh Island Bridge Case*,[8] at least to the extent that it might limit the power of parliament to repeal or amend prior legislation.

In 1988 the Constitutional Commission recommended that s. 51 (xxvi) be deleted as a generalised race power and replaced by a specific power to pass laws with respect to "Aborigines and Torres Strait Islanders".[9] This change, if accepted, might serve to underline the notion that the Commonwealth has not just a power but a responsibility, and should, at least, set national standards in matters such as native title and cultural heritage, even if it leaves administration and service delivery at State/Territory level.

Section 25

There have been proposals for the removal of s. 25. This section relates to s. 24 as to how House of Representatives seats are to be allocated among the States. The general rule in s. 24 is that the allocation shall be in proportion to the population of the respective States. Section 25 qualifies this by providing that if, by the law of any State all persons of any race are disqualified from voting at elections for the State lower house, then persons of that race resident in the State shall not be counted in reckoning the numbers of people for the purposes of s. 24.

This provision serves to penalise any State which does deny the vote on the basis of race by reducing its share of seats in the House of Representatives. But some have argued that a provision which contemplates the possibility of such discrimination should have no place in the Constitution.[10]

Prohibition of racial discrimination

This raises the question whether the Constitution itself should prohibit racial discrimination.[11]

The *Racial Discrimination Act 1975* (Cth) (the RDA) was enacted to implement Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. It has been critical in countering State attempts to derogate from Indigenous rights in such cases as *Koowarta* v *Bjelke-Petersen*,[12] *Mabo* v *Queensland (Mabo No. 1)*,[13] *Western Australia* v *Commonwealth*.[14] But as a mere statute it may be displaced or even repealed by a subsequent Commonwealth Act.

The Constitutional Commission in 1988 recommended a general guarantee of freedom from discrimination on the basis of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief, with an exception for measures taken to overcome disadvantage.[15]

The Council for Aboriginal Reconciliation has proposed repeal of s. 25 and a constitutional prohibition of racial discrimination.[16]

Indigenous rights

The RDA is concerned with the principle of equality before the law and equal protection of the law. This would also be the function of a constitutional prohibition of discrimination.

Would such a provision be *sufficient* to provide constitutional accommodation for Indigenous Australians and the constitutional basis for reconciliation?

In its 'social justice package' proposals, the Council for Aboriginal Reconciliation distinguished between 'citizenship rights' and 'Indigenous rights'. 'Citizenship rights' comprised those rights to which Indigenous Australians were entitled on a basis of equality with other Australians. 'Indigenous rights', by contrast, refer to the collective and distinctive rights of Indigenous peoples in relation to land and waters, culture and so on.[17]

Similarly, the ATSIC (Aboriginal and Torres Strait Islander Commission) proposals urged acceptance by the Commonwealth of the fundamental rights of Aboriginal people and Torres Strait Islanders to:

(a) recognition of Indigenous peoples as the original owners of this land, and of the particular rights that are associated with that status;

(b) the enjoyment of, and protection for, the unique rich and diverse Indigenous cultures;

(c) self-determination to decide within the broad context of Australian society the priorities and the directions of their own lives, and to freely determine their own affairs;

(d) social justice and full equality of treatment, free from racism; and

(e) exercise and enjoy the full benefits and protection of international covenants.[18]

Equality rights are those in (d) and (e); specific Indigenous rights are those in (a), (b) and (c).

(a) Territorial Rights. Proposals for a preamble to the Constitution would provide recognition of Indigenous peoples as the *original* owners of the land. It would not, of itself, provide constitutional protection for the *continuing* territorial rights of Aborigines and Torres Strait Islanders. Some protection is provided, as against the Commonwealth, by the requirement in s. 51 (xxxi) for 'just terms' compensation for any acquisition of property.

Indigenous peoples in Australia and elsewhere insist that stronger protections are justified for the Indigenous relationship to land, particularly in relation to commercial development on the land. Such protection has been accorded in some land rights legislation and under the *Native Title Act 1993* (Cth), notably by giving Indigenous land owners some say as to whether mining should proceed on their lands, and if so, on what conditions, even in terms of the limited 'right to negotiate' under the NTA. (The 'right to negotiate' was significantly eroded by the 1998 amendments to the NTA.)

The need for protections has been recognised in the International Labor Organisation's 1989 Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries and in the UN Draft Declaration on the Rights of Indigenous Peoples.

(b) Cultural Rights. Some protection is provided for cultural rights of minorities under Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which Australia has ratified. Cultural rights are also incorporated in ILO Convention 169 and the UN Draft Declaration on the Rights of Indigenous Peoples. Some such provision could easily be incorporated in the Constitution, including some recognition of Indigenous law.

(c) Political Rights. The right of peoples to self-determination and to participate in decisions affecting them can be found in the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and the UN Draft Declaration on the Rights of Indigenous Peoples.

New Zealand provides for specific Maori seats in the national parliament. Norway legislated in 1987 for the Sami language and also to establish a Sami Assembly for the Indigenous people of the north. Denmark in 1978 legislated for home rule for Greenland with its Inuit majority.

The United States of America has long recognised a residual Indigenous sovereignty under the doctrine of 'domestic dependent nations'. In 1982, Canada provided constitutional protection for 'existing Aboriginal and treaty rights' and agreement has been achieved on a formula for recognition of an inherent right to self-government.

Some elements of self-government have already been developed for some Aboriginal and Torres Strait Islander communities. ATSIC has been described as an exercise of self-determination. The current federal government's references to self-empowerment are consistent with such developments, so are moves by the Queensland government.

To sum up: the Indigenous peoples of Australia, in common with Indigenous peoples elsewhere, have justifiable claims which are not confined to equality and non-discrimination but which extend to specific rights, as the First Peoples, to recognition and protection of their cultures, their territorial rights and their political rights.

Such provisions could be part of an overall Bill of Rights. Or, as in the Canadian Constitution, they could constitute a separate part of the Constitution.

Documents of reconciliation

The question of a National Document of Reconciliation is to be a primary focus in the final report of the Council for Aboriginal Reconciliation in the year 2000. Acceptance of the idea would raise the possibility of linking any such document to the Australian Constitution.

One method of doing so received some support in the context of the 1983 Makarrata proposal.[19] The Senate Standing Committee on Constitutional and Legal Affairs was rightly sceptical about the prospects of incorporating a fully-developed document within the Constitution, but did accept the possibility of incorporation by reference, modelled on existing s. 105A, added in 1929, to provide constitutional backing for the financial agreement with the States to meet the exigencies of the Great Depression.

Five years later the Constitutional Commission was not persuaded that such an amendment should be proposed in advance of the completion of such a document.[20]

On the assumption that such a document is agreed upon, then an amendment to give it constitutional support seems to be feasible and appropriate, just as Canada's Constitution, s. 35, provides constitutional support for land claim settlements.

States and Territories

Constitutional protection and recognition need not be confined to the national level of government. There is absolutely no reason why States and Territories should not, also, make provision in their Constitutions for Indigenous Australians. Indeed, it seemed quite possible that the Northern Territory will set the pace in this regard.

For some years the Sessional Committee on Constitutional Development of the NT Legislative Assembly worked at developing proposals for a new Constitution for the Territory. In 1996, its final draft Constitution proposed constitutional protection for Aboriginal land rights and sacred sites, a preamble which acknowledged prior Aboriginal ownership, and recognition of Aboriginal law as a source of law in the Territory.[21] A discussion paper had also proposed a separate, general Bill of Rights.[22]

However, most of these proposals were deleted from the revised draft Constitution that emerged from the NT Statehood Convention held in March-April 1998.[23] A referendum of NT voters was held on October 3, 1998 on the sole question whether people favoured a move to Statehood, and a majority of 51.31% voted No, apparently because of dissatisfaction with the draft Constitution.

Conclusion

The principal focus for constitutional change at present is the proposed referendum on the question of replacing the Queen by an Australian as Head of State. At the time of going to print, proposals for a preamble are also generating debate.

But under the *Council for Aboriginal Reconciliation Act 1991* (Cth), the target date for legislating the basis for reconciliation stands as 2001, the centenary of Federation. The Council, in its final report, may well recommend amendments to the Constitution, among other things. Any such amendment proposals may well touch on some or all of the matters mentioned in this paper.

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Endnotes

1. *JM Bennett & AC Castles, A Source Book of Australian Legal History LBC Sydney 1982. Emphasis supplied.*

2. *MJ Detmold, The Australian Commonwealth. A Fundamental Analysis of its Constitution LBC Sydney 1985, at 62-66.*

3. *MJ Detmold, 'Law and difference: Reflections on Mabo's Case' (1983) 15 Syd LR 159 at 165; republished in Essays on the Mabo Decision LBC Sydney 1993, at 45.*

4. *Ibid, at 166; 46.*

5. *Council for Aboriginal Reconciliation Going Forward: Social Justice for the First Australians AGPS Canberra 1995, at 35-37;*

ATSIC, Native Title Social Justice Advisory Committee, Recognition, Rights and Reform, AGPS Canberra 1995, at 43-48; Aboriginal and Torres Strait Islander Social Justice Commissioner, Indigenous Social Justice. Volume One - Strategies and Recommendations Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner Sydney 1995, at 9-18.

6. F Brennan and J Crawford, 'Aboriginality, Recognition and Australian Law: Where To From Here?' (1990) 1 Public Law Review 53.

7. (1995) 183 CLR 373, at 460-462.

8. Kartinyeri v Commonwealth (1998) 72 ALJR 722; 152 ALR 540.

9. Constitutional Commission, Final Report, AGPS Canberra 1988.

10. Ibid at 156; F Brennan, Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia Constitutional Centenary Foundation Inc 1994, at 22.

11. In Leeth v Commonwealth [(1992) 174 CLR 455] a majority of those members of the High Court who considered the question rejected the proposition that the Constitution contains an implied guarantee of equality and non-discrimination.

12. (1982) 153 CLR 168.

13. (1988) 166 CLR 186.

14. (1995) 183 CLR 373.

15. Constitutional Commission, Final Report, AGPS Canberra 1988.

16. Council for Aboriginal Reconciliation, Going Forward. Social Justice for the First Australians, AGPS Canberra 1995, at 38.

17. Ibid, at 22, 26-27.

18. ATSIC, Native Title Social Justice Advisory Committee, Recognition, Rights and Reform, Report to Government on Native Title Social Justice Measures, AGPS Canberra 1995, at 10.

19. Senate Standing Committee on Constitutional and Legal Affairs, Two Hundred Years Later - A Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People, AGPS Canberra 1983.

20. Constitutional Commission, Final Report, AGPS Canberra 1988.

21. Foundations for a Common Future 1996. See also Sessional Committee on Constitutional Development, Exposure Draft - parts 1 to 7: A new Constitution for the Northern Territory and Tabling Statement, Legislative Assembly of the Northern Territory 1995; also Aboriginal Rights and Issues - Options for Entrenchment, Discussion Paper No 6.

22. Sessional Committee on Constitutional Development, A Northern Territory Bill of Rights? Discussion Paper No 8, Legislative Territory of the Northern Territory 1995.

23. A Heatley and P McNab, 'The Northern Territory Statehood Convention 1998' (1998) 9 Public Law Review 155.

Judicial independence in the modern democratic state

By Julie Debeljak*

In recent years the judiciary in Australia has been subjected to increasing public scrutiny. The judiciary is faced with comment and criticism by members of the executive arm of government, politicians and the media. Genuine criticism and the freedom to express an opinion are imperative in a free and democratic society. As will be explained, so too is an independent judiciary.

Unfortunately much of the criticism of the judiciary is ill-informed. This threatens not only the independence of the judiciary, but the public's confidence in the ability of the judiciary to protect citizens from unwarranted government intervention.

In this article I will demonstrate the extent to which the peace and order of our society depends on maintaining an independent judiciary. I shall outline the constitutional arrangement of Australia, explain the concept of 'judicial independence' and its importance, and outline ways it is protected and threatened in Australia.

Constitutional arrangements

To fully appreciate the need for an independent judiciary one must have a basic understanding of the way Australia is *constituted*, that is the way in which Australia is governed. There are three arms to governmental structures in Australia: the legislature, the executive (otherwise known as the government or Crown) and the judiciary. The legislature makes the law, the executive implements the law, and the judiciary adjudicates disputes arising under the law. The role of each branch is meant to be separate. This ensures that no arm of government becomes too powerful and allows each branch to act as a check or balance on the other. This doctrine is called the separation of powers and is guaranteed under our federal system of government. One aspect of the separation of powers doctrine is the independence of the judiciary from the legislative and executive branches of government.

The doctrine of the rule of law should also be understood. One element of the rule of law is that no person or body is beyond the reach of the law. Our society is based on government *through* laws and government *under* laws. Members of each branch of government, public servants and police are subject to the same rules that govern the lives of ordinary citizens. Another element is that laws will be administered impartially, ensuring that all persons subject to the law are treated equally.

The judiciary

The judiciary is made up of the judges and magistrates who preside in Australia's courts. Each State and Territory within Australia has its own court hierarchy. Each hierarchy has a local court, usually called the

Magistrates Court, which is presided over by magistrates. Magistrates decide the less serious criminal cases and small disputes involving individuals and businesses. The more serious criminal cases and disputes are presided over by judges in the County or District Courts, and the Supreme Courts.

There are also Commonwealth courts. The Federal and Family Court judges decide disputes arising under laws made by the Commonwealth parliament. At the top of the State, Territory and Commonwealth hierarchy of courts is the High Court of Australia. High Court judges decide appeals from all the courts mentioned, as well as consider important constitutional cases concerning whether government has the power to make particular decisions and whether parliament has the power to enact certain laws.

Judicial independence

The doctrine of judicial independence dictates that when deciding cases, judges and magistrates must be free from any improper external influences. There are two types of external influences. Firstly, the judiciary as a branch of government must be independent of pressures from the government and the influence of the parliament, which is known as 'collective independence'. Secondly, individual members of the judiciary must be independent in two senses: they must have 'substantive independence', which means that in performing their judicial duties judges are answerable to no authority except the law; and they must have 'personal independence' from judicial colleagues and superiors.

Thus, judges and magistrates must make an assessment of the factual situation presented to them and then apply the law in a *fair and impartial* manner. Citizens would not be willing to submit to the decisions of the judiciary if they perceived that the judiciary was unfair or biased in its decision making process. Loss of confidence in the ability of the judiciary to adjudicate disputes may lead to disrespect for the law generally, threatening the peace and ordered running of Australia. As the then Chief Justice of the High Court, Sir Gerard Brennan, said:

> *"Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed."*[1] *[emphasis added]*

Another former Chief Justice of the High Court, Sir Anthony Mason, put it this way:

> *"Judicial independence is a privilege of, and a protection for, the people. It is a fundamental element in our democracy, all the more so now that the citizen's rights against the state are of greater value than his or her rights against another citizen."*[2]

The last part of Sir Anthony's comment must be given historical perspective. Before 1701 judges held office 'during the King's pleasure'. There was an incentive for judges to decide cases in a manner favourable to the Crown, or risk dismissal. It

was not unusual for the Crown to appoint his or her allies as judges. In 1701 the *Act of Settlement* (UK) was passed, which established that superior court judges were to be appointed during good behaviour and could only be removed by the Crown on an address (or request) of both Houses of Parliament. This guaranteed judges freedom from the political influences of the Crown. As Sir Anthony Mason suggests, this is of even greater significance today given the increase in the powers of the Crown as against the citizen in the modern state.

Protection of judicial independence

Judicial independence is concerned with removing reasons to suspect the judiciary of partiality or bias. There are many rules and conventions in place which serve this purpose, some of which I shall now elaborate on. Although I shall refer specifically to the federal system, equivalent provisions exist at the State level.

Security of tenure is one way of protecting the impartiality of judges. Judges must be free to decide disputes before them without fear of adverse repercussions and without favour to any external party. This sentiment is reflected in the *Act of Settlement*, referred to above. Today it is entrenched in the Commonwealth Constitution. Judges of the High Court are appointed for a term that expires upon the judge attaining the age of 70. They can only be removed by the Governor-General In Council[3] on request from both Houses of Parliament on the ground of proved misbehaviour or incapacity (s. 72). The same applies to judges of the Federal and Family Courts unless the parliament makes a law fixing an earlier age.[4]

Protection of the terms and conditions of work for judges also aids impartiality. Reducing the working load, salary or superannuation benefits of a judge is an indirect mode of improper influence as the threat of such action may influence the decision making process of the judge. The Commonwealth Constitution provides that a federal court judge's remuneration shall be fixed by parliament and cannot be diminished during their continuance in office (s. 72). Judicial salaries have been reduced only once in Australia's history, but this was during a period of national economic crisis and it applied to all judges. A related point is that courts need the tools to be independent in the sense that they need administrative and budgetary independence from the executive. The High Court has administrative and budgetary independence with the other courts enjoying such independence to varying degrees.[5]

Judges are said to be immune from suit. This means that judges cannot be sued for anything they say during court proceedings, nor can they be sued for making a mistake in exercising their judicial function. If a party to a case believes that the judge made a mistake, he or she can appeal to a higher court. Most court decisions result in at least one dissatisfied party. Judges would not be able to function properly and impartially were they operating under the threat of suit by a dissatisfied or vexatious party.

Threats to judicial independence

People may consider that the judiciary in Australia is immune from serious threats to its independence, given that we live in a democratic society governed by the rule of law. It is true that the judiciary does not face the blatant pressures from the government of the day or from parliament that may be witnessed in other countries. Yet vigilance is needed to preserve the independence of our judiciary and the confidence we have in the system that regulates our lives.

Traditionally, judges avoided public debate. Judges did not make public comments on cases (other than those that they heard) and did not attempt to publicly justify their decisions or counter criticisms made of their decisions. Rather, the Attorney-General, the chief legal officer of the executive, would speak on behalf of the judiciary generally. In addition, the Chief Justice of a court may have commented on the work of the court. However, the current Commonwealth Attorney-General and some State Attorneys-General are reluctant to defend the judiciary from misguided public debate and criticism. The media and public reaction to some 'controversial' decisions has led to this. The executive is a political creature, responsive to

"Judges must be free to decide disputes before them without fear of adverse repercussions and without favour to any external party..."

the views of the people. Accordingly, the executive caters to this adverse public reaction. In response, some judges have publicly attempted to explain their decisions and to clarify any misunderstandings the media or public may have. This threatens the independence of the judiciary as it draws judges into politics. Further, a judge's view expressed during public debate may lead to a perception of bias in a later case.

The appointment of judges should be done by a politically neutral body that appoints judges on merit, that is according to their training and suitability for the job. However, in Australia it is the executive that appoints judges, the executive being comprised of members of the government of the day. Thus, the community - at times - may perceive that political matters affect the appointment of a particular judge and thereby potentially affect the outcome of particular cases. Headlines in the media illustrate this. For example, in relation to the appointment of Justice Kenneth Hayne to the High Court, the headlines read: 'New High Court judge to temper activism' and 'Conservative to fill High Court vacancy'.[6] Concerning the appointment of judges more generally: 'Judges now picked for their political bias, says Kirby', and 'Wik anger: Premier seeks veto on High Court judges'.[7] Finally, in relation to executive pressure on the judiciary: 'Fischer lashes High Court on Wik', 'Chief Justice tells Fischer: stop attacks' and 'Chief warns against populist pressure'.[8]

Another method by which judicial independence is subverted is by abolishing courts. Some governments have abolished old courts or tribunals, reappointing only some former office holders to the replacement court or tribunal, or to another court or tribunal of equal standing. This occurred in 1982 when the magistracy of New South Wales was reorganised. Five former magistrates were not reappointed under a government policy not to reappoint judges considered unfit for judicial office. The NSW Court of Appeal decided that the decision was unlawful as the magistrates had not been given the opportunity to respond to the allegations regarding their fitness.[9] More recently, the Kennett government in Victoria abolished the Accident Compensation Tribunal. Its members had the status of County Court judges and their removal was to be by the Governor of Victoria on request of both Houses of Parliament. The judges were not offered alternative offices of equal status. Justice Michael Kirby, of the High Court, summed up the impact of abolition of courts as follows:

> *"If regular resubmission of judicial appointees to a suggested test of 'quality' is permissible, whether directly or indirectly, we have shifted the basis of tenure in judicial and like appointments."*[10]

In other words, the concept of judicial tenure, and its underlying principle of judicial independence, is threatened if we indirectly reassess the 'quality' of judges under the guise of abolishing courts and tribunals so as to ensure 'quality' in the courts.

Conclusion

Judicial independence is often cited as the bulwark of a free and democratic society. Although our system of government does recognise the importance of, and protects the independence of, the judiciary, there remain many direct and indirect ways of destroying judicial independence in today's society. This is especially so when the reach and power of the executive seems to be ever increasing. It is imperative for the continued peace and order of our society that people refrain from unduly endangering judicial independence. As Sir Ninian Stephen said:

> *"... an independent judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion indeed."*[11]

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Endnotes

1. G Brennan 'Judicial Independence' Speech, Australian Judicial Conference, Canberra 2 November 1996; available at http:www.law.monash.edu.au/JCA/brennan.html.

2. A Mason 'The Independence of the Bench, the Independence of the Bar and the Bar's role in the Judicial System' (1993) 10 Australian Bar Review 1, at 3.

3. The term 'Governor-General In Council' refers to actions taken by the Governor-General on the advice of the executive, usually the Cabinet.

4. Under s. 23A of the Family Law Act 1975 (Cth), judges of the Family Court must retire at the age of 65. In the absence of specific legislation, the default condition in the Constitution requiring retirement at age 70 applies to Federal Court judges.

5. See Parts III and V and ss. 35 and 36 of the High Court of Australia Act 1979 (Cth).

6. M Kingston Sydney Morning Herald 13 August 1997, at 1; B Lane The Australian, 13 August 1997, at 1.

7. B Lagan Sydney Morning Herald 6 Jan 1998, at 3; M Millett Sydney Morning Herald 19 Feb 1997, at 1.

8. J Woodford Sydney Morning Herald 11 Jan 1997, at 1; J Woodford, Sydney Morning Herald 28 Feb 1997, at 1; M Millett, Sydney Morning Herald 23 April 1997, at 3.

9. Macrae v Attorney-General (NSW) (1987) 9 NSWLR 268.

10. M Kirby 'Abolition of Courts and Non-reappointment of Judicial Officers', (1995) 12 Australian Bar Review 181, at 192.

11. N Stephen 'Southey Memorial Lecture: Judicial Independence - A Fragile Bastion' (1982) 13 Melbourne University Law Review 334, at 339.

The Constitution and judicial review

Constitutional issues are political issues. Judicial review allows unelected judges to strike down the legislative initiatives of an elected parliament and, therefore, is sometimes said to be undemocratic.

However, the practice of judicial review can be seen to serve the democratic end of limiting government power even if the courts which engage in that practice are not themselves democratically constituted.

Professor Tony Blackshield* discusses whether the courts - through the process of judicial review - are the natural entity to determine the validity of Acts of Parliament.

In the early years of our Federation the doctrine of implied immunity of instrumentalities - espoused by the High Court in *D'Emden v Pedder*,[1] but finally abandoned by it in the *Engineers' Case*[2] - was disapproved by the Privy Council because, by adopting such a doctrine, the High Court had asserted a power to declare that State legislation was invalid. In *Webb v Outrim*,[3] their Lordships not only misspelt the respondent's name (which was 'Outtrim'), but betrayed a fundamental misunderstanding of how the Australian Constitution was to work. The concept that a constitutional court could sit in judgment on the validity of legislation, ringingly proclaimed for the United States by Chief Justice Marshall in *Marbury v Madison*,[4] could have no application in Australia (said their Lordships) because the supposed analogy between the Australian and American Federations could not be sustained. On the one hand, the States of the American union had 'the power of independent legislation', whereas Acts of the Australian State parliaments required 'the assent of the Crown'. On the other hand, once that assent was given, an Australian State statute 'becomes an Act of parliament as much as any Imperial Act', protected against judicial interference by the same doctrine of parliamentary sovereignty as prevailed in the United Kingdom.

> *"The American Union . . . has erected a tribunal which possesses jurisdiction to annul a statute upon the ground that it is unconstitutional. But in the British Constitution, though sometimes the phrase 'unconstitutional' is used to describe a statute which, though within the legal power of the Legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, the statute in question is the law and must be obeyed. It is obvious that there is no such analogy between the two systems of jurisprudence as the learned Chief Justice [of the High Court] suggests."*[5]

In short, the Privy Council (or at least the Earl of Halsbury, who spoke for their Lordships) believed in 1907 that the working of the Australian Constitution should reflect the same subordination of judicial power to parliamentary power as had come to prevail in England. In England, as Sir Albert Dicey had argued in his *Introduction to the Study of the Law of the Constitution* in 1885:

> *"Parliament ... has ... the right to make or unmake any law whatever ... English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges."*[6]

It was true that, back in 1610, Chief Justice Coke had asserted a judicial power to "control Acts of parliament and sometimes adjudge them to be utterly void".[7] But English judges had long ceased making such claims, and in 1885 Dicey was able to dismiss *Dr Bonham's Case* as "obsolete".[8]

It is possible that if in *Webb v Outrim* their Lordships had been concerned with the validity of a Commonwealth statute, rather than a State statute, they might not have made such a blunder. So far as the Commonwealth parliament was concerned, it might have been obvious, even to Lord Halsbury, that the Constitution did *not* endow it with unlimited legislative power, but only with power to make laws with respect to the various matters specifically assigned to it by the Constitution (chiefly by s. 51). Had his Lordship looked further, he might have seen that, quite apart from that limitation of Commonwealth legislation to specified topics or purposes, the constitutional text also imposed overriding restrictions on the effect which such legislation could have. (For example, s. 116 provides that "the Commonwealth shall not make any law" for interfering with freedom of religion in any of four specified ways.) He might even have seen that the text itself imposed similar limitations on the powers of the States. (For example, s. 114 provides that "a State shall not, without the consent of the parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth ...".)

It was true that in a series of 19th century cases the Privy Council had affirmed that the legislatures of British colonies (within "limits of subjects and area") had "authority as plenary and as ample ... as the Imperial parliament in the plenitude of its power possessed and could bestow".[9] But whatever the situation in the Australian colonies, their transformation into States of a federal Commonwealth was effected by the coming into force of the federal Constitution and their only existence *as States* was that which the Constitution gave them. As States of a Federation, they were created by and dependent upon the federal Constitution and were necessarily subject to whatever limits it might entail.

Of course, whatever limits the Constitution might expressly or impliedly impose on the legislative powers of either the Commonwealth or the States, it did not necessarily follow that those limits would have *legal* force. The Constitution might have been treated as a mere political document; a declaration of good intentions. One oddity of Dicey's approach to constitutional law, still overwhelmingly influential in 1907, was his distrust of written Constitutions. While insisting that judicial power was always subordinate to the power of parliament, he also insisted that the common law could restrain government power more effectively than a written constitutional text,

"...the effective supervision of limits on institutional power must at least be entrusted to some body other than the power-wielding institution itself. A constraint which means whatever the person or body constrained might decide it to mean is no constraint at all."

which might sometimes be only a scrap of paper and in any event might always be "suspended".[10] The 20th century has seen many examples of written Constitutions that have proved to be even more ineffectual than Dicey implied: Giovanni Sartori has called them "façade Constitutions" or even "fake Constitutions".[11] A favourite rhetorical example is the Soviet Constitution of 1936, filled with eloquent declarations of human rights, which did little to protect Soviet citizens. But a Constitution becomes a façade or a fake, or at best a mere political charter, only if it has no mechanism for authoritative interpretation and authoritative scrutiny of whether the limits it imposes on government, or the distribution of powers which it ordains, are in fact being observed.

To be sure, the existence of such a mechanism does not follow as a matter of logical necessity from the mere existence of a written Constitution. It would logically be possible for the constitutional constraints on the power of a legislative body to be interpreted and applied *by that legislative body itself.* It would even be possible - given a sufficiently alert and informed electorate - to argue that, if parliament had the primary responsibility for policing the limits of its own powers, its effectiveness and good faith in doing so would sufficiently be guaranteed by normal political checks. But, realistically, the effective supervision of limits on institutional power must at least be entrusted to some body other than the power-wielding institution

itself. A constraint which means whatever the person or body constrained might decide it to mean is no constraint at all.

Even if we accept the need for an *independent* body to determine the constitutional validity of Acts of parliament, it does not necessarily follow that this body should be a court. We could maintain, on a permanent footing, a constitutional convention representing the people or the States, or both; or we could assemble such a convention *ad hoc* whenever disputes about constitutional limits on power arose. Or we could establish (as was done at one stage in Thailand) a joint tripartite commission, representing the judiciary, the legislature and the executive government.[12] Within a bicameral parliament we could set up a joint standing committee of both houses; or simply refer constitutional problems to the upper house - the Senate - in its role as a house of review. But some of these suggestions seem too clumsy, inefficient or wasteful of resources; and others seem too likely to be dominated by merely political processes.

As compared with these suggestions a court is a natural choice. It has genuine independence and at least an appearance of impartiality. It can be kept permanently available to deal with disputes on a relatively inexpensive basis and it is the institution traditionally used in our society for the definitive resolution of other kinds of disputes. Indeed, once constitutional disputes are defined as *legal* disputes, a mechanism for judicial review seems almost the only choice. If the rules which govern the distribution and limits of governmental and legislative powers are seen as *legal* rules, then the practices and techniques developed by judges for interpreting and applying legal rules in other disputed areas seem to offer a ready-made resource for interpretation and application of constitutional rules as well.

Of course, it does not necessarily follow that *all* constitutional rules should be defined as legal rules. The High Court has consistently taken the view that some parts of the Australian Constitution are *not* legally enforceable and, therefore, *not* subject to judicial review. One example is s. 54, which prevents a government from 'tacking' other matters onto the annual appropriation bills (the budget). A more controversial example is s. 53, which limits the power of the Senate in respect of money bills. The High Court has treated both of these as essentially laying down guidelines for proper parliamentary procedure - 'constitutional' rules in the limited British sense used by Lord Halsbury - to be interpreted and enforced by the parliament itself.

Yet any extensive resort to constitutional provisions which are 'unenforceable' or 'not legally binding' would lead us back into the realm of the façade or the fake, or at best, of mere pious sentiment. One example currently attracting controversy is the final communiqué issued by the Constitutional Convention in February 1998, which foreshadowed a new preamble to the Constitution affirming fundamental national values, but which also insisted that such a preamble was to have *no legal effect* - and foreshadowed also that this insistence should be reinforced by a new provision in Chapter III of the Constitution (which governs Commonwealth judicial power), forbidding judges from taking any notice of the preamble when interpreting the Constitution. The danger is that a preamble stripped of all legal effect might be stripped of all meaning.

At the least, attempts to ordain fundamental constitutional principles, yet also to shield them from any possibility of judicial enforcement, wear a self-contradictory air. The apparent contradiction leaves the intended result vulnerable to defeat in two quite opposite ways. Either the affirmation of principles will prove to be ineffective, or the shield against judicial scrutiny will prove to be so.

The latter has proved to be the case, for example, with the 'directive principles' set out in Part IV of the Constitution of India (which borrowed the idea from the 1937 Constitution of Ireland). The Indian 'directive principles' are prefaced by Article 37 of the Constitution, which states that the provisions which follow shall be "fundamental in the governance of the country", but also that they "shall not be enforceable by any court". Yet Article 21 (which *is* judicially enforceable) provides that no one shall be deprived of "life or personal liberty" except according to procedures established by law, and in seeking to give a judicially ascertainable content to the words 'life' and 'liberty', the Supreme Court of India has begun to use the directive principles to supply that content.[13]

Of course, that kind of outcome is only possible when a court becomes 'activist' - even 'proactive' - in its practice of judicial review. That the practices of the High Court of

Australia have generally stopped short of 'activism', apart from a brief controversial flurry in the early 1990s, has been the product of many factors. One is the continuing influence of 'parliamentary sovereignty'. Another factor, itself perhaps reflecting the influence of Dicey's ideas on Australian constitutional law, is that Australia has *not* entrusted the task of judicial review of legislation to a specialised 'constitutional court'. On the one hand, though constitutional matters are regularly removed into the High Court, *any* court in which a constitutional issue arises has the power and (apart from removal) the duty to determine the issue for itself. On the other hand, our 'constitutional court' (the High Court) is also an ordinary appellate court in matters of general law; and for much of its history constitutional cases have been only a small part of its workload. This latter factor, in particular, has meant that the doctrines and techniques developed by the court in its constitutional work have been influenced, to an unusual degree, by those of the common law. Whether it would be better to entrust the task of judicial review to a specialised 'constitutional court' may perhaps be a matter for future debate. Certainly Dicey would not have thought so.

"Inevitably, constitutional issues are political issues; and because judicial review entails the power of unelected judges to strike down the legislative initiatives of an elected parliament, it is sometimes said to be undemocratic."

While Lord Halsbury's attempt to impose that notion on Australian constitutional law was ineffective and misconceived, its influence *within* the practice of judicial review in Australia has nevertheless been profound. The legislative powers of the Commonwealth parliament may be confined by s. 51 to specified limited areas; but so long as the exercise of those powers is found to be 'within power', the High Court has generally assumed that the manner in which the power is exercised, or the purpose for which it is exercised, is not subject to judicial review. The exceptions to that assumption have been confined to cases where the powers conferred by s. 51 are perceived to be subject to other overriding limitations, spelled out elsewhere in the Constitution (as with s. 116) or necessarily implied in its text and structure (as with the implied constitutional commitment to freedom of political discourse). Alternatively, they are confined to cases where the *purpose* of the legislation is relevant to its validity, or where the legislation does not fall *directly* within the constitutional power, but is brought within it only by an 'incidental' extension of the power.

Inevitably, constitutional issues are political issues; and because judicial review entails the power of unelected judges to strike down the legislative initiatives of an elected parliament, it is sometimes said to be undemocratic. Insofar as limitations on government power reflect basic democratic values, the practice of judicial review can be seen to serve democratic ends, even if the courts which engage in that practice are not themselves perceived as democratically constituted. But a problem remains, and for constitutional law it may be acute.

Judicial development of common law rules may often be far-reaching, and sometimes misconceived, but in that respect the doctrine of parliamentary sovereignty still prevails, so that judicial developments can always be overridden by parliament. When judges interpret legislation, the same limit on their power applies: if the legislating parliament thinks its intention has been misconstrued it can always legislate again to make its intention clearer. In both these respects, insofar as parliament is a representative democratic body, judicial decisions are ultimately subject to democratic control.

But when judges interpret the Constitution, and especially when they declare that an Act of parliament is unconstitutional, there is nothing the parliament can do. In the words of the United States Supreme Court, the Constitution is "superior paramount law, unchangeable by ordinary means".[14] By the Constitution - and therefore by the judges' interpretation of it - the parliament itself is bound.

In theory, at least in Australia, the fact that the Australian *people* have the power to amend the Constitution means that the ultimate overriding control on the judges' constitutional work is the most democratic of all. But the real or perceived difficulties of the referendum procedure cast a long shadow over that theory. The need to ensure

that judicial review not only serves democracy, but is itself subject to effective democratic control, is one of many reasons why we need to amend our procedure for constitutional amendment.

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Endnotes

1. *D'Emden v Pedder (1904) 1 CLR 91*
2. *Engineers' Case (1920) 28 CLR 129*
3. *Webb v Outrim (1907) AC 81*
4. *Marbury v Madison, 5 US (1 Cranch) 137 (1803)*
5. *Webb v Outrim, at 88-89*
6. *A Dicey Introduction to the Study of the Law of the Constitution, 1885, at 39-40, 60*
7. *Dr Bonham's Case (1610) 8 Co Rep 107a, at 118a; 77 ER 638, at 652*
8. *A Dicey, at 61-62*
9. *Hodge v The Queen (1883) 9 App Cas 117 at 132; see also R v Burah (1878) 3 App Cas 889 and Powell v Apollo Candle Company (1885) 10 App Cas 282*
10. *A Dicey, at 195-202*
11. *G Sartori 'Constitutionalism: A Preliminary Discussion' (1962) 56 American Political Science Review 853*
12. *See Nash & Valaisathien, 'Thailand: the Courts and the Legal Profession' (1974) 5 Lawasia 61.*
13. *See Mohini Jain v State of Karnataka AIR 1992 SC 1858; Unni Krishnan v State of Andhra Pradesh AIR 1993 SC 2178*
14. *City of Boerne v Flores* 138 L Ed 2d (1997)

The Republic Debate

In November this year the Australian people will be asked to vote in a referendum on whether to change the Constitution to become a republic. For republicans the issue of how to choose a Head of State has become a contentious one between those advocating direct election by the Australian people and the Constitutional Convention model of bipartisan appointment by parliament.

In this series of articles, Adrienne Stone, from the Australian National University, advocates a model that she believes will strike a balance between these concerns. The Australian Republic Movement's Malcolm Turnbull and Professor David Flint, of Australians for Constitutional Monarchy, debate their respective viewpoints.

The republic and popular involvement in presidential nomination

*By Adrienne Stone**

Most of the controversy concerning the proposed constitutional amendment to implement an Australian republic has concerned the method by which the new Head of State, the President, would be appointed.

Among republicans there is an important, and much highlighted, division between those republicans who would have the President directly elected by the Australian people and those, most prominently represented by the Australian Republican Movement, who advocate a parliamentary appointment process. The latter model was endorsed by the Constitutional Convention in 1998 and it is this proposal that will be put to referendum in November of this year. It provides for presidential appointment by a two thirds majority of the parliament.[1]

The focus on the appointment method is understandable for it will largely determine the character of our republic. This article will address the controversy over the appointment method with special reference to the nomination procedure adopted by the Constitutional Convention and since fleshed out in a proposal by a group of republicans, of which I am a member.[2] I will explain how the proposal for popular involvement in the nomination of the President strikes the appropriate balance between the concerns of the direct election and the parliamentary appointment republicans.

Why the controversy?

Broadly understood, 'republicanism' is a philosophy of government that values, among other things, involvement of citizens in the process of government.[3] Thus, the republican debate in Australia focused on one aspect of this, involvement of the citizenry in the selection of our Head of State.

Here lies the point of disagreement between the direct election and parliamentary appointment republicans. For the direct election republicans that involvement should be through the direct election of the President by the Australian electorate. They oppose entrusting the parlia-

ment with this task. This unwillingness to allow parliament to make the choice is commonly grounded in a distrust of or cynicism about the parliamentary process and even the notion of representative government. The parliament is decried for its domination by the major parties and the executive. It is seen as an elite far removed from the Australian people. According to its supporters, a

"A President might perceive himself or herself to have a greater political mandate than the Prime Minister, after all, he or she would have a direct link to the Australian people whereas the Prime Minister would not."

directly elected presidency would be a healthy counterbalance to this and would certainly be preferable to giving over the selection process to the unrepresentative, elitist parliament.[4]

Against this, republicans who support a parliamentary appointment model usually justify it on the basis that it is compatible with our current form of parliamentary democracy. Under this system a President would be faced with the task of enforcing fundamental constitutional principles through the exercise of the President's reserve powers. Although this requires that the President have a measure of legitimacy, it also requires that the President be, and be seen as, above politics. Supporters of parliamentary election suggest that a directly elected President might have difficulty achieving the appearance of non-partisanship after an election. By contrast, they argue, the parliamentary appointment of the President ensures an appropriate measure of legitimacy while at the same time removing the President from the political process that would undermine his or her impartiality.[5]

In addition, it is sometimes argued that the direct election of the President might even be dangerously destabilising. A President might perceive himself or herself to have a greater political mandate than the Prime Minister, after all, he or she would have a direct link to the Australian people whereas the Prime Minister would not. This belief might tempt the President into the inappropriate exercise of the reserve powers against the Prime Minister, undermining our parliamentary system. Thus it is argued that if the new Presidency is to exist along side the parliament with its current powers, the President should not have a greater mandate than the parliament and the executive. This problem could only be satisfactorily overcome if the President's reserve powers could be codified and, perhaps, made reviewable by the High Court, a matter on which the Convention could not agree.[6]

The better argument is, I think, with the those who support the parliamentary appointment model. Even assuming that the direct electionists' cynicism of the parliament and enthusiasm for more direct participation is well placed, the expression of that in a popularly elected President within the context of our present system is unwise. The parliamentary appointment republicans are right: direct election may undermine the President's capacity to transcend party politics and it may even be dangerous to invest an essential symbolic figure with a greater degree of political legitimacy than can be found in the parliament and executive.

This is not to say, however, that popular election could not work under any circumstances. However, the concern with popular alienation from the political process could be more satisfactorily addressed with appropriate codification of the reserve powers or, less plausibly, in a full executive presidency.[7]

Public involvement in nomination

One challenge for the Convention was to address the concern for popular involvement in the selection of the President within the bounds of the existing parliamentary system. From the robust debate of the Convention emerged a proposal for popular involvement in the nomination procedure. The communiqué of the Constitutional Convention sets out a nomination procedure designed to "ensure that the Australian people are consulted as thoroughly as possible [and] ... involve the whole community".[8] Specifically mentioned is consultation with State and Territory parliaments, local government, community organisations, and individual members of the public.

According to the communiqué, the nomination process is to be overseen by a committee that should have a balance between parliamentary and community membership and take into account so far as practicable considerations of federalism, gender, age and cultural diversity. The com-

mittee is to produce a shortlist for consideration by the Prime Minister. Nominations are not to be disclosed by the committee without the nominees' consent.

This nomination procedure is not included in the proposed constitutional amendment. The Convention took the view that the process is likely to evolve with experience and thus is best dealt with in ordinary legislation.

The Mason proposal

On December 16, 1998 in an open letter to the Commonwealth Attorney-General, Sir Anthony Mason and a group of republican academics set out a proposed nomination procedure that expanded on the nomination procedure approved by the parliament. I was a signatory to that letter.

Expansion on the proposal in the communiqué was clearly necessary before the proposal could be set down in legislation. Although the Convention had offered some guidelines, it left many matters of detail undecided. The proposal we put forward addressed these matters of detail in three parts.

First, it proposed that any person can nominate another by a short written statement in support of the nominee and with the nominee's written consent. The nominator, but not the committee, can make the nomination public though, again, this requires the written consent of the nominee.

Second, the proposal addressed the composition and procedures of the nomination committee. To reflect the diversity of the Australian community (and the guidelines of the Constitutional Convention) it was proposed that the committee be composed as follows.

Four members from the federal parliament including at least one man and one woman. The committee is to be chaired by a member nominated by the Prime Minister and the Deputy Chair will be nominated by the Leader of the Opposition. The committee is to include one member nominated by the leader of each of the third and fourth largest parties in the parliament.

Two community representatives appointed by the Prime Minister, one of whom must be an Indigenous Australian and one community representative nominated by the Leader of the Opposition. At least one man and one woman must be selected.

Eight State and Territory 'community representatives' to be chosen by each Premier or Chief Minister after consultation with local government and community organisations.

After consultation and deliberation the committee will prepare a shortlist of at least five candidates. The proposal leaves the committee to determine how the shortlist is to be selected, but stipulates that at least one man and one woman must be shortlisted and that the candidates should not be ranked. The committee is not to interview candidates but, provided that there is no direct contact with the candidates, it is to consult as widely as possible. The committee shall prepare a report outlining the background and qualifications of each shortlisted candidate. The shortlist and the report is to be provided to the Prime Minister and the Leader of the Opposition and the shortlist is to be made public at that time.

Finally, the proposal suggests a timetable for the nomination procedure. The committee, it is proposed, should be set up no earlier than six months and no later than five months before the President's appointment. The committee will have 28 days to devise the official nomination forms and clarify procedural details. Following that, it has 28 days to receive nominations plus a period of 56 days to assess them. Then the shortlist will be presented to the Prime Minister and the Opposition Leader. The Prime Minister, with consent of the Leader of the Opposition, will then submit a candidate to the parliament between 14 and 21 days after receiving the shortlist. As specified by the Constitutional Convention, that candidate will become President if approved by a two thirds majority in a joint sitting of the two houses of parliament.[9]

Conclusion

Thus the public nomination procedure envisaged by the Constitutional Convention opens up the nomination procedure to the public. As expanded in the Mason propos-

al, this represents a significant dilution of the parliament's power over the selection of the President. The nomination committee will not be dominated by members of parliament, but will be drawn from a broader cross-section of the Australian population. In addition, it will provide a mechanism for considerable consultation. Thus the shortlist from which the Prime Minister will have to choose will not simply reflect the will of the parliament. It will reflect the committee's own diverse membership and its wide consultation.

Popular involvement in the nomination procedure obviously does not achieve all that those advocating direct election would desire. However, appreciating the incompatibility of direct election with our current parliamentary system, the popular nomination process is an acceptable compromise and, indeed, represents a significant improvement on a simple parliamentary appointment model.

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Endnotes

1. *Report of the Constitutional Convention* Communiqué *vol 1, at 44-45.*
2. *See 'President Must be the People's Choice'* The Australian *16 December 1998, at 15.*
3. *See G Williams 'A Republican Tradition for Australia?' (1995) 23* Federal Law Review *134.*
4. *Report of the Constitutional Convention, Transcript of Proceedings, vol 3, at 43 (Ted Mack). Other delegates who campaigned for direct election include Clem Jones, Pat O'Shane, Paddy O'Brien and Phil Cleary. See Report of the Constitutional Convention, Transcript of Proceedings, vol 3 and 4, at 102-3, 152, 171, 757-8 867-8.*
5. *G Winterton 'The 1998 Convention: A Reprise of 1898?' (1998) 21* University of New South Wales Law Journal *856, 858.*
6. *Report of the Constitutional Convention, Transcript of Proceedings, vol 3, at 137-42, 158-61.*
7. *Although this model has been advocated by some prominent participants in the republican debate such as Ted Mack, it was clearly rejected by the Convention. Report of the Constitutional Convention, Transcript of Proceedings, vol 3, at 44, 138-40, 160.*
8. *Report of the Constitutional Convention* Communiqué *vol 1, at 44.*
9. *Ibid, at 45.*

The republic: a vote of confidence in Australia

*By Malcolm Turnbull**

In November this year, all Australians will have an opportunity to say what we believe about our community. We will have a choice to vote to retain the British monarch as our nation's Head of State or to vote to have an Australian citizen, chosen with the support of both sides of politics, as our Head of State. That decision will be the most important political choice most of us have ever made.

In February 1998, the Constitutional Convention concluded with a recommendation, overwhelmingly carried, that the 'bipartisan appointment of the President model' be put to the people in a referendum pursuant to s. 128 of the Constitution.

The Convention was held to deliberate on and recommend a republican model to be put to the people in a referendum. By the end of the Convention, 133 of the 152 delegates voted in favour of the bipartisan appointment model being put in a referendum. Of the 76 delegates who were elected by the people, 58 (more than three quarters) voted in favour of that resolution. Both the Prime Minister and the Leader of the Opposition committed their parties to put that model to the people.

Whether you consider the Convention's outcome by reference to all the delegates or just those that were elected, it is clear that there was overwhelming support for the people being presented with a clear cut choice between the monarchy, on the one hand, and an Australian citizen as our Head of State appointed by a bipartisan super-majority of parliament, on the other.

But is the bipartisan appointment model a good one for Australia? Would a variant have been preferable? Most relevantly of all, can it carry the day?

The changes proposed by the bipartisan appointment model are, in fact, very modest. A President would be Australia's Head of State, replacing the Queen and her representative the Governor-General. The President would have the same powers as the Governor-General does today.

To arrive at a list of candidates for President, nominations would be sought from the public. These nominations would be considered by the 32-member Presidential Nominations Committee. This committee would be made up of members of the Commonwealth, State and Territory parliaments and the general community. As such, the committee would be representative of the diversity of Australia in terms of ethnicity, age, gender and geography. (In short, it will not be comprised solely of middle-aged gentlemen from Sydney and Melbourne). Once the committee has considered the nominations for President, it would devise a shortlist of candidates to be presented to the Prime Minister and the Leader of the Opposition, who will choose a single candidate from that list. The motion of appointment of the President would be moved by the Prime Minister and seconded by the Leader of the Opposition. The President would then be need to be approved by a two-thirds majority of a joint

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sitting of both houses of the Australian parliament.

The powers of the President would be handled in this way: in those circumstances where the Governor-General has conventionally acted on advice, which is in all cases but those involving the use of the reserve powers, the Constitution will state that the President will act on advice. However, this will not be so in those areas where the reserve powers are, or can be, applicable: the appointment and dismissal of the Prime Minister, the dissolution of parliament and the issuing of writs for an election.

In this area, the Convention decided not to codify the constitutional conventions, and instead resolved that the Constitution should state that the existing conventions, which govern the office of Governor-General, should continue to apply. Advocates of codification, myself included, had to face up to the fact that the overwhelming majority of delegates did not share our passion for 'spelling it out'.

In terms of dismissal of the President, the Convention resolved that the Prime Minister should have the power to dismiss the President. Within 30 days the Prime Minister would be required to bring his or her action before the House of Representatives for ratification. If it were not ratified, it would constitute a vote of no confidence and, consistent with convention, he or she would be obliged to resign. It should be noted in this context that following the removal (or indeed the resignation, death or disability) of the President, the office would be filled, pending a formal new appointment by the joint sitting, by the senior State Governor, which is consistent with current convention.

It can be seen that this model is essentially a republican facsimile of the status quo with four significant innovations. The first is that the President is appointed by a bipartisan parliamentary process instead of an hereditary, sectarian procedure governed by British law in the case of the Queen, or by the decision of the Prime Minister in the case of the Governor-General. The bipartisan appointment model offers an opportunity to improve the quality of our public life. It is an opportunity to say that at least one public office in this country shall be the result of cooperation between the two leaders in our parliament. It is also an opportunity to say that the person who fills this office will be a constitutional umpire - a person who is above politics. It is an opportunity to say that the person who fills this office will have the bipartisan support of our parliamentary representatives and through those representatives, the support of the majority of Australians.

The second is that public consultation will be injected into the process of determining Australia's Head of State where it has never existed before. The idea is that the sifting through and assessment of nominations should be done by a group of people who truly represent our Australian society; our diversity of gender, culture, ethnicity and geographical diversity.

The third is that while the reserve powers remain the same, with all of the attendant merits and vices of the current dispensation, the non-reserve powers are to be stated to be exercised on advice, thereby making the Constitution a more accurate reflection of how the system actually works.

The fourth is that while the President can be dismissed by the Prime Minister, thereby preserving the current arrangement as between the Prime Minister and the Governor-General, the Prime Minister cannot, in a republic, sack the President and appoint a new one in his or her place. The casual vacancy so created will be filled by the senior State Governor in office, over which the Prime Minister will have had no influence at all. Then within a specified interval the parliament would convene in a joint sitting to appoint a new President - a process that, as we have seen, will require the concurrence of the Opposition Leader.

The model has been attacked by monarchists, who say it goes too far, and direct electionists, who say it does not go far enough. The monarchists' case is really an emotional one. If you were to analyse the Convention model as being, in fact, the status quo minus the Queen and plus a bipartisan mode of appointment, it is hard to see how it could be anything other than an improvement. Would anyone not applaud John Howard if, for example, he were to undertake that the next vice-regal appointment would be made with the support of the Opposition?

The advocates of a directly elected President are, in most cases, equally

emotional. With only a few exceptions, none of the direct electionists favour a United States system with an elected President, who is both Head of State and of government, and a completely separate legislature, also elected by the people. Our Australian direct electionists want to give the people the right to directly elect a President who will have the same largely ceremonial duties as the Governor-General. It would be a fraud on the people and a temptation to the incumbent.

We would be saying to the people of Australia: "You may directly elect just one public official, not the Prime Minister who heads the government, nor any member of his Cabinet, not the Chief Justice who heads our highest court nor any of the other judges, but the President who has almost no political power."

To the incumbent we would be saying: "We want you to run for national political office, we want you to raise the campaign funds and the support of political parties and other organisations. We want you to win the people's support knowing that in victory you will drink the intoxicating brew of popular endorsement ... and then we want you to spend five years doing what you are told by the Prime Minister, receiving ambassadors, welcoming guests, awarding medals and opening fetes."

"But wait, there's something else. Every now and then there may be a constitutional crisis, perhaps an impasse between the Senate and the House of Representatives. If that occurs we want you to act as a constitutional umpire. We want you to forget your political partisanship and forget that more Australians have voted for you than for any other public official. We want you to act as though you were the figure of impartiality, immune to the transitory shifts of public sentiment. We want you to act like a judge."

I am sure there are a few saintly souls who could be directly elected and then passively play the part of ceremonial Head of State and occasional constitutional tie-breaker ... but I have not met any yet.

We spend a lot of time reflecting on how the Olympics will put Australia in the global spotlight. But the real spotlight will be on this referendum. We cringed when the world reacted to the rise of Hansonism in Australia. We were embarrassed that a substantial minority, but a minority nonetheless, could embrace the divisive and intolerant nonsense of One Nation. But what will the world say if, on the verge of the millennium, the centenary of our life as a nation, Australia signs up for another 100 years of the British monarchy?

What will it say about our belief in a tolerant, multicultural society if we reaffirm that our Head of State must be a member of the British ruling family and must, by law, be a member of the Anglican Church?

What will it say about our belief in ourselves, our confidence in our own people, if we reaffirm that no Australian, not the best or most brilliant, is good enough to be our Head of State. In 1930 it took a great struggle by Prime Minister Scullin to persuade King George V that an Australian, Isaac Isaacs - one of our greatest jurists - was good enough to be Governor-General, the monarch's viceroy or representative. Nearly 70 years later, have we come no further? Do we still believe that Australians are only good enough to have the second ranking post?

Finally, what will it say about our commitment to a society of equal opportunity if we reaffirm that there will always be one office in our society to which no Australian may aspire, an office the occupant of which is defined by heredity, not ability, by sectarianism, not tolerance, and by the laws of the United Kingdom, not the laws of Australia?

Whether we have the Queen as our Head of State or not, we are a tolerant and independent country. Those who are nervous and unthrilled by republicanism should bear in mind that even John Howard is of the view, expressed to the Financial Review on October 15, 1998, that if we do become a republic "the fabric of the Australian community is not going to be, in any way, damaged or hurt by the process".

The reality is that in February last year something remarkable occurred. One hundred and fifty two delegates from all over Australia gathered in Canberra for a Constitutional Convention to consider Australia's future. In the 97 years of our Federation there has been far too little public involvement in the Constitution

and its reform. We believe that the principal obstacle to constitutional change in Australia has been ignorance and a lack of popular involvement. The republican cause is, apart from the 1967 amendments, the first occasion where there has been genuine popular movement for constitutional change, and the Constitutional Convention was testament to this.

Coming out of the Constitutional Convention process, two things became clear: Australians want an Australian as Head of State and an even larger percentage of them want to be able to vote on this issue at a referendum.

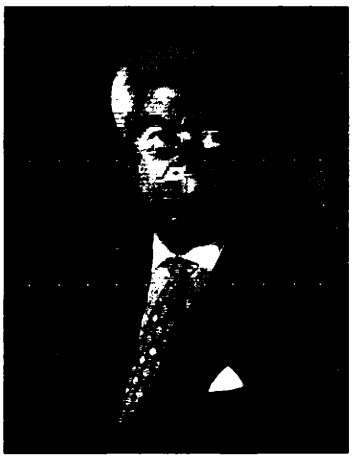
The Australian people expected us at the Constitutional Convention as commentators, advocates and opinion leaders, to present them with a republican alternative that they felt confident enough to vote for. Our role was to frame the question and to present the case for change, so that they may give us the final answer. In response to this, the Constitutional Convention concluded with a recommendation, overwhelmingly carried, that the 'bipartisan appointment of the president model' be put to the people.

The goal of republicans now is a clear one. Australia's Head of State should be an Australian citizen, representing Australian values, living in Australia, chosen by and answerable to Australians. The Australian people clearly support this change. Our task is now to offer them the means of doing so. If we fail to mobilise behind the bipartisan appointment model, we may deny the people the opportunity to achieve an Australian Head of State at the turn of the century.

In November this year we will be faced with a vote of confidence. We must not fail to carry this amendment. We cannot allow ourselves to fail this test. We cannot carry a no-confidence motion in ourselves.

* *Malcolm Turnbull is Chair of the Australian Republican Movement.*

A Rolls Royce Constitution



There are two questions in the republican referendum. First, why should Australia become a republic? Second, is the republican model better than, or at least as good as the present Constitution?

*By Professor David Flint**

So what are the reasons for becoming a republic? Some rather odd ones have been proposed. For example certain ex-diplomats and other worthies tell us that some foreign leaders find our Constitution 'confusing'. So to meet their needs we have to change our system of government. It's claimed an Asian Cabinet Minister told a well known Australian businesswoman that his country was 'ready to help us in our struggle for independence from Britain'. And the former Indonesian President, General Suherto, was apparently equally confused about our Constitution. He couldn't understand why the Governor-General wasn't thrown into gaol in 1975. (Under the referendum model, a Prime

Minister won't even have to do that. He or she will be able to sack the Constitution referee whenever he or she wants to.)

But many Australians probably don't understand and don't need to understand the constitutional arrangements of other nations. It's their business not Australia's. And our constitutional arrangements are for Australia's good, not others.

Yet other reasons have been advanced in the media. It is claimed a republic will improve trade, create jobs and unleash our artists from cultural oppression. It will allow us to experiment with the legislation of illicit drugs! Even in the 1931-32 Bodyline cricket series between Australia and Britain has been dragged in - by a former Chief Justice!

These 'arguments' are seriously being put forward as grounds to amend, remove, replace or add to about one third of our federal Constitution. Yet the Australian Constitution is the blueprint for one of the most successful, enduring, open and generous societies the world has ever seen. To change it Australians will need compelling arguments.

When former Prime Minister Paul Keating converted republicanism from a curious dinner party topic to a political platform, he knew he must make a very good case for change. So first he ridiculed our Constitution. It was, he said, imposed on us by the British Foreign Office. (Surely he meant the Colonial Office?) He was then reminded that our Constitution was drafted in Australia by Australians. And unlike other great Federations at the time, it was actually approved by the Australian people in each of the six States - not just by politicians. So he fell silent. But only briefly. Then he changed tack. It was, he now claimed, only about having an Australian as 'Head of State'.

The first difficulty was that most Australians had never heard of this term. The term 'Head of State' is not in our Constitution. It's a term so rarefied it's mainly used by diplomats. To them it's very important. It determines such great issues as who sits where at banquets. Or who gets a 21 or 19 gun salute. In fact, a recent Gallup poll published by the London *Daily Telegraph* makes the same point. Nearly half of those polled could not correctly name the British Head of State.

Humpty Dumpty once said to Alice: "When I use a word it means just what I choose it to mean, neither more nor less." Similarly, a 'Head of State' means precisely what a government chooses it to mean. The Head of State can be a president, a dictator, a king, a king and a bishop, an emperor, a grand duke etc. He or she can be purely ceremonial or exercise absolute power. Hitler called himself a Head of State. Stalin didn't. What they called themselves didn't really matter. Incidentally, you can have more than one - the Soviet Union had 24. Imagine. Twenty-four residents as Presidents!

Now the Australian government, and its predecessors, hold out the Governor-General as our Head of State. As Professor Colin Howard observes: "It seems ... that practice and law now coincide to support the proposition that, certain matters of ceremony and courtesy apart, the Head of State in Australia is not the Queen but the Governor-General."[1]

The Australian Republican Movement nevertheless challenges this conclusion.

The proposition is that the functions of the Governor-General, who is said not to be the Head of State, are to be transferred to a President, who will then miraculously become a Head of State! Note particularly that the functions of the Queen (who is said to be the only Head of State) are not to be transferred to the President.

The Queen's role in the appointment of the President will in fact be transferred to the politicians collectively in a joint sitting of the Parliament. The Queen's role in the dismissal of the President will be transferred to the Prime Minister. What we are being offered is a politician's republic.

But apart from the difficulty of finding a worthy reason for change there is another serious hurdle. We come to the second question. If you propose to gut your Constitution you have to replace it with something better. The republicans have failed this test. It's not as though there

hasn't been time. This debate has been going for the better part of a decade. It's not as though there hasn't been the opportunity. There was Mr Keating's Republican 1998 Advisory Committee stacked to the brim with republicans and with skewed terms of reference. It provided public funds to republicans to come up with a model. Then there was Prime Minister John Howard's Constitutional Convention. It gave the republicans a magnificent opportunity to produce the best republican model.

The republicans have, since 1993, produced two models. The first Keating-Turnbull republic did not, as it claimed, make the President a mirror image of the Governor-General. It would have made Australia similar to the present French Fifth Republic with two powerful competing politicians, a President and a Prime Minister. (Incidentally, the only reason France tolerates the inevitable tension between these two is that the dozen or so previous Constitutions since 1789 failed when they were put under pressure.)

The second republican model goes to the other extreme and it is the one that is the culmination of the republican's efforts. It bears all the marks of frantic manoeuvring and 'back of the envelope' drafting at the 1998 Constitutional Convention. It puts the President at the absolute mercy of the Prime Minister. Unlike any other democratic republic in the world, the Prime Minister will be able to sack the President. At any time. For any reason. Or no reason. Without any notice or right of appeal. A power which the Prime Minister certainly does not have now. Leading experts on the Constitution - mainly republicans - have identified the model's serious flaws. And, remember, the Australian public is passionate about fair play. A rule change which allows one of the captains to send off the referee when he's about to rule against that team will be recognised as the rort it so clearly is. This republican model is not only an embarrassing failure - it is dangerous.

The leading democratic republican Ted Mack points out that many in the Australian Republican Movement, the media and academia know that the model is flawed yet continue to push the 'Yes' case. We must ask, why the rush? Is it to get on with a bigger agenda? Perhaps the flag is next and then the States. And then?

Whatever the reason Australians are now being told not to worry about the details. They can be fixed up later! This is extraordinary. It is difficult to think of a better way to permanently destabilise and damage our system of government than to have constitutional debate, confusion and change every couple of years.

Just as a used car salesman trying to sell a wreck tells a gullible purchaser to bring it back for repairs if something goes wrong, the Australian people are being told to take a wreck in exchange for their Rolls Royce constitution. They won't wear that.

* *Professor David Flint was a legal adviser to the ACM No Republic Team at the 1998 Constitutional Convention and the 1999 No Republic referendum campaign.*

He is also the National Convenor of Australians for Constitutional Monarchy.

Endnotes

1. *C Howard Australian Federal Constitutional Law 3rd ed, LBC Sydney 1985, at 112.*

The Australian Constitution *a time line*

Joanna Longley* provides a time line of the major texts relating to the Australian Constitution, and an outline of our attempts to change it.

1890

Official Record of the Proceedings and Debates of the Australasian Federation Conference, 1890, Parliament House, Melbourne

The Federation Conference was attended by representatives of all States and NZ. The conference resolved in favour of a convention to consider a federal Constitution.

1891

Official Report of the National Australasian Convention Debates, Sydney, March 2 to April 9, 1891

Seven delegates from each State and three from NZ attended the National Australasian Convention, with Sir Henry Parkes of NSW as convention president. A draft Bill to constitute the Commonwealth was adopted. The Bill was not approved by the NSW parliament and was shelved by other States.

1895

A conference of colonial Premiers in Hobart resolved that a further convention be held to draft a Constitution.

1897 - 1898

Official Report of the Debates of the National Australasian Convention: Adelaide, March 22 to May 5, 1897; Sydney, September 2 to 24, 1897; Melbourne, January 20 to March 17, 1898

The convention president was Sir Charles Kingston. Ten delegates from each State, except Queensland, attended the first session. By the third session in Melbourne another Bill to constitute Australia was drafted.

1900

***Commonwealth of Australia Constitution Act, 1900* (63 & 64 Victoria, Chapter 12)**

The Imperial Parliament at Westminster passed an Act to create the Commonwealth of Australia and its Constitution on July 9, 1900.

1901

The Constitution took effect on January 1, 1901, when the Commonwealth of Australia came into being.

1906

Constitution Alteration (Senate Elections) 1906

A referendum to allow for minor changes to s. 13 of the Constitution, including the provision for Senators' terms to commence on July 1 and end on June 30 was passed on December 12.

1910

Constitution Alteration (State Debts) 1909

A referendum was held on April 13, 1910. A proposal to give the Commonwealth unrestricted power to take over State debts passed, but a proposal to set a fixed payment

out of surplus revenue to the States failed.

1911 - 1926

A number of failed referendums were held between 1911-26. A referendum on the extension of the Commonwealth's trade and commerce power and the nationalisation of monopolies was held on April 26, 1911; May 31, 1913; and again on December 13, 1919.

A further unsuccessful referendum on the extension of the Commonwealth's legislative powers was held on September 4, 1926. A second proposal to empower the Commonwealth to protect the public against the interruption of essential services also failed.

1927 - 1929

Report of the Royal Commission on the Constitution, 1929

In August 1927 the Commonwealth government appointed the Royal Commission on the Constitution, with Mr JB Peden as Chairman. The Commission reported in September 1929. There were no legislative outcomes.

1928

Constitution Alteration (State Debts) 1928

On November 17, 1928 a referendum was passed enabling the Commonwealth to enter into financial arrangements with the States and to legislate to give effect to such agreements.

1937 - 1944

A referendum on March 6, 1937 proposed giving the Commonwealth powers to legislate on air navigation and aircraft, and exempting any Commonwealth law with respect to marketing from the requirements of s. 92. The proposals of the 1911 referendum were again put to a referendum on August 19, 1944. This referendum also proposed to empower the Commonwealth to legislate for a five year period on such matters as rehabilitation of ex-servicemen, family allowances, Aborigines and national health. All proposals failed.

1946

Constitution Alteration (Social Services) 1946

Another referendum was held on September 28, 1946 on the Commonwealth's power to make laws with respect to social services (passed) and the organised marketing of primary products, and to legislate on terms and conditions of industrial employment (rejected).

1948 - 1951

A proposal to give the Commonwealth power to legislate to control rents and prices went to a referendum on May 29, 1949, but failed.

After the *Communist Party Dissolution Act 1950* was declared beyond the constitutional power of the government, a referendum to overcome the problem was held on September 22, 1951, but also failed.

1956 - 1959

Report from the Joint Committee on Constitutional Review, 1959 [a 1958 interim report is appended to this report]

The Joint Committee was appointed in 1956 and reported in 1959. The report was never debated in detail and only one proposal (to allow an increase of members in the House of Representatives without a similar increase in Senate numbers) was submitted - unsuccessfully - to the 1967 referendum.

1967

Constitution Alteration (Aboriginals) 1967

The Joint Committee proposal on the size of the House of Representatives was rejected at a referendum on May 27, 1967. A second proposal to remove any grounds for the belief that the Constitution discriminated against the Aboriginal race, and to allow Aborigines to be counted in the census succeeded.

1973

An unsuccessful referendum was held on December 8, 1973 on price control and incomes.

1973 - 1985

Proceedings of the Australian Constitutional Convention were published for each plenary session, along with reports of the Standing Committees. Some Standing Committee reports were published separately

The Australian Constitutional Convention was appointed in 1973, to identify areas of the Constitution in need of change and to refer these areas to standing committees.

The Convention held six plenary sessions from 1973-85, and established four standing committees. It produced more than 130 recommendations. Four were put to a 1977 referendum - three passed.

1974

A referendum was held on May 18, 1974 on: simultaneous elections for the House of Representatives and Senate; the right of ACT and NT electors to vote in referendums; to make population the basis of determining the average size of electorates; and extending to the Commonwealth the power to borrow on behalf of, and make grants to, local government bodies. All proposals failed.

1977

Constitution Alteration (Senate Casual Vacancies) 1977

Constitution Alteration (Retirement of Judges) 1977

Constitution Alteration (Referendums) 1977

Four proposals were put in a referendum held on May 21, 1977. Once again a proposal to bring the House of Representatives and Senate elections into line was rejected, but proposals to allow ACT and NT electors to vote in referendums; to allow casual Senate vacancies to be filled by a person of the same political party; and to set the retirement age of federal judges at 70 were accepted.

1984

A referendum was held on December 1, 1984 on simultaneous Senate and House of Representative elections, and on a proposal to enable the Commonwealth and states to refer powers to each other. The referendum failed.

1985-88

First report of the Constitutional Commission, 1988

Final report of the Constitutional Commission, 1988

The Constitutional Commission was established in December 1985, chaired by Sir Maurice Byers. It was to report on a revision of the Constitution and established five advisory committees.

Four Commission recommendations were put to a referendum on September 3, 1988. None succeeded.

The proposals were: four year maximum terms for both the Senate and the House of Representatives; fair and democratic parliamentary elections throughout Australia; the recognition of local government; and to extend the right to trial by jury and freedom of religion and to ensure just compensation for property acquired by any government.

The five Advisory Committees produced reports on the specific areas of the Australian judicial system; distribution of powers, executive government; individual and democratic rights and trade and national economy.

1993

An Australian republic: the options - the report of the Republic Advisory Committee, 1993

The Republic Advisory Committee, chaired by Malcolm Turnbull, was established on April 28, 1993 to examine options for an Australian republic.

1998

Report of the Constitutional Convention, 1998

The Constitutional Convention on February 2-13, 1998 was a people's convention with 152 delegates, 76 of them elected. The convention supported Australia becoming a republic, and proposed a model for bipartisan appointment of the President be put to the people before the end of 1999.

1999

Constitution Alteration (Establishment of Republic) Bill

Constitution Alteration (Preamble) Bill

Presidential Nominations Committee Bill

In November 1999 a referendum will be held to decide whether Australia will become a republic. The bipartisan model and a proposal for a new preamble will be voted on by the electorate. Exposure drafts and explanatory statements are available at:
http://www.dpmc.gov.au/referendum.

* *Joanna Longley is a former Australian Law Reform Commission librarian.*

Work in progress: the adversarial inquiry

The Australian Law Reform Commission has now made a preliminary analysis of its empirical research on the Federal Court, the Family Court and the Administrative Appeals Tribunal (AAT). Helen Dakin writes,* some of the results are surprising, disproving widely held beliefs about the workings of the federal civil litigation system.

The research by Commission staff was based on a sample of the cases finalised in the AAT during August, September and October 1997; and by consultants Tania Matruglio and Gillian McAllister on cases finalised in the Federal Court during February, March and April 1998, and in the Family Court during May and June 1998.[1] Each period chosen was set to show representative samples of court and tribunal workings. Information was collected from the court and tribunal databases and from the individual case files held by the courts and tribunal.

The solicitors associated with the cases, or the parties themselves if unrepresented, were surveyed on aspects of the litigation procedure, in particular for information on their legal costs. Analysis of this solicitor/ litigant survey information is not yet available.

Some key findings from the studies of court and tribunal case files are set out below.

Who are the litigants?

One of the tasks of Commission staff and consultants was to collate information to show who are the litigants and applicants in the federal civil justice system. The courts varied in the extent to which they collect such demographic data on litigants.

In the AAT and the Federal Court, the government is a consistent litigant. All matters in the AAT involve government departments or agencies, notably Comcare, Centrelink and the Department of Veterans' Affairs. In the Federal Court, government departments are present as applicants (usually regulatory bodies such as the Australian Securities Commission) and, more often, as respondents (in particular the Department of Immigration and Multicultural Affairs and the Australian Taxation Office).

Of other AAT and Federal Court applicants and litigants, the sample showed varying numbers of private individuals, businesses and associations. In the Federal Court sample, 48.5 per cent of applicants and 14.3 per cent of respondents were individuals; 39.3 per cent of applicants and 35.4 per cent of respondents were businesses; and 7.2 per cent of applicants and 47 per cent of respondents were public agencies. The remainder were organisations such as trade unions, cooperative or unincorporated societies, or registered clubs. In the AAT, nearly all applicants were individuals; however, out of a total of 1588 cases there were 50 business applicants - most of them in taxation administration or customs and excise matters. A majority of the individual applicants (67.6 per cent) were male, and men made more applications than women in every category of case. The gender difference was most marked in taxation matters, in which 90.8 per cent of applicants were male, and least marked in social welfare matters, in which 56.7 per cent of applicants were male.

The Family Court case files provided the most illuminating demographic data on litigants. Parties in this court were almost all individuals, although the government was joined as a party in a small proportion of cases dealing with the operation of the *Family Law Act 1975* (Cth).

The Family Court is a superior, and therefore an expensive court, yet the Commission's research shows many of the litigants have limited means - 37 per cent of applicants and 38 per cent of respondents were not in the workforce, and were categorised as engaged in home duties, retired, unemployed, or students or benefit recipients. Those in the workforce were fairly evenly distributed across occupational groups, but the weekly incomes of most litigants in the Family Court were below the national average of $596.20 for all (full and part-time) employees.

The average weekly income for litigants in the Family Court was $674.48, somewhat higher than the national average for all workers, but below the average for full-time workers of $767.80. The income for female litigants was 60.3 per cent of that for male litigants. Half of the litigants in our sample disclosed incomes of $500 or less per week. This is a very low base from which to finance litigation.

What is the dispute?

While there were significant differences in subject matter, in the AAT all disputes concerned the making of an administrative decision.

By contrast, in the Federal Court there was considerable variety in the subject matter of cases coming before the court. The court itself classifies 235 different case types, of which 55 were identified in the sample analysed by the ALRC consultants. The largest case category was migration and refugee cases, which constituted 22 per cent of the caseload in the sample. Other major categories concerned the Trade Practices Act (16.3 per cent); corporations law (12.2 per cent); Administrative Decisions (Judicial Review) Act matters (9.1 per cent) and intellectual property matters (8.4 per cent).

The major categories in Family Court cases are children's cases (concerning residence, contact and specific issues) and financial cases (concerning property and maintenance). In the sample, 15.2 per cent of cases involved both children's and financial issues. These categories were further defined into 'house and garden' cases (72.5 per cent of the sample), complex businesses (three per cent) and for children's matters, cases with allegations of child abuse.

Case delay

One of the persistent criticisms of our litigation and review system is that it is a time-consuming process characterised by extensive delays. Our review does not confirm this. Despite the complexity of many of its cases, the Federal Court disposes of its cases quickly: the median time from commencement to finalisation was seven months, and 8.4 months for cases proceeding to judgment. Most cases in the Federal Court are resolved either quite early, at the directions hearing stage (40.8 per cent of cases), or by judgment (35.4 per cent). Very few cases were resolved at the door of the court: almost all cases listed for hearing went through to judgment. This may be a result of the court's Individual Docket System, by which a judge has responsibility for the management of the interlocutory process of a case, up to and including a hearing. This system is said to increase the likelihood that the interlocutory process will clarify issues and persuade the parties to settle if this is at all possible.

In the AAT there were significant differences between the times taken to resolve different case types. Compensation and Veterans' Affairs matters took the longest to resolve, with a mean of 11 months 10 days and 11 months 4 days respectively. The fastest cases were social welfare cases, with a mean of six months 20 days. Between 23.5 per cent and 38.8 per cent of matters in each case type went through to a final hearing; however, a significant proportion of cases listed for hearing were settled by consent or other means at the hearing. Social welfare cases were the most likely to require a determination (35.5 per cent of these cases, out of 38.8 per cent attending a final hearing); in compensation, Veterans' Affairs and taxation matters between 23.5 per cent and 35 per cent of cases went to a hearing, but between 15 per cent and 17 per cent of cases required a determination. The relatively large number of cases being withdrawn or settled 'at the door of the tribunal' (22.3 per cent of all cases; 44 per cent of compensation cases) and settled in the applicant's favour, may indicate that the case management process or the government agency involved did not make the optimum use of the chance to resolve cases earlier.

Perhaps the most surprising finding was that the Family Court cases sampled did not show a significant problem with delay. The median time from commencement to finalisation

for the Family Court cases sampled was 5.23 months for disputed matters and eight days for consent orders. Most cases were settled fairly early: just over 50 per cent were settled at the directions hearing stage. Eight per cent of cases ultimately received a judgment: their median duration from commencement to finalisation was 7.6 months. This is a very different picture from the widely publicised view that there is a substantial delay for Family Court cases.

Who are the winners?

In the Federal Court and the AAT it is possible to identify differences in the likelihood of success for applicants and respondents between the different case types, and according to whether they were represented.

In the Federal Court sample respondents were more successful than applicants. This was most marked in migration and refugee cases, 72.4 per cent of which were resolved in favour of the Minister for Immigration and 14.3 per cent in favour of the applicant (the remainder being withdrawn or abandoned). In the AAT applicants were most likely to succeed (by having a decision set aside, varied or remitted to the primary decision maker) in compensation matters (53.7 per cent) and Veterans' Affairs matters (53.1 per cent), and least likely in social welfare matters (26 per cent).

There was a significant relationship between legal representation and success. In the Federal Court, 7.8 per cent of parties were unrepresented, and most unrepresented litigants were applicants in migration or refugee cases; the case category in which the success rate for applicants was lowest. In the AAT, where approximately 33 per cent of applicants are unrepresented, in all case categories the percentage of represented applicants who were successful was significantly more than the percentage of unrepresented applicants who were successful.

In the Family Court, in 41.1 per cent of cases one or both parties was unrepresented for at least part of the time. Litigants in person were likely either to settle their case early, in the directions hearing stages, or to go through to a defended hearing. Cases where the applicant was a litigant in person were less likely to be settled between the parties (50.8 per cent) than those where the applicant was fully represented (82.9 per cent).

Further issues

Consultants Tania Matruglio and Gillian McAllister, and from within the Commission, Bruce Alston and Angela Repton, are undertaking further analysis on the case information collected by the ALRC. These studies are providing us with information not previously available on what is happening in the federal civil justice system. The specific issues arising from the studies will be discussed at length in the Commission's forthcoming discussion paper; but some preliminary conclusions can be drawn.

Substantial differences can be seen between the processes and resolution of particular case categories, at least in the AAT and the Federal Court. Attention needs to be paid to proper identification of these categories, and to the particular characteristics of the cases and the litigants involved, in order to ensure the case management system deals with them appropriately. For example, litigants in person are often concentrated in particular case areas. Cases in the Family Court involving children frequently remain unresolved by primary dispute resolution processes and proceed to trial.

Processes in the Family Court need to take account of the fact that its litigants are comparatively poor, and often unrepresented.

Contrary to popular belief, there does not appear to be significant general delay in resolving cases in federal civil matters. However, further research may reveal problems in specific courts or registries, in areas such as listing of hearings or court-initiated adjournments.

* *Helen Dakin is a Law Reform Officer working on the Australian Law Reform Commission reference into the federal civil litigation system.*

Endnotes

1. *T Matruglio and G McAllister Empirical Information about the Federal Court of Australia ALRC Sydney February 1999; Part One Empirical Information about the Family Court of Australia ALRC Sydney February 1999.*

Improving litigation practice: a consideration of 'Lord Woolf's Rules'

By Lani Blackman*

Over the past 10 years, Australia, England, Canada and the United States have undertaken major reviews of their civil justice systems. The reviews have had a common goal to reduce legal costs and delays, while ensuring disputants receive a fair and just resolution of their disputes.

In England and Wales, a number of the recommendations arising from Lord Woolf's 1996 *Access to Justice* report are being implemented. These reforms will have a significant effect on their system. The Australian Law Reform Commission is considering the Woolf reforms as a part of its review of the federal civil litigation and dispute resolution system.

The Woolf Report found that legal fees expended to litigate cases often exceeded the value of property which the parties were disputing. Lord Woolf attributed this 'lack of proportionality' between legal costs and legal claims to the 'uncontrolled nature of the litigation process', and considered that there was a need for a fundamental shift in responsibility for the management of civil litigation from litigants and their legal advisers to the courts. To achieve this shift, Lord Woolf recommended a greater emphasis on judicial case management. This shift towards judicial supervision was combined with procedural reforms such as:

- case streaming with smaller claims assigned to a fast track, with fixed costs option;
- simplification of procedures;
- greater disclosure by lawyers to clients concerning their costs; and
- greater obligations on courts to provide litigation information and assistance.

To support judges in their management of litigation, Lord Woolf suggested new Rules of Civil Procedure. The first such rule set down the overriding objective of case management, namely enabling the court to deal with cases justly. The Rules specifically require parties and their legal advisers to assist the court to deal with cases justly. Dealing justly with a case includes:

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate -

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the parties' financial position;

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.[1]

The extent of judicial discretion

There have been a number of criticisms of Lord Woolf's reforms. One critic views the reforms as permitting "*ad hoc* exercises of subjective, antagonistic and potentially prejudicial judicial discretion to meet the perceived exigencies of individual cases."[2] Certainly, each of the elements set out in draft Rule 1.1 invokes a largely unguided discretion of such scope as to make the judge's role an intrepid one. For example, while judges can ensure that both parties comply with court rules and procedures, it can be difficult for a judge to seek to ensure, so far as is

practical, that the parties are on an equal footing. Other features in draft Rule 1.1 require consideration of the importance of the case, the complexity of the issues, and the parties' financial position. The criteria raise as many questions as they answer - is it the importance of the case to society, to the parties, or to the development of the common law that is the determining factor, and how are judges to decide such matters? How do judges, who are neutral umpires of the parties' dispute, obtain information as to the parties' financial positions?

One of the cornerstones of our legal system is the neutrality of the judge. There are many sporting analogies which emphasise that the judge oversees fair play, but does not descend into the arena as a player. The trend to judicial management is seen to threaten the 'fair play' notions implicit in our system. Sir Anthony Mason has said:

> *"A judge must remain a judge, despite the temptation in the world of case management to call him a manager. It is vital to build up and maintain public confidence in the court system. Accordingly, there is a risk that, if we put too much emphasis on speedy disposition of cases, we shall prejudice the just disposition of cases. That is just what we cannot afford to do."*[3]

The role of lawyers

In the Woolf Report, much of the blame for 'adversarial excesses' in the system was laid at the feet of lawyers and their clients. Lord Woolf saw judicial control as the solution to inhibit the worst of 'excessively adversarial' conduct by parties and their legal advisers.

Criticism has been levelled at the profession for conducting matters in a fashion that leaves 'no stone unturned' which can contribute to the private and public costs of litigation. Geoffrey Gibson describes such as a 'loss of nerve' deriving from a combination of business pressures, fear of negligence suits and lower levels of experience throughout the profession.

> *"The loss of nerve is made worse by the fear of failure, either through being successfully sued, or even colourably sued, for professional negligence, or being overturned on appeal, or just making a fool of yourself. It runs from the litigant through to the top of the courts. The litigant wants a level of assurance that cannot be got. The temptation is there to throw lawyers and money at a problem. The solicitor worries about leaving something out. When it comes to discovery, it may be safer to put everything in ... It is better to be safe than sorry. Similarly, with counsel, it would be safer to read everything in sight; you cannot afford to leave it to the solicitors. When the inexperienced barrister comes to cross-examine, the lack of experience often means there is a lack of judgment or nerve about where to start or where to stop. This lack of judgment is a major reason for the excessive time taken for both criminal and civil trials."*[4]

Case management can be effective in limiting overservicing, tactical play and litigation excesses. To be effective, case management requires the cooperation of lawyers and litigants. Lord Woolf's draft Rules of Civil Procedure include an obligation that parties and their legal advisers assist the court to deal with cases justly. However, merely imposing an obligation on parties and lawyers will not effect change in litigation culture, particularly if the obligation is set in general terms attached to wide judicial discretion as to its interpretation. Further consideration needs to be given to the framing and enforcement of the obligation.

An alternative court rule

In its present formulation, Lord Woolf's rule for litigation practice is not easily implemented by a judge. There is no doubt the litigation system would work better if lawyers and litigants dealt justly with cases such that they worked cooperatively, undertook work proportionate to the claims, and engaged with each other from points of relative parity. But how can such engagement be mandated and how does it sit with the lawyer's obligation to be a partisan advocate for the client?

> *"...The lawyer aims at ... [w]inning in the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interests."*[5]

Rule 11 of the United States Federal Rules of Civil Procedure provides one example of how sensible pre-trial litigation behaviour and advice can be incorporated within a court rule. Rule 11 requires a pleading, written motion or other paper to be signed by at least one attor-

ney, or by the party if unrepresented. The rule then includes particular requirements relating to representations being made to the court.

> *"By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, -*
>
> *(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or increase in the cost of litigation;*
> *(2) the claims, defences, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;*
> *(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and*
> *(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."*

The rule provides the court with positive authority to impose sanctions against attorneys, law firms, or parties who have violated the rule.

Proportionality principles

It may be that an obligation on practitioners to approach cases in a 'proportional' manner may be more appropriate as a professional practice rule than as a rule of court. Certainly any exposition of such an obligation in legal practice standards would require a narrower duty than that invoked by Lord Woolf.

A number of professional practice rules in Australian jurisdictions include such obligations as a duty to avoid unnecessary expense and waste of the court's time; a duty to inform the court of the possibility of settlement; and requiring a practitioner to exercise independent forensic judgment, after consideration of the client's desires.

The federal civil litigation system: the Commission's inquiry

To help define the issues and clarify reform options in this reference, the Commission has released a series of six issues papers:

- *Rethinking the federal civil litigation system* (ALRC IP 20, released April 1997)
- *Rethinking legal training and education* (ALRC IP 21, released August 1997)
- *Rethinking family law proceedings* (ALRC IP 22, released November 1997)
- *Technology - what it means for federal dispute resolution* (ALRC IP 23, released March 1998)
- *Federal tribunal proceedings* (ALRC IP 24, released April 1998)
- *ADR - its role in federal dispute resolution* (ALRC IP 25, released June 1998)

Timetable for rest of the inquiry

The Commission is currently finalising its discussion paper, which will outline the results of its research and consultations, and make suggestions for reform. This discussion paper is due to be released in mid 1999.

A final report on this inquiry will be provided to the federal Attorney-General by November 30 this year.

Please contact the Commission if you are interested in receiving copies of the issues papers, or the discussion paper once it is released. All new Commission publications are posted on our homepage:

http://www.alrc.gov.au

Comments and submissions on any issue relevant to the inquiry are also welcome.

The American Bar Association (ABA) Model Rules of Professional Conduct include clearer positive duties to the administration of justice than the Australian rules.

> ***Rule 3.1.*** *A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.*
>
> ***Comment.*** *The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure ... The action is frivolous ... if the client desires to have the action taken primarily for the purposes of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of the existing law.*
>
> ***Rule 3.2.*** *A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.*
>
> ***Comment.*** *Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain the rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of the action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.*

The practicality and relevance of the rules is enhanced through the commentary attached to each rule, a device which is used in the US, Canada and New Zealand, but has not yet been developed in Australian versions of professional practice rules.

Such guidance through professional practice rules could be made in conjunction with, or independently of, increased obligations in court rules. While professional practice rules are binding on practitioners, court rules impose obligations on practitioners and parties. If a practitioner or party does not comply with court rules, costs orders can be made against parties or the lawyers, or the court can impose preclusionary sanctions, such that defaulting parties may be prevented from using particular evidence, or calling a particular witness in their case.

Meeting the challenge

Lord Woolf's rules set down best practice principles for a fair, just and cost effective litigation system. The principle is laudable. However, to effect a change in litigation practice, the principle must be followed by judges, lawyers and litigants. On its face this appears to be the difficulty with Lord Woolf's rules. The challenge for the Commission is finding a way to resolve the dilemma.

* *Lani Blackman is the Legal Policy Officer with the Australian Law Reform Commission. She is also working on the Commission's reference into the federal civil litigation system.*

Endnotes

1. *Draft Civil Proceedings Rules r 1.1(3).*
2. *N Andrews 'The Adversarial Principle: Fairness and Efficiency' in A Zuckerman and R Cranston (eds) Reform of Civil Procedure: Essays on 'Access to Justice' Clarendon Press Oxford 1995, at 182.*
3. *A Mason 'The Courts as Community Institutions' (1998) 9 Public Law Review 83, at 85.*
4. *G Gibson 'The Cancer in Litigation' (1998) 104 Victorian Bar News 24, at 26.*
5. *J Frank Courts on Trial Princeton UP 1950, 85.*

An adversarial system: a constitutional requirement

By Alison Creighton*

Lawyers and journalists love to debate the relative merits of the adversarial and inquisitorial systems of law. Like playing the English at cricket, the debate is enjoyed, but we do not respond well to evidence that the other might be a better side.

A major difference between the two systems is seen in the roles of the judge and the parties at a hearing. On a traditional view, in inquisitorial legal systems judges have a significant role in controlling the proceedings at a hearing or trial, including questioning witnesses. In criminal law this extends to assisting the detectives conducting the investigation. Hearings are a connected series of meetings and written communications rather than a single proceeding where parties have a relatively minor role in presenting written submissions. In adversarial legal systems, characteristically judges maintain their independence and impartiality from the dispute; their primary role at hearing is to adjudicate rather than participate - an umpire not a player. The hearing is the climax of the litigation process and the parties, generally through their lawyers, direct the proceedings, control the evidence that is presented and question witnesses.

The debate about which system is best has lost its impact because of changes to both systems. Civil law countries have taken on features traditionally seen as adversarial, while adversarial countries are considering and using inquisitorial techniques. In Australia this change is seen most strikingly in the adoption of case management practices in our civil law courts. Populist calls for Australia to change to an inquisitorial process focus on criminal trials and criminal procedure. Such calls, whether for changes in civil or criminal law practice, ignore the possibility that our Constitution may prevent any change to an inquisitorial system. Through the notions of judicial power and process our Constitution may be seen to have entrenched in legal proceedings principles of natural justice and procedural fairness - principles regarded as characteristics of an adversarial system.

Judicial power

Judicial power is the power distributed by Chapter III of the Constitution to the High Court and other federal courts created by parliament.[1] This is the power of the sovereign authority "to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property".[2]

It is difficult to formulate a comprehensive list of what is encompassed by judicial power.[3] Judicial power does not include "non-judicial powers that are not ancillary, but are directed to some non-judicial purpose"[4] and powers which are foreign to the judicial power to be attached to Chapter III courts.[5] It includes incidental activities, such as administrative duties, and power:

- "to compel the appearance of persons before the tribunal in which it is vested"[6]
- "to adjudicate between adverse parties as to legal claims, rights and obligations, whatever their origin"[7]

- "to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision"[8] and
- "to direct the preparation of the issues in controversy for decision and the execution of decisions so as to make them effective."[9]

"An essential feature of judicial power is that it be exercised in accordance with the judicial process."[10]

What is judicial process?

Justice Gaudron has stated that the judicial process includes an open and public inquiry, the application of the rules of natural justice, a determination of the law and the facts, and the application of the law to those facts.[11] In *Re Nolan* she asserted that Chapter III provides a guarantee of a fair trial.[12] Justice Deane has described Chapter III as "the Constitution's fundamental and overriding guarantee of judicial independence and due process".[13]

Natural justice and procedural fairness

What then are the features of due process, natural justice, the essential character of the court, and the nature of judicial power? It is not suggested in any of the authorities that these features are inherently adversarial. However, such features are characteristics of an adversarial system and the adoption of some inquisitorial features may interfere with our notions of natural justice and due process.

Like judicial power and judicial process the extent of natural justice is not given precise legal definition. The primary requirement of natural justice is that "fairness in all the circumstances"[14] must be achieved. Chapter III courts must:

> *"... exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligations to act judicially. At the heart of that obligation is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds."*[15]

The critical test is "what does the duty to act fairly require in the circumstances of the particular case?"[16] In terms of the Constitution, the question is not: is an adversarial system required by the Constitution? But rather: are those elements required by the Constitution, such as natural justice and procedural fairness, best protected in an adversarial system?

A duty to act fairly is not excluded from the procedure in non-adversarial legal systems. In civil law countries such as France and Germany, fairness is inherent in the system. A judge who conducts the investigation, assists the parties to clarify the issues and pleadings or questions the witnesses is not necessarily proceeding unfairly. However, in an adversarial system, to be fair, a judge must be independent of the State, be impartial, and be seen to be impartial. Procedural fairness is also preserved through party control of investigation and proceedings.[17] These are elements that an adversarial system seeks to uphold.

Case management

Many recent national and international reforms of civil justice systems have promoted case management by judges as a means of addressing problems of high costs and delay. In Australia, case management is widely practised in State and federal courts.

A recent High Court case has raised the question of whether case management, in any one of its many manifestations, offends the guarantee of procedural fairness.[18] Case management is not a traditional feature of adversarial systems, but more a halfway between the traditional inquisitorial practice of having a judge have control over the investigation, procedure and issues to be argued and the traditional adversarial concept of a judge as a referee.

In Australia an investigation by a judge is out,[19] but judicial intervention by setting limits for procedural

compliance and early intervention through directions hearings is in. However, the High Court has indicated that in a case where case management procedures compromise justice or procedural fairness, justice would not be done.

> *"Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."*[20]

Where justice is jeopardised by case management, managerial judging or another procedural innovation, the decision of the court may be set aside.

Procedural intervention by the executive

In Australia the judiciary has initiated the change to case management and managerial judging. Future directions in court and case management may be introduced by the executive. However, such changes cannot interfere with the exercise of judicial power. Functions imposed by the legislature cannot be "incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power".[21]

The judiciary jealously and appropriately guards its role and independence.

> *"[T]he due process implication secures to the courts a guaranteed measure of control over their own procedures at the expense of parliament."*[22]

This principle alone could be a significant barrier to implementation by the executive of procedures in federal civil litigation that do not accord with traditional adversarial principles.

Conclusion

The Australian adversarial system has changed significantly from the traditional model. We have enlarged the role of the judge umpire to include judicial management, but even with the continuing development of case management and other procedural innovations we are still some way from adopting an inquisitorial investigative role for judges. Such a role sits uneasily with our notions of procedural fairness and the attainment of justice and our Constitution may prohibit such modification of judicial functions and the judicial process.

* *Alison Creighton is a Law Reform Officer working on the Australian Law Reform Commission reference into the federal civil litigation system.*

Endnotes

1. *Commonwealth Constitution s. 71.*
2. *Huddart Parker and Co Pty Ltd v Moorehead (1909) 8 CLR 330, 357.*
3. *Brandy v Human Rights and Equal Opportunity Commission (1994) 183 CLR 245, 267; Precision Data Holdings Ltd v Wills (1991) 173 CLR 1767, 188–89; R v Davison (1954) 90 CLR 353, 366; Harris v Caladine (1991) 172 CLR 84, 122.*
4. *Leeth v Commonwealth (1992) 174 CLR 455, 469. See also Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, 70.*
5. *R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254, 289.*
6. *Waterside Workers' Federal of Australia v JW Alexander Ltd (1918) 25 CLR 434, 442.*
7. *Ibid.*
8. *Ibid, at 451.*
9. *Harris v Caladine (1991) 172 CLR 84, 107–8.*
10. *Polyukhovich v Commonwealth (1991) 172 CLR 501, 703.*

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Proceeds of Crime: an inquiry update

Proceeds of crime legislation - introduced by a succession of Australian federal and state governments - has largely failed to measure up to expectations of ensuring 'crime does not pay'.

With the Commission's deliberations on Commonwealth proceeds of crime laws now complete but the final recommendations still under embargo, David Edwards* offers some thoughts on reform of Australia's confiscation regime.

The *Proceeds of Crime Act 1987* (Cth) (POC Act) was introduced and developed in consultation with the States and internal Territories. The aim was to form a consistent, if not uniform, Commonwealth-wide legislative package providing for conviction based forfeiture of property with orders made in one jurisdiction being capable of enforcement in any other.

Since that time Victoria and South Australia have completely overhauled their original conviction based legislation and New South Wales and Victoria have added a non-conviction based forfeiture regime.

While fine tuning amendments have from time to time been made to the Commonwealth Act, it still embodies the basic scheme first enacted in 1987. So seen, it can be regarded as 'first generation' legislation that - in the light of developments - needs to be revisited to ensure that its basic objectives are being met.

What's wrong?

There are three principal objectives of the legislation, as set out in the POC Act itself. They are to deprive persons of the proceeds of, and benefits derived from, the commission of offences against the laws of the Commonwealth or the Territories; to provide for the forfeiture of property used in or in connection with the commission of such offences; and to enable law enforcement authorities effectively to trace such proceeds, benefits and property.

A number of submissions made to the Commission have pointed out major shortcomings in the legislation. These include:

Failure to meet objectives. There are genuine doubts that the POC Act is achieving its primary objectives, for a number of structural and definitional reasons.

Practical difficulties. From submissions received, it is clear that all persons and bodies involved in the administration and application of the Act have experienced difficulty, including the Official Trustee, who is charged with administrating restrained assets.

Complexity. The draftsperson has sought, in many important instances, to cover every possible combination of events, resulting in an extremely complex scheme. This, no doubt,

results from the fact that when first enacted the Act was breaking new ground and establishing novel principles leading to new jurisprudence. The result, however, is a very unwieldy and difficult piece of legislation for law enforcers, prosecutors, judges, administrators and defence attorneys alike.

The Commission inquiry

In December 1997 federal Attorney-General Daryl Williams asked the Commission to review the POC Act. The terms of reference were broadened in April last year, with the Attorney-General further requesting the Commission to inquire into and report on the impact of the POC Act on business. The initial reporting deadline of December 31 last year was recently extended, requiring the Commission to complete its inquiry by the end of March.

At the time of publication of *Reform*, the Commission had concluded its deliberations and consultations and settled its final recommendations. It is now completing the production of the report.

The Commission's investigation *has* led it to conclude that sweeping changes to Australia's federal confiscation regime are necessary. However, it would be inappropriate to disclose the nature of the recommendations ahead of the presentation of this report to the Attorney-General and, ultimately, the federal parliament.

Some issues

One of the major areas of consideration for the Commission has been whether proceeds of crime legislation should include a non-conviction based regime.

In relation to narcotics dealing, the *Customs Act 1901* (Cth) has contained a non-conviction based civil forfeiture regime since 1979. Victoria has recently introduced a non-conviction based regime in relation to drug offences, while New South Wales introduced such a regime in 1990 for a wider range of offences carrying a penalty of five years or more imprisonment. The POC Act, dealing with all indictable Commonwealth offences, is still solely conviction based.

In relation to both conviction and non-conviction based forfeiture, a key issue confronting the Commission has been whether the legislation properly distinguishes, in areas such as sentencing and confiscatory discretion, between, on the one hand profits, and on the other, property, not of itself profits, that is used in or in connection with the commission of an offence.

In particular, questions have arisen whether confiscation of profits ought to be allowed to be taken into account in sentencing and whether courts ought to have any discretion regarding the amount of profits that are forfeited in any case.

Further areas of major concern for the Commission have included a consideration of whether the restraining order provisions are sufficiently flexible to achieve their purposes and whether the money laundering provisions of the Act are of optimal effectiveness.

Any discussion of proceeds of crime legislation generally, and non-conviction based schemes in particular, necessarily give rise to questions regarding the implications of such legislation for people accused of crime.

In the course of this inquiry, the Commission has actively sought a diverse range of views and opinions. Submissions have been received from organisations representing business, third party interests, defence lawyers and academics, as well as agencies such as the National Crime Authority, the Director of Public Prosecutions, Customs, and the Australian Federal Police. Perhaps not surprisingly, no submissions have been made to the inquiry from those who have been the *subject* of proceeds of crime action.

While the Commission is very sensitive to the views of opponents of proceeds of crime legislation and the intrusive nature of confiscatory laws, it needs to be emphasised that the Commission has not been asked to review the need for such laws, but rather to review the existing legislation and to advise the government on how it might be made to operate more effectively.

Given also the very short time frame permitted by the government, this review has, of necessity, had to focus on the experiences of those who work with confiscation legislation, in its various forms, on a daily basis.

The Commission's report will be seen to be a practical, detailed review of federal proceeds of crime legislation,

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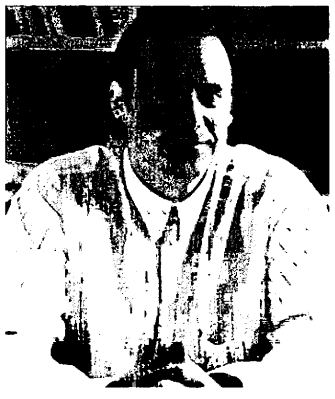

Making crime pay

The Australian Law Reform Commission has been asked to consider the issue of literary proceeds as one part of its inquiry into Commonwealth proceeds of crime legislation.

Bruce Shearer,* from the Communications Law Centre, gives his perspective on this complex issue.

When people become aware that offenders, upon leaving prison, have written stories about their crime, they seem to respond in two ways. They express outrage that the offender could profit from their life of crime, and then a good number of the public go straight out and purchase the book.

Crime fiction is a very lucrative market. True crime, where the subject is 'real', takes us out of the world of creative imagination and into the world of informed detail. Readers of true crime fiction find this fascinating and they vote for it with their wallets.

This is an extremely confronting issue, which needs to be seen from different perspectives. The victims of crimes and their families are grieving from wrongs done. Convicted criminals who have served their time feel as free as any other citizen to tell their story. The general public feels for the victims and families, but still can't wait to hear the details.

The 'Son of Sam'

'Literary proceeds of crime' generally refer to the profits gained by an offender from the publication or exploitation in any media form of the details or experiences relating to their crimes or life of crime.

The 'Son of Sam' case in the US in the late 1970s produced the first literary proceeds of crime legislation. David Berkowitz pleaded guilty to killing six people in New York. He had dubbed himself 'Son of Sam' and wrote of a book of the same title, claiming that his neighbour's dog Sam had told him to commit the crimes. The New York court found Berkowitz to be "acting under a legal disability" and appointed a "conservator" or official custodian for him.

A 'Son of Sam' law was passed in New York giving the courts the right to confiscate 'literary proceeds of crime' in response to a public outcry from those angry that Berkowitz could benefit financially from the deals he was making. By 1997, Congress and 36 states in the US, and parliaments in the UK and Canada, had passed such laws.

The legislation was successfully used to confiscate the proceeds from literary sales involving several well known crimes although, curiously, it was not the vehicle by which Berkowitz' literary proceeds were redirected. Although a court upheld the validity of the law and the right of the conservator to hold Berkowitz' profits from literary sales for the compensation of crime victims, the New York Crime Victims Board found that Berkowitz, through the conservator, had voluntarily paid the proceeds from the book *Son of Sam* to the victims or their estates.

These types of laws often have several dimensions. Some are part of broader legislative schemes which permit the confiscation of the proceeds of crime more generally: for example, from drug trafficking and money laundering. New York's founding 'Son of Sam' law is typical of those under which the sums confiscated are paid to victim compensation funds rather than to general revenue - so the policy goals are wider than 'unjust enrichment'.

In 1991 New York's law was struck down by the US Supreme Court. In *Simon and Schuster v New York Crime Victims Board*, [502 US 105 (1991)] the court held that the effect of the New York State legislation was to unduly limit speech protected under the First Amendment. It was therefore unconstitutional. Although the court felt there were 'compelling state interests' in ensuring that criminals did not profit from their crimes and that victims were compensated by those who harmed them, the First Amendment required 'content-based laws' of this kind to be narrowly tailored. The court's reasoning thus left open the possibility of a constitutionally-valid 'Son of Sam' law, but the New York State law, as drafted, was too broad. The mere mention of even a 'crime' that did not result in a conviction would merit confiscation. The court contended that this would catch the proceeds of books such as *The Autobiography of Malcolm X* and Thoreau's *Civil Disobedience*.

However, other State laws continue to be applied, some with amendments to guard against the problems of the original New York law. At the time of writing, the 'Queen of Serial Killer Journalists', Sondra London, was appealing against a decision by the Florida circuit court to confiscate money she made marketing the work of the 'Gainesville Slasher' Danny Rolling. Rolling was convicted of murdering five college students in 1990. This is said to be the first time a 'Son of Sam' law has been used against an author working with a felon. London was once engaged to Rolling, a 'unique and special relationship', which was relevant to the judge's decision. London claims Florida's law is unconstitutional.

Australian law

The Australian parliament passed a Proceeds of Crime Act in 1987. Similar legislation has been passed in Victoria (1986), Queensland (1989), Tasmania (1993) and South Australia (1996). The separate federal and State legislation reflects the fact that the relevant acts are crimes under the laws applying in different jurisdictions: for example, most criminal matters fall under State laws, while certain kinds of drug-related offences and some matters relating to international conventions fall under Commonwealth law.

The prevailing view is that at present literary proceeds would not be viewed as 'proceeds' under the Commonwealth Act. The Australian Law Reform Commission is currently undertaking an inquiry into whether the Act should be amended to include literary proceeds of crime. *(See article on page 68 for an update on the Commission inquiry.)*

The Australian State Acts differ in the discretion they give to the courts when ordering the confiscation of literary proceeds. The Victorian Act expressly, and the Queensland Act impliedly, provide for social utility or public benefit criteria to be taken into consideration. In these States the courts may choose not to order confiscation, or to order partial confiscation, in appropriate circumstances. The South Australian and Tasmanian Acts provide no such flexibility.

Forfeiture applications can be brought by State or federal police under the direction of the relevant Director of Public Prosecutions (DPP) in the jurisdiction where the infringement has taken place. These are civil proceedings arising out of the civil remedies function of the Director of Public Prosecutions.

Should crime pay?

There are a number of arguments in favour of the confiscation of literary proceeds of crime.

First, it can seem unjust that criminals profit financially from acts which the society has stated, through its laws, are unacceptable. This is the primary basis for the public outrage in the US that led to the 'Son of Sam' laws. Second, 'unjust' rewards may become even more disturbing if they are put to work in the commission of further crimes. Third, it is argued that others could be encouraged to commit crimes because of the notoriety and financial rewards which accrue to those who do. Fourth, it is argued that retelling the stories

can be hurtful to victims and their families and friends. Fifth, supporters of 'Son of Sam' laws say they do not prevent speech itself, only the earning of financial rewards from it.

On the other hand, an offender who has served any sentence or paid any financial penalty imposed by the justice system may be seen to have paid sufficiently for their crime. Any further restriction of rights can be seen as punishment beyond sentence. The telling of their stories in any medium is not unlawful and it may seem inappropriate for the authors to be unable to earn financial rewards from it. Indeed, the financial rewards might be an important kick-start to a new life, and the confiscation of proceeds statutes generally do not prevent other people, such as journalists, profiting from re-telling the same stories (unless they are acting in collaboration with the criminal). The telling of stories about criminal activities and lives may also help society to understand them: the public which are victims of them, the professional criminologists who try to explain them, the law enforcers who try to detect, solve and reduce their incidence, the criminals themselves for whom retelling may be part of the process of rehabilitation. Or they may simply be forms of self-expression by individuals which free societies should tolerate.

Some commentators have suggested that some of the goals of these kinds of laws can be achieved more directly. At conviction US judges have imposed orders for restitution which specifically include future media-related profits or probation conditions imposing a gag on public comment about the crimes. While these mechanisms may also be criticised for chilling speech, they do not, like the confiscation of proceeds statutes, directly extend punishment beyond the criminal's sentence.

Australia has had some significant examples of 'true crime' stories in recent years. Mark 'Chopper' Read, convicted for offences including assault with a weapon, malicious wounding and kidnapping, has written several books about his life, in conjunction with editor and Melbourne *Age* journalist, John Silvester. The eight books have sold over 300,000 copies. *The Matriarch*, the story of Kath Pettingill - the mother of deceased crime figure Dennis Allen, whose two other sons were charged with but acquitted of the Walsh Street murders and herself convicted of indecent language and harbouring an escapee - has sold 25,000 copies. Heather Parker, a Victorian former prison warder who assisted her lover and another prisoner to escape from custody, contracted with *New Idea* magazine to tell the story of the escape and ultimate shootout for the sum of $52,500.
Silvester argues that legislation allowing for confiscation of literary proceeds is a form of concealed censorship. If offenders thought that their profits from writing a book could be confiscated, they wouldn't bother to do the hard work of writing it. Amanda Hemmings, non-fiction publisher at PanMacmillan, which published *The Matriarch*, agrees that many people with criminal backgrounds see writing a book about their experiences as a way of making a living. If they believed that their literary proceeds could be confiscated, particularly by authorities with whom they have severe antipathies, they would never pick up a pen.

There have been no confiscations of the proceeds from Chopper Read's books or from *The Matriarch*, but the proceeds of the deal with Heather Parker were successfully confiscated under the *Crimes (Confiscation of Profits) Act 1986* (Vic). Since applications for forfeiture or confiscation of literary proceeds occur at the discretion of the

DPP or government solicitor in different jurisdictions (no applications were made in relation to the Read or Pettingill books) there is no comprehensive, readily accessible record of the reasons such applications have and have not been made in particular circumstances.

John Silvester argues that a distinction needs to be drawn between situations where the proceeds result from the labour, literary skills and business acumen of the convicted person, and those, like the Heather Parker case, which he says are an example of 'exploitative chequebook journalism' where the offender simply sold an exclusive story to the highest bidder. Chopper Read, says Silvester, laboured for many months to produce his books with no financial guarantee as to sales.

The recent Florida case noted above also raises this issue of the relationship between published work and the criminal subject. The judge felt the case was one where a criminal and an accomplice were effectively working as one so that the profits of the accomplice deserved to be confiscated as if they were those of the criminal. So the proceeds of another version of the story - perhaps less complete, and less reliable - told by a less well-connected storyteller, might escape confiscation.

These are complex issues which require sensitive balancing of the public's faith in the fairness of our systems of justice and the rights of individuals to tell stories and of societies to listen to them. In certain tightly prescribed circumstances confiscation of literary proceeds may be justified, but truly just and tolerant communities may generally be better off accepting some ugly spectacles than policing too vigorously the boundaries of human storytelling.

* *Bruce Shearer is a Research and Policy Adviser with the Communications Law Centre in Melbourne.*

Obituary

Sir Maurice Byers 1917-1999

The Australian Law Reform Commission was saddened by the death in January of Sir Maurice Byers, a valued part-time member of the Commission between May 1984 and December 1985.

Sir Maurice was admitted to the New South Wales Bar in May 1944 and went on to become one of the nation's visionary constitutional lawyers. As Commonwealth Solicitor-General between 1973 and 1983, he played a seminal role in moving the High Court to a more expansive view of federal powers, including federal judicial power. He continued to practise his persuasive legal skills after returning in 1983 to the private Bar in New South Wales and they were particularly evident in his arguments in the *Mabo* case.

He was Chairman of the Australian Constitutional Commission from 1985 to 1988.

Sir Maurice, as Solicitor General, was also in the thick of the international and domestic controversies of the Australian government in the 1970s, appearing in the French Nuclear Test case in the International Court of Justice and before the Senate in the supply crisis of 1975.

Sir Maurice has been a welcome guest at many Australian Law Reform Commission functions over the years and will be sadly missed by all past and present Commission members.

Our sincere sympathies are extended to Lady Patricia Byers and family.

Continued from Page 1: 'President's comment'

> prevail in the midst of the turmoil and change of the past two centuries is performed by the light, the colour, the air, the sea, the land forms, and the flora and fauna of this most ancient and 'isolated' land?

The impact on the 'weird mob' of the post-industrial information age, which has brought an enhancement of individual rights and freedom of intercourse, might just have laid a sustainable foundation in the national psyche for a change to more direct and less representative forms of Executive accountability. Advanced electronic communications and information technology also conspire to remove the balance of utility from the indirect representative democracy. It has become a more directly participative and accountable world.

Perhaps what the Australian community is seeking is leadership to a more radical but simpler, more inspirational and more understandable change, in tune with popular sentiment and one that can be truly owned by the people. Something that is undeniably Australian.

Such a rebalancing would have a new Constitution addressing the people as citizens; who they are and what are their obligations, rights and freedoms. Much less might be devoted to a simpler form of machinery of government.

Some who look at the regular confirmation of Australian's ignorance of our Constitution, of our Westminster heritage and of our legal history, believe it is too soon for significant constitutional change to take place. They might be right, but for the wrong reason.

In my judgment the Australian people give priority to overcoming fundamental difficulties in Australian society, possibly because they see a republic in practical terms already a day-to-day reality.

It may also be that their unwillingness to learn the intricacies of the present arrangements is a pragmatic response that it is just not worth the candle.

If so, it would be no surprise to see the baton change slip past 2001.

Continued from Page 69: 'Proceeds of Crime: an inquiry update'

providing significant recommendations for efficient and effective reform.

* *David Edwards PSM is the Deputy President of the Australian Law Reform Commission and the Commissioner with responsibility for the proceeds of crime reference.*

Please contact the Commission for further information on this reference.

Continued from Page 67: 'An adversarial system: a constitutional requirement?'

11. Harris v Caladine *(1991) 172 CLR 84, 150.*

12. Re Nolan; Ex parte Young *(1991) 172 CLR 460, 496.*

13. Re Tyler; Ex parte Foley *(1994) 181 CLR 18, 34.*

14. National Companies and Securities Commission v News Corporation *(1984) 156 CLR 296, 311.*

15. Leeth v Commonwealth *(1992) 174 CLR 455, 487.*

16. Kioa v West *(1985) 159 CLR 550, 585.*

17. *J Thibaut and L Walker* The social psychology of procedural justice *Plenum Press New York 1988, cited in M Shirley* Procedural justice - A shifting focus *Laws 99203 Dissertation, at 37.*

18. Queensland v JL Holdings Pty Ltd *(1997) 189 CLR 146.*

19. See R v Federal Court of Bankruptcy; Ex parte Lowenstein *(1938) 59 CLR 556, 588–9.*

20. Queensland v JL Holdings Pty Ltd *(1997) 189 CLR 146, 154.*

21. Grollo v Palmer *(1995) 184 CLR 348, 365. See also* R v Kirby; Ex parte Boilermakers' Society of Australia *(1956) 94 CLR 254, 314–5.*

22. *F Wheeler 'The doctrine of separation of powers and constitutionally entrenched due process in Australia' (1997) 23(2)* Monash University Law Review *248, 253.*