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This issue of *Papers on Parliament* brings together in published form five lectures given during the period from February to June 1994 in the Senate Department's *Occasional Lecture* series. It also includes a paper that resulted from research undertaken for an entry for the Department's forthcoming publication, *Biographical Dictionary of the Australian Senate*. This issue includes an update of the Parliamentary Bibliography published in previous issues.

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ABBREVIATIONS

ALP	Australian Labor Party
ALP (A-C)	Australian Labor Party (Anti-Communist)
CP	Country Party
CPD	Commonwealth Parliamentary Debates
DLP	Democratic Labor Party
IND	Independent
IND LIB	Independent Liberal
IND UAP	Independent United Australia Party
LP	Liberal Party of Australia
MHR	Member of the House of Representatives
NCP	National Country Party
NPA	National Party of Australia
UAP	United Australia Party

Membership of the Joint Parliamentary Committee on Foreign Affairs, 1952-1967 [1]

Derek Drinkwater

For the first fifteen years of its existence, 1952-1967, membership of the Joint Parliamentary Committee on Foreign Affairs was confined to Senators and Members from the Liberal and Country Parties, from the Australian Labor Party (Anti-Communist), a breakaway party of the ALP which became the DLP in 1957, and from the DLP. The ALP Opposition, led at this time by Dr H.V. Evatt and A.A. Calwell, refused to nominate Senators and Members for appointment to the Committee. Not until mid-1967, under the leadership of Calwell's successor, E.G. Whitlam, did Labor Senators and Members join the Committee.

How the Committee was able to discharge its functions for fifteen years without the participation of Opposition Senators and Members, and whether or not it managed to do so satisfactorily are, to say the least, intriguing questions. Any attempt to answer them must rest on an understanding of the following: the reasons for the Committee's appointment; ALP attitudes towards the Committee; the success or otherwise of the Committee's activities during this period; and the implications of such a Committee arrangement for Australia's foreign relations throughout the 1950s and 1960s.

In 1929 a Senate select committee recommended that a standing committee on external (or foreign) affairs be established to examine and report upon matters concerning the League of Nations, mandated territories and other subjects of imperial or international concern.[2] However, nothing came of this recommendation. Successive governments failed to act upon it and the idea of such a committee received little parliamentary or public attention until the mid-1940s.

Renewed interest in the creation of a committee on foreign affairs — on the part of the Liberal–Country Party Opposition but not the ALP Government — arose after the Second World War. Liberal-Country Party concerns that Dr H.V. Evatt,[3] Attorney-General and Minister for External Affairs in the Federal ALP Government, might use the Commonwealth external affairs power to bind Australia to international conventions and agreements as a means of achieving domestic change, led the Opposition Leader, R.G. Menzies,[4] to advocate the establishment of an all-party foreign affairs committee during the 1946 Federal election campaign.[5]

Menzies called for the creation of a foreign affairs committee which could contribute to the formulation of foreign policy and monitor the activities of the executive in matters related to foreign affairs and defence. He stressed that, although the making of foreign policy should remain an executive responsibility, the Committee should be empowered to provide additional information to Parliament,

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1 Research by the author for a biography of Senator E. B. Maher (CP, QLD, 1949-1965), to be included in the forthcoming *Biographical Dictionary of the Australian Senate* (Vol. I, 1901-*circa* 1970), revealed that for the first fifteen years of its history the Joint Parliamentary Committee on Foreign Affairs was without Opposition representation. The present article examines the reasons for this and the effects of such an arrangement on foreign policy formulation and the structure and operations of the Senate and House of Representatives committee systems during the 1950s and 1960s.

2 J. Knight and W.J. Hudson, *Parliament and Foreign Policy*, Department of International Relations, ANU and Australian Institute of International Affairs, Canberra, 1983, p.63.

3 H.V. Evatt (1894-1965); MHR NSW (ALP), 1940-1960. Attorney-General and Minister for External Affairs, 1941-1949; Leader of the Opposition, 1951-1960, and Deputy Leader of the Opposition, 1950-1951.

4 R.G. (later Sir Robert) Menzies (1894-1978); MHR VIC (UAP), 1934-1944 and (LP), 1944-1966. Prime Minister, 1939-1941 and 1949-1966; Leader of the Opposition, 1943-1949.

5 Knight and Hudson, op. cit., pp. 63-4.

'additional to what the executive through Evatt chose to give it.'[6] There was no government response to these arguments, which Menzies repeated while campaigning for the 1949 Federal election.

The Liberal and Country Parties obtained a majority in the House of Representatives on 10 December 1949 (and in the Senate on 28 April 1951). Menzies lost no time in outlining his government's plans for a foreign affairs committee. The Governor-General, W.J. McKell,[7] in his Opening Speech to Parliament in February 1950, referred to the Government's intention to establish a 'Parliamentary Standing Committee on Foreign Affairs to give opportunities for full study [of foreign affairs and defence matters] and to serve as a source of information to Parliament'.[8] The Opposition Leader, J.B. Chifley,[9] emphasised that the ALP neither supported nor opposed the formation of such a committee. Chifley made it clear that for the moment the Opposition would do no more than examine the proposal on its merits.[10]

On 9 March 1950, the Minister for External Affairs, P.C. Spender,[11] announced the Government's intention to appoint a standing committee on foreign affairs, with 'a broad mandate to study external affairs in the widest sense' and the power to inquire into and report upon matters referred to it by the Minister. Spender was hopeful that the Committee would provide a lead to the Parliament on foreign policy matters, while emphasising that it would have no policy-making role.[12] ALP attitudes towards Spender's proposal were initially favourable. Evatt, as Opposition foreign affairs spokesman, referred to the ALP's 'acceptance in principle of the establishment of an all-party standing committee on foreign affairs [which] might be to the great advancement of Australia's interest'.[13] When Spender sought to take the matter further in December 1950, however, he received no support from the Opposition,[14] on the grounds that his original proposal had been watered down so much that the Committee envisaged by the Government would be little more than a mouthpiece for the Executive.

There matters rested until R.G. Casey,[15] who succeeded Spender as External Affairs Minister in April 1951, held discussions about the proposed committee with the ALP leadership (Chifley and Evatt until Chifley's death in June 1951 and then Evatt and Calwell).[16] After months of wide-ranging discussions, the Government and the Opposition were unable to agree on proposals concerning the Committee's powers and responsibilities, and it was not until 17 October 1951 that a motion was moved in the House of Representatives to appoint the Committee. The Government proposed that: the Committee should be empowered to consider only matters referred to it by the Minister for External Affairs; it should comprise seven Senators and twelve Members of the House of Representatives; its proceedings (and those of its sub-committees) should take place *in camera*; such proceedings should remain secret; for reasons of national security, the Committee should forward its reports to the Minister for External Affairs, informing the Parliament each time it did so; and it should have no power to send for persons, papers or records without Ministerial permission. Evatt and Calwell opposed the Government motion

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6 ibid., p.64.

7 W.J. (later Sir William) McKell (1891-1985); Governor-General of Australia, 1947-1953.

8 *Commonwealth Parliamentary Debates (CPD)*, Senate, 22 February 1950, p.6.

9 J.B. Chifley (1885-1951); MHR NSW (ALP), 1928-1931 and 1940-1951. Prime Minister, 1945-1949; Leader of the Opposition, 1950-1951.

10 *CPD*, House of Representatives, 23 February 1950, pp.56-7.

11 P.C. (later Sir Percy) Spender (1897-1985); MHR NSW (IND UAP), 1937-1940, (UAP), 1940-1944 and (LP), 1944-1951. Minister for External Affairs, 1949-1951.

12 *CPD*, House of Representatives, 9 March 1950, p.622.

13 *CPD*, House of Representatives, 16 March 1950, p.912.

14 *CPD*, House of Representatives, 7 December 1950, p.3966.

15 R.G. (later Lord) Casey (1890-1976); MHR VIC (UAP), 1931-1940 and (LP), 1949-1960. Minister for External Affairs, 1951-1960.

16 A.A. Calwell (1896-1973); MHR VIC (ALP), 1940-1972. Leader of the Opposition, 1960-1967, and Deputy Leader of the Opposition, 1951-1960.

put forward by Casey, asserting that the Spender proposal of March 1950 would have allowed the Parliament and the Committee greater influence over foreign policy formulation than that now being put forward by Casey.[17]

The Opposition accordingly moved five amendments to the motion aimed at securing the following: a degree of autonomy for the Committee in determining what matters it would examine (the ALP proposed that the Committee should also be able to examine matters referred to it by either House, or as decided upon by a majority of the Committee); equal representation on the Committee between the Government and the Opposition in the House of Representatives; power for the Committee itself to determine whether or not it would meet *in camera*; authority for either House to decide that a report from the Committee should or should not be published; and power for the Committee to send for persons, papers or records on its own account. These amendments were negatived and the original motion agreed to on 18 October 1951.

The Senate did not consider the motion until 26 February 1952, when the Opposition unsuccessfully proposed amendments similar to those moved in the House of Representatives. Senator J.H. O'Byrne [18] summed up Opposition objections to the Committee:

> The formation of parliamentary committees is a very important part of the democratic form of government. I believe that it is the right way to obtain the views of the people through their representatives. The variety of angles from which problems are viewed and the clashes of ideas that take place in committees are fundamental to a democratic parliament. But in order to function successfully a committee should not be restricted in its field of investigation. It should be competent to call upon witnesses from whom it considers that it could obtain valuable information. Members of Parliament who are appointed to this type of committee realise the very secret nature of their investigations and respect the need for secrecy. A committee constituted as the Government has proposed would give its members glory without power. Their wings would have been clipped in order to prevent them from fully investigating the subjects referred to them.[19]

Despite such objections, the Government's motion was agreed to with minor modifications, and the Committee was established by Senate resolution on 27 February 1952. Dissatisfied with both its powers and its functions, the Opposition in the Senate and the House of Representatives boycotted the Committee.[20]

The fact that such an important parliamentary committee was without Opposition representation occasioned little academic or journalistic comment.[21] Knight and Hudson have accurately described the Committee as 'nominally a committee of Parliament, [which] was in fact a committee in the gift of the executive and limited to one side of each house'.[22]

The Committee finally emerged with a membership of four Senators and seven Members of the House of Representatives — all from the Government parties. Eight places on the Committee were left vacant should the Opposition decide to join the Committee, which held its first meeting on 5 March 1952. Foundation members were Senators J.G. Gorton, J.A. McCallum, E.B. Maher, R.H. Wordsworth, and, from the House of Representatives, W.D. Bostock, A.R. Downer, D.H. Drummond, F.M. Osborne, H.S. Roberton, R.S. Ryan and W.C. Wentworth.[23] The Committee's beginnings were not auspicious.

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17 *CPD*, House of Representatives, 17 October 1951, p.787 and 18 October 1951, pp. 898-9.

18 J.H. O'Byrne (1912-1993); Senator TAS (ALP), 1947-1981.

19 *CPD*, Senate, 27 February 1952, p.396.

20 J.R. Odgers, *Australian Senate Practice*, Government Printer, Canberra, 1953, pp. 193-4.

21 A noteworthy exception was an article by T.N.M. Buesst entitled 'An Incomplete Foreign Affairs Committee', *Australian Outlook*, (6), 2, June 1952, pp. 85-90.

22 Knight and Hudson, op. cit., p. 65.

23 For Committee membership see Appendix I.

Government-Opposition cooperation on matters relating to the Committee proved difficult to achieve, and the years 1952 to 1967 were to be characterised by largely unsatisfactory Government attempts to accommodate increasingly strident Opposition objections to the Committee's powers, functions and activities.

In the early 1950s, Evatt was more favourably disposed towards the Committee than Calwell. Years later, Senator E.B. Maher, a Committee member between 1952 and 1965, recalled 'very animated discussions' in late 1951 between himself and Gorton and Evatt and Calwell in Casey's office about the proposed committee. Maher remembered Calwell as the main ALP opponent of the Government's proposal to establish such a committee. Calwell, who was to remain the Committee's chief critic after its appointment, objected particularly to what he perceived as the limited opportunities available to the committee to contribute to the formulation of foreign policy, and also to the secrecy provisions surrounding committee proceedings.[24] He made repeated comparisons with the US Senate Foreign Relations Committee, while ignoring the differences between the American and Australian systems of government in which the respective foreign affairs committees operated. In the opinion of one Committee member, Senator J.A. McCallum:

> So long as we have responsible government it is not possible for us to set up a committee on foreign affairs comparable to the Senate Foreign Affairs [sic] Committee in the United States of America. The theory of our Government is that the Executive is responsible to the Parliament, and specifically, to the Lower House of the Parliament. The American executive is completely independent of either house, and in order to have a liaison between the President and his executive, and the legislature, these committees function. The framing of policy is the joint work of the Senate Foreign Relations Committee and the Foreign Affairs Committee of the House of Representatives, and the President and his executive.[25]

Knight and Hudson have outlined other relevant differences in the way committees function in the American and Australian political systems:

> Congressional committees have flowered in Washington principally for two reasons. The first is that the executive (the elected president and his appointed cabinet) and the legislature, Congress, are separate and distinct institutions. It is assumed that one will serve as a check on the other. One outcome is that Congress, and especially the Senate, is powerful. Executives must court it; senior Congressional figures have high standing as members of Congress rather than, as in the British and Australian systems, as members or potential members of the executive. The second reason is that, while the United States has a two-party system, and each party has its own traditions, these traditions are overlaid with regional, institutional and personal loyalties and traditions, and party discipline of the British or Australian kind does not apply.[26]

Despite Opposition reservations about the Committee's treatment by the Executive, Casey often spoke to the Committee. He also ensured that the Department of External Affairs briefed it frequently about international developments, and kept Evatt informed of the kind of information supplied to the Committee by his department.[27] The Government through Casey also offered some concessions: from December 1953 the Minister for External Affairs could, at the Committee's request, authorise it to sit other than *in camera*. Provision was also made for the Opposition Leader to receive copies of the Committee's reports, although this was made conditional on the ALP joining the Committee.[28] In October 1954, the Committee's terms of reference were expanded, to allow it greater latitude in the choice of subjects it examined.[29] Nevertheless, Casey continued to regard the Committee's primary role as educative and advisory:

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24 *CPD*, Senate, 15 March 1962, pp. 542 and 552.

25 *CPD*, Senate, 29 September 1954, p. 585.

26 Knight and Hudson, op. cit., p 60.

27 W.J. Hudson, *Casey*, Oxford University Press, Melbourne, 1986, p. 282.

28 *CPD*, Senate, 1 and 2 December 1953, pp. 232-3.

29 *CPD*, Senate, 20 October 1954, pp. 858-859.

> For Casey, foreign policy and diplomacy were for ministers and their public servant diplomats. If a committee of Parliament allowed some education for MPs in the arcane problems of foreign policy and diplomacy, it had his blessing. If it aspired to a greater role, if it distracted his External Affairs officers or if it presumed to grill him, he was not benignly disposed.[30]

Labor remained strongly opposed to the Committee, Senator N.E. McKenna[31] referring to it disparagingly as little more than 'a study circle',[32] and Senator P.J. Kennelly[33] describing it as 'the catspaw of the Minister for External Affairs'.[34] In May 1956, with an Opposition change of heart increasingly unlikely, Casey decided to fill the seven vacant places on the Committee with Government Senators and Members until the Opposition consented to join the Committee[35] (one had already been filled by an ALP (A-C) Senator).[36]

Calwell continued to lead the charge against what he termed this 'fatuous' Committee.[37] Not to be outdone, Senator J.A. Cooke,[38] labelled it 'a puerile and futile body' devoid of achievements.[39] Repeated Opposition requests were made for details of the Committee's operations as part of concerted attacks on its performance,[40] and in March 1962 a major debate was held in both Houses about its future. E.G. Whitlam,[41] Deputy Opposition Leader since 1960, put Labor's position succinctly:

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30 Hudson, op. cit., p. 283. Casey's early view that the Committee represented 'an effort to create machinery whereby members could have access to information that would improve the calibre of debates on International Affairs' remained largely unchanged during his time as External Affairs Minister. See T.B. Millar (ed.) *Australian Foreign Minister: The Diaries of R.G. Casey 1951-60*, Collins, London, 1972, entry for 18 October 1951 (p.41). A suggestion by Senator J.G. Gorton (LP, VIC) that Casey should include a Committee member in his entourage when he attended major international meetings abroad, was not well received by Menzies, senior External Affairs Department officers, nor, presumably, by Casey himself. See A. Trengove, *John Grey Gorton: An Informal Biography*, Cassell, North Melbourne, 1969, pp. 120-1.

31 N.E. McKenna (1895-1974); Senator TAS (ALP), 1944-1968.

32 *CPD*, Senate, 11 August 1954, p. 146.

33 P.J. Kennelly (1900-1981); Senator VIC (ALP), 1953-1971.

34 *CPD*, Senate, 28 September 1954, p.540.

35 *CPD*, House of Representatives, 24 May 1956, pp. 2455-60.

36 G.R. Cole (1908-1969); Senator TAS (ALP), 1949-1955, (ALP (A-C)), 1955-1957 and (DLP), 1957-1965. A Committee member, 29 February 1956 - 30 June 1965.

37 *CPD*, House of Representatives, 25 February 1959, p. 263.

38 J.A. Cooke (1904-1981); Senator WA (ALP), 1947-1951 and 1952-1965.

39 *CPD*, Senate, 11 April 1961, p. 398.

40 See, for example, *CPD*, House of Representatives, 30 April 1958, p. 1331; 4 May 1961, p. 1588; and 17 August 1961, p. 295. Second only to Calwell among the Committee's critics was E.J. ('Eddie') Ward MHR NSW (ALP), 1931 and 1932-1963. Ward's attacks usually involved lengthy questions about the Committee's activities. 'On ... 26 March 1963, Eddie Ward set a parliamentary record by submitting 118 questions without notice. They covered a wide range of subjects and were addressed to almost every minister in Cabinet.' See G. Souter, *Acts of Parliament*, Melbourne University Press, Carlton, 1988, p.451.

41 E.G. Whitlam (1916-); MHR NSW (ALP), 1952-1978. Prime Minister, 1972-1975; Leader of the Opposition, 1967-1972 and 1976-1977, and Deputy Leader of the Opposition, 1960-1967.

> Our objection to this committee is that it is so circumscribed and so superintended by the executive that it serves no useful purpose at all.[42]

During the Senate debate on the Committee's composition and powers, Senator Cole argued that it should be given greater scope to contribute to the making of foreign policy, and that the Opposition ought to be represented on the Committee.[43] For the next five years, however, existing arrangements remained in place.

Nevertheless, the Committee was approaching a watershed in its history. Between 1964 and 1967 Whitlam and three fellow Members of the House of Representatives — G.E.J. Barwick, P.M.C. Hasluck and P. Howson[44] — were involved in negotiations which led eventually to Opposition representation on the Committee. Barwick, External Affairs Minister from December 1961, had succeeded in meeting most ALP objections to the Committee by late 1963, but two major obstacles remained: provisions in the Committee's resolution of appointment relating to dissenting reports, and Senator Cole's membership of the Committee. The Opposition maintained that Cole's place on the Committee belonged to an ALP nominee.[45]

Notwithstanding these differences, Whitlam was eager to find a *modus vivendi*, and Howson, a Committee member, acted as an unofficial link between Barwick, Whitlam and the Committee in early 1964 in an attempt to bring this about.[46] However, on 22 April 1964, the ALP Executive rejected the Government's proposed Committee reforms, which included changes to the Committee's 1964 resolution of appointment, ostensibly because of reservations about provisions concerning the furnishing of dissenting reports. Howson's diary records his understanding of the real reasons: Opposition Leader Calwell's fear that membership of the Committee would result in Labor Senators and Members being 'brainwashed'; Cole's continuing membership of the Committee; and, at a more personal level, Calwell's wish to remind his ambitious deputy that the Opposition leadership ranking was Calwell–Whitlam and not *vice versa*.[47]

Whitlam remained undeterred in the face of this major reversal, and he continued to negotiate, henceforth with Hasluck, who succeeded Barwick as Minister for External Affairs on 24 April 1964. Hasluck shared Whitlam's strong belief in the need for Opposition representation on the Committee. Calwell's attitude remained unchanged. He made it clear that the ALP would join the Committee only if it were established on the same basis as similar committees in Canada and New Zealand.[48] However, Calwell's views were not shared by many senior Labor Senators and Members.

K.E. Beazley,[49] who regretted the ALP's lack of representation on the Committee, was convinced that the Opposition would join when Calwell retired.[50] Knight and Hudson have argued that greater ALP receptiveness at this time derived in large part from Opposition perceptions of Hasluck, who:

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42 *CPD*, House of Representatives, 14 March 1962, p. 778.

43 *CPD*, Senate, 15 March 1962, pp. 568-9.

44 G.E.J. (later Sir Garfield) Barwick (1903-); MHR NSW (LP), 1958-1964. Minister for External Affairs, 22 December 1961 - 24 April 1964.

P.M.C. (later Sir Paul) Hasluck (1905-1993); MHR WA (LP), 1949-1969. Minister for External Affairs, 24 April 1964 - 11 February 1969.

P. Howson (1919 -); MHR VIC (LP), 1955-1972. A Committee member, 1962-1964 and its Chairman, 5 May - 11 June 1964.

45 *CPD*, House of Representatives, 22 April 1964, pp. 1307-12.

46 See D. Aitkin (ed.) *The Howson Diaries: The Life of Politics*, Viking Press, Ringwood, 1984, entries for 26 February 1964 (p. 80); 18 March 1964 (p. 84); 8 April 1964 (p. 86); and 20 April 1964 (p. 88).

47 ibid., entries for 21 and 22 April 1964 (pp. 88-89).

48 *CPD*, House of Representatives, 31 March 1965, p. 511.

49 K.E. Beazley (1917-); MHR WA (ALP), 1945-1977. A Committee member, 1967-1969 and its Vice-Chairman, 1967-1969.

> ... more than most had a reputation for detachment from some of the more Machiavellian aspects of politics and for commitment to principle, and this doubtless encouraged the Opposition to co-operate in an enterprise which might develop along lines likely to meet its and the Parliament's purposes.[51]

Calwell retired as Opposition Leader in February 1967, and was succeeded by Whitlam. Hasluck and Whitlam immediately began to press their case for Opposition membership of the Committee. Both believed that Australia's growing foreign commitments — particularly those in South-East Asia — made Opposition representation on the Committee essential. Cole had left the Parliament in 1965, and his place on the Committee had been filled by a fellow DLP Senator, F.P.V. McManus.[52] The proposals agreed on by Hasluck (representing the Government) and the Opposition Leadership met with general parliamentary approval, before being presented to, and passed by, both Houses in May 1967. However, some Senators and Members expressed reservations. Senator L.K. Murphy[53] was concerned that the Committee would remain 'a ministerial committee' rather than a properly constituted parliamentary committee,[54] while G.M. Bryant[55] questioned the *in camera* provisions in the Committee's terms of appointment.[56]

The majority of ALP objections to the Committee having been met even before Calwell's retirement, and the presence on the Committee of a DLP Senator apparently no longer an obstacle, three Opposition Senators and five Opposition Members joined the Committee in May 1967. The Committee's 1964 resolution of appointment remained unchanged except for a minor amendment relating to dissenting reports, although Whitlam was quick to point out that Opposition membership of the Committee would not lead to a bipartisan foreign policy.

The reconstituted Committee comprised twenty-one Senators and Members: four Government and three Opposition Senators, one DLP Senator and eight Government and five Opposition Members.[57] The Government retained a majority on the Committee, which continued to meet *in camera*, while the public disclosure of records of its proceedings remained at the Minister's discretion. However, it now had the power to invite experts to appear before it, and, for the first time, the Leader of the Opposition would receive its reports as a matter of course.

Hasluck summed up the Committee's *raison d'être* thus:

> The functions of this Parliament in respect of foreign affairs are, of course, parliamentary functions. Under our parliamentary system the Executive is responsible to Parliament and the Executive is formed from the majority in Parliament. But Parliament itself does not have executive functions. Consequently, this Committee of Parliament does not have functions in respect of foreign policy for which the Executive must bear the responsibility, but it has functions arising from the parliamentary role of review, discussion, and debate. It provides opportunity for members appointed to the Committee to inform themselves more fully, to study more deeply and to consider more thoughtfully the matters involved in the conduct of foreign affairs.[58]

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50 Aitkin (Howson), op. cit., entry for 22 April 1964 (p. 88).

51 Knight and Hudson, op. cit., p. 66.

52 F.P.V. McManus (1905-1983); Senator VIC (ALP (A-C)), 1956-1957, (DLP), 1957-1962 and 1965-1974. A Committee member, 1965-1972.

53 L.K. Murphy (1922-1986); Senator NSW (ALP), 1962-1975.

54 *CPD*, Senate, 11 May 1967, p. 1372.

55 G.M. Bryant (1914-1991); MHR VIC (ALP), 1955-1980.

56 *CPD*, House of Representatives, 4 May 1967, pp. 1790.

57 For Committee membership see Appendix II.

58 *CPD*, House of Representatives, 4 May 1967, p. 1787.

Between February 1952 and May 1967 the Committee produced six reports, four of which were printed for public circulation.[59] Committee sub-committees also reported on a broad range of subjects, either to the full Committee or to the Minister. Much of the Committee's work went unnoticed because most of its private briefing papers were never published. However, there is evidence to suggest that significant work was done by the Committee.[60] Nevertheless, its tangible achievements during these years were comparatively modest, and the failure of the Government and the Opposition to reach agreement at the outset on the Committee's purposes, powers and functions seriously weakened its capacity to contribute to the formulation of Australian foreign policy. Some Liberal–Country Party provisions governing Committee operations — such as that preventing the Committee from sending for persons, papers or records without Ministerial consent — were too stringent; while the ALP's initial insistence on equal Government-Opposition representation on the Committee in the House of Representatives betokened a limited understanding of the realities of political and parliamentary life.

Senators' and Members' knowledge of foreign affairs, and public perceptions of Parliament and parliamentary committees, would have been enhanced considerably by Opposition membership of the Committee. A properly constituted joint committee would certainly have made more useful contributions to the foreign policy debate, especially in relation to South-East Asia, during the 1960s.

The 1967 reforms 'had no discernible impact on executive policy; [nor] did [they] alter the power balance between the executive and the parliament'.[61] However, they did result in the Committee achieving greater prominence and recognition. The successful compromise reached over Opposition membership of the Foreign Affairs Committee provided encouragement to the growing number of parliamentarians of all parties in favour of Committee Office reform in both the Senate and the House of Representatives. Among the most prominent voices calling for such reform was that of the Liberal Party MHR, H.B. Turner, who served as Chairman of the Committee between August 1964 and October 1966. Turner believed that the 'failure to read the signs of the times and to devise the institutional forms to make Parliament efficient and apt for the tasks required of it'[62] had resulted in an increasingly dominant Executive. Turner argued that it was time for the Parliament to reassert itself, particularly through the mechanism of parliamentary committees:

> Parliament should insist upon having essential information at its disposal. This must primarily be achieved by bringing legislators face to face with administrators and experts at the committee table, whenever possible making available from the Departments background documents that form the basis of policy decisions, all this resulting later in meaningful and informed debate on the floor of Parliament.[63]

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59 *The Peking Peace Conference* (September 1952; Parliamentary Paper No. 132); *The Committee's Activities and Functions* (November 1953; printed but no Parliamentary Paper No.); *Indo-China* (April 1954); *Extradition Arrangements Between Australia and Communist-Controlled Countries* (October 1956); *The Status of Berlin As It Affects the Relationship Between the Major Powers and Australia As An Integral Part of the Western World* (May 1963; Parliamentary Paper No. 202); and *The United Nations* (May 1966; Parliamentary Paper No. 296).

60 See, for example, the Howson diaries, op. cit., entry for 10 September 1963 (p.54) in which the diarist recorded the business of that day's Committee's meeting:

> Foreign Affairs Committee. Discussion on possible political repercussions if Soekarno visited Australia. The Committee was fairly evenly divided. On my motion we agreed to inform Barwick that it would be inadvisable until public opinion had been conditioned to its value to Australia, and that we should prepare a press campaign as soon as possible. We also agreed to Malcolm Fraser's report on Australia-New Zealand relations.

61 Knight and Hudson, op. cit., p. 67.

62 H.B. Turner, 'The Reform of Parliament', *Australian Quarterly*, (37), 4, December 1965, pp. 56-65, p.62.

63 ibid., p.63.

Turner did not propose a policy-making role for parliamentary committees; he insisted rather on the necessity for a greater number of committees to monitor the activities of government departments and the Executive. The importance of committees within the parliamentary context received increasing acknowledgment as a result of the 1967 Foreign Affairs Committee reforms. These reforms were undoubtedly an important factor in preparing the way for major reform of the Senate and House of Representatives committee systems in the 1970s and 1980s.[64]

64 Hitherto, ambitious attempts at committee reform had been unsuccessful, and, in most instances, stillborn. See, for example, J.F. Cairns (1914-) MHR VIC (ALP), 1955-1977 on 'the extension of the committee system', *CPD*, House of Representatives, 2 October 1957, p. 967. Senator E.W. Mattner (LP, SA), called for radical committee reform in 1964, stressing the need for Senate standing committees in areas like foreign affairs to improve critical debate. See *CPD*, Senate, 17 March 1964, p. 306.

Appendix I

Membership of the Joint Parliamentary Committee on Foreign Affairs, March 1952.

Senate

J.G. (later Sir John) Gorton (1911-); Senator VIC (LP), 1949-1968 and MHR VIC (LP), 1968-1975 (IND, May-November 1975). Prime Minister, 1968-1971. A Committee member, 1952-1958 and its Chairman, 1952-1956.

J.A. McCallum (1892-1973); Senator NSW (LP), 1949-1962. A Committee member, 1952-1955 and 1959-1962.

E.B. Maher (1891-1982); Senator QLD (CP), 1949-1965. A Committee member, 1952-1965 and its Vice-Chairman for brief periods during the 1950s.

R.H. Wordsworth (1894-1984); Senator TAS (LP), 1949-1959. A Committee member, 1952-1959.

House of Representatives

W.D. Bostock (1892-1968); MHR VIC (LP), 1949-1958. A Committee member, 1952-1955.

A.R. (later Sir Alexander) Downer (1910-1981); MHR SA (LP), 1949-1964. A Committee member, 1952-1958.

D.H. Drummond (1890-1965); MHR NSW (CP), 1949-1963. A Committee member, 1952-1961.

F.M. Osborne (1909-); MHR NSW (LP), 1949-1961. A Committee member, 1952-1955.

H.S. Roberton (1900-1987); MHR NSW (CP), 1949-1965. A Committee member, 1952-1955.

R.S. Ryan (1884-1952); MHR VIC (UAP), 1940-1944 and (LP), 1944-1952. A Committee member, February-August 1952 and its Chairman, March-August 1952. R.G. Casey's brother-in-law.

W.C. Wentworth (1907-); MHR NSW (LP), 1949-1977 (IND LIB, October-November 1977). A Committee member, 1952-1961.

Appendix II

Membership of the Joint Parliamentary Committee on Foreign Affairs, May 1967.

Senate

T.L. Bull (1905-1976); Senator NSW (CP), 1965-1971. A Committee member, 1965-1969.

M.C. (later Sir Magnus) Cormack (1906-); Senator VIC (LP), 1951-1953 and 1962-1978. A Committee member, 1965-1971 and its Chairman, 1967-1969.

A.J. Drury (1912-); Senator SA (ALP), 1959-1975. A Committee member, 1967-1972.

K.A. Laught (1907-1969); Senator SA (LP), 1951-1969. A Committee member, 1962-1969.

F.P.V. McManus (see note 52).

E.W. Mattner (1893-1977); Senator SA (LP), 1944-1946 and 1949-1968. A Committee member, 1959-1962 and 1965-1968.

J.A. Mulvihill (1919-); Senator NSW (ALP), 1965-1983. A Committee member, 1967-1972.

D.R. Willesee (1916-); Senator WA (ALP), 1949-1975. A Committee member, 1967-1969.

House of Representatives

A.A. Armstrong (1909-1982); MHR NSW (CP), 1965-1969. A Committee member, 1967-1969.

L.H. Barnard (1919-); MHR TAS (ALP), 1954-1975. A Committee member, 1967-1969.

K.E. Beazley (see note 49).

D.E. Costa (1900-1976); MHR NSW (ALP), 1949-1969. A Committee member, 1967-1969.

M.D. Cross (1929-); MHR QLD (ALP), 1961-1975 and 1980-1990. A Committee member, 1967-1972.

R. Davies (1919-1980); MHR TAS (ALP), 1958-1975. A Committee member, 1967-1969.

G.O'H. Giles (1923-1990); MHR SA (LP), 1964-1983. A Committee member, 1967-1969.

T.E.F. Hughes (1923-); MHR NSW (LP), 1963-1972. A Committee member, 1964-1969.

J.D. Jess (1922-); MHR VIC (LP), 1960-1972. A Committee member, 1962-1972.

D.J. (later Sir James) Killen (1925-); MHR QLD (LP), 1955-1983. A Committee member, 1964-1969.

P.J. Nixon (1928-); MHR VIC (CP), 1961-1975, (NCP), 1975-1982, (NPA), 1982-1983. A Committee member, May-November 1967.

A.S. Peacock (1939-); MHR VIC (LP), 1966 - . Minister for Foreign Affairs, 1975-1980. A Committee member, 1967-1969.

H.B. Turner (1905-1988); MHR NSW (LP), 1952-1974. A Committee member, 1956-1958 and 1962-1966 and its Chairman, 1964-1966.

Reform Trends in Swiss Government

Professor Ulrich Klöti

Times are changing and we are changing with them; however, political institutions remain what they have always been. This could be the conclusion of someone who looks at the archaic Swiss political system from outside. It might also be the position taken by a Swiss observer, like myself, who did his master's degree in political science in the almost revolutionary year of 1968 and who, since then, has seen so many failed attempts to reform the political institution in any basic way.

In the 1960s there was much concern about what was called the 'Helvetic malaise' or the 'small state syndrome' that we suffered from. In the 1970s the Swiss envisaged a complete revision of the Constitution: a first reform of the executive branch; a considerable strengthening of parliament, particularly vis-à-vis the government and the bureaucracy; and a redistribution of tasks and powers between the federal level and the states, which are called cantons.

For the anniversary of 1991, when the old Swiss federation was 700 years old, and for the anniversary coming up in 1998 when the new federal Constitution will celebrate 150 years, many of my colleagues in law, economics, sociology and political science developed and evaluated new models for a Swiss polity in the next century. The results have been rather modest; little change has occurred. Basically, Switzerland is still governed in the same way it was 25 years ago.

In my disappointment I might have stopped my lecture on reform trends here. I continue not only because I have promised to talk for about 40 minutes but mainly because I would like to show that social change has dramatically accelerated and that, therefore, at least in my opinion, institutional reform has become rather inevitable.

In my brief overview, I would like first to summarise the main reasons for the increased need for reform in the traditional Swiss polity and then to develop what this means for government and administration, parliament, direct democracy and federalism. Finally, I would like to give some explanations for the fact that there have not been many successful reforms in the last 25 years.

The reasons for the need for reform of political institutions have been listed many times. I could even imagine that in Australia they would not be much different from what they are in Switzerland. Hence, I can limit myself to mentioning a few key points.

First, as in most other OECD[1] countries social developments, technological innovation and rapid economic growth have allowed a massive expansion of the welfare state on the one hand and have increased the demand for regulation and for limiting the negative consequences of growth on the other.

Second, for these reasons the political system has been confronted with qualitative new tasks. Twenty-five years ago the Swiss Federal Government did not have to deal with economic growth, physical or land use

[1] Organization for Economic Co-operation and Development

planning, comprehensive environmental protection, nuclear policy, problems of telecommunication or data protection, housing or consumer protection. Most of these problems either did not exist or were left entirely to the cantons or even to the local authorities.

Third, in quantitative terms there is much more at stake today. The states' share of gross domestic product has risen from 20 to 30 per cent since 1968. The total expenditure of the governments at the three levels has increased from 15 billion to 105 billion Swiss francs, which is about $A100 billion. This may still be a small amount in a comparative perspective, but the dramatic increase has been quite a challenge.

Fourth, interdependency and complexity of policies have become more important. Different policy fields are more and more intertwined, and a program in one field has consequences in others. For instance, interactions between the fields of energy, transport, environment, housing and regional development can no longer be denied.

Fifth, relations between governments at different levels seem to be more and more complicated. I will come back to that later on.

Sixth, the international and supranational dimension of politics is added to this already mysterious game. Years ago foreign policy was limited to security, bilateral diplomatic relations and foreign trade. Development aid and immigration came later on. There was little cooperation in international organisations, and European integration was considered something alien to Swiss concerns. Today, there are almost no policy problems left where domestic departments in the Federal Government do not have to consider the international dimension. Sometimes it is rather difficult to distinguish the domestic and foreign aspects in politics at home.

Finally, in view of the developments mentioned it is now increasingly difficult to build consensus among the diverging political tendencies. We can observe a considerable fragmentation of the political forces. It is hard to integrate the evermore numerous small groups and social movements into a political mainstream. At the same time, we have to take into account an important polarisation. Parties and interest groups in the centre of the political spectrum are either moving to the extremes or disappearing. Under these circumstances, national solidarity and consensus have become rather scarce resources in Swiss politics, at least compared with what we had 25 years ago. Considering all the new challenges confronting the Swiss Government it is, for me at least, rather surprising that political institutions have remained basically unchanged since the last century when the Constitution was written.

In the last 5 or 6 years, however, we can observe a new reform trend in Switzerland. According to an almost unanimous view of professional observers, academics, critics, and even practicians involved, reform should achieve at least two goals: first, the capacity of the government system to guide and direct the nation and to make timely decisions should be increased; and, second, the main actors who suffer from a considerable overload in particular members of government and members of parliament should get better financial, professional and technical support in order to be partially relieved of their burden. The first goal has to do with the effectiveness of democracy and the second has to do with the efficiency of its working. As we all know, the two cannot be easily reconciled.

Before I go into the details of the reform debate, I should remind you that the Swiss governmental system is somewhat peculiar. I want to talk about the Federal Council, which is the government. Government, in a narrow sense, has always been entrusted to a Federal Council composed of exactly seven members. Members of that Council are elected individually for a full period of 4 years by the Federal Assembly, which is a common assembly of the two chambers.

The work of the Federal Council is based on two main principles of organisation. In the first place, the Constitution states that its functions should be distributed amongst its individual members. Thus, seven departments have been set up. Therefore, the whole scale of government operations of a modern state in the case of Switzerland must be undertaken by precisely seven ministerial departments. This means, for example, that one member of the government may be responsible for communications as well as energy and transport; another for foreign trade, industrial and labour matters, agriculture and housing; while still another may be responsible for culture, education and training, health, social welfare, environmental protection and sports. You can see what the load must be on that person. However, only a part of government business is legally delegated to the departments responsible for important matters.

The second principle of organisation can be found in Article 103 of the Federal Constitution, which states that 'decisions are taken by the Federal Council as a body'. This creates a so-called collegial principle by which the government as a whole is responsible for all decisions taken. This means that the members of this Federal Council have equal importance. The President of the Confederation, elected for one year only, presides over the meeting of the Federal Council as *primus inter pares*, so he is at the same level. A government head who has supreme power and can make policy decisions on his own a single leader is unknown in Switzerland.

It is interesting to see that the latest process of governmental reform was initiated by Parliament, although the two powers are clearly separated. Following a move by both chambers, the Federal Council installed a high-ranking commission led by one of the most prestigious law professors in the country. In its final report, this commission discussed four models; however, two of them were dismissed almost immediately. These models may be of interest to you: one was the presidential system of the United States and the other was the parliamentary system following the Westminster model. Both seem to be incompatible with Swiss history and experience.

Two models are still discussed. The first one would imply an expansion of the Federal Council to at least 11 members. This would make it possible to maintain collegiality, although the position of the president would have to be slightly strengthened by creating a presidential department and by electing the president for two years instead of only one. The other officers and tasks could be distributed to ten departments instead of seven. Departments would be smaller, more homogeneous and the work-load would decrease.

The second model foresees a two-level government. The Federal Council would remain a small collegial body maybe even reduced to five members limiting itself to problems of a strategic dimension and of high political importance. It would leave the direction of the departments to about 20 junior ministers. They would have to solve the administrative problems of a tactical dimension only. Members of the Federal Council would still be elected by Parliament for a full 4-year term, whereas ministers would be nominated by the small cabinet.

It was no surprise to me that the acting Government did not like any of the proposed models. It is not willing to change the Constitution at all. The bill, which is called *Governmental Reform 93*, is limited to two other proposals which do not go very far indeed. First, the Government should have the power to adapt the departments to changing needs without being forced to ask for the consent of Parliament something that is not possible under the current law. Second, it should be possible for each department to nominate up to three state secretaries according to the necessities of the department.

Most commentators think these reform proposals are the first step in the right direction. As far as the increased flexibility of organisation and the expansion of the top personnel are concerned, this is probably true. Personally, I doubt that the Reform 93 Bill will solve the main difficulty of Swiss government. The decision-making capacity will probably not be improved. Departmentalism and policy egoisms of the different departments will continue to flourish. Coordination at the top will still be very difficult as nobody is really responsible for an overall view.

As you are in this famous building, it may be of even greater interest to you to analyse the situation of the Swiss Parliament. The Swiss Federal Assembly disposes of the supreme power in the confederation under the reserve of the rights of the people and the cantons. This means that, in formal terms, Parliament has an extremely strong position. Since the people have opposed decisive power in legislative matters, the Swiss Parliament has a function which is different from popular representation as seen in purely parliamentary systems of government.

First of all, it is not possible for the Swiss Parliament to exercise control over the government by voting it out of office. There is no such thing as a confidence vote. On the other hand, instruments for permanent supervision of the activities of the executive have been built up. The dissolution of Parliament and early elections are not allowed for in the Constitution.

Since there is no clear party political majority and no clear distinction between government and opposition benches, and since the parties have little power of compulsion and therefore hardly any disciplinary function, it is possible for specific legislative matters, both of principle and detailed correction, to be discussed with great thoroughness. The most important changes in legislative proposals which come from

government take place where parliament takes a different view from that of the government with regard to the chances of success in the referendum.

It is true that the Federal Parliament does not use all its potential strength to the limit. This is mainly due to the non-professional or part-time system. Sometimes we call it the amateur system. Members of the Federal Assembly do not exercise their office as a full-time profession. They continue their professional lives outside the framework of Parliament. This system is founded on the idea that the people's representatives will maintain a greater identity with the people. It certainly also means that individual members of parliament must carry heavy burdens. It is estimated that members of the Swiss Parliament must give up more than half of their working time to parliamentary activities and, as a rule, they must combine this with a full professional life.

In September 1992, the Swiss Government held three referenda on parliamentary reform. In one bill it was proposed that the Federal Council be obligated to inform the presidents from the two chambers and the commissions on foreign affairs about foreign policy developments. In addition, it was proposed that they consult with them when negotiations were going on and inform them of procedures being set up when there were differences between the two chambers. Of course, this has to do with European integration. These procedures were simplified.

People accepted these bills. However, they rejected by a large margin two other proposals of law which would have increased the remuneration of members of the National Council from about 60,000 francs to about 90,000 francs a year, including all the expenses for everything else. The bill included a proposal for members of parliament to be entitled to a small sum, which they do not have now, to cover the costs of personal secretarial staff. As this proposal was rejected, their financial, material and personnel resources remain modest.

Certain professional categories, such as medical doctors, business managers or even members of cantonal or city governments, can no longer be serious candidates for office in parliament. It is simply impossible for them to combine two jobs. The situation continues to limit the power of Parliament as it does not have the means to be an equal partner of the professional government and, in particular, of the bureaucracy.

I might add that honorary work for the community occurs not only in the Federal Parliament, but also at the canton and local levels where it is even more important and where a considerable part of the administrative tasks are fulfilled by non-professionals. The best known honorary work is in the military service. The system applies even in the federal bureaucracy, which invites experts from businesses, peak associations and sometimes even universities. These experts give advice without being paid for it.

All this proves, from Swiss public opinion, that people in politics and administration are there primarily to serve the public. It is a positive aspect of Swiss political life that many are still willing to do it. I must add that they will do it as long as they are well paid in their primary jobs.

The topic of public opinion brings me to the most special dimension of Swiss political institutions: direct democracy. No other country in the world makes such extensive use of popular rights at the national level. Any change in the Constitution is automatically subject to a referendum. The same is true of certain other important federal decisions, such as membership of international organisations.

In December 1992, the Swiss voted by a majority of 50.3 per cent and by 17 out of 23 cantons not to sign the treaty on the European economic area. Although Government, Parliament and all the major parties favoured the Bill, they will have to live with this decision for a while. It will take the Swiss a long time to get the majority of the people and of the cantons to say 'yes' to Europe. We had three attempts at introducing women's right to vote and four referenda to have a value added tax. One can now extrapolate how long it will take to join the European Union under the current rules.

Governing a country with direct democracy is difficult. This is particularly true when the optional referendum is added. Direct democracy allows all laws passed by the Federal Parliament, all binding federal decisions and all treaties with foreign countries to be submitted to a popular vote. The only condition is that 50,000 citizens should sign a petition to this effect. The signatures must be collected within 90 days of the publication of the Act of Parliament or the document in question. If a referendum takes place, only the majority of the voting citizens is required, not the majority of the cantons anymore. Thus the referendum constitutes the right of the citizens to veto parliamentary decisions. It takes place, to

some extent, in the form of a judicial review of the constitutionality of laws as it operates in other countries, including Australia, as far as I know.

Finally, government and parliament have to cope with the popular initiative. This instrument gives 100,000 voters the right to demand a partial or total revision of the Federal Constitution. The necessary signatures must be collected here within 18 months of the launching of the initiative. There have been some very important initiatives in the last few years. One, for instance, wanted to abolish the Swiss Army. A second asked for the closing down of all nuclear plants. A third wanted to make sure that the school year began at the same time of the year in all the cantons. By the way, the first two were rejected; the last was passed.

From looking at these issues, one can imagine that we have some problems with direct democracy. The first problem has to do with the extent of its use. Between 1981 and 1990, voting took place on 18 compulsory and 12 optional referenda, as well as on 17 initiatives. There were approximately five votes a year. If you add to this the referenda at the canton and local levels, you may end up with people having to vote on more than 30 issues on four weekends in one year.

We can conclude that there is a massive overload not only on the citizens but also on the parties and interest groups which should be able to conduct decent referenda campaigns. The result may be little participation by, and insufficient information for, the citizens and irrational decisions influenced more by populist slogans and heavy advertising than by argument and political debate.

The second difficulty of direct democracy has to do with its conservative consequences. As I have said, many observers are afraid that Switzerland will not be able to solve the problems of the next century when successive votes in the referenda merely confirm the status quo.

This brings me to the third problem of direct democracy the increasing frustration of losing minorities. Those who find themselves on the losing side in most of the numerous referenda tend either to organise in social or protest movements or to withdraw from politics altogether. Low participation of sometimes around 30 per cent in national referenda is not enhancing the legitimacy of the decisions.

The problems of direct democracy that I have mentioned do not seem to be taken seriously by a large majority of the citizens. For the moment, we could not say that there is a lively reform debate on direct democracy going on. To be sure, there are some interesting proposals for reform discussed in parliamentary commissions. One idea is to allow for counter-projects in referenda, not only for constitutional matters but for single acts of law as well.

Another proposal would make it possible to have referenda on major administrative decisions which do not have the status of a law. Some groups consider that there should be measures against commercial collection of signatures; others would like to increase the number of required signatures for initiatives and referenda. Other groups claim that there should be no retroactive consequences of popular initiatives because there are occasions when the time has passed for a decision to be made. For example, it may be that the plant is already there when we vote that it should not be there. But I am convinced that none of these proposals will find a majority in Parliament and certainly not in a referendum.

Although I do not have to explain federalism to Australians, let me just say a few words about the problems the Swiss experience with their federal system which, of course, cannot be changed in any basic way at all. First, we are confronted with a very complicated distribution of powers. In recent years, it has become less and less clear to citizens, and even to professional observers like myself, which of the three levels of government is in charge who decides an issue, who has to pay for a program, who implements the program, who is the addressee, who profits from the program and who are the losers.

Second, as a result of this distribution of tasks and powers, intergovernmental relations have become real issues. Vertical interlocking with regard to law, fiscal equalisation which is also an issue in Australia growing bureaucracies at the three levels and horizontal cooperation between the 26 cantonal systems and the 3,000 communal administrations lead to a considerable ‘entanglement’. Citizens can no longer understand what is going on.

Third, political borders are no longer congruent with social and economic areas. People live in one place, they work in another and they spend their free time in still a third place. These places may not even be in the same canton. New problems of transport, energy, environment and drugs go across the borders of

communities and even of cantons. Therefore, we have to deal with the problems of spillovers and external matters, which are very serious.

Finally, the differences — the economists would say disparities — between political units and regions have increased despite all the programs of equalisation. Many local governments and some cantons as well are no longer in a position to solve their own problems. The result is usually centralisation, which basically nobody wants, so there is a paradox built into that process.

Reform of federalism is very difficult. The attempts to redistribute tasks and political power between the Federal Government and the cantons failed to a large extent. New proposals we made recently for a better cooperation at least in urban areas were not very well received by the cantons. We are afraid that federalism nowadays has more to do with communal and cantonal interest and regional egoism than with the basic values of subsidiarity and solidarity.

In my overview of reform trends in Swiss government, I have concentrated on political institutions whose reform would make it necessary to change the Constitution or at least some important laws. In addition, I might have discussed areas where political reforms would be possible without touching the legal framework. I think the composition of the Federal Council — the so-called magic formula with two representatives of the three major parties and one of the fourth party — could be changed from one day to the other if parliament decided to do so.

I think of the reform potential: the introduction of new consultation procedures with the cantons, coalition programs increasing the efficiency of parliament by self-discipline or easing the task of the Federal Council by pragmatic delegation of powers — but if these reforms within the existing legal framework are also not used, it proves that there is no real urge for political reform in Switzerland.

Before we come to an end, we might just ask ourselves why this is so. Why is there no enthusiasm for political reform when social, economic and technological developments both at the domestic and at the international level suggest rather fundamental innovation? I can think of at least four explanations for this paradoxical situation.

First, it is the political institutions themselves that inhibit change. They were designed in the last century to guarantee reasonable bargaining, accommodation and reserve and they had to make sure that the tempo of development was convenient even for the slowest and most traditional regions. It is not surprising, therefore, that these institutions prove to be resistant against their own reform. Minimal changes of the people's rights are possible only by passing a referendum. In a vote, the citizens will not accept any proposal that rouses the suspicion of limiting the people's rights. Ultimately, what we have could be called structural gridlock.

Second, we have to take into account resistance. For a long time, the Federal Council has opposed governmental reforms successfully. Parliaments saw the need for reform, particularly to strengthen the capacities to control the bureaucracy, only after some serious affairs and mishaps. The reform of federalism failed because the cantons were against it and, as I said before, the citizens do not accept a reform of direct democracy.

Third, the Swiss now live in a climate of insecurity and lack of reassurance. After a 40-year period with an unemployment rate of less than one per cent, the deep recession makes people doubt whether growth can go on forever. The end of the Soviet empire has left the Swiss with a vacuum as far as basic assumptions on foreign policy are concerned. Even neutrality is being discussed nowadays. The considerable proportion of foreigners living in the country seems to threaten Swiss qualities and maybe peculiarities. Many Swiss feel that European integration will put an end to the country's sovereignty. In times of transition and crisis, there is a strong tendency to maintain the status quo at least in some areas.

Political institutions are a field where nobody can really impose change on the citizens. At the same time, they are the only symbols of identity in a purely political nation which has no president representing the country, no monarchy, few national heroes who lived in the Middle Ages and not even a very successful soccer or skiing team anymore. In this situation federalism, direct democracy, non-professional service to the country and collegial government are seen as the essentials of the nation. Questioning institutions and discussing its reform, as I have tried to do here, will be interpreted by some as an almost subversive activity.

Last, but not least, there are some very good reasons for not altering political institutions too often. These institutional arrangements have been very successful in the past. They have made it possible to mould into one whole a country which is so diversified on the linguistic, cultural, religious and economical levels, and to integrate the various parts of the population in the system of peaceful coexistence.

The level of acceptance of political decisions, in spite of what I said before, has been very high. Citizens still feel strongly involved in their political institutions and, as far as performance is concerned, according to almost all current international economic and social indicators, Switzerland is still highly successful. Hence, the conservatives would ask, 'Why change anything at all?' They are probably right when they claim that it does not make sense to impose on Switzerland political institutions which are modelled for example along the lines of the Westminster parliamentary system. They are probably wrong, however, when they believe that Switzerland can continue to be a special case in a world that is constantly changing.

My country will have to situate itself in Europe not only in economic terms but also in political terms. In order to do this it will have to adapt its political system to some extent. We should not copy blindly what others do, but we can certainly learn from the experience of other highly developed democracies. This is, by the way, one of the reasons I am here, and I take the opportunity to thank Australians for their hospitality and thank you for your attention.

Questioner I have a degree in politics and was also in government. In Australia we have ministerial responsibility. It is difficult to have accountability. I found that, when I was at the base level in government, the top and the bottom did not really know what was happening. If something is wrong, where do you go to find who is responsible? In Australia we have the Secrecy Act. I do not know if you have such a thing in Switzerland.

Professor Klöti I can say two things. First, all national programs are implemented at the level of the cantons. If a citizen does not agree with something, he first goes to his local government or canton: he or she does not go to Bern to see what is wrong there. This is bureaucracy closer to the people.

Second, what is really decided in the federal bureaucracy is now better controlled by parliament because it has installed some very effective instruments to control the bureaucracy. People can go there and look at what it is doing. When I was working for the Swiss Government for 7 years in the 1970s, some member of parliament could just step in and ask, 'What are you doing? Oh, you are reading a newspaper', or something like that. You should not read the sports pages when you are working. These are the two ways accountability is controlled to some extent.

Questioner What do you see as the ways to break human communication barriers? The barriers are there partly because people do not want to communicate in a democracy and they have become so disillusioned and fed up that many put their minds in their pockets and do not even try to communicate. Do you have any recommendations for us as to how we can achieve a collection of more honest information and also of more ways to stir people to want to be alert?

Professor Klöti Maybe Switzerland has something to offer in this regard with the idea that we discuss problems at the lowest possible level where people still know each other. I got the impression that sometimes in other highly developed democracies people expect everything to come from the top, wait for the best solutions and, as you said, wait till they solve the problem. There is still something left of the idea that instead of waiting to see what others do, you should just take the initiative and start talking about the problem. Maybe it will not even be necessary to have a solution come from the top, but that is all I can say for the moment.

Questioner There is a proposal to introduce in the Australian Capital Territory legislation by voter initiatives along the lines of the Swiss model. Naturally, we are very interested in some of the issues you raised about the practicalities of such a system. You mentioned that frustration of losers was a problem particularly in the situation of a low voter turnout. I imagine that is in turn connected with the frequency of questions that you also mentioned. Does Switzerland have, or has it considered, mechanisms for either limiting the frequency of referenda, or, if there is a minimum voter turnout, for a referendum outcome to be binding?

Professor Klöti There is one very simple way to try to increase the turnout at a referendum and that is compulsory voting. Compulsory voting is enacted in one or two cantons and it shows that the turnout is higher there. This is contrary to liberal ideas when you think that someone can decide whether they want to vote or not; that is their decision.

It is difficult to limit the number of votes because you have to set some limits and you cannot really say, 'Well, it is for only important questions'. Who defines what an important question is? You can say it is for laws. Sometimes you may have a small amendment to a law which is not very important, but you may have a very important administrative decision, such as putting up a nuclear plant which was the case in Switzerland which is not subject to a law or a referendum.

What we can do is increase the number of signatures necessary to launch an initiative or to have a referendum but, again, this is against the basic ideas of democracy. You will have people reject the idea of increasing the number of signatures. If you are going to introduce something of the kind, I would suggest that you be careful not to go too far in the beginning. Once it works, you can still expand the issues or do things like that, but you will never be able to come back to a lower level of participation and a smaller number of votes.

Questioner You mentioned before creating some degree of difficulty. Can you say why the Swiss have not considered, or a proposal has never been put to the Swiss people by the Swiss Parliament for, a minimum requirement of a certain percentage in each of a majority of cantons with an overall ceiling limit? I believe it is the only system being considered anywhere in Australia.

Professor Klöti Could you explain the system to me? What is the minimum requirement?

Questioner The Swiss figures of 100,000 break down to 2.2 per cent of the Swiss voting population. At the moment, you can raise that 100,000 out of Zurich, and I understand that in other parts of Switzerland Zurich is not regarded as being typical of Switzerland. If you look at the numbers of referendums which have failed, you find that most of them have failed miserably in most cantons anyway. If this requirement were put in place at the initial stage, it would certainly indicate that there must be widespread support. Yet, it would eliminate most things which have got no support when it really comes to the vote.

Professor Klöti The result of the failures of some proposals and projects was the introduction of a very complicated pre-parliamentary process of consultation. It is not true that most of the referendums fail. When you look at the laws being enacted by only 8 per cent or 9 per cent, you see that they are really subject to a referendum. The referendum is not taken on every change of the law. In most of the cases you will still find consensus, but in the most important cases, which are really at the base of the changing of the overall society, it is very difficult.

There are fields where you can compromise and there are fields where you cannot. You cannot be only a 10 per cent member of the European Union. You are a member or you are not. You cannot have only a small nuclear plant. You have nuclear power or you do not. It is like being a little bit pregnant. In these questions it is very difficult to find a compromise and work out a common basis before the vote, but in most other cases and with regular distribution problems you usually find a solution. That is why we still think, basically, the system is working, but for these difficult questions it is different.

Questioner There is, indeed, growing interest in Switzerland and I think it is shown by the number of people here today, particularly because of your system of binding citizens initiated referendums. There is actually a bill before the ACT Parliament at the moment. The trigger is in two directions. First, 2 per cent of the electors signing triggers a referendum to be held at the next election. A percentage greater than 5 per cent triggers a referendum to be held within three months. That handles the problem you raised earlier in that, if there is a longer period of time, the building may be built, et cetera. There are some cases where we need to stop the tunnel before it is constructed.

You mentioned a number of areas in which you suggested that the people took a long time to get it right. One area would be the value added tax. I would suggest that most Australians do not think that is a right decision; that it is a very bad decision. When you talk about the referendum to abolish the army and the one to join the European Union and others that have not met success in Switzerland, I think your suggestion is that they are wrong and they have not yet got it right. It is an interesting debate as to whether the majority of people can be wrong. After all, who makes the decision?

I ask: first, could you let us know what you mean by counter projects; and, second, do you have some idea of where the Swiss people got it right, such as requiring a hospital to be built before roads and such things?

Professor Klöti Let me take the last point first. It is difficult to say that people were wrong. On the other hand, take the women's vote for instance. You can say that it is a human right. If it takes 50 years to achieve and you are ridiculed all over the world, I tend to believe that finally we should get there. We got there in 1971, but it was long after the others got there.

In relation to the European Union, I am not quite sure what is the right solution. The problem is that when you are in the midst of a huge union and everybody around you is a member of it, you have to comply and do the things they are deciding anyway in economic terms. If you want to be part of that market and we are part of that market then it is better to join them, discuss problems and counter the solutions and participate in that process, because that is the problem. We will have to adapt to European law anyway one day, earlier or later, and the same is true for the value added tax. It was a handicap for our export industry to have the system we had before. We changed it last December, so we are no longer really free to choose in some ways.

Questioner What about the counter projects?

Professor Klöti It will mean that when we have a new law on environmental protection some restrictions will be established, for example, the Clean Air Act might say that there should be only 0.8 per cent of pollution in the air. People may agree but not with the certain limits, so there could be a counter project saying that the restrictions should not be at 0.8 but 1.2 per cent. You would then have a choice between two limits without being obliged to reject the whole project. This is the basic idea. Otherwise you would have to wait for another 10 years until a new law is worked out. That is exactly what happened to the environmental protection law.

Questioner My question has several parts, but they are very short. First, you said that the lowest voting level in a referendum was about 30 per cent. Could you give some information about the highest level? Second, do the referendums come around like clockwork every 3, 4 or 6 months, or do they come up irregularly as people get them ready for voting? Finally, I understand that some cantons have compulsory voting and others do not. Is the general tendency to go to voluntary voting or to compulsory voting?

Professor Klöti The tendency is to go to voluntary voting. The rhythm of the referendums is dictated by the rhythm of Parliament whenever a law is ready, it is subject to referendum. It is not a very clear-cut rhythm of 3 months, but a referendum is held whenever something is ready. The highest level of participation we had was in that famous vote on joining the European economic area, which was 80 per cent.

A Stranger in Paradise? A Foreign Correspondent's View of the Parliamentary Press Gallery

Kathleen Burns

To set my job in context, let me refer to a report issued last October by the Australian parliamentary delegation to the United States, which visited there in June and July 1993. The report, *Fighting Friendly Fire*, examined media coverage — or the lack thereof — of Australian events by US journalists. It noted 'all is not well in the Australian–US relationship'. The report concluded:

> Most Americans are well-disposed toward Australia and Australians. We are seen as good blokes. We pose no threat. We are not a problem for them. On a world scale, in US eyes, the difficulties in the Australia–United States relationship pale into insignificance.
>
> [But] on the international front, it is only the world trouble spots where the US is directly engaged that fill US television screens. It is a fact of life that the vast majority of Americans are parochial in their outlook. Local issues with obvious, direct and immediate impact dominate the media. So do oddities. It is telling that in the three weeks of the Delegation's visit to the United States virtually the only news item on Australia carried by the major TV networks was that of a drunken koala. The fact that a koala suffered a headache as a consequence of quaffing a can of beer in a Brisbane suburb was, as far as we know, not made widely known in Australia. But it made prime time news in the United States. The plight of Australian farmers, or peacekeeping [efforts by Australians] in Cambodia failed to get a mention.
>
> There is little understanding of the many ways in which events, policies and practices in the United States affect Australia. There seemed genuine regret that Australians might be hurt by the actions of the United States and unease that this should be so.
>
> [But] pre-occupied and perplexed by their own domestic problems, few Americans evaluate their own Government's policies from the wider international perspective, let alone from the point of view of a country such as Australia. It was perhaps most disappointing to find that even elite think tanks pay little attention to our part of the world and what impact United States policies have upon it.[1]

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1. *Fighting Friendly Fire*, Report of the Australian Parliamentary Delegation to the United States of America, June-July 1993, Senate Committee Office, Department of the Senate, Parliament House, Canberra, 1993, p.39.

Why is this so? Perhaps it is a combination of American ignorance and arrogance on the one hand, coupled with an Australian sense of apathy, naiveté, 'no worries' and downright frustration at being ignored on the other. I also think that sometimes Australians are their own worst enemies when it comes to generating news coverage. For whatever reasons, they can be overly modest about their own achievements. In true 'tall poppy' fashion, they beat down those who excel and thus the many exciting innovations that occur throughout Australia are not covered by Australian reporters — much less foreign reporters.

The other big problem is the redundant 'we're too small' syndrome. Lillehammer, Norway, has a total of 23,000 people in a country with only 4.3 million people, or less than one-fourth of the Australian population. Yet no-one in Lillehammer or all of Norway thought they were too small to host the 1994 Olympics, and they did a great job. They certainly got a lot of media coverage. Similarly, Israel has only 5.3 million people in a tiny sliver of land — 8,029 square miles compared to 2.97 million square miles for Australia. But the United States gives its highest amount of foreign aid annually — $US3 billion — to Israel as well as extensive, almost daily, news coverage. Israel does not see itself as too small either.

Australians need to see themselves as a continent — not merely an island. They also need to make better use of the 20th century technology at their fingertips. Although Australia has one of the highest penetration rates in the world for computer and facsimile machine usage, I had a call from one of the major agricultural organisations that wanted to mail a press release to my editors in Washington. What an incredible waste of time! Anyone can fax a message around the world in seconds, while overseas mail takes weeks and by then the story is dead.

During the past 3 years, Australia has provided me with a wealth of wonderful topics for stories in diverse fields of business and economics, the environment, CSIRO and the sciences, trade issues and treaties, the Australian securities markets, pharmaceuticals and foods, and government regulation on all levels. On the lighter side, I even did a piece recently on 'Fabulous Facts about Australia' for the United Airline's travel magazine. I went to the White House to hear President Clinton and Prime Minister Keating discuss mutual interests. I have covered the historic visits of President Bush and Queen Elizabeth and cheered as you won the Olympic bid for the year 2000. The events have ranged from the mundane to the marvellous.

Through it all, there have been interesting and unique problems that I have encountered in trying to report on Australian news for American audiences. I must continually try to convince my Washington-based editors of the value of that news and fight for space in the paper — as with the story about the Australian Ambassador to the United States, Dr Don Russell, who spoke last week at the National Press Club about APEC, the Asia Pacific Economic Cooperation group. My editor at the *Washington Post* played it down, saying that we had covered APEC last November and wanted to know why we were writing about it again.

I have been told by editors with the *Chicago Tribune*, the *Washington Post*, Knight Ridder and Scripps Howard (major American newspaper chains) that they had not heard of the export enhancement program (EEP), the US subsidy program that has had a devastating impact on Australian trade. So they asked me, 'Why should we write stories about it?' The *New York Times* stood out in that it did an outstanding series on EEP, but the others ignored it.

At the same time as fighting for stories, I must continually try to convince Australians that many of the things that happen here are indeed newsworthy and that people overseas are interested. Keep in mind that my readers are 10,000 miles away and they do not vote in Australian elections or pay Australian taxes, so some politicians here are not eager to talk to me.

One of the first clues that I was definitely a stranger in this reportorial paradise was when I noticed that people were hanging on my words; not for the content but because I had an accent. I did not know until I got here that I had an accent. Because you and I speak fluent English, I never considered myself to be in a 'foreign' land, but I gradually realised we were using words in totally different ways and that it affected my reporting. For example, when the Parliament tables a bill in Australia it means that it is published, but in the United States it means the opposite: that you kill it. So I went out and got a *Macquarie Dictionary* so I would know the Australian meaning for the words I once took for granted.

During George Bush's visit here in 1992, Americans were amazed to see an unusual story in Australian newspapers about someone lifting up their baby and asking the President if he would like to nurse the baby. In Australia that means to hold a baby in your arms, but in America it means to breastfeed — something George Bush was ill-equipped to do! Similarly, gestures can mean radically different things, generating

undesired results. In what he thought was a show of goodwill, Bush raised his hand in what would be seen in the USA as a sign of victory, but by turning his hand around toward his Australian audience — which, unfortunately, happened to be farmers — it was perceived as an obscene gesture; something of which he was unaware.

Not only were words and gestures a problem for me, but so were numbers, especially telephone numbers. When someone would mumble a phone number of double four, double three, double two, double one (44332211), I would still be writing 'double'. And when they mixed doubles and triples, I was totally lost.

As strangers to this country and to this press gallery, we foreign correspondents also lack the helpful historical perspective. People, places and events that are commonplace to Australians are alien to us and that alters our news judgment. As a newcomer, I thought it barbarian to see ads saying, 'Come see Phar Lap's heart at the National Museum', until I realised it was a horse. I had no idea why the mere mention of Dame Edna Everage made people hysterical or who Kerry Packer or Manning Clark were. Besides my confusion over language and folklore, I was also a stranger here shut out by the physical constraints of this parliament. I feel like singing that song 'If they could see me now'.

Let me zero in on the logistics. Given the fact that there is so little media coverage in the US of Australian events, I thought Australian news makers would be greeting me with open arms when I arrived. Similarly, I thought local bureaucrats would be wining and dining me and offering assistance so that I would write about their projects. Wrong on both counts.

When I arrived in November 1990, I carried letters of introduction from my various editors which I promptly presented to the Department of Foreign Affairs and Trade as required by your laws. Then I set off to get my credentials at the parliamentary press gallery so I could start sending the news back home.

Even though I am still the only US reporter in this gallery, it took me 9 months before the committee gave me a press box so I could collect the daily press releases that are given to everyone else. After more than 3 years, I am still waiting for them to put my name bracket on the box. In the meantime, I have scratched my name in pencil. You can look for it; I am near the bottom.

Parliamentary press releases are generally just a starting point. Thus I was amazed to see how many of my colleagues simply wrote their stories from these releases without making any phone calls. I had noticed that the same version appeared in their stories, often without change and with a by-line at the top.

Once I got a press box, I still had the hassle of getting my credentials. At first my nemesis in the parliamentary press gallery simply ignored me for weeks at a time. Then he said that he had lost my application. I said I would simply sit in his office until he found it — which he did, 15 minutes later. They finally gave me an orange pass, which is reserved for 'lobbyists, private enterprise groups and contractors'. I was denied the standard yellow badge which is for 'accredited members of the parliamentary press gallery'. When I protested that I did not want to be grouped with PR flacks, I was told that there was no special badge for foreign correspondents. This is unfortunate since there are several of us working here in Canberra.

Even the Foreign Correspondents Association in Sydney kept telling me that there were no foreign correspondents here, even though I pointed out that in the gallery there were reporters representing Italy, Indonesia, the UK, Germany, China, Russia and Japan. Nor will you ever see any foreign correspondents participate in the weekly 'Meet the Press' or other television broadcast shows. We are invisible. This is unfortunate since Australians could benefit from exposure to different points of view.

When the new parliament building opened in 1988, supposedly a room had been set aside for foreign correspondents. There was the false assumption that those in Sydney would flock to Canberra. That did not occur, so the room was locked and no other facilities have been provided. Thus we have no work space. There are not even phones next to the gallery boxes, so we have to go elsewhere to make calls to check information in the press releases.

During Warren Christopher's visit last week, I had nowhere to go to write the seven stories I produced in two and a half days for the *Washington Post*, since there was no gallery space for foreign correspondents. Thus, in the rain, I had to shuttle back and forth several times between the Parliament and my house in Weston so I could type my stories on a laptop computer and send them back to Washington via a modem.

When time is of the essence and you are trying to make international deadlines, such roadblocks are not helpful.

Having a parliamentary press box and a pass only gets you into the building. As a foreign correspondent, I never received any introduction to how the gallery or the Parliament operated, nor were there any maps available on how to find your way around this maze. I did figure out that the carpet was colour-coded, but once you get beyond that it is really tough. Also, missing from the local paper is the daily schedule of committee hearings in the Senate and the House. In the United States the *Washington Post* publishes such relevant material so press and public alike readily know what is happening. There is no press gallery camaraderie shown to an outsider since you are seldom introduced to anyone, including the officers of the press gallery. It is difficult to operate without this professional support network.

Besides language and logistics, I have also noticed a fundamental difference in focus on what I consider news from that of some of my parliamentary press gallery colleagues. Because of its geography and physical isolation, Australia is very interested in knowing what happens overseas. An outstanding outlet for this is the ABC, with its budget of $600 million. Thanks to Monica Attard and Ellen Fanning on 'AM' and 'PM', we know more about what is happening in Moscow, Bosnia or even Washington DC than we do about Darwin, Hobart or Perth.

The media, however, often ignore the foreign news in their midst. There are 70 embassies in Canberra but they seldom receive any news coverage unless there is a siege, as with the Iranian Embassy, or pickets outside, or a charity concert on the front lawn. Recently, the Australian–American Association organised a discussion on the shifting perspectives on Vietnam, a country which is Australia's fourth largest trading partner. Only one reporter showed up to hear what the speakers, including the Vietnamese Ambassador, had to say.

This fascination with other countries' news is fuelled, in part, by the unique foreign ownership phenomenon here. Ninety per cent of all Australian newspapers are foreign owned. These are the gatekeepers who decide what news Australians will read and their foreign ties limit the information available to you. Would any writer at one of Tony O'Reilly's Australian papers question the multinational activities of Heinz 57, which O'Reilly also owns? Could reporters at the *Australian* be totally objective in writing about Murdoch's media empire or the new stock scheme and not worry about losing their job? The same holds true for Conrad Black, who had not visited Australia prior to purchasing its two top papers — the *Sydney Morning Herald* and the *Melbourne Age*. What reporter of either paper would dare do a hard-hitting story on the acquisition or the subsequent Foreign Investment Review Board inquiry and still hold his or her job?

Ironically, after trumpeting how he valued Australian editorial expertise, one of the first things Black did was to bring in an overseas editor from South Africa, a country which has no recent history of a dynamic independent press freedom because of the stifling presence of apartheid since 1948. Courageous South African journalists, like Donald Woods, fled that country long ago.

The foreign ownership in Australian newspapers combines with the high rate of media concentration in broadcasting as well as in the publishing of magazines. This situation leads to intellectual isolation. Copyright laws and postal costs make it difficult and prohibitively expensive for books and magazines to come into the country and to offer Australians a broad gamut of news sources.

Thus, Australian journalists cover the routine domestic news: unemployment, taxes, health, local government services, schools and daily trivia. But for those in the press gallery, the focus is politics — and it is an obsession. The problem is being located in this building and wrongly believing that this is where most of the news that interests the average person comes from. Reporters in this building are shielded from the realities of pounding the beat and looking for news in the real world.

Because of a fixation on political news, many other worthwhile stories never get covered. This was particularly true during the 3 months of the 'Sports Rorts' media trial of Ros Kelly. Few journalists picked up the story that the environment minister joined her cabinet colleagues in giving a 4-year extension to the dumping of a very toxic chemical called jarosite off the waters of Tasmania. The press gallery similarly ignored plans to boost meat inspection fees by 50 per cent until the Opposition and the Australian Democrats combined efforts and forced Labor to back down.

The Prime Minister, Paul Keating, seriously misread the situation when he said on February 25 that except for the press gallery, no-one in Australia was interested in this internal friction. But 3 days later, Kelly was forced to resign. Both the Prime Minister and some of the media missed the message sent by the public during an outbreak at question time. This was not a 'gender issue', since Mrs Kelly was 'one of the boys'; this was not a sports issue, since the grants could have been tied to anything. The bottom line was money and taxpayers wanted to know where it was going. One reporter who got it right was Margo Kingston of the *Canberra Times*.

Another reason for the obsession with political news is the concept of the Westminster system, where all power is vested in the Prime Minister. If you are a member of the party in power, you must vote according to party lines, unless it is an extraordinary matter of conscience. By the time something comes up for action, politicians know what the outcome will be. In comparison with the United States, power in our government is balanced between the President, as executive, and the House and Senate, as the legislative body, with each having veto powers over the other. As the recent Reagan and Bush administrations would attest, there are often many Democrats and Republicans voting against their own parties, since congressional members enjoy a degree of autonomy and individual notoriety which is unheard of in Australia. The Supreme Court also plays a more active role in striking down or upholding legislation in executive orders.

Since our election terms are fixed by law, reporters in the United States do not continually wonder how long a government's term will last, though President Clinton may be disputing this based on current Whitewater coverage. This is not so in Australia, where I would also question the ethics of polling techniques and the way that they are reported. Often, pollsters or reporters leave out how many people were questioned, how they were selected, the demographics of the group, who paid for the poll, and how the poll was conducted. What is most disturbing is that surveys have a built-in margin of error of between 5 per cent and 10 per cent, so some of these so-called swings would be insignificant. The *Associated Press Stylebook and Libel Manual*, on American journalistic guidelines, states:

> Only when the margin between the candidates is more than twice the sampling error can one candidate be said to be leading. If the gap is less than the error margin, the poll says the candidates are about even.

In the Australian Parliament, there is seldom any real debate, except in the Senate where members of the Greens and the Australian Democrats may occasionally combine with the Opposition, but it is unusual for all three to agree and to have the numbers to carry the vote. I see that Mr Keating is getting ready to work on the Senate, so that may not occur anymore there either.

Lacking substantive debate on the issues, the press gallery is forced to focus more on the process than the outcome; on the personalities rather than the underlying issues. Thus question time becomes a major source of news. Yet, to the average Australian, it provides little real value; instead of debate there is diatribe. It is a national embarrassment rather than an enlightening experience. There is no pretence at civility, with interchanges resembling 'Fast Forward' skits. I have heard teachers say that they no longer take their students to observe the antics of these adults. Amidst the verbal gladiators, this is not government at its best.

Another tough situation for the press gallery reporters is the fact that the party out of power is basically powerless. These politicians can say whatever they want, but generally their votes hold no weight. There is no thoughtful, consistent plan on being the Opposition. On the 'Mabo' issue, the Opposition, instead of generating a serious debate for the public good, simply folded up and opted out of the final draft. The Opposition squanders its efforts on telling us what it may do some day if it ever wins office, and since the Opposition cannot radically affect most legislation the press focuses on the internal squabbles with a rabid fascination. In reality, does it make any difference who is head of the party out of power if the Westminster system denies them any productive way to exercise that voice?

A third situation that the press gallery has to deal with is the role of ministers under this Westminster scheme. They are like a deck of cards that is routinely shuffled. Since 1983 there have been nine ministers for communications and eight for the arts. As journalists, it would be more helpful to focus on the department itself and the bureaucrats who are in charge of day-to-day activities, rather than the changing figureheads at the top. Why is it that editors do not use a beat system so that someone covers these

powerful departments on a regular basis? Editors should also tell the reporters to follow the money, not the minister.

A fourth and most difficult situation that my press gallery colleagues must contend with is the media laws which make being a journalist in Australia an almost impossible task. Indeed, it seems the only people to enjoy truly free speech are parliamentarians speaking in parliament. As a result, there is little hard-hitting investigative reporting since reporters are far too vulnerable. This is in stark contrast to the reporting freedom I enjoyed in the United States under the benefits of the First Amendment to the Constitution, which guarantees a free press and free speech for all. Australia lacks a unified federal media law. Instead, each state has widely varying norms, none of which are hospitable to journalists.

In Australia there are no shield laws that provide for informants to reveal confidential material to journalists without the threat of such reporters being prosecuted for refusing to disclose their sources. In fact, in some Australian states even priests in the confessional enjoy no shield law protection. In the United States, 28 individual states have protective shield laws. They offer qualified rather than absolute privilege for reporters.[2] It does not always protect journalists from being subpoenaed and cited by judges for contempt for refusing to divulge information, but it does provide a great deal more protection than would be available in Australia.

In 1732, long before we were the United States of America, the colonies decided that truth was a defence in libel matters in the precedent-setting case of John Peter Zenger, a German printer. That basic right still does not apply in Australia. Privilege is also woefully lacking, especially for 'fair comment'. If I criticise an art exhibit or a mediocre restaurant, I can be sued. The definition of privacy in Australia is also radically different from that in the United States and sharply inhibits solid reporting. Nor can one easily follow the paper trail that is a basic investigative tool in the United States, since many routine licences and documents here are not open to the same public scrutiny. The Freedom of Information Act is weak and a pay-in-advance proposition with little guarantee of obtaining any useful data.

Crispin Hull, a tough-minded reporter for the *Canberra Times*, sums it up best when he notes that Australia's convict past means that those at the top take sides with authority, and one is not encouraged to question the system; thus reporting can be a veritable minefield. Hull said:

> The nature of what is defamatory in Australia is very wide, more so than in the UK. It allows all sorts of things which most people regard as trivial . . . There's no mercy here if you get something wrong. The onus is on the person making a comment to prove it's true.

Besides the impossibilities of media law in Australia, there is also no journalistic support system like there is in the United States with groups such as the Society of Professional Journalists, with 25,000 members, providing a lot of assistance. In Australia the Australian Journalists Association deals only with union issues such as salaries and working conditions; not ethical matters.

If the powerful parliamentary press gallery and the National Press Club joined forces, they could demand changes to bring Australian media laws into the 20th century. They should be joined in this effort by all the communications departments of the major universities in Australia. All three groups need to push for better professional training as well as mid-career updating of skills.

I am amazed that at the university level practical professional journalistic experience among faculty members is viewed with absolute disdain. Yet all theory without solid hands-on work experience through supervised internships and lots of practical classroom exercises is a waste of time and the degree merely a sheet of worthless paper. One 10-page term paper a semester does nothing to teach one the rigours of writing under deadlines or producing spot news. How great it would be if every working journalist in this press gallery took on a student for 14 weeks each semester. Both would benefit from the exchange of skills and instruction.

I had an interesting experience yesterday when I was teaching a class of 32 students in two sections. Not one of those 32 students could tell me what a part of speech was. When I asked, 'How about nouns and

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2 The Quill magazine, Society of Professional Journalists, October 1991, p.15

verbs? Do they mean anything to you?', they looked at me as if to say 'She speaks with forked tongue.' Being daring, I moved on to homonyms and it was as though they were asking, 'Where did they find this woman!' No wonder we do not have time to teach ethics if we do not know what a noun and a verb is. I can hardly wait to read the papers this semester; it should be a real challenge.

Besides the logistical nightmares, foreign correspondents here face problems inherent in covering a totally different political system. Reporting the Australian Parliament is vastly different from reporting the US Congress, which I observed both from the outside as a journalist and from the inside as an investigator with the House of Representatives for three years.

Perhaps a good example of the differences in perception between myself and members of the Australian press gallery came most sharply into focus in December 1991. Prime Minister Bob Hawke's tenure was on shaky ground. The press was not merely reporting what was happening, but seemed actively involved as catalysts for the events. To me, they seemed to have crossed the line which calls for neutral, objective, non-partisan reporting based on what has been observed. Only those writing editorials, letters to the editor or drawing political cartoons should state how they think and feel about such matters — not the reporters.

On December 19, Hawke was toppled from power and Paul Keating became the Prime Minister. Since I was one of the few foreign correspondents observing this event, I was interviewed by Tony Delroy of the ABC regarding my observation. To me, it was extraordinary that a country of 17 million people was now headed by a man who had won by only seven votes in a limited party caucus. Unlike the American system, there was no direct election by the people. This seemed most unusual to me.

The upheaval in the Australian Labor Party came only 10 days before the visit of US President George Bush, who also happened to be a personal friend and golfing buddy of Hawke. The *Washington Post* had asked me to do a personality profile on the new Prime Minister for its style section. I was delighted. But I got no cooperation from Keating's neophyte press staff. The very limited biography sheet they gave me provided no details, no insights and no interest.

I tried to explain to Keating's media person that the head of one of the most powerful countries in the world was coming to visit and that the people in the United States wanted to know more about this new and generally unknown Australian leader. She curtly reminded me that Keating was once described as 'the world's greatest Treasurer'. 'Oh!' I said, 'That's very interesting, but it's not much to write about now.'

Since the American public had no idea of what Keating looked like, I wanted a photo. And because the new Prime Minister had a young, attractive family, and he was still with his wife — which is a plus in American politics — I requested a photo of the family as well. Again, they said to me that there would be no photos and that the earliest they could provide any information or background data would be in 3 weeks — long after Bush had departed.

So I did not get the story. But more importantly the American public did not get the story either and Keating received very little overseas coverage. In fact, when Bush and Keating visited the new Maritime Museum in Sydney that week, Bush was photographed by *Newsweek Magazine* peering into a submarine periscope. The person next to him was left unidentified in the photo and unmentioned in the story copy. It was Paul Keating.

Two years later, the message still had not sunk in that if you want to appear in American media you have to work at it. Prior to his departure for the United States, I mentioned to Keating's media staff in September some things that might be helpful in generating coverage. It was a PR person's dream, since it was 10 days before the 2000 Olympics decision was announced — and Sydney was definitely a frontrunner. But the Keating team ignored it. Americans love schmaltz. I said, 'Give Clinton a baseball cap with a Sydney logo, a pin for Hillary, a T-shirt for Chelsea. Run that Olympic flag up the pole of your embassy, which is only a block from the *Washington Post*, and a photo is more than likely. Make use of Anita Keating's fluency in languages and have her address reporters at the Foreign Press Centre. Then, have her serve morning tea at the embassy residence with some of Australia's leading designers who have shops in the Washington area so you can show the media what new wool really looks like. Go out of your way to meet the American media beforehand and invite them for snacks of emu and kangaroo such as Qantas is featuring on its flights.' Nothing happened. The visit went unnoticed and unreported. The final blow — which was not Keating's fault — was the cancellation of the National Press Club luncheon where he had planned to lay out his point of view. It went to Yasser Arafat, instead.

In the good news column, Ambassador Don Russell emphasised on March 9 in his National Press Club address that one of his goals was to work on better press coverage — an area ignored by his predecessor who, in 3 years, gave few interviews and press conferences. He said, 'I have been willing to appear on almost any American radio program that will have me', adding that he is doing his own version of 'Meet the Press', with a full agenda of interviews. I hope that the first person he calls to set up one of those interviews when he returns to Washington is my boss.

Questioner — Thank you very much for that speech. I learnt a lot about the media in my own country. Something I would like to follow up, is the objectivity aspect. When there was coverage on our television of the presidential elections, I was fascinated by the way the interviewers would elicit the information from the interviewee and allow me, in my lounge room, to make up my own mind without, as is my experience in Australia, having the interviewer overlay the questions with a presumption or an assumption. Why is there a difference — unless I am generalising — in the American media and Australian media approach?

Ms Burns — With the political coverage, I think sometimes we are obsessed with the personal aspects. We want to know if there are any skeletons in the family's closet. I do not think they get into that as much in Australia. Because we can get a lot more paper information, we can check out whether you really did have a degree, and certain financial statements must be provided — I understand that yesterday the Parliament discussed such requirements of parliamentarians.

One of the things I noticed here is the different questioning techniques. Even the ABC, which I regard highly, asks browbeating questions. Reporters will ask somebody, 'Don't you think . . . ' I tell students not to do that because you are setting a person up. Reporters also do not give them the chance to respond. They ask them a question and keep interrupting so that there is never a chance to give a formal response. This is very widespread. It kills me when I see it happening on the ABC because it is, in so many ways, a superior news system. But they browbeat people sometimes with the questions and there are a couple of people who do it all the time.

Questioner — As a fellow visitor who is also confused by double and triple phone numbers, I am in sympathy with some of the things you said, particularly about libel laws and about the ethics of how polls are reported. But there are some other things that confused me a bit.

Ms Burns — Are you a reporter here?

Questioner — Not any more. I was, in America, for a time. There is the idea that it is something distinctive about Australia that foreign correspondents are not on the commentary shows like 'Meet the Press'. I cannot think of the last time I saw a foreign correspondent on America's 'Meet the Press' or 'This Week' with David Brinkley.

Ms Burns — I mean ever. For example, would it have been helpful last week to have had a Japanese journalist talk about their view of super 301 trade sanctions, just to get a different point of view once in a while?

Questioner — Okay. Or the idea that the reporters in Parliament House are excessively focused on political news in Parliament House. Is that different from how correspondents act in any legislative house — federal or state?

Ms Burns — I think we would cover bill action in much greater detail than they do here. It is much harder to find out. I could probably get a copy of *Hansard*, but because of the tremendous expense, it did not seem financially worth my while to buy and then have to store it. It is much harder to follow a bill. Also, I think they do not cover the role of lobbyists here in as great detail, although lobbyists, as we all know, in every country of the world are the ones who decide what gets to be law. I do not think there is the same kind of coverage here to enable people to know who initiated the bill and why it went this way or that. Because there is not much debate on a bill, you do not see much being amended and there is no public participation. There are not a lot of public hearings on bills — or there might be, and I just have not been able to find out about them.

Questioner — I am interested in your views. I spent 1990 in Washington DC at the time of the Australian federal election and your newspaper the *Washington Post* had, at best, a 700-word article on the winner of

the election. That was the limit of the Washington press coverage of the Australian federal election. I am interested in your views on that. When I complained to the ombudsman of the *Washington Post*, he sent me back a rather curt response and said, 'Well, you know, *Washington Post* has to cover 157 different countries. How can we afford to send people everywhere?' That was not really my intention. I was merely trying to raise the issue with him that Australia is, theoretically, one of America's closest allies. At least in America there should be a little bit more than 700-word articles from a string of biased angles.

Ms Burns — I do not know about the 1990 election, but they sent in Bill Branigan from the Philippines for the 1993 election. They considered it such an important story that they got the bureau chief for the whole Asia-Pacific region to come in and do it. While he was here he also did an extensive piece on Mabo. I think he did about five or six in-depth stories.

Christopher's visit last week is probably more current. It was very frustrating because of the limited amount of coverage. There was a parallel between Christopher's visit and Bush's visit in the sense that Australia was viewed as a pit stop on the way to some place really important. Many of the stories that appeared in the American press — and I have not seen a lot of the clips — do not even have an Australian date line and they only talked about Japan and China. There was very little acknowledgment of what was happening here.

I felt like I had a split personality because I am American and I am a reporter. There were 17 American reporters covering anything from the Australian point of view. They talked about the export enhancement program and Christopher said, 'Oh, well, we really haven't done much with that in the last several months.' Ten days after Clinton and Keating met, there was a massive EEP sale and Christopher said, 'Well, that wouldn't occur again because of GATT.' There have been 43 more sales since GATT was signed in December.

Also, there was the whole problem that the American media — not including me — did not recognise that the super 301 problem with Japan was putting Australia in the middle between the United States and Japan, both Australian allies. None of the stories mentioned the fact that Japan is Australia's largest trading partner, not the United States; that Australia has a huge trade surplus with Japan and a big trade deficit with the United States. Some of the coverage was extremely one-sided.

During the press conference on the second night, we had two questions on Australia before they started asking Christopher about Whitewater. Here is somebody who is 10,000 miles out of the country and not intimately involved with that issue anyhow. I thought that the American press froze out some of the Australian reporters.

Every time I have been back home, I have always looked to see if there is something about Australia and a lot of the time the only thing I could find was the weather. You can guarantee if anybody in Australia is eaten by a shark, bitten by a snake or nibbled by a crocodile that it will be international news. There was a wonderful project in Melbourne where they found out how to recycle rubber tyres. Nobody has known what to do with them. They built a $9 million plant, and it has been so successful that they have created eight subsidiary businesses. I have never seen any coverage of something like that. Of all the stuff the CSIRO does, very little of it makes the American media. It is very frustrating. As I said, part of it is the Australian attitude because they have not actively gone out of their way to promote the country. I think sometimes when they do go out of their way, they do not get any response and they give up.

I also write for a company called BNA. Most people are not familiar with BNA, but BNA has 80 publications and has the largest number of reporters in the press gallery. It is the second largest news agency in Washington, next to the *Washington Post*. I said to the Australia press secretary, 'Would you like to see a print-out of the articles I did on Australia, because there are about 250 of them and it would give you a good idea of what we are saying?' He said to me, 'Why would I even care?' I thought that was an interesting approach.

Then I asked for some help. I do not travel much with my job because of the cost, and I wanted to get some help on some things about Perth. He said that he was much too busy to do anything about that. So when I went back for Keating's visit in September I saw this person again and asked for some more information, and they sent me on a wild goose chase to get my press pass. I had to wait over at the State Department for two hours, only to find out that it was not the right kind of press pass anyhow.

It works both ways. I am not here to provide any answers. Somebody asked me, 'What can Australia do to get great press coverage?' I kiddingly said, 'Well, there are two things: One, ask for money because the US always covers people who receive American aid, and two, get a nuclear weapon. You would only need one, but we would keep attention focused very directly.' You could probably use the money that we give you to buy the nuclear weapon, which would help our balance of trade enormously.

Questioner — Thank you very much for your lecture; I got a different viewpoint. When the Israeli and PLO foreign ministers met on the White House lawn, Paul Keating had a chance to gain a higher profile but he stood in the background. How was that viewed in Washington? Do you think it is just that our current Prime Minister wants to take a different profile, in the sense that he does not want to trip over TV cables?

Ms Burns — I watched the Israeli declaration on television because access was limited. That would not have been an appropriate time for Paul Keating to say, 'Let me say a few words about Australia.' I think it was unfortunate that Australian officials favoured only the 30 Australians travelling with Mr Keating. They were going to write about it anyhow. The Australian Government did not make any effort; none of my friends in the American media knew he was coming or knew anything about it. When he held the press conference, they did not put anything out on the wires. They did not have an informal meeting with him, one on one.

I think Mrs Keating would have been a terrific plus for Australia. She is a very intelligent and attractive woman, and they made no use of her. Don Russell realises that this is a problem, and he intends to do something about it. I think he is an extremely articulate person, and it is probably one of Mr Keating's better appointments in the sense that he is somebody who understands trade.

I found it very frustrating when Warren Christopher said that Australia is our oldest and most trusted ally, and we immediately cut to World War II. Fifty years later, it is not relevant to say that we fought shoulder to shoulder in every war — except the one that counts, the trade war. I think that is the problem. They made a big deal about defence. Defence in the Pacific is not a real problem. You are safer on a ship in the Pacific than you are in almost any major city in the United States because of the lack of gun control. It is said how wonderful it was that we came out here to defend the Pacific. It was wonderful 50 years ago, but the talks last week focused inordinately on the military aspect. If you come up with any good stories, call me.

Questioner — I have been in Washington for the past 9 months and I watched the press very carefully. Everyday I read the *New York Times*, the *Washington Post*, the *Washington Times*, *US Today* and various others. I was watching for mention of Australia, and it did not surface at all; there was an article or two on Thomas Keneally. The only by-line that got continuous attention — and I mean continuous — in a number of periodicals and on a number of up-to-date issues about Australia was that of Kathleen Burns.

A Charter of Rights: The Canadian Experience

Kathleen Mahoney

I Introduction

On 17 April 1982, Canada repatriated its constitution from the Parliament at Westminster, sweeping away one of the final vestiges of its colonial past. At the same time, a *Canadian Charter of Rights and Freedoms*[1] was entrenched, giving people express constitutional rights for the first time. The equality provisions in particular, represented a new era in Canadian constitutional law.

The intense debate leading up to the entrenchment and content of the Charter raised profound questions about the basic nature of the country, its values and its ability and willingness to acknowledge equality for women and other disadvantaged groups. For the first time, equality seekers participated in the process of constitutional renewal.[2] They expressed a clear desire to be full and equal citizens in Canadian society and to have their needs and aspirations translated into constitutionally recognized rights.[3] As a result of the largest lobbying and participatory effort ever mounted by ordinary citizens, particularly women,[4] very broad and comprehensive equality guarantees[5] were entrenched in the Constitution. In addition, a specific section entrenching sexual equality as an overriding principle of the Charter was included, the intention clearly being to ensure that Canadian women would enjoy a status equal to that of Canadian men.[6]

Since the entrenchment of the *Charter* in 1982, equality seekers have continued to play a significant role through the use of litigation and other strategies, in order to clarify and develop approaches to constitutional theory and interpretation so that the *Charter's* promise of equality will be realized.[7] They recognized that entrenched comprehensive equality rights would not achieve legal equality on their own; in order for people to become true equal bearers of rights under the *Charter*, the content of established rights and concepts must be challenged and the legal norms of existing societal and institutional structures premised on *inequality* changed.[8]

It is the author's view that the Supreme Court of Canada, to quite a remarkable degree, has recognized the egalitarian challenge the *Charter* presents. In the past few years, it has launched a promising new era for equality jurisprudence quite unique in the world. The equality theory it has developed goes far beyond that which underlies constitutional law of other western societies including Europe and the United States. It has fashioned principles

which give disadvantaged groups a better chance than ever before to alleviate the inequities they experience in laws, policies and practices of governments and government officials. This is because instead of using abstract, formal rules to analyze equality and discrimination, the Canadian Supreme Court applies a purposive, contextual approach to constitutionally entrenched equality guarantees which in turn defines their scope and purpose in terms of individuals and groups persistently disadvantaged by the legal system.

To understand fully the Canadian approach to *Charter* equality guarantees, the history of equality and discrimination law must be examined. To a large extent, the Supreme Court's interpretation of constitutional equality guarantees in the *Charter* have been informed and influenced by the lessons and themes which emerged from the common law, human rights legislation and earlier attempts at constitutional reform. In this paper I discuss the development of legal equality in Canada including pre-*Charter* recognition of concepts of equality, inequality and discrimination and post-*Charter* interpretation of constitutional equality guarantees. I also discuss the effects of the constitutional equality jurisprudence beyond constitutional law — effects which may ultimately hold the greatest promise for the achievement of social equality in Canada.

II Early Development

Equality in Canada has been an evolutionary process — a slow struggle whereby legislatures, the Parliament of Canada and sometimes the courts have incrementally responded to varying degrees of pressure to eliminate or reduce conditions of disadvantage. One of the reasons progress has been so slow is that different groups being disadvantaged in different ways often did not communicate effectively with each other and their common cause was often overlooked. In this paper the example of gender inequality is used to show how change has come about and where it may lead. Gender is the example used because women experience all the disadvantages experienced by disadvantaged groups, they comprise more than one half of the Canadian population and the women's movement in Canada has led the way in the struggle for equality.

Less than one hundred years before the enactment of the *Charter*, the social and economic position of women was dismal. Women were unable to vote, hold elected or appointed office, sit on a jury, or participate in the professions. Employment outside the home provided minimal opportunities and very low wages. If a woman became pregnant during her employment, she could be discriminated against with impunity because differential treatment on the basis of pregnancy was not considered to be discrimination on the basis of sex.[9] At the same time, she was legally forbidden access to information and effective methods of controlling her fertility. Marriage exacerbated women's second class citizenship by removing the few rights or legal recognition single women possessed. For example, a married woman lost her own nationality and domicile upon marriage if that differed from that of her husband. In addition, the father of children of the marriage had the legal right at common law to determine their religion and education.[10] Married women were unable to make wills or enter into binding contracts and lost almost complete control over their real and personal property to their husbands. The common law permitted a husband to beat his disobedient wife[11] and rape her without fear of punishment.[12] Even after these cruel laws were repealed, the trivialization of wife abuse continued and in many ways, persists until this day.[13]

The law regulating sexual assault presented unique barriers to the realization of women's rights to bodily security and equal right to protection and benefit of the law.[14] The rules of corroboration, recent complaint, warnings to the jury regarding a woman victim's credibility, allowance of examination of the victim's prior sexual history, all treated women victims of violent assault in a gender specific, disadvantaged way.[15] Until 1980, sexual harassment of women in the workplace was not even recognized as a legal issue.[16] It took an appeal to the Supreme Court of Canada to determine, as late as 1989, that sexual harassment amounted to sex discrimination and that it exacerbates the systemic gender inequality that exists in the workplace.[17]

In the civil law of tort, the persistent disadvantage of women affects the legal recognition of legitimate lawsuits as well as measurement of compensation when they succeed in establishing their claims.[18] Similarly, the civil law of contracts, specific performance and injunctions has made women's interests invisible by defining the legal principles in male terms.[19]

When race combines with gender, systemic disadvantage is more pronounced. Aboriginal women in Canada, for example, have been particularly singled out for adverse treatment. The Canadian version of apartheid, *The Indian Act*,[20] successfully denied them their cultural status, connection with family, property rights, inheritance and devolutionary rights.[21]

Canadian women have never willingly accepted legally imposed invisibility and disadvantage. History shows that they have constantly and persistently protested their inequality but lack of power or access to power impeded significant change. A watershed event however, was the 1930 decision of the Judicial Committee of the Privy Council in the 'Persons' case[22] which held that the word 'persons' within the meaning of section 24 of the *Constitution Act, 1867*, included women. The narrow ratio of the case stood for the proposition that women could no longer be denied appointment to the Senate of Canada solely because of their sex. They were 'persons' as much as men were. The broader implications of the decision reached similar restrictions based on 'personhood' such that qualifications to practice law, to vote or to hold other offices were gradually removed.[23] As far as formal inequality in statutes was concerned, a victory of sorts was won. Canadian society came to recognize that formal equality for women was a desirable goal. In real terms, however, women as a group continued to be disadvantaged as compared to men. Women continued to suffer adverse treatment in employment, to be under represented in all areas of public life, to be over represented in the poverty class, and to experience disproportionate violence.[24]

III Pre-Charter Equality Rights: The Non-Constitutional Context

(a) The Canadian Bill of Rights

In 1960, the Parliament of Canada brought the *Canadian Bill of Rights* into force. Although it does not have constitutional status, the jurisprudence developed under it had a profound impact on the shape and content of the constitutionally entrenched *Charter* guarantees of 1982, as well as judicial interpretation of them. Section 1(b) of the *Bill of Rights* addresses equality. It reads:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely . . .
>
> (b) the right of the individual to equality before the law and the protection of the law . . .[25]

During the 1970s the Supreme Court of Canada decided ten cases under this section. In nine of the cases, the Court declined to find any breaches of 'equality before the law' or the 'equal protection of the law' guarantees. Needless to say, equality seekers were disheartened by this result. It appeared to them that the *Bill of Rights* was more of an instrument to perpetuate inequality than one to redress past inequities and promote reform. For example, the two cases which involved gender equality show how judicial interpretation of the equality provision merely served to perpetuate inequality between women and men.

In *A.G. Canada v. Lavelle, Issac v. Bedard*,[26] two native women challenged a section of the federal *Indian Act*[27] which disqualified them from claiming their Indian status if they married outside their race. The challenge was made under the sex equality guarantee of the *Bill of Rights* because Indian males who married non-Indian women did not suffer the same disqualification. Upon marrying non-Indian women, males not only retained their Indian status, they automatically conferred full Indian rights and status on their non-Indian wives and children. The effect of losing statutory Indian status meant that upon marriage to a non-Indian, women were required to leave their reserve. They could not own property on that reserve and were required to dispose of any property they may have held up to the time of marriage. They could be prevented from inheriting property and could take no further part in band business. Because their children were not recognized as Indian, they were denied access to cultural and social amenities of the community. The women could also be prevented from returning to live with their families on the reserve notwithstanding dire need, illness, widowhood, divorce or separation. The discrimination even reached beyond life — they could not be buried on the reserves with their ancestors.[28]

When this institutionalized gender inequality was put before the Supreme Court of Canada, it found that the legislation did not violate sex equality rights. The Court interpreted the section to guarantee only procedural, not substantive, equality. It said that Indian women were not the same as Indian men and could not be compared to them. As long as all Indian women were treated the same, no violation of 'equality before the law' or 'equal protection of the law' occurred. The Court refused to consider the inherent unfairness or adverse effect of the law on women.

The second case involved pregnancy discrimination. In *Bliss v. A.G. Canada*,[29] the Court was asked to consider the validity of a legislated benefit provision. The *Unemployment Insurance Act*[30] required that before an unemployed pregnant woman could qualify for maternity leave benefits, she must have been employed for ten weeks. At the same time, qualifications were less demanding for unemployed, non-pregnant women and men. The differential treatment of pregnant women was particularly disadvantageous because women in the fifteen weeks immediately surrounding the birth were barred from receiving ordinary benefits even if they were able and willing to work.

When this inequality was challenged under section l(b) of the *Bill of Rights*, the Supreme Court refused to strike down the discriminatory benefits provision because it could find no breach. Instead, it came to the bizarre conclusion that any discriminatory treatment of pregnant women was not discrimination on the basis of sex. Justice Ritchie, speaking for the Court stated:

> Assuming the respondent to have been 'discriminated against', it would not have been by reason of her sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application, of course, to men. [If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.][31]

This very restrictive definition of discrimination confined judicial scrutiny to the protected criteria of sex as a totality in itself without considering its components or consequences. (The parallel application in race and disability contexts would prohibit discrimination against the blind or against Sikhs, but would not prohibit discrimination against guide dogs or the wearing of turbans.)[32] The Court further reasoned that the legislation conferred a special *benefit* for a *voluntary* condition.[33] Any benefits or positive rights conferred by statute were not subject to the equality provisions of the *Bill of Rights*.

The Court in both *Lavell* and *Bliss*, embraced the view that the meaning of the right to be free from discrimination was freedom from negative rights. Its scope was not broad enough to include positive rights such as the right to enjoy an equal share of society's benefits. Both cases had a considerable impact on Canadian women. Not only did it teach them that courts were not particularly sympathetic to women's equality claims, it made them realize that any future constitutional provisions addressing equality would have to contain broader and clearer substantive protection in order for real equality or even a semblance of real equality to be achieved.

(b) Anti-Discrimination Statutes

From the early 1950s, Canadian provincial legislatures and the federal government recognized the need for comprehensive legislation prohibiting discrimination. The earliest Acts dealt with fair employment practices[34] but soon fair accommodation practices were legislated as well.[35] But prior to the 1960s and 1970s, anti-discrimination legislation was piecemeal, uncoordinated and placed the whole emphasis of promoting equality upon individual victims of discrimination.[36] The result was that victims of discrimination rarely complained and very little enforcement was achieved.[37]

The situation improved once provinces began to consolidate and strengthen non-discrimination statutes into human rights codes administered by human rights commissions.[38] The codes prohibited discrimination in a number of areas, including employment, public accommodation, commercial and dwelling units, and advertising. Legislators were of the view that the establishment of human rights commissions charged with education, administration, promotion and enforcement of human rights legislation would make discrimination a community responsibility. They thought human rights legislation would create both a general environment of equal opportunity as well as correct past inequalities. Despite these laudable intentions, the legislation did very little to advance the status of women or other

disadvantaged groups. In practice, the human rights legislation was unable to address the most serious discriminatory disadvantages.[39] For example, despite protection from discriminatory practices in employment and equal pay provisions, the structure of the labour market did not change. Women continued to predominate in occupational job 'ghettos' such as secretarial, nursing and teaching occupations where few men were employed. Anti-discrimination legislation could not reach wide discrepancies in pay between men and women in jobs of comparable responsibility and qualifications just as equal opportunity legislation could not require employers to provide women with comparable opportunities to men. Furthermore, anti-discrimination legislation was and continues to be based on an individual complaint mechanism. Individuals may only lodge a complaint if they can claim themselves to be or to have been the victim of a violation of a right in the statute. Only an individual woman denied a promotion or opportunity on the basis of sex could complain about widespread employment inequities. Nothing could be done for a women disadvantaged as a group by systemic institutionalized discrimination.

Another reason the legislation was ineffective was the acceptance of the 'sameness of treatment' concept of equality. Legislators assumed that if women and men were treated the same procedurally, both males and females of similar talent and motivation would achieve the same opportunities and successes. What they failed to take into account was that men do not experience long-term, wide-spread societal conditioning and systemic subordination as women do. When women's labour is confined to narrow, low valued and low paid areas of work generally unoccupied by male workers, for example, sameness of treatment will not ameliorate workplace disadvantage. This is because the situation of women workers in female job ghettos has no male basis of comparison. If there is no basis of comparison against which to prove differential treatment, the sameness of treatment definition cannot provide a legal basis for complaint.

Even if found to be 'alike', sameness of treatment as a remedy is deficient because
it cannot make the necessary adjustments required to be fair. To use the now trite example of two people competing in a foot-race, the same treatment model requires that both runners start and finish the race at the same points, be equally free from any obstacles on the track and be governed by the same rules. Whether or not the runners have unequal strength, training or experience or whether one is older, disabled, or malnourished is irrelevant. Social, economic, and physical disadvantages or prejudices become invisible. The result is that sameness of treatment often has the effect of perpetuating inequality rather than curing it.

While the recognition of formal equality between individuals was an essential first step towards the achievement of legal and social equality, early experiences of equality seekers using human rights legislation made it obvious that much more was required. Equality issues arising out of women's unequal pay, their allocation to under valued work, demeaned physical characteristics, targeting for rape, domestic battery, sexual abuse as children, systematic sexual harassment, use in degrading entertainment and forced prostitution could not be addressed through a system or approach requiring sameness of treatment or male comparators to prove discrimination on the basis of gender. To address the deeply entrenched second class status of women, it became clear that a markedly different approach was needed.[40]

In the late 1980s some human rights statutes were amended to address certain systemic inequalities[41] but more importantly, a series of decisions of the Supreme Court of Canada indicated that courts wanted to put substantive meaning into human rights guarantees. The

first major step was taken when provincial anti-discrimination legislation addressing private discrimination in access to employment, accommodation and services and facilities, was interpreted. The case involved unintended discrimination on the basis of religion. In defining 'discrimination', the Supreme Court of Canada said in addition to differential treatment with intent, it also included unintended effects of neutral practices.[42] Later, the Court extended the concept of discrimination to say that notwithstanding formal, equal treatment, if neutral laws had an unintended, adverse effect on protected groups or individuals they may be discriminatory.[43] A further development occurred when the Court held that in order to prove discrimination, it was not necessary for the complainant to compare himself or herself with a more favoured group,[44] thus opening up many old but previously unchallenged systemic problems to scrutiny. Greater weight was given to human rights laws in another decision where the Court held that such laws are 'quasi-constitutional' in nature and, that while they may not have the same overriding authority as a constitutional provision, they have a natural primacy over other laws.[45] The Court also set out the purposive method of interpretation as the appropriate general approach to human rights interpretation. J. McIntyre, for a unanimous Court in the *O'Malley* case stated:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . . and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than ordinary — and it is for the courts to seek out its purpose and give it effect.[46]

On the remedial side, the Court recognized that affirmative action is sometimes necessary to cure systemic discrimination.[47] Acknowledging that discrimination is not always a wrong against an individual, the Court said when a whole group is wronged, the remedy must give full recognition of the group right not to be discriminated against.[48] The Court further decided that anti-discrimination legislation requires employers to reasonably accommodate employee needs, to avoid being found in violation of the law.[49] To emphasize that the purpose of human rights laws is to provide effective remedies to those who are discriminated against, the Supreme Court used a sexual harassment case to establish the principle that employers are vicariously responsible for discriminatory acts of their employees. It said interpretations of the law which undermine its capacity to effectively redress discrimination should be avoided.[50] In summary, all of these judge-made principles — repudiation of same treatment as the definition of equality, the focus on equality of outcome, the contextual, purposive approach to decision-making and the requirement of effective remedies — indicated that in the context of human rights legislation, the Supreme Court set out to create a new substantive approach to equality rather than a procedural one.

IV. The Canadian Charter of Rights and Freedoms

In the early 1980s, the prospect of a new *Charter of Rights* provided an opportunity for women and others to advance their constitutional interests beyond the formal equality constraints imposed in the jurisprudence established under the *Bill of Rights*.
After a massive lobbying effort, two sections relevant to sex equality were incorporated into the *Charter*. They were section 15 and section 28 which read as follows:

> *Section 15(1)* Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> *(2)* Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> *Section 28* Notwithstanding anything in the *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Insertion of the guarantee of equality 'under' the law was considered to be essential in order to avoid the result reached in the *Bliss*[51] and *Lavell*[52] cases. It was thought that this guarantee would ensure that constitutional review would reach the substance of laws as well as their procedure. The guarantee of '*equal benefit*' of the law was proposed to overcome the *Bliss* holding which permitted Parliament to differentiate as long as a benefit rather than a burden was conferred by legislation. Women argued that *equal benefit* must also be guaranteed because under-inclusive laws denying benefits contribute to the perpetuation of disadvantage just as much as laws requiring adverse treatment.

The second equality provision, section 28, resulted because women wanted assurance that their section 15 equality rights could never be eroded.[53] The wording of the section makes it clear that it overrides everything in the *Charter*, arguably giving it a potency absent from section 15.[54] Because the section makes reference to all the rights and freedoms guaranteed in the *Charter*, it has a very broad application, including equality in relation to all the legal and political rights. This means it could be used to challenge freedom of expression rights in the context of pornography, bodily security rights in the context of police practices applied to wife abuse or sexual assault cases and any other gender specific laws, policies or practices of government which have the effect of diminishing women's legal or political rights compared to those of men.[55] Section 28 requires that everyone must be able to enjoy all their constitutional rights and freedoms equally, to an equal extent.

V. Judicial Interpretation of Charter Equality Guarantees

Most scholars predicted that when it came time to interpret the *Charter* guarantees, Canadian courts would be strongly influenced by their American counterparts.[56] It was thought that notwithstanding the decisions rendered under human rights legislation, Canadian courts would likely follow the American view that adverse-impact or unintended results are excluded from the definition of discrimination for the purposes of constitutional law and that the similarly situated definition of equality would be adopted.[57]

Contrary to the predictions, however, the American constitutional case law was not particularly influential in Canada's highest court. Rather than ignoring its own human rights jurisprudence, the Supreme Court of Canada built upon it in the interpretation of Charter guarantees and rejected the constitutional equality jurisprudence of the U.S. courts.

The implications of this approach to constitutional equality guarantees are profound. The groundbreaking constitutional case was *Andrews v. Law Society of British Columbia*.[58] Decided by the Supreme Court in February 1989, the case arose when the Law Society of British Columbia refused to admit a landed immigrant to the practice of law for the reason that he did not meet the requirements of the *Legal Professions Act.* The *Act* stipulated that practising lawyers must be Canadian citizens. But for his nationality, Mr. Andrews was fully qualified to practice law. He brought an action to strike down the provision arguing that the citizenship requirement violated his equality guarantees entrenched in section 15 of the *Charter.*

At trial his claim was rejected. The trial judge found that although discrimination on the grounds of citizenship came within the purview of section 15, the essence of discrimination is the drawing of 'irrational' distinctions. He concluded that the citizenship requirement was relevant to the practice of law and thus did not meet the irrationality test.

The British Columbia Court of Appeal also rejected the complaint, but for different reasons. The Court adopted the 'similarly situated' test as the essential meaning of the guarantees to equal protection and equal benefit of the law.[59] It then tied this test to the meaning of 'discrimination' which was defined in terms of reasonableness and fairness. The Court said that in order to prove a breach of the *Charter* equality guarantees the onus was on the plaintiff to prove, on a balance of probabilities, that the legislative means were unreasonable or unfair. The Court then weighed the purposes of the legislation against its effects on the individual adversely affected.[60]

The Court of Appeal's requirement that interests be balanced suggested a more nuanced approach than that of the trial judge which required a mere testing of distinctions on the basis of rationality. But the spectre of the Aristotelian approach[61] once again determining the content of equality guarantees caused widespread concern.[62]

The decision of the British Columbia Court of Appeal was appealed to the Supreme Court of Canada. Five important equality questions were put to the Court for the first time: the meaning of the constitutional equality guarantee; its scope; what interests it is designed to protect; the meaning of discrimination; and appropriate remedies when a breach of section 15 is found.

Ultimately, the Court struck down the citizenship requirement in the *Legal Professions Act* as a violation of section 15 equality rights. In so doing, the Court differed markedly in its analysis from both lower courts. In its discussion of equality and discrimination five fundamental principles emerged, all of which have major implications for equality under the Constitution. Summarized, the principles are as follows[63]:

- the interests protected by section 15 must be determined by way of a generous interpretation using a purposive approach;
- the meaning of equality as sameness of treatment is rejected in favour of an effects-based approach. Intention need not be proven;
- the similarly-situated test is rejected: a finding of discrimination requires harm, prejudice or disadvantage;
- the scope of the equality guarantee is limited to the categories enumerated within the section or grounds analogous to them.

All of these themes are discussed below.

(a) The Purposive Approach

It was clear from the decision in *Andrews* that the Supreme Court wanted to make a difference for people in Canadian society who suffer real inequality.

In adopting the purposive approach, the Court rejected the use of formulaic, abstract rules to determine constitutional violations of the equality guarantee. In earlier decisions, the Court had repeatedly directed that the *Charter* be interpreted with careful attention paid to the provision's text, its legislative history, its role in a free and democratic society and its relationships to other *Charter* rights.[64] Consistent with this approach, the Court said the interpretation of section 15 specifically required an appreciation and understanding of its social and historical purpose — by the interests it was intended to protect. ln other words, interests arising out of inequalities between real people rather than generic or abstract inequalities. J. McIntyre, writing for the majority, stated the purpose of section 15 in these words:

> It is clear that the purpose of section 15 is to insure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.[65]

At page 324, J. Wilson added:

> It is consistent with the constitutional status of s.15 that it be interpreted with sufficient flexibility to ensure the 'unremitting protection' of equality rights in the years to come.

Although the statements do not tell us much more than the section itself, read in the context of the entire judgment, it is apparent that the Court was adopting a broad and generous approach to the section purpose similar to that of human rights legislation.[66]

(b) The Meaning of Equality and Discrimination

Addressing the constitutional meaning of equality, the Court first made it clear that sameness of treatment is not necessarily equality.[67] J. McIntyre stated:

> It must be recognized at once . . . that every difference or treatment between individuals under the law will not necessarily result in inequality and, as well that identical treatment may frequently produce serious inequality.

The Court in *Andrews* rejected the view that any distinction constitutes discrimination and also rejected the view that discrimination requires the plaintiff to prove a distinction is unfair or unreasonable.[68] Its definition of discrimination drawn from human rights jurisprudence places the emphasis on the impact of the law regardless of whether there was intention to discriminate or not. The unanimous court stated that

> discrimination may be described as a distinction, whether intentional or not but based upon grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[69]

Rejecting sameness of treatment as the only meaning of equality is a significant departure from traditional constitutional values.[70] It amounts to a recognition that Canadian society is made up of a diversity of groups and individuals in different circumstances with different needs. The rejection is particularly significant for women. Under the 'sameness of treatment' approach discussed *infra*, when women have discrimination complaints they are always compared to men. In a male dominated society, the equality standards they are forced to accept are designed to meet male, not female needs. By contrast, the approach adopted in *Andrews*, gives women the opportunity to challenge male-defined structures and institutions that disadvantage them and to set their own norms based on their own needs and characteristics. The Court's statement that identical treatment can accentuate inequality incorporates the idea that neutral laws or policies can violate section 15 if they have a disparate impact on disadvantaged individuals or groups. This result-oriented approach expands the protective ambit of the equality guarantees under the *Charter* substantially beyond that permitted by the equal protection doctrine adopted under the Bills of Rights in both Canada and the United States.

There are more implications from a remedial perspective. When discrimination is found, an effects-based approach allows for pro-active remedial responses. Although the remedial options include striking the law or policy down, they also include reforming an unconstitutional provision to secure equality of outcomes or implementing special measures to alleviate the disadvantage it causes or exacerbates. These pro-active remedies will require

standards, rules, laws and policies of the status quo to be challenged in consideration of past, existing and future adverse effect and systemic discrimination.[71] The process of pleading and proof may go some considerable way to identifying and remedying systemic disadvantage. Once this information is in the public domain, other members of excluded groups will be in a much more advantageous legal and political position to argue for better access to resources, skill, education, or employment opportunities[72] without necessarily invoking the legal process.

In cases involving discriminatory allocation of benefits, courts may be especially inclined to adopt a 'positive' rights approach. When under-inclusive legislation is found unconstitutional[73] the ability to promote equality is greatly enhanced if courts extend benefits to those improperly excluded from them. On the other hand, if courts limit themselves to merely striking down unequal benefit provisions, the result in most cases will be contrary to the purpose of the equality guarantees. All that will be achieved will be a guarantee that groups or individuals have the same entitlement to no benefits. This 'dog in the manger' approach to equality produces sameness rather than equality and should be avoided when equality of result is the desired goal.

This issue arose in *The Queen v. Schachter*,[74] a case presently before the Supreme Court. The plaintiff *Schachter* is challenging the *Unemployment Insurance Act*[75] under section 15 of the *Charter* on the grounds that he, a biological father, has been denied parental leave benefits available to adoptive parents[76] and to biological mothers.[77] The Federal Court of Appeal found a breach of section 15 and also accepted the argument that striking down the parental leave provisions would not promote equality even though it would place both natural and adoptive parents in the same position. The Court held that as long as the *Act* remains in its present form, it must provide *both* natural parents with the same child care benefits available to adoptive parents. As a result, the law in Canada today is that courts have the authority to extend statutory benefits to those who have been improperly excluded from them. We await a final determination from the Supreme Court.

(c) The Rejection of the Similarly Situated Test

Perhaps the most emphatic aspect of the Court's discussion of equality in *Andrews* was in its rejection of the 'similarly situated' test, or the Aristotelian principle of formal equality.[78] In no uncertain terms, Justice McIntyre argued that the test is seriously deficient, ignores the content of the law, is tautological and could even justify Hitler's Nuremburg laws as long as all Jews were treated similarly.[79]

The similarly situated test determines discrimination by starting from the proposition that: 'things that are alike should be treated alike and things that are unlike should be treated unalike in proportion to their unlikeness'. Part of the reason the Court criticized the test so harshly was because it provides no guidance as to what should follow once a finding of difference or 'unlikeness' is made. The pregnancy case referred to *infra*, makes the point. Once the Court in *Bliss*[80] determined that pregnant women workers were 'different' from men and non-pregnant women workers, there was nothing to prevent the government from treating pregnant workers in a way that disadvantaged them because of their pregnancy. The similarly situated test permitted this even if the determination of 'difference' relied solely on the subjective values, stereotypes or biases of the judges at the time. No requirement of objective rationality, certainty or fairness of treatment was required.

Another related weakness the Court identified in the similarly situated test is the way similarity is measured. When women are compared to men, their opportunity to be treated as equal is limited to the extent that they are the same as men. This superficial form of analysis severely limits and circumscribes women's equality claims. As Catharine MacKinnon noted: 'applied to women, it means if men don't need it, women don't get it'.[81] Issues such as pregnancy discrimination, sexual harassment, violence against women, reproductive choice and pornography fall outside the scrutiny of constitutional equality guarantees because men, the comparators, have no comparable need and the similarity situated test is not met. There is no legal basis for complaint. In other words, many legally imposed abuses women suffer are not considered to be equality issues at all. The similarly situated theory effectively works to obscure the systemic, historically embedded disadvantaged reality of women because of the narrowness of its scope.

On the other hand, when discrimination is measured in terms of disadvantage as it was in *Andrews*, the test is applied by asking whether a claimant is a member of a 'discreet and insular minority'[82] which has experienced persistent disadvantage on the basis of personal characteristics such as those listed in section 15. 'Persistent disadvantage' is determined contextually by examining the group in the entire social, political and legal fabric of our society.[83] If the measure under attack continues or worsens that disadvantage, it violates the equality guarantee. No comparator is required.

When the disadvantage test is applied to gender inequality cases, women's social subordination is recognized in terms of a sexual hierarchy with women on the bottom. This revelation adds a new dimension to constitutional equality analysis because it finally requires the law to confront the reality that women suffer from socially created inequality. The systematic abuse and deprivation of power they experience is because of their place in the sexual hierarchy. Viewed this way, the inappropriateness of the similarly situated test is obvious. The test assumes that those using it enjoy social equality and are therefore entitled to legal equality. When one is born socially unequal because of gender (or other personal characteristic) it is almost impossible to be the same, or be 'similarly situated' to the socially advantaged. If true equality or equality of result is the desired goal of constitutionally entrenched equality guarantees, the *Andrews* analysis is much more appropriate than that used under the *Bill of Rights* because the real problems of the socially disadvantaged, the inequality of power between dominant and subordinate groups, can be addressed. The similarly situated criteria, by only concerning itself with sameness and difference, remains in the realm of the abstract.[84]

This is not to say that the related concept of sameness of treatment is always inappropriate. It clearly is not. History shows us that personal characteristics which make people 'different', whether that be gender, skin colour, disability, age or religion, have often put them into the categories of greatest disadvantage. In some situations, identical treatment with those who are the most advantaged will be the most appropriate and effective remedy. In other circumstances, however, different treatment may be required to alleviate the disadvantage. That different treatment will vary in each case depending upon the facts. What is most attractive and practical about the *Andrews* decision is the flexibility it offers to the measurement of equality and the ability it gives the judge to identify and remedy systemic disadvantage in a variety of different ways.

(d) The Scope of the Equality Guarantee

The decision in *Andrews* both broadened and narrowed the scope of the equality provisions. The criteria of disadvantage broadened the scope of section 15 to cover unintentional or adverse impact discrimination. On the other hand, it limited the scope of the equality guarantees in terms of standing. In other words, claims by privileged individuals or groups targeted by legislative classification will rarely succeed.

It could be said that the plaintiff in *Andrews*, a white, male, highly educated, healthy and able bodied person was not in the category of 'disadvantage'. However, the contextual approach applied to his situation as a member of the group of non-citizens, put him within a group analogous to the enumerated groups in section 15. Justice Wilson explained that non-citizens because of their lack of political power, are 'vulnerable to having their interests overlooked and their rights to equal concern and respect violated'.[85] She stressed that the question of whether a group is analogous to those enumerated must be assessed not only within the context of the challenged law, but also in the context of society generally.[86] Determining disadvantage by going outside to the legislation is very significant because any rational litigant regardless of group affiliation will always be disadvantaged by the legislation which is the subject matter of their complaint. If the Court is going to adhere to a purposive approach it must be able to determine whether or not the complaint fits into overall patterns of disadvantage and whether or not identical or differential treatment is discriminatory. Justice Wilson explained 'It is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage'.[87] An external evaluation allows the Court to ensure that those who suffer persistent disadvantage will benefit from section 15 guarantees while those with generic or abstract equality claims will have to take their complaints to some other forum.[88]

Vl. Implications For Women's Legal And Social Equality

At a minimum, the decision in the *Andrews* case will allow courts to hear women's stories, whether they have to do with racism, sexual violence, pregnancy, heterosexism, age, poverty, disabilities or dominance of the white culture.[89] No longer are women held hostage by abstract doctrinal rules which obliterate their reality. The constitutional approach to equality adopted by the Supreme Court provides women with an opportunity to educate the judiciary about their lives. Cases decided subsequent to *Andrews* show the promise this approach holds out.

In *Brooks v. Canada Safeway*[90] for example, the Supreme Court of Canada overturned its own decision under the *Bill of Rights* in *Bliss* that decided discrimination on the basis of pregnancy did not constitute sex discrimination. In *Brooks*, where pregnant women received disfavoured treatment, the Court said notwithstanding the fact that only women get pregnant, it was sex discrimination. They not only found it unnecessary to find a male equivalent to the condition of pregnancy, they specifically held that the disadvantage the pregnant women suffered came about because of their condition — because of their difference. In recognizing such discrimination, the Chief Justice described its invidious nature as well as its social costs:

> Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be

> economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.[91]

Although the Brooks case was decided under human rights legislation, the interrelationship of human rights with *Charter* equality principles fused by the *Andrews* case suggests future possibilities of the Court's approach to constitutional equality. Certainly the tone, reasoning and language of *Brooks* is a far cry from the earlier *Bliss* case.

Another recent human rights case dealt with sexual harassment. The Supreme Court unanimously overturned a lower court's decision which had concluded that sexual harassment did not constitute sex discrimination.[92] Similar to the *Brooks* decision, the Court rejected formalistic, sameness reasoning in favour of the approach adopted in *Andrews*. Rather than merely relying on the concept of adverse affect discrimination which could have resolved the matter, in favour of the complainants, the Court developed a much more sophisticated analysis which explained the relationship between sexual harassment and gender. C.J.C. Dickson, writing for the majority first discussed how sexual harassment has a differential impact on women in terms of the gender hierarchy of the labour force and the inherent 'abuse of both economic and sexual power'[93] it entails. The Court then defined sex discrimination in the manner suggested by *Andrews*:

> Discrimination on the basis of sex may be defined as practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender.[94]

Looking at the social and economic realities of women, the disparate impact of sexual harassment and the gender hierarchy of the workforce, the Court concluded that sexual harassment amounted to sex discrimination. The lower courts' analysis which led to the conclusion that sexual harassment involved discrimination on the basis of sexual attractiveness of the victim, not discrimination on the basis of sex, was much like that in *Bliss* where discrimination on the basis of pregnancy was not considered to be discrimination on the basis of sex. The Manitoba Court also thought that sexual harassment was treatment accorded to an individual, not a group characteristic. The Supreme Court of Canada rejected these views as misconceived. It said:

> While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than as the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of the individual.[95]

C.J.C. Dickson went on to say the notion of sexual attractiveness, like pregnancy cannot be separated from gender.[96]

The contextualized approach the Supreme Court used in *Janzen v. Platy* demonstrated sensitivity to women's perspectives. It seems the Court understood that in the context of a deeply sexist society that objectifies women's bodies and perpetuates a male-defined image of sexual attractiveness, the practice of sexual harassment cannot be separated from the unequal relations of sexual interaction that disadvantage women.[97] The Court noted with approval the view that a hostile or offensive working environment created by sexual harassment 'is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.'[98]

Both the *Brooks* and *Janzen* decisions are positive and important legal victories for women in Canada. Although neither were *Charter* cases they further developed the approach to discrimination articulated in *Andrews* and revised legal doctrine which previously reflected only male defined norms. Two other important examples which show a willingness on the part of the Court to question male assumptions underlying the law are the *Morgentaler*[99] and *LaVallee* cases.[100]

In *Morgentaler*, the *Criminal Code* legislation relating to abortion was struck down on the basis of a constitutional challenge that it violated section 7 of the *Charter* which guarantees everyone 'the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. The majority of the Court found the legislation unconstitutional because of its violation of the security of the person guarantee. However, Justice Wilson in concurring, expanded the reasoning under the liberty guarantee linking the notion of being women with the notion of being human in a way never before articulated in Canadian jurisprudence. She described the implications of an unwanted pregnancy as follows:

> This decision is one that will have profound psychological, economic and social consequences for the pregnant woman . . . It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large.
>
> It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be a response of the whole person.[101]

She elaborated on the point by rejecting male-centred norms that influence the concept of 'liberty' because the experiences of pregnancy, birth and abortion are ones for which men have no analogy:

> *It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.* As Noreen Burrows, lecturer in European Law at the University of Glasgow, has pointed out . . . the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men . . . It has *not* been a struggle to define the

> rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The rights to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.[102] (emphasis added)

Although Justice Wilson did not refer to section 28 of the *Charter*, its values are implied in her judgment. Clearly if liberty and security rights are to be enjoyed equally by male and female persons, courts must interpret laws which infringe upon them in a way that is meaningful for women as women. The *Morgentaler* decision is a landmark case for future gender equality jurisprudence because it interpreted the abortion law from the empathetic perspective of the experiences, aspirations and problems of women and demonstrates how courts can begin to incorporate women's reality within the meaning of constitutional rights.

The *LaVallee* decision demonstrates the effect of *Andrews* beyond constitutional and human rights law. The case involved the criminal law of self-defence in a case of a woman who shot her partner in the back of the head as he left her room. The shooting occurred after an argument where the appellant had been physically abused and was fearful for her life after being taunted with the threat that if she did not kill him first, he would kill her. She had frequently been a victim of his physical abuse. In assessing her defence of self-defence, the Court recognized the inequities perpetuated by the 'same treatment' model of equality. Borrowing analytically from the approach adopted in *Andrew*, the Court found that the common law self-defence criteria of 'imminent danger' is gender biased when applied in the context of wife abuse.

Expert evidence of the battered wife syndrome was held to be admissible, which in turn allowed the Court to apply a woman-centered approach to the criteria of reasonableness. The Court said:

> Given the relational context in which the violence occurs, the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality.[103]

The Court then extended the analysis to recognize the gender specificity of battering. In reasoning similar to that in *Morgentaler*, Justice Wilson questioned the male-defined concept of reasonableness when it is women who are the victims:

> If it strains credibility to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstance which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'.

In its conclusion, the Court determined that the law's traditional concept of self-defence evolved out of a 'bar-room brawl' model which comprehends only a male concept of reasonableness. In order to be fair to women and (presumably) to recognize their right to equal protection and benefit of the law, the Court reconstructed the defence. It is quite clear

from the decision that *Charter* values underlie *LaVallee* even though the *Charter* was not argued in the case.

Another example worthy of note is the Supreme Court's decision in *R v. Keegstra*.[104] Although not involving gender equality directly, its implications for future sex equality jurisprudence are considerable. This was a case involving a freedom of expression constitutional challenge to hate propaganda laws in the Criminal Code. The Court upheld the law, advancing an equality harm-based rationale to support the regulation of hate propaganda as a practice of inequality. The Court used section 15 in a unique way in the case. It said that not only can the constitutional guarantee be used to strike down laws which discriminate, it can also be used constitutionally to *support* laws which further section 15 values. Further, it held that the objective of promoting social equality that lies behind section 15 is relevant to the inquiry about justifiable limits on freedom of expression. The Court examined the larger social, political and legal context of the target groups protected by the hate propaganda provisions and balanced them against the free speech interests of hate mongers. In other words, the Court contemplated the social meaning of hate propaganda and uncovered its harmful effects.[105] Once they were revealed, the balancing of interests resulted in the establishment of equality as a pre-eminent value in Canadian society. The centrality of equality to the enjoyment of individual as well as group rights in the decision demonstrates a firm acceptance of the view that equality is a positive right, that the *Charter's* equality provision has a large remedial component and that legislatures should take positive measures to improve the status of disadvantaged groups. Most importantly, the *Keegstra* decision identifies the transformative potential in the *Charter*, a potential to achieve social change towards a society that responds to needs, honours difference and rejects abstractions.

The importance of the *Keegstra* decision to women's equality rights was borne out in the case of *R. v. Butler*, the first case to challenge obscenity laws as a violation of the freedom of expression guarantee.[106] Because the *Charter* issues were approached in a manner which located harm to women at the centre of the analysis, the threat pornography posed to other *Charter* values such as physical integrity and equality, was accentuated. This in turn led to the important conclusion that regulating pornography is not a question of regulating morality but rather one of regulating harm. It was argued in the case that while the harms-based approach to hate propaganda adopted in *Keegstra* was correct, pornography presents a much stronger case for regulation. The Court adopted the contextualized approach which revealed that pornography is much more commonplace, socially accepted and widely distributed across class, race and geographical boundaries than hate propaganda is and it exists in a context of social inequality. It said that the most serious risk of harm arises when the material in question presents sexual representations that degrade and dehumanize the participants, subjects them to violence, and reduces them to mere objects of sexual access. Women's experience viewed in the larger context — including rape, battery, prostitution, incest and sexual harassment — when placed beside the encouragement and promotion of women's subordination in pornography, demonstrated its undermining effects on women's social equality.

The Court logically concluded that the deeper, wider and more damaging harm to social life caused by pornography, as compared to hate propaganda, outweighs any free speech interest of pornographers or their consumers. In a society where gender inequality and sexual violence exist as entrenched and widespread social problems, criminal legislation with the objective of prohibiting material which attempts to make degradation, humiliation, victimization and violence against women appear normal and acceptable is a pressing and

substantial concern. Just as the Court said in *Keegstra*, 'Parliament promotes equality and moves against inequality when it prohibits the wilful public promotion of group hatred',[107] it recognized in *Butler* that Parliament promotes equality when it moves against the 'undue exploitation of sex, or of sex and one or more of the following subjects, namely, crime, horror, cruelty and violence.'[108]

On the remedial side, the Supreme Court recently developed a potentially far reaching approach to *Charter* remedies in the case of *Shalom Schachter v. The Queen.*[109] Up until this decision, the extent to which courts could rewrite unconstitutional laws in order to extend benefits to those wrongfully denied them was unclear. As under-inclusive benefit schemes are a common equality problem, the decision was of major importance for women and other disadvantaged groups seeking to share in societal resources.

The facts of the case were that the plaintiff, Shalom Schachter, a biological father, wished to stay home with his newborn son so that his partner, the child's mother, could return to work. He applied for benefits under the *Unemployment Insurance Act* which provided women with 15 weeks of maternity benefits[110] and benefits for both adoptive parents who wished to stay home with a newly adopted child.[111] The legislation did not allow for benefits for natural fathers except where the natural mother died or became disabled.[112]

The Unemployment Insurance Commission rejected his applications. On appeal to the Federal Court, Mr. Schachter was successful in obtaining a declaration that the benefit scheme was discriminatory, violating his s.15 equality rights on the basis of parental status.

After finding a violation of the *Charter*, the Court then turned to the question of remedies. On one hand, the government argued that the only appropriate remedy was to strike down the legislation as invalid and of no force and effect. On the other, the plaintiff argued that rather than striking the law down, the appropriate remedy was to extend the benefits to natural fathers by 'reading-in' their entitlement. The Federal Court decided on the latter proposal. This decision was upheld on appeal in the Federal Court of Appeal and subsequently appealed to the Supreme Court of Canada.[113]

What was at stake here was a very basic implementation question. If the purpose of the *Charter* is to promote the equality of historically disadvantaged groups,[114] including women, it follows that remedies must be able to give effect to the purpose. lf all the courts are able to do is strike down under-inclusive benefits legislation, then the remedy defeats the *Charter's* purpose. Would-be applicants wrongfully denied benefits would be reluctant to litigate their claims if success could well mean the destruction of the entire benefit scheme.

To be in compliance with the *Charter*, all the government would need do is deprive benefits to everyone equally. This would result in a kind of 'equality with a vengeance', or 'dog in the manger' litigation strategy.[115] Such a solution not only fails to promote social equality, it renders 'equal benefit of the law' a meaningless, hollow right. The 'reading-in' remedy by contrast, is consistent with *Andrews* in the sense that its application achieves equality of result rather than mere formal equality.

In July 1992, the Supreme Court of Canada decided unanimously in favour of a flexible approach to *Charter* remedies.[116] It said that courts have three options when a law violates the *Charter*. Depending on the circumstances of the case, a court could:

(1) strike down the legislation;

(2) strike down the legislation but suspend the effect of that decision to give the legislature a chance to revise the law to be consistent with the *Charter*, or

(3) reformulate the law so that it is consistent with the *Charter*. This would be achieved either by 'reading down' (declaring the offending section of the law to be inoperative) or 'reading in' (by, for example, extending benefits in the case of an under-inclusive law).

While stressing that each case must be decided on its own merits, the Supreme Court provided guidelines to assist lower courts in assessing which of the three options is appropriate. The striking down remedy would normally be used where the purpose of a law is not sufficiently pressing to warrant overriding a *Charter* right. Where the legislative objective is pressing and substantial but the means of achieving it are not rationally connected to the objective, the Court said the legislation as a whole or the portion which fails the rational connection test should be struck down. However, if it is the case the legislation rationally furthers an important social objective but the means may be inappropriately tailored to that end, then more flexibility is permitted. Some argue that giving such remedial power to the courts usurps the role of Parliament. This is incorrect. Parliament is still supreme. The Court was careful to point out that 'reading-down' or 'reading-in' remedies are available where it is possible to fulfil the purposes of the *Charter* while minimizing judicial interference in politics. For example, if there are various policy options which could make a law constitutional, the choice should be left up to the legislature.[117] The Court said reading in or reading down remedies could be properly employed where:

(1) the legislative objective is clear and the remedy would further the objective or constitute a lesser interference with that objective than the striking down option;

(2) where the means chosen are not so unequivocal that reading in or reading down would be an unacceptable intrusion into the legislative domain; and

(3) reading in or reading down would not involve an intrusion into the budgetary sphere so substantial as to change the nature of the legislative scheme in question.

On the third point the Court emphasized that the question is not whether a court can ever grant remedies with a budgetary impact but rather whether it is appropriate in a particular case given the principles underlying the *Charter*. An example where the Court said 'reading-in' would be appropriate was that of *A.G. Nova Scotia v. Phillips*.[118] ln that case, the Nova Scotia Court of Appeal struck down a benefits provision for single mothers after it was found to violate the equal benefits right of single fathers. Both single mothers and fathers were denied welfare benefits — 'equality with a vengeance'. Clearly, extending the benefits to fathers would have been the more appropriate remedy. The Court explained that even though section 15 does not create positive obligations, the 'reading-in' remedy would have been more in keeping with the goals of section 15 and the welfare legislation in question.

On the facts of *Schachter,* the Court chose not to read-in benefits for natural fathers. The reasons cited were that it lacked a factual base, the excluded group was vast and that including them could alter the entire scheme of parental benefits. The massive financing 'reading-in' would require could also result in benefits being cut from other disadvantaged groups. As a result, the Court was of the opinion that Parliament was in a better position to evaluate the broader implications and solutions. It was also noted that Parliament had already amended the legislation to provide parental benefits to all parents, albeit on a smaller scale.

The decision in *Schachter* is significant for women. When one of the purposes of s. 15 is to overcome the effects of disadvantage, it does not make sense to interpret a remedial provision to make the applicants worse off. If courts are to safeguard and promote equality rights of women and other disadvantaged groups they must provide a strong incentive to governments to amend under-inclusive, discriminatory benefit provisions.

Furthermore, the flexible approach outlined by the Court provides parties before the courts a much broader remedial scope. By allowing the 'reading-in' option, the Court has acknowledged that the guarantee to equal benefit of the law can be a positive right. At a minimum, the decision encourages governments to provide benefits to disadvantaged groups and to be as faithful as possible within the requirements of the *Charter* to the scheme enacted by the legislature.

Vll. Conclusion

Just as in *Andrews, Brooks, Morgentaler, LaVallee* and *Janzen* and *Platy*, the *Keegstra, Butler* and *Schachter* decisions demonstrate a re-thinking of legal concepts. The assumption that human behaviour can be generalized into natural universal laws is being challenged by an analytical approach which favours context rather than detached objectivity. Starting in human rights cases, elaborated and expanded upon in *Charter* equality cases, it is now reaching into criminal and civil law. By expanding the perimeters of the discussion, previously hidden underlying facts and issues are being exposed. The cases demonstrate that social and economic arrangements which have been taken for granted often disadvantage women in a multitude of ways. To redress past wrongs, equality principles have been taken beyond the sameness approach because the courts have begun to realize that not all individuals have suffered historic, generic exclusion on the basis of their group membership. Where barriers impede fairness for some individuals, they must be removed even if this means treating some people differently. The Supreme Court of Canada has demonstrated in a number of different cases on a number of different issues that gender equality in the Canadian context is result-oriented. Rights and duties are being allocated equitably, not simply on the basis of abstract, doctrinally stagnant principles of formal equality which thwart rather than achieve substantive equality.

This is not to say that real equality has been achieved in Canada. Far from it. What it does say is that a major stumbling-block to its achievement has been identified and a methodology developed to move toward our country's proclaimed commitment to legal and social equality. Much remains to be done but what is critically important is that women can now address, in constitutional terms, the deepest roots of social inequality of the sexes. Issues such as reproductive control and sexual violence can now be considered as sex equality issues and laws dealing with them subjected to constitutional scrutiny. The Supreme Court of Canada is the first court in the world to adopt the reality of social disadvantage as a basis for

constitutional equality analysis. It will as a result, be the first court which will have the opportunity to change it.[119]

1. *Canadian Charter of Rights and Freedoms*, Part 1, of the *Constitution Act, 1982*, being *Schedule B of the Canadian Act, 1982* (U.K.). 1982. c.11 [hereinafter *Charter*].

2. The Special Joint Committee of the Senate and House of Commons on the Constitution of Canada sat from 7 November 1980 to 9 February 1981 to hear submissions on the Constitution. Over 1,200 groups and individuals appeared before the Committee. See Issue 57 of the *Minutes of Proceedings and Evidence* for the Committee's Report to Parliament submitted on 13 February 1981.

3. Katherine J deJong, 'Sexual Equality: Interpreting Section 28' in *Equality Rights and the Canadian Charter of Rights and Freedoms*, Bayefsky and Eberts, eds., Carswell 1985, pp.493-528. See also, E. McWhinney, in *Canada and the Constitution 1979-1982*, 1982, pp.104-5.

4. Penny Kome, *The Taking of 28*, Women's Press, Toronto, 1983; Chaviva Hosek, 'Women and Constitutional Process' in *And No One Cheered*, K. Banting, R. Simeon, eds, Methusen, Toronto, 1983; L. Gotell, *The Canadian Women's Movement, Equality Rights and the Charter*, C.R.I.A.W., 1990.

5. Section 15 actually contains four equality guarantees and an affirmative action provision. It reads as follows:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental of physical disability.

6. For a discussion of the history and interpretation of s.28 see K. deJong, *supra*, note 3, pp. 494-512.

7. In *Canadian Feminism and the Law*, Second Story Press, 1991, Sherene Razack describes the history of the Women's Legal Education and Action Fund (LEAF), a Canadian group created to promote women's equality through litigation of precedent-setting cases using the sex equality guarantees in the *Charter of Rights and Freedoms*.

8. Mary Eberts, 'Sex and Equality Rights', in *Equality Rights and the Canadian Charter of Rights and Freedoms, supra*, note 3, p.199.

9. *Bliss v. Attorney-General of Canada*, [1979] 1S.C.R. 183; *Leier v. C.I.P. Paper Products Ltd.* (1979), cited in Tarnapolsky and Pentney, 'Discrimination and the Law', De Boo (1989) pp.8-13; *Wong v. Hughes Petroleum* (1983), 4 C.H.H.R.D./1488; *Breton v. La Société Can. des Métaux Reynolds Ltée* (1981), 2 C.H.H.R.D./532; *Nye v. Burke* (1981), 2 C.H.H.R.D./538; *C.D.P.Q. v. L'Equipe du Formulaire L.T. Inc* (1982), 3 C.H.R.R.D./1141.

10. C. Cleverdon, *The Woman Suffrage Movement in Canada*, 2nd ed., 1974 and M.E. MacLellan, 'History of Women's Rights in Canada' in *Cultural Tradition and Political History of Women in Canada*, Studies of the Royal Commission on the Status of Women in Canada #8, 1971.

11. M. Metzer, 'A Social History of Battered Women', p.59, cited in L. Macleod, *Wife Battering in Canada: The Vicious Circle*, Canadian Advisory Council on the Status of Women, 1980.

12. T. Davidson, *Conjugal Crime: Understanding and Changing the Wife Beating Pattern*, Hawthorn Books, New York, 1978; D. Russell, *Rape in Marriage*, New York, Collier, 1982.

13. K. Mahoney, 'The Legal Treatment of Wife Abuse: A Case of Sex Discrimination' course materials, Judicial Education Seminar, 1991, Western Judicial Education Center, 1362 Mathers Avenue, Vancouver, British Columbia, V7V 2K5. See also (1992) U.N.B.L.J. (in print).

14. Sheilah Martin, 'The Social Context of Sexual Violence', Course Materials, Judicial Education Seminar, 1991, Western Judicial Education Center, 1362 Mathers Avenue, Vancouver, British Columbia, V7V 2K5.

15. T.B. Dawson, 'Sexual Assalt Law and Pask Sexual Conduct of the Primary Witness', 1988, 2 Can. J. of Women and the Law 310; J.G. Hoskins, 'The Rise and Fall of the Corroboration Rule in Sexual Offence Cases', 1983, 4 Can. J. Fam. L. 173; L. Vandervort, 'Mistake of Law and Sexual Assault: Consent and Mens Rea', 1988, 2 Can. J. of Women and the Law, 233-309; *Sexual Assault Legislation in Canada: An Evaluation Report #2, The New Sexual Assault Offences*, Ottawa, Department of Justice, Canada, 1973; L.O. Wener, *An Examination of the New Sexual Assault Legislation*, Alberta Law Foundation, Calgary, 1985; G. Ruebsaat,*The New Sexual Assault Offences: Emerging Legal Issues*, Ottawa, Department of Justice, 1985.

16. See C. Backhouse and L. Cohen, *The Secret Oppression: Sexual Harassment of Working Women*, Toronto, Macmillan, 1978; Tarnapolsky and Pentney, *supra*, note 9. pp.8-23.

17. *Janzen v. Platy Enterprises Ltd.,* [1989] 1 S.C.R. 1252 [hereinafter Janzen].

18. K. Cooper-Stevenson, 'Pask Inequities and Future Promise: Judicial Neutrality in Charter Constitutional Tort Claims' in *Equality and Judicial Neutrality*, K. Mahoney and S. Martin eds, Carswell, 1987, p.226.

19. See Christine Boyle, Book Review of *Injunctions and Specific Performance* by R.J. Sharpe, [1985] Can. B. Rev. 427.

20. R.S.C. 1970, c.1-16.

21. See Beverly Baines, *Women, Human Rights and the Constitution*, the Canadian Advisory Council on the Status of Women, 151 Sparks Street, Box 1541, Station 'B', Ottawa, Canada K1P 5R5, pp. 46-50.

22. *Edwards v. A.G. Canada*, [1930] A.C. 124 (P.C.) reversing the Supreme Court of Canada in *In the Matter of Reference as to the Meaning of the Word "Persons" in Section 24 of the British North American Act, 1867*, [1928] S.C.R. 276.

23. ibid., pp.186-7.

24. Mary Eberts, 'Sex-based Discrimination and the Charter' in *Equality Rights and the Canadian Charter of Rights and Freedoms*, Bayefsky and Eberts, eds., Carswell, Toronto, 1985 pp.185-6.

25. See R.S.C. 1970, Appendix III.

26. [1974] S.C.R. 1349.

27. *Supra*, note 20, s.12(1)(b) was the section challenged.

28. For a discussion of discrimination against aboriginal people generally, see Thomas P. Berger, *Fragile Freedoms, Human Rights and Dissent in Canada*, Clarke, Irwin and Company Ltd., Toronto/Vancouver.

29. [1979] 1 S.C.R. 183.

30. *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c.48, s.30(1).

31. *Supra*, note 29, pp.190-1, per Ritchie, J.

32. Dale Gibson, 'The Law of the Charter: Equality Rights', Carswell, 1990, p.31.

33. ibid. This voluntarism rationale is still propounded by some as a justifiable limit on the right to equal treatment. See for example, Thomas Flanagan in the 'Manufacture of Minorities' in *Minorities and the Canadian State*, Toronto, Mosaic, 1985, p.10. For a reply, see Dale Gibson, 'Stereotypes, Statistics and Slippery Slopes: A Reply to Professors Flanagan and Knopff and other Critics of Human Rights Legislation', in the same volume, pp. 125-37.

34. Ontario was the first jurisdiction to pass such legislation with *The Fair Employment Practices Act*, S.O. 1951, c.24. Within five years, Manitoba, Nova Scotia, New Brunswick, British Columbia and Saskatchewan adopted similar legislation.

35. Ontario again led the way with the *Fair Accommodations Practices Act*, S.O. 1954, c.28 which dealt with equality of access to 'the accommodation, services, facilities available in any place to which the public is customarily admitted'.

36. See Shelagh Day, 'The Process of Achieving Equality' in *Human Rights in Canada*, R. Cholewinski, ed., Human Rights Research and Education Centre, University of Ottawa, 1990, for a critique of human rights legislation and procedure. See also her paper, 'Impediments to Achieving Equality' in *Equality and Judicial Neutrality, supra*, note 18.

37. ibid.

38. Tarnapolsky and Pentney, *supra*, note 9, pp.14-1 to 15-1. For example, in 1962, Ontario strengthened its human rights legislation by consolidating all its non-discrimination statutes in the *Ontario Human Rights Code* administered by the Ontario Human Rights Commission, S.O. 1960-61, c.63.

39. *Supra*, note 35.

40. See Catharine MacKinon, discussion of equality in *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press, 1987, pp.23-5, 40-1, 169-70, 277-9.

41. Laws guaranteeing equal pay for work of equal value have been introduced in a number of jurisdictions. In Quebec and in the federal jurisdiction, equal pay for work of equal value is guaranteed in the human rights laws encompassing both public and private sectors. Ontario has pay equity legislation which requires equal pay for work of equal value applicable to private and public sector with 10 or more employees. Legislation in the Yukon, Nova Scotia, Manitoba, New Brunswick and Prince Edward Island requires pay equity for public sector employees. The provinces of Alberta, British Columbia and the Northwest Territories do not have provisions for pay equity.

42. *Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd.*, 1985, 2 S.C.R. 536 at 547.

43. *Canadian National Railway Co. v. Canada, Canadian Human Rights Commission; Action Travail des Femmes*, [1987] 1 S.C.R. 1114 at 1138-39.

44. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

45. *Supra*, note 42 at 547.

46. ibid. at 547. This judgment built on *Ins. Corp. of B.C. v. Heerspink,* [1982] 2 S.C.R. 145, 43 N.R. 168, Lamer J., and *Winnipeg School Division No. 1 Craton*, [1985] 2 S.C.R. 150, 6 W.W.R. 166, 21 D.L.R. (4th) 1.

47. *Supra*, note 42.

48. ibid.

49. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* [1990] 2 S.C.R. 489.

50. *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 (sub. nom. *Robichaud v. R.*) 40 D.L.R. (4th) 577, 8 C.H.R.R. D/4326.

51. *Supra*, note 29.

52. *Supra*, note 26.

53. See C. Hosek, 'Women and the Constitutional Process' in Banting and Simeon, *And No One Cheered*, Methusen, 1983, at 295ff. and P. Kome, *The Taking of 28*, Women's Press, 1983.

54. Section 15 is subject to the s.33 override provision which allows provinces and the federal parliament under certain conditions to override the fundamental freedoms in section 2 or the rights in sections 7 to 15.

55. These section 28 arguments have been made in some constitutional cases but it is too early to tell whether or not the Supreme Court will give them the weight suggested here. In *Jane Doe v. Toronto Metropolitan Police*, 40 O.A.C., 161 the Court of Appeal of Ontario held that the plaintiff has the jurisdiction to sue the police force for its investigation of a serial rapist who sexually assaulted her and many others. One of her complaints was that the police policy of keeping the fact of the *modus operandi* of the assailant a secret as well as their judgment as to where he would strike next, violated her constitutional guarantee of equal security of the person rights. In *R. v. Butler*, [1991] W.W.R. 97 (Man. C.A.) at 141, a similar argument was made in a case involving a constitutional challenge to obscenity laws. The Supreme Court has yet to render a judgment on the point as to whether or not section 28 guarantees equal freedom of expression rights to women to the extent that laws promoting such equality should be constitutionally valid. A third example which does not bode well for the author's proposition was the case of *Seaboyer and Gayme v. R.* S.C.J. No. 62, where rape shield provisions were struck down as constitutional violations of the accused's presumption of innocence guarantee. The majority did not even address the argument that women's security rights and equality rights should weigh more heavily in the balance. But see the dissenting opinion of L'Heureux-Dubé J.

56. For example, see Walter Tarnapolsky, 'The Equality Rights', in the *Canadian Charter of Rights and Freedoms: Commentary*, W. Tarnopolsky and G. Beaudoin, eds, 1982, p.442. The author is now a judge of the Ontario Court of Appeal.

57. The United States Supreme Court requires that before a statute can be struck down intentional discrimination must be found. They hold to this principle even though American federal human rights legislation acknowledges disparate impact discrimination. See *Washington v. Davis*, 426 U.S. 299 (1976); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *McCleskey v. Kemp*, 481 U.S. 279 (1987). See also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

58. [1989] 1 S.C.R. 143 [hereinafter *Andrews*]. See also two subsequent decisions which added further clarification to the principles articulated in *Andrews*, namely, Ref. re Workers Compensation Act, 1983 (Newfoundland), [1989] 1 S.C.R. 922; *R. v. Turpin*, [1989] 1 S.C.R. 1296.

59. (1985), 22 D.L.R. (4th) 9, at p.16, 66 B.C.L.R. 363 at p.370, [1986] 1 W.W.R. 252 at p.259 (B.C.S.C.).

60. ibid., at p.605 (D.L.R.), 311 (B.C.L.R.), 248 (W.W.R.).

61. Aristotle, Ethica Nichomacen, trans, W.Ross, Book V3 at p.1131 a-6 (1925). See discussion in text pp.11-12.

62. Many third parties intervened in the appeal, including the Women's Legal Education and Action Fund (L.E.A.F.) to argue against the similarly situated test being used to define equality. L.E.A.F. is a charitable organization whose purpose is to achieve equality for women by means of litigation using the guarantees of the *Charter*. Other groups which intervened included the Coalition of Provincial Organizations of the Handicapped, The Canadian Association of University Teachers and the Ontario Confederation of University Faculty Associations.

63. ibid., at p.610 (D.L.R.), 315 (B.C.L.R.), 253 (W.W.R.).

64. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p.344; *Reference re s.94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. 482 at pp.499-500; *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at p.394; *Reference Re Roman Catholic Separate High Schools* (1987), 77 N.R. 241, pp.267-8 (S.C.C.); *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at pp.604-5.

65. At p.171 (D.L.R.).

66. See discussion in the text associated with endotes 41-49.

67. *Supra*, note 58 at 164 (S.C.R.).

68. The Court left this part of the analysis to be decided in section 1 of the *Charter*.

69. *Andrews, supra*, note 58 at 174-5, J McIntyre .

70. The U.S. Supreme Court rejected an effects-based approach in *Washington v. Davis*, 426 U.S. 229 (1976).

71. See N. Colleen Sheppard, *Recognition of the Disadvantaging of Women*, 1989, *McGill L.J.*, p.207, p.215.

72. Per Dickson C.J. in Action Travail des Femmes, *supra*, note 43 at 1143.

73. This was done by the Federal Court of Appeal in the case of *The Queen and Canada Employment and Immigration Commission v. Shalom Schachter* and has been appealed by the Federal Government to the Supreme Court of Canada. A similar result was achieved in Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (C.A.) (leave to appeal denied) where the Ontario Human Rights Code excluded the application of its non-discrimination provisions to the Ontario Hockey Association which in turn, refused to allow girls to play hockey in any of their teams.

74. ibid.

75. *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c.48.

76. ibid, s.32.

77. ibid, s.30.

78. *Supra*, note 58 at p.166.

79. ibid. But see comment of William Black and Lynn Smith [1980] 68 Can. Bar. Rev. 591 at 660-01/ See also J.T. Tussman and J. Tenbroek, 'The Equal Protection of the Laws', 1949, 37 Calif. L. Rev. 341 at pp.345-6.

80. *Bliss, supra*, note 29.

81. *Turpin, supra*, note 58 at 1332.

82. ibid. note 57.

83. ibid.

84. N. Colleen Sheppard, *supra*, note 71.

85. *Supra*, note 58 at 152.

86. ibid.

87. *R. v. Turpin, supra*, note 58 at 1332.

88. L. Smith, *Gender Equality in the Canadian Context: Implications For Judicial Decision Making*, Course Materials, Judicial Education Seminar, Western Judicial Education Centre 1991.

89. ibid.

90. [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321, 10 C.H.R.R. D/6183.

91. ibid. at 1234-44 (S.C.R.).

92. *Janzen and Govereau v Platy Enterprises* [1989] I.S.C.R. 1252, 59 D.L.R. (th) 352, 10 C.H.R.R. D/6205.

93. ibid. at S.C.R. at 1284.

94. ibid. at 1279.

95. ibid. at 1288.

96. ibid. at 1290.

97. Sheppard, *supra*, note 71 at 233; see also C. MacKinnon, *The Sexual Harassment of Working Women: A Case of Sex Discrimination*, New Haven, Yale University Press, 1979 c.5.

98. *Supra*, note 90 at 1284.

99. *R. v Morgentaler*, [1988] 1 S.C.R. 30.

100. *R. v. LaVallee*, [1990] 1 S.C.R. 852.

101. *Supra*, note 99 at 171.

102. ibid. at 171-172.

103. *Supra*, note 98 at 880 per J Wilson.

104. *R. v. Keegstra*, [1991] 2 W.W.R. 1.

105. ibid., p.44.

106. *R. v. Butler*, [1991] 1 W.W.R. 97 (Man. C.A.).

107. *Supra*, note 102, p.46.

108. *Criminal Code*, s.163(8). See also, K. Mahoney, 'An Equality Approach to Freedom of Expression', Duke L.J. (forthcoming); K. Mahoney, 'R. v. Keegstra: A Rational for Regulating Pornograhy?', McGill L.J. (forthcoming).

109. [1992] 139 N.R 1.

110. Section 30, *Unemployment Insurance Act.*

111. Section 32.

112. Section 32.1.

113. After the Federal Court of Appeal decision, Parliament amended the *Act* providing ten weeks of parental benefits to both natural and adoptive parents. Sections 32 and 32.1 were repealed and replaced by a new section 20.

114. The Supreme Court has made this assertion many times.

115. See intervenor factum, Women's Legal Education and Action Fund.

116. *Schachter v. The queen*, [1992] 139 N.R. 1.

117. The Court used *Hunter v. Southam* as an example. In that case, the court found the procedures for authorizing searches under the *Combines Investigation Act* unconstitutional. The Court could have read in safeguards but that remedial option would have meant an arbitrary choice between a variety of options.

118. (1986), 34 D.L.R. (4th) 633.

119. Catharine MacKinnon, 'Breaking New Ground', LEAF LINES, Women's Legal Education and Action Fund, Vol. 3, No. 2, February 1990, p.2.

Parliament: Our Great Expectations

Fred Chaney

I started off calling this paper 'Parliament: in great expectations' and, having a fondness for wet jokes, I thought I would subtitle it, 'and what the Dickens to do about it'. I gave it to my typist and got it back spelt D-I-C-I-N-S; that is when I thought that the joke probably was a bit past the current generation.

Since leaving parliament just more than a year ago, it has become a remote place. When I think about it, I assume that it is a little less remote for me than it is for most other Australians; but it is remote nonetheless.

This is an illustrative week to be talking about it. Once again we have had the high theatre of a leadership struggle dominating the news. That is what the public gets to hear about rather than the sort of things which are dealt with in these occasional lectures. That reality needs to be borne in mind when we are looking at what to expect from this place and its occupants.

If we were to address the issues of parliamentary reform on the basis of listening to the views of electors the debate would be different. Most electors would probably just ask for better behaviour from our leaders, indeed, for better behaviour in parliament generally and for a more obvious addressing of the nation's problems. I doubt whether they care much about the detail of issues of effective scrutiny and better legislation although the idea that they might have a larger voice would probably command support.

But as I said, for most of us, parliament is remote from our concerns. Earlier this year I found I could be in Canberra for a month at the Australian National University and not feel the need to visit the place where I had worked for 19 years. Perhaps my not wanting to visit was tied up with recent memories of ex-members when I was still a member of parliament. Some seem to drift around Parliament House like lost souls. Parliamentary death seems to have resulted in a hereafter that is not quite Hell but is certainly not Heaven. Some might be thought to be in Purgatory. They are the ones whose suffering may end by re-election to this place. They find a

niche which will enable them to have another go. The rest might be said to be in Limbo. There is no hope of return but they have not been, and never may be, released from a longing to return.

My memory is that in 19 years here as a senator and a member I never sought the advice of an ex-member, with the exception of a few who in retirement made a distinguished contribution to my party. Jim Forbes is one who did that. He is a friend and was a parliamentary colleague of mine and of my father and I valued his occasional counsel. But that is the exception rather than the norm. For the most part there is, in the best cases, a shared nostalgia and perhaps a shared friendship, but in political and parliamentary terms the departed are irrelevant. It is today's senators and members who will decide what this place will be like.

Late in 1992, after I had decided and publicly announced that I was to render myself irrelevant by not contesting the election in 1993, I read the Archbishop Sir James Duhig Memorial Lecture presented by the Reverend Peter Hollingworth, then Australian of the Year and then, as now, Anglican Archbishop of Brisbane. It was a fascinating paper on the difficult relationship between Christian doctrine and economic policy and was largely not relevant to my task today. But it contained a quotation which struck me then as good advice to a retiring MP. Archbishop Hollingworth thought it timely to reflect on the words of Theodore Roosevelt:

> It is not the critic who counts, nor the man who points out how the strong man stumbles or where the doers of deeds could have done better.
>
> The credit belongs to the man who is actually in the arena; whose face is marred with dust and sweat; who strives valiantly; who errs and may fall again and again, because there is no effort without error or shortcoming, but who does actually strive to do the deeds; who does know the great enthusiasm, the great devotion; who spends himself in a worthy cause; who at best knows in the end the triumph of high achievement and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold or timid souls who know neither victory nor defeat.

At that stage I still had hopes that my party would win the election, and I had thought about how they might see me as a future pain in the neck to them as busy ministers — a 'past irrelevant' pushing critical views on their performance. So I gave John Hewson a copy of the quotation and promised him I would remember it when he was prime minister.

I do not know if he kept it — I had to chase up the quote with a patient Peter Hollingworth — as our failure in the 1993 election released me from my promise to Hewson to keep a framed copy in my study. But I have remembered the notion and I acknowledge now how easy it is to be a critic from the comfort of an armchair or even a university.

I should also say that I never realised how hard or difficult it was being a politician until I stopped. What critical views I have on the Parliament and on politics now is, of necessity, moderated by the reality that at the moment I have a pleasant, rewarding and easy life compared with the 19 years I had in Parliament. I see my family and friends; I do the work that I wish to do rather than the work a leader wants me to do; I am free to pursue the ends that I believe worthwhile rather than advancing a group view which is only partly mine. Best of all, I do not feel that I am endlessly responsible to others and completely to blame for all the

community's woes. This comes home to me most when I drive through my old electorate or look down on it from the plane window. It was always a lovely bit of Australia with lots of wonderful people to whom I felt a strong bond, but my ease now tells me more about the burden of representation than I consciously understood at the time.

My post-parliamentary experience reinforces the need to heed Roosevelt's words So from my armchair I have refused invitations to comment on many issues, particularly ones relating to personalities rather than policy. But there are a number of areas where I am happy to speak out even at the risk of adding to the burden of those who hold office and causing them some irritation.

The first of these is again irrelevant to this lecture being on subjects which touch on our present and future relations with Aboriginal Australia. That life-long interest of mine is now the core of my present work. I believe that because public debate and policy approaches often tend to be episodic and ill-considered, there is a need for the participation of those with a long and consistent interest. As my interest was never primarily political in a partisan sense, I feel no obligation to remain silent in fairness to former colleagues.

A second area, however, is the institutional underpinning of our society and our democracy. The reason for this exception is that it appears to me that at all levels of our system and our society there is a loss of understanding of the significance of our institutions and the role they play in preserving what is, in world terms, a free and prosperous society. We continue to enjoy the advantage of many of these institutional underpinnings, not so much because we understand and support them, but, because they are still there and we obtain their advantages as a sort of hangover from the past. The risk is that without understanding they will not be nurtured and there is a risk they will be lost. There is a risk that the short term need will overwhelm the long term structure and whereas we might have brick wall institutions, they might turn out to be just paper cut-outs which will not give much support at a time of crisis or need.

Let me illustrate my point about the lack of understanding of institutions by talking about institutions which many see as inimical to the proper functioning and well-being of this parliamentary institution — the political parties. Last year, I was interviewed by an experienced reporter from a commercial television network about the Liberal Party. Our conversation was at cross-purposes. For her, the party organisations were irrelevant; what mattered was Keating versus Hewson in a television exchange, with clashes in the House as a second tier of significance. But the notion that the non-parliamentary organisations were themselves significant in the overall working of the constitutional processes seemed quite outside her conceptual framework. When I talked of the importance of grassroots involvement at branch and electorate level I may as well have been talking in a foreign language.

Mind you, when I read comments on the functioning of parliament by those who are devotees of the institution there is sometimes a flavour of blaming the party system for all that is wrong with parliament. Parties are responsible for the fact that numbers are used tyrannically in a party block to prevent the representative institutions from legislating with care, genuinely representing the electorate and putting an effective barrier in the way of executive absolutism. Yet it seems to me that political parties with a functioning caucus and a grassroots membership based in the community are a vital part of the operation of our sort of democracy, in particular, the Westminster system. Government goes to the members of

parliament able to command majority support in the lower House. The alternative government — essential to any realistic notion of democracy since to have true freedom to sack a government requires the capacity to replace it — has to be sufficiently organised to have the chance to achieve a majority in the next election.

The decaying number of party members in Australia is a real problem which influences the selection process and the breadth of focus of the parties. Their health has an impact on the functioning of this Parliament. Parties are not an unfortunate excrescence on this Parliament; they are an important part of what makes it work.

The real alternative to tightly controlled political parties is a non-parliamentary executive government. The US Congress can survive the lack of a genuine or binding caucus within the Congress because a new president will construct a cabinet through a process which is largely free of Congress — certainly it is outside Congress.

Prime Minister Bob Hawke may be seen as the first of our presidential prime ministers because he established his claim to office more through activities outside the Parliament than inside it. Even though he remains a 'one-off' in that respect, his cabinet was given him by caucus and had to be drawn from within the Parliament. He could not have become prime minister and could not have remained prime minister without Labor Party support within the House of Representatives and that was so, whatever his public standing.

As a recent escapee from the discipline of Westminster front bench conformity from 1978 to 1993, I understand better than most the attractiveness of having more freedom to dissent. But the rule of a single cabinet voice is just an old expression of the need for objectives which are shared in any management team; indeed shared by the whole work-force. This notion is not only as old as the cliche 'divided we fall', it is at the heart of modern management and industrial relations theory, and it seems unlikely to be overturned as an appropriate rule for government.

In talking about parliament therefore, we should be realistic (well I should be realistic at least) about what the elements are, how they are made up and what is expected of them. Parliament is made up of individuals who collectively control all the levers of power, including the Crown. There may be reserve powers; they may be enormously interesting and in times of crisis they may even be important, but in the long haul the Crown is what the elected people want it to be and it does what the elected people tell it to do. We could have a lovely academic debate about that. Politicians feel they carry a lot of responsibility because they are responsible for everything that is served up. If what is served up is not their fault, the fact is that they can take action about it if they have the collective will to do so. If they choose inaction in areas of national discontent that is their choice and their responsibility.

Almost all of our parliamentarians contest elections on the basis that they are members of a political party which seeks to govern Australia and must gain that right by winning a majority of seats in the House of Representatives. Most were elected on an undertaking to support their party and most would not be elected without party endorsement. They come into parliament with a bundle of obligations which may give rise to inconsistent demands. In no particular order they have obligations to

- the party organisation which put them there and within which there will be quite diverse expectations of them

- the electorate which put them there and again within which there will be diverse expectations
- the parliamentary party to which they now belong
- the nation
- their personal philosophy and beliefs
- the parliament, in particular to the chamber to which they were elected and to the parliamentary committees in which they participate.

To that list can be added a clearly defined set of obligations imposed on cabinet ministers and even on members of the shadow cabinet. A member is either loyal to the cabinet or resigns. That is the choice which underlines the strength of that obligation which must sit alongside when it does not subsume or consume the earlier institutional commitments that I have outlined.

Does anyone challenge the existence and indeed the inevitable existence of this sometimes contradictory web of obligations? Is it any wonder, therefore, that from within the different constituencies, there is a set of expectations which, when put together, cannot be reconciled? Is it any wonder that any analysis which focuses on one set of obligations or one set of expectations tends to be full of disappointment?

In the context of a lecture in this Parliament, it might be useful to focus on how the system appears to an observer from a different institutional perspective. Assume you are a volunteer member of a political party. Without reward, you are likely to work long and hard to advance the party interest which in your eyes is the best way to advance the interests of the nation. Part of that work is to find, select and help elect people to send to Canberra who will advance the views which reflect your own commitment to politics and to Australia.

In that context, I think it is highly unlikely that you will believe that the member of parliament you have supported has been sent off to Canberra to follow Burke's precept to exercise independent judgement without regard to the views of the electorate. Yet on day one in Canberra this fellow you have worked for becomes a person with new obligations to a parliamentary caucus in which his or her view is just one among many. Even if your MP agrees on every subject with you or with his or her party constituents, it is likely the member's view would not prevail in every case. So from the start, the member will be associated with decisions which are quite contrary to the expectations of those who helped him or her become a parliamentarian.

We have it on biblical authority that no man can serve two masters. An acknowledgment of the many areas to which the MP owes commitment is a starting point for a realistic assessment of how the system might work and for recognition that an MP cannot satisfy all areas of obligation. Even among the most thoughtful people in this place, there is not a clear or single view about where the primacy of obligation lies.

The member of parliament I most respected during my time here for his range of contributions and for the quality of his thought was the former senator, the Honourable Peter

Durack, QC. I read his paper, 'Parliament and People' in this series of Senate Occasional Lectures. He chose a topic that related to what he saw as the fundamental issue of what the parliament is about — 'representing people'. He in turn quoted Sir Anthony Mason in the political broadcast case as follows:

> The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.

Peter said that he had chosen this quotation because he believed it was a classic statement of our system of democratic government. There is no doubt that the members who come here are accountable to the people. They must face the people at every election and they may or may not be elected.

There is an interesting difference of emphasis in the way Edmund Burke chose to describe his obligations. In 1774 he said to the electors of Bristol: 'You choose a member indeed; but when you have chosen him, he is not a member of Bristol but he is a member of Parliament.' What Burke asserted has always seemed to me to be part of the core conflict which faces every member of this parliament. Burke stepped back from the notion that he should be in parliament as a mere reflection of his constituency. As he put it: 'Your Representative owes you not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion.'

I doubt that any member of parliament could say that he or she consistently embraced the views of Sir Anthony Mason or the views of Edmund Burke. Indeed, I am not sufficiently a student of Burke to know whether he was consistent in this regard; although I do understand that brave Burke lost his seat. But Burke is also credited when writing about the Revolution in France with saying: 'In all forms of Government the people is the true legislator.'

This is not a matter of semantic quibbling. During my time here, I frequently found myself supporting federal parliamentary party decisions; decisions I agreed with but which were contrary to majority views of my party constituents in Western Australia. Given the general temper of Western Australia, my views were probably contrary to those of the majority of people from that state. This was most notable in the field of Aboriginal affairs. At such times I found Burke's dictum to his electors a consolation.

There were other occasions, however, when I fought hard for issues about which I felt lukewarm because it seemed to me that I owed that to the strong views of my constituency. Given my own view that it was a marginal issue, I felt obliged to represent their view. This got me into real trouble only once when somebody leaked information that I had said in shadow cabinet that I would oppose the tax on gold because all of us had some area where we had to bow to our constituency rather than to the logic of the argument. When I made that remark I had in mind the constant opposition of representatives from South Australia to the imposition of a tax on wine and the strong Queensland support for the Queensland sugar monopoly. This was picked up by the current prime minister; corruption was insinuated.

In Western Australian terms, a defence of an industry of great importance to the West, like a defence of a federalist approach to government generally, was part of a broad pattern which would have been expected from its representatives by the state party. I talk about these examples because I think they show that I, like other members, found it difficult to hang my actions on a single principle useable in all circumstances. In the broad, where I had a passionate view on a matter I followed Burke's advice. Where I regarded the decision as marginal and I had no particular personal conviction about it, then representing what I thought to be the views of my electors seemed the appropriate course of action.

I am not setting up a straw man. After all, Peter Durack and Tony Mason are saying that the electors' views must be taken into account rather than followed. My experience of electors is that they do not think you have taken their views into account when the final decision is opposed to their views. They are not interested in the agonising of decision making; only the outcome.
In looking at my expectations of MPs and of the Parliament, I have to make judgements from that background. Bear in mind that in 19 years I never established myself as a man of principle by crossing the floor or voting against my party in Parliament. Crossing the floor is the stuff of which parliamentary heroes are made and I want to put a personal perspective on that aspect of parliamentary life.

My view is that party discipline is too strict in our Parliament and, at least on technical and non-policy amendments to legislation, members should be allowed to exercise personal judgement, as they should when serving on parliamentary committees. In my later years in Parliament, however, I was much more of the opinion that the failure of many members to have a view that they were prepared to articulate and argue for within the party forum was far more of a problem than excessive party discipline. Many seem to have forgotten Reg Wright's view that the Liberal Party is about 'the clash of ideas'.

To return to the point, my party's constitution permits individual judgement on conscience issues as an acknowledgment of the primacy of obligation to the broad electorate. I think it is right not to impose rigid parliamentary party control although sceptics might point to the rarity of floor crossing to suggest that the provision is fairly meaningless.

My impression is that individual stands are rarer now and that there is a different style of person being elected to the Parliament. Those of you who are still here can better judge whether Ivor Greenwood, Peter Sim, Peter Durack, Jim Cavanagh, Reg Wright, Peter Rae, Ron McAuliffe, Magnus Cormack, Alan Missen, Neville Bonner and Justin O'Byrne have been replaced by men of similar independence of mind. I suspect not, but that may be an illusion of age. I ran into John Watson at the airport and he reminded me that there are still some fairly powerful individual figures in the Senate who make a substantial difference to the handling of important issues — in John's case, taxation and superannuation.

But despite my great personal respect and affection for the many I have named let me say two things about floor crossing under the existing rules which explains my own unprincipled position — a position shared by a number of those in the list I have just made. Incidentally my view may also be coloured by the fact that I was from 1975 to 1978 my party's whip in the Senate and so responsible for maintaining my party's vote.

In 1975 the Labor Government brought in the Racial Discrimination Bill. As you would expect, the Bill attracted mixed responses from my side of politics. I have not looked at it since

1975, but I remember Sir James Killen's speech in the House of Representatives as indicative of some of the concerns. I do, however, remember it as my first significant win in the parliamentary party when the party adopted a supportive position for the Bill while seeking amendments favouring conciliation and education over criminal sanctions. As I watched with great satisfaction my Liberal and National Party colleagues vote for what I believed in, I was struck by the fact that a number of them were supporting my position against their own views and better judgement. I remember thinking that this could not be a one-way street; that fairness would require me to repay in kind when I found myself in a minority position.
I was also aware that in the Senate at that time, if you were from the liberal wing of the Liberal party and you crossed the floor, you could always combine with Labor to defeat the opposition. Whereas, if you were a conservative Liberal or a conservative National Party member and you crossed from the right, you would invariably wind up sitting alone. It seemed to me grossly unfair that only the small 'l' liberals in the Liberal Party had the capacity to affect the outcome by crossing the floor. I thought that was very unfair and another reason for caution.

My final and perhaps more contentious point is that I often found — and perhaps I am coloured by my experience as whip — that crossing the floor was not all that principled at all. I very seldom saw anyone cross the floor against the wishes of their endorsing body. From a Western Australian perspective, not crossing the floor was on occasion the course of action which carried the greater political risk. The only senator whom I could see as unequivocally clear of any motivation other than firm personal commitment to his principle when he opposed his party was my friend Neville Bonner. He consistently crossed the floor in a way which enraged the Liberal Party of Queensland. In time he paid the political price and left the Parliament. I think Burke would have been proud of him. He never used his vote to curry favour with those who had the power of political life and death over him and, while you could disagree with his stands, it would be hard to argue that they were unprincipled.

In another of these lectures given by Bill Blick, entitled 'Accountability, the Parliament and the Executive', he drew attention to the fact that even membership of the public service can present ethical dilemmas. He described the case of Clive Ponting in the United Kingdom where 'a senior official believed it was his duty to leak to a parliamentary committee, material which indicated that the government was attempting to mislead the committee about certain events in the Falklands War'. Ponting was prosecuted under the Official Secrets Act but was acquitted by a jury despite clear directions to the contrary by the Judge.

Blick's view, while sympathetic to Ponting, was that he should not have done what he did. He thought that Ponting violated a fundamental principle of Westminster Government, namely that ministers, not public servants, take responsibility for the relationship between the executive and the Parliament. As Blick advised in his paper — presumably advice meant for his fellow public servants — 'we do need to keep in mind at all times that our relationship with the Parliament is conditioned and shaped by our duty to serve and to be accountable to the government of the day'. I was not surprised to read in that paper that the distinguished Clerk of the Senate, Harry Evans, took up this point. He asked that if a person in Ponting's situation is questioned directly about his knowledge of the Government misleading the Parliament, does that person decline to answer the question, which is a contempt; does he lie, which is also a contempt; or does he tell the truth, 'which puts the Government right in it'.

Blick smoothly suggested that such a person should ask for the question to be directed to the minister. When pressed by Evans about the question relating to the public servant's own

knowledge of the matter, Blick reminded the audience that the head of a government department had told a committee that 'he was unable to answer a question about the whereabouts of Coronation Hill because the minister had instructed him "not to answer any questions at all on the subject"'.

At whatever level these matters are examined there are apparent dilemmas. No doubt when I was consoling myself with Burke's view of the responsibility of a representative, I should also have been considering the sobering comments of Professor Geoffrey de Q. Walker on the issue of élite opinions. He writes in support of citizens' initiative and referenda under the title *The People's Law*. Walker draws attention to the fact that political intellectuals tend to reject everyday experience and observation as a guide to decision making, preferring to deal in theories. He goes on to say: 'This makes the whole group a volatile one, since it is continually switching from one fashionable theory to another.'

I take Professor Walker seriously because he gives some powerful examples. The move from the espousal of eugenics in the 1930s to disavowal in the face of the dreadful consequences of Hitler's racial policies is one example which should frighten us away from not too readily leading the people through fashionable theories. Feminists in the audience, if they like to be outraged, might like to read pages 177 to 180 of Walker's book, because he deals with the ideological vagaries of the feminist movement over a couple of decades. I am sure they will find it either sobering or enraging.

Realising that my recognition of such dilemmas may be no more than a sign of weakness and lack of principle, I turn to the work of one of the high priests of the Parliament, the Clerk of the Senate, Mr Harry Evans. I use that description in a way which is serious and intended as a compliment. Earlier I commented on the loss of understanding of our institutions. There is no doubt in my mind that the officers of the Parliament and principally the clerks of the House and the clerks of the Senate do represent the high point of dedication to the standing status and role of the parliamentary chambers. Of course It is always possible that they will get a distorted or lopsided view, but without their careful tending of principle and practice; without their devotion to the parliamentary institutions, I think Parliament would be in dire straits.

I found Harry Evans' contribution to this series during 1992 consoling. He pointed out that many other countries similar to us are arguing about constitutional reform and demanding the very institutions which Australia already possesses: written constitutions with the authority of popular approval; elected second chambers as brakes on the powers of governments with entrenched control of lower houses; constitutional and legislative safeguards against excessive executive government power; and real federal systems.

I agree with Mr Evans that Australia has a constitution which brings in many of the features and principles of the late 19th century liberalism and constitutionalism. This means there is great force in his view that Australia does not need to undertake fundamental constitutional changes, but rather can concentrate on improving the operation of the institutions we already have. It is a reasonable statement, but on reflection it is not one with which I am yet ready to agree.

It seems to me that in setting the balance between the competing interests in this place the steady drift is towards the entrenchment of party authority in an extreme form. It is in this entrenchment of rigid and near universal party authority that I believe we start to move away

from some of the fundamental goodness of our constitutional structure. Once again, Burke had something to say about this. In the speech to which I have already referred, he made it plain that in his view:

> Parliament is not a congress of ambassadors from different and hostile interests; which interests each it must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole.

As my own thinking drifts towards what I understand to be called 'civic republicanism'; towards the notion that we have obligations towards each other as members of a civic community, I see a parliament which increasingly appears to service a narrower range of interests than that. We seem to be losing the notion of serving the interest of the whole. That is, I think, the perception of the public; that is, I think, the reality; that is, I think, at the heart of disillusionment about politics and parliament.

It seems to me that the most successful political organisation of the 1980s, the right wing of the ALP, represents the political efficiency of a strict adherence to sectional interests within the party — some would say with excellent results for the country but some would disagree. To my mind, the fundamental problem is that increasingly the focus is on the party rather than the national interest and that undermines our institutions as surely as it produces other suboptimal outcomes.

I make no personal criticism of the people here. I am grateful that they are carrying the burden rather than I. But I think if we are to see greater improvement in the operation of parliament, it is unlikely to lie in further incremental change in line with the changes which have already been made in terms of beefing up the committee system and so on.

There may be value in the suggestion that opposition members should have a fair share of parliamentary committee chairs. It may be that through further refinement of the structure of committees in the Senate — for example, by combining standing and estimates committees — we can achieve even better outcomes than those which have been achieved by the reforms of the last 20 years.

It may well be that further extensive labouring of the sort that produced the legislative committees of the Senate, the devoted work of former deputy president David Hamer and Senator Michael Macklin, would produce further refinements, adjustments and improvements to the parliamentary process. But it appears to me that the only present bulwark against narrow party dictatorship in this Parliament is the Senate and its system of proportional representation, which in most cases guarantees that the governing party does not have a majority in the Senate. Preservation and enhancement of that part of the structure is essential if we are to preserve some of the proper democratic features of our system of government.

Incidentally those who are impressed by the present Prime Minister's claims that senators are 'unrepresentative swill' and by his suggestions that the Senate position needs to be re-examined would benefit from reading an analysis by J.R. Nethercote published in the *Sydney Morning Herald* last March. In a definitive way this article shows the poverty of views such as

those of the Prime Minister. The just published magazine the *Independent* in June 1994 editorialises in a similar vein.

I say that it is only by strengthening the independent and legislative nature of the Senate that we will get a strengthening of those elements of the Parliament which permit the people to check power and access the legislative process. This is where I think it is worth departing from the Evans' view.

When I first came to the Senate I thought the views of the then Senator Peter Sim rather eccentric when he advocated that there should be no ministers in the Senate. Senator Sim was one of those senators who tended to speak in jovial but disparaging terms of the role of the members of the House of Representatives. Perhaps it was because I was the son of a member of that House that I found myself in some disagreement with him and, as a would-be minister, I was not impressed by his first point either.

In examining the functioning of parliament, it is hard to accept that if one goes down what I would broadly term the 'Harry Evans' route' and simply continues to make minor adjustments to the status quo, the problems of our modern Parliament will be solved. In those circumstances, the reality will remain that those ongoing adjustments would only be of value if members of parliament see it as their obligation, or as being in their interest, to use the mechanisms which are established.

The limited use made by senators of the reports of the Scrutiny of Bills Committee has been commented on elsewhere in this series. I had some part in the establishment of that committee and it was my expectation that had provisions in bills which impacted on individual rights and liberties been drawn to the attention of senators it would be almost inevitable that they would want to do something about it. I would watch senators such as Jim Cavanagh get up and embarrass ministers at the table into admitting that bills had retrospective provisions, or all sorts of provisions, and provoking them to take action.

Much of what has been exposed by the Scrutiny of Bills Committee has not commanded parliamentary attention. What I expected has not happened. It is clear that a parliamentary mechanism which is not used by members of parliament is merely a token. We talk of parliamentary reports gathering dust on shelves; of wasted parliamentary inquiries. Unless there is a will at the level of the individual member to utilise mechanisms and to follow up reports, nothing will happen.
We can continue to rely on the spread of power in the Senate caused by the fragmentation of party representation in that chamber. Recent history, however, shows that the present arrangements can render an opposition totally irrelevant where the government is able to gain the support from minor parties. The Mabo debate is an example of that — an example of which I am deeply grateful. On the other hand, if the opposition is in support of the government, then the minor parties are rendered irrelevant.

It appears to me that, from the party viewpoint, the same rules apply in the Senate as in the House of Representatives. The hardening of party solidarity means that parliamentary deliberation in the Senate is more the result of an accident of the combination of numbers in the chamber than a function of superior intellectual and moral input of the senators. I think that consideration should be given to refocussing the Senate on its legislative and scrutiny functions by removing ministers from the Senate and creating a career structure for senators which is related to their performance of legislative and scrutiny tasks. Behaviour follows

rewards. At the moment the most desired reward, a ministry, will follow from effective service to the party. A system of rewards is needed to tilt behaviour towards legislative and scrutiny functions.

There are, I am sure, many within and without the Parliament — perhaps a majority — who share what I might term the 'Evans' view' and see the possibility of real improvements without any fundamental changes. Recent developments in the House of Representatives might be seen as a sign of change, but there is a touch of irony in what I am about to say.

I am indebted to Daryl Williams, QC, MP[1] for drawing my attention to the exciting and novel action of the House of Representatives in referring a number of bills to House of Representatives standing committees. It had to be drawn to my attention because it evoked no media interest; I was not going to read about it in the newspapers or hear it on the evening news. It is a reminder of why most politicians do not give very high priority to the finer points of being good legislators. There are no political rewards for doing that part of the job well. Mr Williams found that out rather dramatically yesterday when he was dropped from the shadow cabinet.

Last week on Wednesday and Thursday, the House of Representatives Standing Committee on Legal and Constitution Affairs sat to consider the contentious provisions of the Crimes (Child Sex Tourism) Amendment Bill. Two other bills have been or are to be referred for similar consideration to standing committees. This is heady stuff; this is the House of Representatives acting as a legislative chamber with a role for MPs beyond that of a traditional rubber stamp or automatic opponent. Perhaps it heralds a new dawn: I doubt it. Look at the mix which has produced this development.

Until yesterday, it could be put down to the unusually highly qualified shadow Attorney-General, Daryl Williams. He is a distinguished lawyer and was president of the Australian Law Council. He could be expected to have a better than average comprehension of the possibilities of the House of Representatives. It is likely that his efforts to get the House of Representatives to behave as a legislative chamber have been substantially aided by the background and attributes of a key player on the Labor side, Daryl Melham, MP, himself a lawyer and one with experience as a public defender.

One thing public defenders know about is the possibility of injustice being done through the law. With some experience in that area as both a prosecutor and defender — never in the same trial I hasten to add — I know how enforcement agencies like to provide legislative short cuts to proving guilt. I know too that not every defendant has the long pockets of a Laurie Connell. You had a nice coincidence: Williams and Melham. It is a reminder that the nature and quality of individual senators and members does make a difference.

What is happening serves to illustrate what we have always known, namely, that the House of Representatives can do better, but look at the further factor at work. Earlier this year the same Daryl Williams suggested that the Crime (Search Warrants and Powers of Arrest) Amendment Bill be referred to the same House of Representatives committee. The same Daryl Melham

[1] Member for Tangney, Liberal Party of Australia, Opposition Shadow Ministry from 7 April 1993 to 26 May 1994. Shadow Attorney-General and Shadow Minister Assisting the Leader of the Opposition on Constitutional Reform from 7 April 1993 to 26 May 1994.

seemed to think it was a good idea, but the Minister for Justice declined the offer and he, of course, had the numbers. The bill was referred to a Senate committee and in due course amended. With the subsequent bills the real choice facing the government has not been whether to refer but where: a 'your place or mine' choice. There are some attractions for the Government in doing it in the House of Representatives; committee numbers being one of them. It is not unduly cynical to suggest that without the overhanging threat of the 'unrepresentative swill', government enthusiasm for developing the legislative role of the House of Representatives would soon evaporate.

Once again, remember that we are dealing with legitimate competing interests. It would be wrong to categorise the normal government desire to have its legislation passed as just wrong headed and unprincipled. The legislation on sex tours is clearly very sensitive and involves attacking highly unsavoury behaviour that would be regarded by all but pederasts as an affront to human dignity. It is not easy to get sober consideration of the adequacy of the protection of the 'innocent until proven guilty' accused alongside the understandably passionate concern about the protection of innocent children.

The dilemma involved in these issues came home to me in a personal way strongly in the recent controversial legislation on native title. As an individual in Parliament I consistently worked to improve parliamentary scrutiny of legislation. As leader of my party in the Senate I believed that leadership should come not from the executive but from senators, and in David Hamer I had someone who had strong personal convictions and as Deputy President and Chairman of Committees the perfect platform for advancing that cause. I am proud of the work he did and the changes he helped to achieve. Yet last December I appeared before a senate committee and argued against the legislation being referred to a select committee for consideration, urging instead that the bill should be passed before Christmas. Part of my evidence was quoted by the committee as follows:

> I suppose my chief concern as an ex-member of the Senate is that I do not want the Senate Committee system used as a Trojan Horse for prejudice, and I think there is every risk that that would be what would happen if we had a lengthy Senate inquiry. I also do not want to see what I think was an important symbolic gain for the whole Aboriginal community in the Mabo decision thrown away

and

> Most importantly, the early passage of the Commonwealth legislation will bring to an end the political and industry campaigns designed to inflame public opinion and to force the federal government to abandon any defence of Aboriginal property interests because of the electoral consequences. I think that any one with a knowledge of the history of the last 10 years could not deny that that is the reality within which you are working.

My fear was that this tinder box issue was due for some of the sort of treatment it got in my State of Western Australia in the mid-eighties. I had little doubt that the legislation could have been improved technically and little doubt the legislation risked destruction. I thought there was a risk the opposition would use any committee for the purpose of destruction rather than improvement — a view fortified when the opposition adopted the extraordinary tactic of not supporting any amendments in the committee stages in the Senate, even those which would have lessened the concerns of industry. From an outsider's viewpoint the Senate's role in the

native title debate was dominated by party tactical considerations. I shall go to my grave grateful to opposition senators for their odd stance because it rendered them irrelevant and ensured the passage of the legislation they claimed to oppose, but that is just another illustration of how complex these matters are.

Senators are not more moral or finer people than members in the House of Representatives. From a party standpoint, a significant proportion of them are or were senior office bearers in their parties or employees of their parties — they are party people. (I was transplanted into the Senate from the vice-presidency of the Liberal Party of Western Australia.) Senators are the same sort of people as members of the House of Representatives operating in a different environment and that produces some different approaches. I would say that the approaches are better and more likely to serve the national interest. My fundamental point is that by further changes in the institutional settings, we may be able to raise our expectation of further improvement.

What are the options for real improvement? There is the incremental approach which is ably expounded by Harry Evans. The trouble with this approach is that, in a sense, it has been tried over 20 years with some wonderful results, and yet the dissatisfaction persists. The Parliament has continued to add to its armory of parliamentary mechanisms to enable it to legislate and scrutinise, but the use of that armory has too often faltered under the weight of stronger allegiances to party and faction.

Approaches which will shift the incentive structure and encourage MPs to act as legislators and challengers to autocratic government require more fundamental changes. The big change that would re-focus both the House of Representatives and the Senate would be to move to an extra parliamentary executive. That is the issue which really should be driving the republican debate; but it is not.

The intermediate option is to move the executive government out of one chamber: the Senate. That is the Sim option and it is practical and achievable. It is practical because it works elsewhere within the federation, namely in Tasmania. Of course, you would need a government and opposition leader in the Senate. But for the rest, the avenue of preferment would be the key committee positions and the clear roles would be scrutiny of government actions and legislation.

This might be achievable politically because it is in the interest of all members of the House of Representatives and most senators to make the change. The members will see the prospects of more ministries for them. Some senators who are confident that they will be ministers will baulk at it. Since most will not be ministers, the influential — and I am sure they can be made highly paid — committee chairmanships will offer a career path with the added advantage that it might be a career in government and in opposition if the system is so constructed.

Some will argue that any such moves will require a reduction of the Senate's powers. I do not agree. In any event, while that proposition may be an interesting debating point, I doubt that any reduction of senate powers is achievable. Why not just try it as a procedure, as most such reforms are tried out in the Senate before they become fixed in the standing orders? Then if the experience is unsatisfactory there can be a reversion to the status quo.

I do not expect Senator Evans or Senator Cook, or a few others I could name, to think much of this idea, or even the opposition frontbenchers — not, at least, until after the next election.

But the rest of us should look at this on the basis that our legislators face impossible demands and that, in the main, they do their best to manage the inconsistent demands made on them. It is idle to expect that, in an elected parliament, we will have philosopher kings; rather, we will have decent men and women responding to the demands on them and the institutional framework within which they work. I believe that without real changes in the incentive patterns we can expect much talk of reform, but little change.

Questioner — In your proposals for reform, I take it you abandon entirely any notion that the Senate should be restored to its original position of being a states' house representing state interests?

Mr Chaney — As a logical proposition that has always puzzled me. I do not believe that the Senate could effectively operate in that way. I have never been able to grasp conceptually how that could be. I come from a state which has strong state interests. It has a very strong state's rights orientation. You see that whether there is a Labor or Liberal state government in Western Australia. It has particular interests and concerns about things such as taxing of gold, and so on. But if the Senate operated as a states' house, I cannot see how it is going to benefit Western Australia if its 12 senators come beetling over to Canberra beating their state drum to face the senators of five other states who are simply concerned with beating their state drums. It seems to me that the arithmetic of the Senate being a states' house, in the sense that you would expect senators to vote on state interest lines, is something of a fantasy. I have never actually seen that as being a realistic or sensible expectation.

I think that it is more realistic to say that there could be a greater role for independence in the Senate. If you took ministers out and continued to change the culture, that would make sense. In Tasmania there is the precedent of a large number of nominal Independents. They seem to be identified as having particular interests or allegiances. That would always be the case. I think the move towards more independence in the Senate would be a realistic option. Now that I am just a citizen copping the same as every other citizen, the notion of having an upper house which has divided authority appeals to me greatly.

I can understand those voters who spread their vote — vote for party A or party B in the lower house or an Independent in the upper house. That seems to me to be quite a rational response to the nature of Australian politics today. Would you really want Paul Keating to have the absolute power of life and death over government decisions in Australia? I think most Australians are actually quite happy to have the Senate as something of a problem for the Government. But the answer does not lie in going down your track. As a West Australian, I would hate that, because I know you bastards in the eastern states would gang up on our westerners and put through a lot of dreadful laws that would make us even poorer than we are today.

Questioner — You criticised the rigidity of the party systems today. What do you think of suggestions within the Liberal party that adopting more formal factions would be desirable? Following on from that, do you think that Alexander Downer's shadow ministry reflects a balance between moderates and conservatives?

Mr Chaney — The second part of your question seems to be a very politically charged question. In answer to the first part of your question, I actually see no signs that the faction system of the Labor Party has benefited Australia. I think it has benefited the Labor Party in a

management sense. I think I have made clear in my paper that there will be different views as to whether the sort of hegemony of the New South Wales Right has been good or bad for Australia. I think it has been bad for our institutions and, in many ways, bad for Australia. I think if the Liberal Party goes into government next time with a similar system, we would have no greater guarantee that it would be superior. As an internal party management for the Liberal Party, which is no longer my direct concern or interest, it may have advantages, but I do not know that it would necessarily be particularly good for the country.

As far as Alexander Downer's shadow cabinet is concerned, let me express one personal disappointment, which I have already made clear. I think Daryl Williams is an outstanding person who, in an institutional sense, would have been wonderful to have there. But on the other hand, I think the *Financial Review* put its finger on it. I think there has been a shadow cabinet chosen for aggression. Given the aggressive nature of the Government, I think Mr Downer is probably being very sensible. He seems to me to have picked a group of people who will take the fight to the Government, which is a pretty ferocious show.

I will make one other comment. I have tried to stay out of all personality politics, because I had enough of that in the 1980s to last me three lifetimes. I am personally delighted they have chosen someone with Alexander Downer's breadth of experience and background. He is a man who has a real understanding of the history of the country and of the party. He has much greater breadth than most members of the House of Representatives. I think he is very well qualified to do the job. I came to a personal view some time ago that he was the person of the next generation whom I would most like to see as prime minister. I am thrilled the party, with no help from me, made such an excellent choice. I would not have supported him publicly for fear of injuring his chances before he got it.

Questioner — The perceived performance of many backbenchers on both sides of the house — and one or two on the front bench, too — is less than a lot of people would expect. Also linked to that is the question of the family life of parliamentarians. Is there a case to limit the tenure of office of parliamentarians to about 10 or 12 years, after which they get a suitable order — a fat gratuity: no pension and no other privileges?

Mr Chaney — I wish you would have thought of that 10 years ago, cobber. On the first point, and I tried to avoid this in my paper, it is very hard to avoid making what I call old men's judgements. Things are never as good as they used to be and the people are never as good as they used to be. I re-read Paul Hasluck's *Time for Building* recently. It is a really wonderful internal account of how it all works. He tells a terrible story. He explained the illness of people in New Guinea and the 'scourge of yaws'. The interjection was, 'What's yours?' There were guffaws around the chamber. I just tell that story as a reminder that they were not actually perfect little gentlemen or wonderful men of principle. They were actually just as larrikin and ordinary as we always will be in a parliament as long as we have a representative institution. One has to expect that parliamentarians will be very normal.

Your proposition is one that the *Economist* put forward a long time ago. The *Economist* stated, 'In the House of Commons of some 600 people there are 50 people who make any difference. Most of them are decent men and women, but if you took the 550 out and replaced them with someone else, no-one except their mums and dads would notice.' You can take that as a sneer or as a tribute to the genuinely representative nature of the parliament. I take it as the latter.

But I also think it is true that in a parliament at any time there is a small group of people who really do change the nature of the place and provide a different sort of hope and expectation.

In that frame of mind, the *Economist* stated, 'The object should be to turn the 550 over as quickly as possible. We therefore advocate a really sizeable retirement pension after eight years diminishing annually thereafter.' If that system had applied and cupidity had ruled my life, I would have had a wonderful political career. I would have left parliament in 1983, avoided all the unpleasantness of the 1980s and started another career at an earlier time than I have now been able to.
That sort of thinking is worth consideration. I do not think we should place barriers in the way of members of parliament leaving the parliament. If I may strike a personal note, there are real difficulties in this. There is no escape route for many people in parliament. That keeps many of them around too long. I had a couple of friends here whom I was delighted to see leave during the course of this Parliament. They were long-serving people whom I greatly admire, respect and like. Yet there was criticism that they should bring about by-elections and cause great public expense.

Bill Hassell, who is an ex-member of parliament in Western Australia, told me how awful it was to be criticised. Whatever you did — for example if you got work from the government — you were seen as engaged in some sleazy activity. I have been doing some consultancy work for the University of Western Australia for ATSIC. One of my ex-Liberal colleagues put this question on notice, 'How much is Chaney being paid?' Any palm-getting, happily, is going to the university, but it is a reminder that there are some real barriers in the way of getting the sort of turnover in the Parliament that I think would be wise. I am quite attracted to your view. I am not sure if I have answered all your questions, but since you asked a number altogether I am not going to apologise.

Questioner — In some parts of your speech today — and obviously I only agreed with parts of it — you seemed to support the proposition of having independents and non-committed people and referred to having more Democrat types in the Senate. My own belief is that you would never get any sort of tough, rational solutions to become Acts. Whilst we have a Labor government, I would say that Labor people from Western Australia would oppose the gold tax and it would get rolled; the wine tax in South Australia would get rolled; and the third runway in East Sydney would get rolled. You would finish up like the Democrats, where you oppose all tough measures such as the means test and support all handouts and say that they are not sufficiently great.

Mr Chaney — I think that is a very valid criticism. It is a criticism that has been very well developed in a couple of books written by Richard W. Bolling who narrowly missed out on becoming the speaker of the house in America. He was a long serving member of the House of Representatives and wrote *Power in the House* and *The House in Disarray*. He was a long serving member of the House of Representatives. He spends the whole of these books bemoaning the lack of a tight caucus in the Congress, which, as he says — and this is exactly what you say — stymies the passage of needed legislation.

I actually think that criticism reflects a much more basic criticism of the state of the United States and the Anglo-Saxon world, which is in a very confused state of mind. We approach most things in an adversarial way. The commentators I most admire for the comparisons they

make between the way the Anglo-Saxon and Asian worlds work in a business or economic sense, is one of the Cabot Lodge family — a very great political family in the United States.

George Cabot Lodge is a professor of business at Harvard. He contrasts the communitarian approach of the successful economies with the adversarial approach of countries like our own.
In my view, there are much broader issues to be tackled and I touched on that when I mentioned civic republicanism. We actually need to build a much stronger sense of the horizontal obligations in our community and a much stronger sense of community if we are to solve a lot of Australia's problems. I would like to think that we could build an assembly which was not based on the sort of adversarial tradition of the parliament, but based more on what the Senate already has to some extent — a capacity, through its committee system, to draw out common views.

I will tell a quick anecdote about that. You will remember a super-charged political period in this Parliament in 1975. I was a member of the Standing Committee on Legal and Constitutional Affairs. It was a splendid committee with John Button, Donald Grimes and Mervyn Everett on the Labor side and Alan Missen, Reg Wright and me on our side. A committee membership of five or six of us and you would all agree it was certainly a splendid committee. We were dealing with the national compensation bill. The bill was a very high profile, political proposal from the then government. It was a massive income proposal to deal with all cases of injury and illness, and so on.

I remember being terrified. We went around Australia taking evidence and all it seemed to show was that the government proposal was absolute nonsense. It was economically fraught and had huge problems. I remember going to Reg Wright — I was very green and very new — and saying, 'I am very worried about this committee and where it is going.' He said, 'Come and have a talk.' He took me over to the Senate rose garden. This all sounds like something out of a book, really. He sat me down in the Senate rose garden in his green tweed suit. He asked, 'What are you worried about?' I said, 'Look, everything seems to me to point to the fact that this scheme is a disaster for Australia. We have a committee with a Labor majority. What's going to happen?' Reg Wright leaned forward, put his podgy little finger on my knee and he said, 'My boy, the facts will speak for themselves.' We unanimously recommended that that bill be withdrawn.

I chose that as a single example. I do not think there has ever been a piece of legislation sent off to a Senate committee which has not produced at least a degree of unanimity on the need for change. I think there is a whole need for a paradigm shift in the way we approach these issues and in the way we see ourselves as a community, and we have to translate some of that shift into the parliamentary process.

I can only say that whilst I find it easy to be fairly clever around here, I actually find it terribly hard to be clever in a university where people have to have a certificate to prove they are clever. I am now learning that those certificates do mean something. People can sort all these things out and get it into a logical and coherent pattern. I am still struggling with that. I have not needed to do that for 20 years.

All I will say to you is that I think it can be a terrible burden. Yes, it can stop some good things from happening, but it can also stop some absolute disasters. I doubt that in the overall, if parliament had legislated less, then Australia would be worse off. If parliament had been a bit

more thoughtful — if groups had been able to throw a few logs on the path — we would be in a worse state than we are today. That is a value judgement. It is a guess, I suppose, but that is my judgement.

Questioner — It seems to me that the end product of your thinking is actually to take the executive right out of both houses and that that might assist the civic consciousness that you desire. What is the argument against heading more towards the American system, taking the executive out of both houses and emphasising that the role of Parliament is, indeed, legislative and legislation review?

Mr Chaney — That is a good question. I have not got time to canvass all that. Bolling, the author I mentioned earlier, canvasses all the reasons why we should not do that, because he says that there is an inability in the American system for a government to get its program and to do the things which are needed.

Questioner — But that is with a deficit in excess of $300 billion.

Mr Chaney — That is right. That is the counter argument. I think that, if you took the argument halfway and had an upper house which was more independent than the present Senate, that would be a step in a useful direction. But there are no absolutes in this. That was part of what I was trying to do in this paper. The only thing that makes me sad about some of these debates is that people see the truth with such clarity when the truth is much muddier than that.

Whichever way you go, there will be disadvantages. The present disadvantages of the strength of party commitment and the power of the party commitment are such that you will only change that and move the Parliament back into a better shape by strengthening the institutions which are not directly part of the executive government.

Questioner — This is a special interest question. In the light of the variety of comments that you have made on the role of the Senate, could you comment on a remark that was made by Frank Brennan a couple of weeks back that the way to go, as far as the Aboriginal people were concerned, would be to have five seats permanently available in the Senate?

Mr Chaney — When I hear suggestions like that, I half cheer. Again, this is this terrible indecision. I have no problem with that. I think that the notion of providing Aboriginal representation in some special way, à la the Maori representation, would be a very powerful, symbolic and practical tool in terms of achieving what is broadly termed reconciliation. I do have some doubt about it. I have just come back from spending time in a town which has a substantial Aboriginal population doing the work which I now do. I try to see how all this works — what is good, what is bad and what we can do to make it better rather than worse.

Anyone who underestimates the white backlash is obviously not in touch with reality. There is, in my view, an extraordinarily ungenerous — but it is a fact — negative response to special provisions to assist Aboriginal people. It may be stronger in my state than in other places, but I think it is probably generally stronger closer to where Aboriginal people live than further away. That is probably the rule of thumb. This goes back to 1979 or 1980 when the notion of a treaty came forward, but I have always been extremely cautious because I think

the potential gains can sometimes be outweighed by the loss of community support and by the negative attitudes which build up in the community.

It is not always easy to be an Aboriginal Australian. Over the last year, in Western Australia with the Mabo debate at a very intense level, and particularly with the anti-Mabo debate at a very intense level, my anecdotal evidence is that it has been very uncomfortable for many Aboriginal people — uncomfortable for children at school and uncomfortable for people in the streets, shops, pubs, workplaces and so on.

Whilst I have enormous respect and affection for Frank Brennan, who I think is a really great Australian, he is always perhaps more ready to make the next cut or take the next action that is necessary. I am cautious because I see a lot of negatives around at the moment and I think that hastening slowly in this thing is the only way that you are actually going to make progress. I would not put high symbolic issues up. The sort of thing that the then Prime Minister, Bob Hawke, did at Barunga was an absolute disgrace. It ranks with the sort of rubbish we had from Graham Richardson. I am sorry to sound so very political on this. You discover the problem; you make some highly symbolic gesture. In Barunga it was, 'We are going to have a treaty.' Then, when it all becomes too hard, you walk away from it.

That is the history of these things. With the honourable exception of Paul Keating last December who, with very little internal support, gained the land title legislation. I regard that as an act of great political leadership on his part. It was a very difficult thing to have done. He broke a decade of the sort of behaviour that I have outlined — dramatic promises and a ghastly lack of fulfilment, except in the generous expenditure of money. But the big symbolic gestures — the treaty and national land rights — were really craven performances and very, very poor.

You have moved in and out of left field. That is a very broad answer to your question. As an individual, I would find that very easy to live with. I would want to think a lot about the community relations impact which are so important to the daily lives of Aboriginal people before I started to really run with it.

Questioner — This question changes the subject. I was stimulated by the title of your paper 'Parliament: Our great expectations'. This is a behavioural question and rather different from what you have been addressing most of the time. It seems to me to be important because one of the roots to power is your capacity to stand up and do well in the behavioural climate that is part of both houses. This leads both the President and the Speaker to spend at least half their time saying, 'Order! Order!' A community generates power and the people who live in that society are putting power in the wrong hands. You have been away from it a long time and I know you would not like, any more than I do, that sort of behaviour. Because of the title of your paper, do you have some thoughts on how behaviour might change and a different kind of person might be promoted to power?

Mr Chaney — Let me say two things. Firstly, I have a reputation for piety which is ill deserved. When Amanda Vanstone brought out a booklet of abusive terms used in the Senate, I turned to the index to find my name and, much to my surprise, I found an extraordinarily long list of quotes. I was very embarrassed to find that I had been so badly behaved and abusive. I think I called Gareth Evans a prawn or something like that. I cannot imagine what would have moved me to such heights. In my notes for this paper I said:

> If we were to address the issues of parliamentary reform on the basis of listening to the views of electors, the debate would be different. Most electors would probably just ask for better behaviour from our leaders, and within the parliament generally, and a more obvious addressing of the nation's problems.

I think you are right and you pick a very strong point.

I gave you the example of Paul Hasluck. Paul Hasluck was a really fine scholar and a gentleman — not without his imperfections since he is human — but a really unrepresentative politician. It is worth remembering that story about the yaws. It was bad.

We happen to have a prime minister with extraordinary skill with vitriol. I think he has done a lot to change the nature of the House. One of the great experiences of my life was sitting on the frontbench effectively being accused of corruption by the Prime Minister and Kim Beazley, who has been a friend of mine. It is quite hard. It is not really a very pleasant experience, but I do not think that you can change that. I think that to try to change that in some artificial way is wrong. Again, it is a matter of more fundamental things within Australia. This is a very representative institution.

If you travelled around Australia, as I do now, looking at Australia from a different perspective, you would leave places, as I do, as deeply disturbed about behaviour in bars as I am disturbed about behaviour in the House of Representatives. I am as disturbed by the level of vitriol, racism and, in my view, totally unacceptable attitudes being trumpeted in a way which admits of no difference of opinion. I think it is a bit of a mistake to see the Parliament as always being a leader in this. I think to some extent Parliament is a reflection of Australia and the toughness of the House of Representatives is a reflection of some elements of Australia.

I close by reminding you of this very nice cartoon in the current *Bulletin*. There is a cartoon of old money, which is Alexander Downer, and new money, which is the Prime Minister, portrayed in nice form by Patrick Cook. In a sense, we all know there is going to be the most ghastly abuse of Alexander Downer for his accent, his schools, his club, his face or anything. It is going to be a very unpleasant experience. I just thank God that Alexander Downer has what parliamentarians have always had — a very thick skin.

What has happened to political ideas?

Professor James Walter

Let me start by giving you a brief road map of what I am hoping to do. Firstly, I want to talk about the mood of change that is clear in political life — the move towards a concern with social issues and social concerns. I want to suggest that, to some extent, our political leaders have lost the language and the rhetoric to deal with that, to mobilise us and to inspire us. It has not always been that way. If we look to the past, we can find other models; not that I am suggesting that we need to go back to the past. In fact, we need to go forward. But it is important to say that it has not always been that way.

I then want to argue that it is the preoccupation with the economic above all other things that has made it more and more difficult to talk about what I think is truly political. I will give a brief history of why I think that has happened. I then want to take up the question about the relevance of ideas, because some, economists among them, will argue that there is simply no space for political ideas anymore. I will end with some gestures towards what we can do about it.

For two or three years, it has been fairly clear that there is a pressure to rethink, and to move away from, the preoccupation with economics that has dominated public life in the 1980s. We can see it not only in Australia, but also in the United States. The election of President Clinton on a platform that promised concern for social issues was one sign. Living in Britain in 1992, I noticed that in the run-up to the national elections in that year, there was a decided renaissance of a quasi-Keynesian rhetoric in the press, and some cautious gestures towards that, too, in the conservative party.

Last year in London one of the pre-eminent Thatcherite think-tanks, the Institute of Economic

Affairs, published a book *Reinventing Civil Society*. Its release was accompanied by a press conference at which the author of the book, David Green, criticised Thatcherism for putting emphasis on the economy at the expense of a sense of community. He said that 'competitive markets coordinate the efforts of people who may be self-interested, even selfish, but they do not create solidarity'.

In Australia, too, it is very clear that the shift has been under way since about 1991. 'Fightback' — paradoxically the Liberal Party's program — may have marked the high tide of economic rationalism in Australia. In part, it impelled the Labor Party to begin the move towards the social, registered first in 'One Nation'. Of course, the Liberal defeat in 1993 has pushed that party also to attempt thinking in broader than purely economic terms. In parallel, there has been a spate of books questioning the wisdom of economic rationalism. For example, from the left, there has been Michael Pusey's *Economic Rationalism in Canberra (1991)* ; from the right, John Carroll and Robert Mann's *Shutdown (1992)* ; and from the centre, Hugh Emy's *Remaking Australia (1993)* .

That debate is obviously going to continue. The debate about the wisdom of internationalising the economy will go on. I do not want to talk directly about that today. That is, I do not want to be diverted by this debate about economic alternatives, although it is an important debate. Rather, in the face of all of these books that do raise questions and other alternatives, I want to ask: what has this lengthy preoccupation with economics above all things done to the status of ideas in politics? Despite this pressure to rethink, we are in a real quandary. There is this urge to rethink politics, yet our political leaders seem capable only of gestures. They have lost the language for addressing the social. Could it be that the language of economics has driven out the language of politics?

Consider the evidence. A year ago Paul Keating said that we were fitted up with the policies and rhetoric of the eighties; we had to change that and to change our position. On the eve of the 1993 election you will recall that he called for a more caring and compassionate society. Yet what does he think such a society might look like? I have combed through his public statements, speeches, lots of transcripts of interviews and so on and the best I can come up with is this quote of Mr Keating's:

> I want policy changes to make the place the kind of social democracy it ought to be: a new basis of our wealth, a new basis of employment with a nice social policy wrap around it. A place which is complete, inclusive, kind and gentle — a nice place.

There is very little content here. It may be a view that allows space for others to dream about what the 'social policy wrap' might be, and I do not underestimate that. Certainly, we can see alternatives beginning to emerge, for instance in the area of child care and, to some extent, in the white paper on employment, *Working Nation*. The notion of a social policy wrap may allow space for others to take up those issues, but it is not a vision that itself suggests ways of tailoring social policies. That is not to say that Keating does not have ideas: he has plenty of ideas. He can speak at length about Australia's economic integration with Asia. He can speak

about our history, although I think in substantial areas of that he is usually wrong. And he can speak about the need for a republic. But it is not clear what life will look like in the fully internationalised economy, or what the transition to a republic might mean at the level of every day life.

If it is forgotten that politicians once could be more explicit, and once could articulate a political vision as opposed to an economic vision, then re-read Ben Chifley's 'Light on the Hill' speech, Gough Whitlam's policy speeches, or Robert Menzies' 'Forgotten People', a speech that was broadcast in 1942. I take Menzies' 'Forgotten People' as an exemplary model because it comes from the other side of politics — a side that we now think has been less concerned with social issues. There is a wonderful elaboration and analysis of this model in Judith Brett's book *Robert Menzies' Forgotten People* (1992), but I want to take one issue to remind you of what other sorts of rhetoric might look like.

In Menzies' speech you find a very clear representation of where the people to whom he casts his appeal are located. His imaginative appeal is to an audience which he sees as 'poised between the Socialist State with its subordination of the individual to the universal officialdom of government', and, 'the rich and powerful who control great funds and enterprises and are able to protect themselves, though in a political sense they have shown neither comprehension nor competence'.

The moral ground, the ground for politics, therefore, lay between the state and economic élites. Not surprisingly, Menzies conceived politics as the highest of civil vocations. The speech continues with a powerful metaphor for life outside the state and outside the market: the real life of the nation, according to the metaphor, is in the home. Menzies extends this metaphor to talk about what he calls 'homes human', 'homes spiritual' and 'homes material'. I think it is a metaphor that would be difficult to sustain today, but it does have some conception of what, beyond politics and economics, brings us together. He goes on to say: 'Patriotism springs from the instinct to defend and preserve our homes'. This is a mobilising speech and one that is clear about moral values, whether or not you agree with it. As it happens, I do not agree with it, but it is significant that we have lost this sort of rhetoric.

Of course, Keating is not alone — as I am arguing — in having this difficulty in conceiving the social. I would suggest that there is no politician presently capable of persuasively articulating the links between government, economy and society, because none of them can conceive clearly of that third element — the social. Certainly neither Peter Costello nor Alexander Downer offers better hope, despite both professing an attachment to softer liberalism — the sort of liberalism that will attend to people's needs as well as to market demands.

When pushed, Downer will make statements such as: 'We will aim to provide greater social stability and cohesion in Australia and to do that will involve some change'. But what sort of change? He is not saying. The opposition seems to accept the common wisdom that it should say as little as possible and provide as few hostages to fortune as possible, because governments lose elections; oppositions do not win them. Indeed, 'Fightback' has been

represented as a strategic error. They now think it offered too much detail; it was too open for attack.

I have to say, first, that elections are sometimes won by parties with programs and ideas. Arguably the Curtin government won in 1943 because of its program. Menzies probably won in 1949 because of what he promised. Whitlam certainly won in 1972 on the basis of detailed policies. Second, 'Fightback' may not have been a strategic error; it may have simply been wrong, that is to say, out of synchronisation with the sort of movement in ideas to which I referred earlier.

What the people want today is clear. Hugh Mackay's *Reinventing Australia: The Mind and Mood of Australia in the Nineties (1993)* ends by pointing this out:

> Ordinary Australians speak of the need for more open communication about the nature and direction of our society; the need to experiment with more imaginative redeployments of available work; the need to 'get our values straight' and to rebuild our sense of being a community.

How did we reach this quandary where politicians are no longer able to come up with the ideas that will respond to such a need?

As I reflect on this, the thing that strikes me about the last two decades is how the shifts politicians have felt forced to make to keep up in the new world market have undercut the intellectual underpinnings of social life. That has led to a politics where the values and ideas that once gave meaning to political negotiation have been discarded. Much of what we value in the modern world has been created by a partnership between state and private enterprise, with politics as the sphere of negotiation between what was essential to create economic growth and what was needed to protect the broader interests of the community. Until the 1970s in Australia, support for this proposition was implicitly bipartisan, though that still left room for real conflict over the correct balance — should the state or business dominate within this bargain? It still left room for ideas about how the community should be defined, about what was politically valuable and about what was really in the community's best interests.

Every postwar leader up to and including Malcolm Fraser worried about and traded in ideas. Look, as I have suggested, at Menzies' 'Forgotten People' speech, Chifley's 'Light on the Hill', Whitlam's book on Labor and the Constitution, Fraser's book on Australia and, indeed, his regular columns in the *Australian* now. The issue is not whether we agree or not with any of these representations; it is just that they existed. Of course, Fraser and Whitlam were still the differing voices of what Paul Kelly in *The end of certainty: the story of the 1980s* (1992) called 'the Australian settlement'. By the 1970s, the conditions that made that settlement possible were rapidly changing. It was not that Australia in the 1970s suddenly lost the plot, though this is what we are always told, even by Paul Kelly. Instead, it was the arrival of a world market at full strength. It was the capacity of corporations to move in and out of countries according to production benefits, and the capacity of international financial

markets to exert discipline on nations by directing or withdrawing capital flows. It was a new ball game in which we were told that the only way to stay on top was to stay competitive.

It was thought that this diminished the power of governments to control their own affairs. Corporations would move offshore or there would be a capital flight, if conditions were not to the liking of the market. So, it undercut the conditions of a politics which was about achieving the best bargain for the community between the state and private enterprise. That was a politics that seemed to make sense only within nations. The game now transcended individual nations. Politics could no longer 'deliver', at least not in the old familiar terms. At once the old intellectual agendas — a product of the Australian settlement — were outmoded.

There was a new orthodoxy in economic rationalism. That new belief provided at least one idea about where the future lay and it gave politicians an out. They were not responsible for the dislocations we faced since these — they were persuaded — were the costs imposed by the deluded polices of the past. In any case, we should not look to governments for redress, since the market provided the only goods worth having. There was a new bipartisan consensus about the primacy of economics, albeit again allowing for slightly different emphases.

Once committed to this rhetoric — this techno-specialism — politicians became more and more prey to their advisers. They became less reliant on their parties, the grassroots or the community — none of whom could be expected to understand the economy. Indeed, I think by conflating the market and society, they lost the ability to conceptualise the community.

A residual effect of this has been a quite explicit antipathy to political ideas. There is the constant argument that all the great systems of ideas have failed. Marxism has failed, Keynesianism has failed and even economic rationalism has not delivered; all we are left with is pragmatism. P.P. McGuinness is a constant exponent of this sort of view.

Then there is the related argument that, in the current context, political ideas are simply not possible; they are irrelevant. Here for instance are the views of a Canberra economist who responded to an earlier expression of my argument. He suggests that my anxieties about political ideas 'betray a considerable nostalgia for the world in which political action was decisive and took priority over economic life'. His argument was that the world has changed fundamentally and that the great unifying ideas belonged to an era when the nation state

> . . . was reasonably closed and social engineers could try to implement a cohesive political vision. In the open world of the present, owners of high technical and organisational skills, of capital and technical know-how have become highly mobile amongst nations.

Confronted with political demands or with 'footing the bill for income redistribution, being regulated away from their individual aspirations', these people 'will simply take the economic option of walking away and placing their assets and their skills elsewhere'. Political actions, even political ideas, are thus undermined:

> Political commentators and leaders who try to recreate the past when political ideas had primacy are not likely to win the day, even if they offer us the comfort of a return to the familiar. Political leaders who grasp the full implications of the fundamental, technical and economic shifts of the past decade and who develop a political culture that attracts mobile productive resources are likely to command the future.

Those are two versions of the argument that political ideas are outmoded; that they are not a productive concern in the context in which we now have to live.

The most sophisticated version of the argument, though, is to be found in Francis Fukuyama's book, *The End of History and the Last Man* (1992). In that book he claims that the triumph of the liberal ideal within every polity and in the international market-place simply makes political thinking outmoded. This is one of his closing comments:

> Idealism will be replaced by economic calculation, the endless solving of technical problems, environmental concerns, and the satisfaction of sophisticated consumer demands. There will be neither art nor philosophy — just the perpetual caretaking of the museum of human history.

Alternatives, in other words, will be unthinkable. Fukuyama argues for the spectacular abundance of liberal economies and suggests that, as the whole world moves this way, there will be a 'common marketisation' of international relations and a 'homogenisation' of consumer culture.

But what if this does not happen? Think for instance of the United States, which is still one of the most productive economies in the world. Has relative economic success led to safe cities, social equity or a reinforcement of the social world? Or is the social fabric more and more precariously sustained? I think the latter. I think if you look at the civic breakdown in Los Angeles, or if you look at any of the devastated cities of the industrial era, like Bridgeport — which is boarded up and is only occupied by the ever growing underclass — you have to think the latter; that the social fabric is more and more precarious there, despite relative economic success. Yet, there in the United States Fukuyama surely is right. Alternative ideas are virtually unthinkable. If that is the case there is no way out. This reminds me of nothing so much as the central tenet of George Orwell's *1984*: 'Even when they became discontented as they sometimes did, their discontent led nowhere because, being without general ideas, they could only focus on specific grievances'.

I guess in the mid-1980s most of us thought, with relief, that there was much to suggest that this pessimism had been misconceived. Liberal values and 'free' economies had triumphed; the authoritarian communist regimes were in their last days. Yet those who would too readily turn their backs on this little book, relegating it to history as an expression of the 1940s despair, should be reminded that the fable is centrally about language. In particular, it is about a form of language and a habit of thought that made alternative views, and hence

political action, impossible. Orwell shaped his conceit around a fabricated language, 'Newspeak', and a controlling bureaucratic agency, the Ministry of Truth. The more I read it, though, the more I am reminded that the various attempts to proclaim the end of ideology — Daniel Bell's in the 1950s, as much as Francis Fukuyama's in the 1990s — have had as their avowed aim, the assertion that ideas other than their preferred one of individualistic liberalism will become, literally, unthinkable. The agency in their scheme is history, not bureaucratic fiat, and the means are market-driven media industries, not 'Newspeak'. But is the effect far different? Where there can be no debate, there can be no politics.

What can we do? One of the tactics must be to revive economic debate, to insist that there are alternatives. But the second, and more important for my purposes here, will be to revive politics. Of course, those two are linked. The revival of politics will not simply involve adopting ideas from the past, but rather will identify the processes whereby political thinking can be resuscitated. The economist whom I quoted raises exactly the right questions. They are the questions that must be countered if such processes are to be retrieved. Are political projects luxuries only thinkable within a closed state? Is political vision always related to social engineering? Is the discipline exercised by those who control capital, technology, knowledge and administrative skills as untrammelled by politics or the community as he believes? That all boils down to a foundational question: can a particular geopolitical community such as Australia strike its own terms in dealing with the world economy?

I think each of those questions can be productively answered in ways that point to constructive alternatives. I do not have time to do that in detail here, but let me point to where I think some of the beginnings can be found. We do not need to look back to a golden age of protection in the 1950s to defend the mixed economy. Contemporary examples of economic success fostered by an active state abound. Look, for example, at Tom Fitzgerald's *Between Life and Economics* (1990), the Boyer lectures from a couple of years ago, and his account of Japan. His is not an unfamiliar argument, but I think his is a wonderful title; that is exactly where politics should be — between life and economics. He makes a well argued case for the managed economy that we see not only in Japan, but in Germany, in the newly industrialising countries of Asia, and so on.

Planning is not necessarily tied to closed systems or to social engineering. It can be cooperative and active and predicated on continual change, as Hugh Emy argues in his recent book *Remaking Australia* (1993). At its best, it is attuned to gaining strategic advantage in the international market, rather than erecting barriers against it. The point is, precisely, a concerted adaptive strategy and the recognition that the state is and must be an economic player in its own right. The economic success of such strategies, as demonstrated by the more communitarian economies, such as Japan or Germany, is itself the warranty for state intervention. But if the state is to be such a player it must retain planning capacities. It must aim not for deregulation, but for better regulation.

It is those capacities that Australian governments have seemed intent on giving away, as Geoff Dow has argued in several recent issues of the *Australian Journal of Political Science*. The fact that cogent arguments for alternatives to free market orthodoxies and coherent defences of a

newly relevant mixed economy can be mounted constitutes a necessary condition for the revival of politics. Only when alternatives can be voiced; only when the dominance of one big idea is eroded and it is recognised that social life is about debate rather than prescription, can political imagination re-emerge.

Above all, though, we have to remember those elements that Menzies simply took for granted in his speech referred to earlier: that there are the different modes of state, market and community. In fact, most importantly, that beyond both state and market there is a community. Politics is about mediation between the state and the market in the interests of community. The new fount of political ideas will depend upon rethinking the nature of the ties between people and recovering the language of community.

Most of the time we do not make such clear distinctions between state, market and community and, of course, it is a very problematic area. The idea of the nation as something that contains all these elements and that binds us together is under criticism on every side. We are going to have to think again about what our common interests are and not assume that they are captured by something like a national identity or that they are easily encapsulated in political symbols. In fact, instead of the debate I am calling for, there has been a lot of debate about what I call the politics of symbolism — the flag, the monarchy, the republic and so on.

The debate about some of these issues may help us to recover a language of community, but I think there are deeper questions we have to attend to first. Nonetheless, those distinctions that I have mentioned are to some extent fictional. They are ways of thinking about behaviour. And at all times each of those modes — state, market and community — is interdependent. They cannot be separated out easily. State regulation survives only as long as it is sustained by relative consensus emerging from community loyalties. Markets operate only within a sphere secured by the state. The sense of collective well-being is maintained only as long as political action is seen as effective against the intrusive dominance of the state and the fragmentation induced by disparate economic imperatives. In other words, it is all to do with balance and negotiation. This last is the proper sphere of politics: parliament as a restraint on executives and the state, but resort to state agencies as a restraint on the market. The key danger to democratic politics is when people feel powerless to effect change. One of the first needs in reviving political debate and political ideas is to insist that we are not entirely hostages to the international market. For that, we have to go back to the arguments that I have mentioned from people like Tom Fitzgerald, Hugh Emy and others in Australia and from William Keegan, David Harvey and others overseas.

But, that done, we will need to reconsider the nature of our civil society. The old ideas of identity will not wash. I think this reconsideration is starting to happen. The current debates about citizenship, citizen rights and entitlements are part of this — ways of finding a common interest. By insisting on being treated as citizens, and not consumers in a market-place, we may recover the language of community. By insisting that we are a community with options and that our course is not entirely dictated by economic imperatives determined elsewhere, we may reinvigorate the political debate and the generation of political ideas.

Questioner — I was wondering if you would comment on the role of media in all this. I am thinking of the interview with the Prime Minister during the week on ABC 'Lateline', which I found unrelentingly economic, though with a few token non-economic questions thrown in at the end. It was almost the sort of interview you might expect with the Treasurer. But, given the range of domestic political issues, I thought it was most disappointing.

Also I think the interview was conducted at a level of detail which I found extremely difficult to follow and I wonder whether that is part of the alienation of the general community from the sort of political debate which is going on. We can have 15, 20 or 25 minutes of discussion with the Prime Minister about whether interest rates are going to rise in the next three or four months at, I think, a level of detail which very few people would feel able to participate in.

Professor Walter — I should first say that I missed the 'Lateline' interview. When I picked up the paper the next morning I was furious because I thought, 'What if Keating has actually said something new about the social sphere?' The newspaper reports seemed to indicate that I did not have to worry about that.

I do think that there is a large question here, not just about the media, but about the role of the intelligentsia. By the intelligentsia I mean not just academics, but all those who deal in ideas — the media, writers of all sorts, teachers, journalists and so on. Intellectual life has become very specialised and professionalised in the last two decades and part of the problem is that the role of public intellectual — the figure who will stand up and speak and try to articulate things in a public forum — has sadly diminished. I wrote a book some years ago on ministerial advisers, but I have to say that the growth of a very specialist private office structure, where it is assumed that the main qualification to make sensible inputs is, as it were, a very specialist qualification, has been a problem.

As for the media, I think it is fair to say that you do not get alternative views in the media at all, with the possible exception of Ken Davidson in the *Age*. Again, one need not agree with everything that he says, but the papers do not suggest to us that there are ways of modifying or rethinking these things.

Even now, when I think there is pressure to change — and again this is not unique to Australia — there has been only one answer to our problems. To criticise it and say that it does not answer everything, is not to say that economic reform was not necessary; it is not to say that we should live forever in the 1950s. It is simply to say that there may be room; there may be margins for rethinking the social issues and rethinking the role of the state. Indeed, around the world you can, if you look, find ways of that being done, but you do not get that from the media here.

There is also a great celebration of the entrepreneurial spirit in the media. It has gone to a large extent now, but in the 1980s it was theatre. Economics was theatre. If you read the financial pages, for those who were assumed to be in the know, it seemed to me that it was very much theatrical. It was about 'big doers'. Paul Keating talks about his admiration for big doers, and economic journalism was about the big doers who cut a swath through the world.

I think the media is starting to register the move I have been speaking of, but it is moving fairly slowly. It is not getting through on the economic pages.

Between 1990 and 1993 I was working in England and, of course, that is a great social laboratory for seeing what this economic pre-occupation does to the social fabric. But, most of the best sources of ideas were in papers such as the *Financial Times*, which actually covered in great detail things like the Docklands disaster. You had, as it were, perfect case studies of the failure of an idea. Here was a problem that no government had been able to solve since the war — the supposedly derelict wastelands of the docks — and the market would solve it. It would not cost the public anything because the risks would be taken by private enterprise. Essentially, every aspect of it went wrong, and it cost the public a huge amount because the banks and financial institutions were so exposed by this failure, that the only way they could recover was to increase interest rates on our mortgages, loans and so on. In effect, there had been a market solution that had failed and the community still bore the cost. The *Financial Times* was terrific on that. It was terrific on the closing of the coal fields and the attempts to privatise the electricity industry and why that was costing more. It is possible sometimes that just relentless, close-grained reading of what is really going on, even in the financial press, shows you some of the errors. But it has not yet happened in Australia.

Questioner — I would like to add a sceptical note to what you have been saying. One thing that is striking if you look at the figures over that period is that governments have got much bigger. You have talked about the specialisation of intellectual life. There has been a deep specialisation or professionalisation of political life. One might argue that this has lead to political classes which are much more isolated from the societies in which they live, such as this building. A friend of mine calls it the 'forbidden city' and it is not a bad term for it.

You can see this throughout the western world. For example, we had John Major saying, 'We don't need a referendum on getting closer integration in Europe because we've already had a general election on it'. However, in that general election you could vote for the Tories, who are in favour of integration with Europe; the Labour Party, which is in favour with even more integration with Europe; or the Liberal Democrats, who are in favour of even more integration with Europe. But you had a choice.

I note not only these sort of economic questions, but also the way politics has become more isolated as governments have become bigger and the pressures on politicians have got bigger. They just do not have very much spare time. Where do they do their thinking? Their staff are getting bigger, but they are run off their feet. Just the sheer scale of government activity which has got bigger in this period, may be undermining it. Politics in the petite, everyday sense, may be undermining politics in the capital 'p' sense you are talking about.

Professor Walter — I would agree with most of that. There is no question that that sort of specialisation of political élites, too, has gone on. The barrier has been maintained because there has been this implicit argument that anyone outside the circle cannot be expected to understand the economy. We have to wrestle with that.

There is a breakdown in the ways of communicating between the electorate and between the political élites. The electorate is told there is no alternative, and it is this denial of communication that we have got to address. And in a sense, that is going to happen for better or worse, because of the sort of point that Hugh Mackay made about what people want. In other places this is leading to changes. Look at eastern Europe, for example, where we said to them, 'Now you are free of the command economy and the dominant state, the free market will solve your problems'. People were prepared to buy that for a while, but it has not worked. There is a swing back to the left; back to the former communists who were regarded as being completely outside the new realm. In Hungary and Poland they are being swept back in. Elsewhere, things are simply unravelling as in Russia.

At some point the political élite have to respond to this sort of need and open that barrier again. They have to concede that they do not have all the answers, and that the one big answer we have been sold is not going to solve all our problems, or they are going to face real breakdowns. The real problem for democracies is obviously when people feel powerless. I do not think that is happening yet. As I said, I think the pressure to change is under way. The difficulty is that we have got to rethink civil society and rethink the language of community to capitalise on that trend.

Questioner — It seems to me that I have been living in a different country to the country you have been living in. I did not regard the 1950s and the 1960s as a period of very great intellectual ferment from which we have escaped to a period where there is now this tremendous uniformity and where real problems are not discussed. That is just not the world I remember. The world I remember is much more a world where during the 1950s and 1960s there was a uniformity which seems to me to have been disturbed in the 1980s and 1990s.

Now, it is true that market forces have become more important in many regards, but it does seem to me that people are asking all sorts of questions about what to do about single parents, what to do about the long term unemployed and how to cope with alienation. It seems to me that this idea of consensus, which was to some extent Hawke's great hallmark, works much better than I expected it to work. It just does not seem to me to be true at all that political ideas did not exist in the 1980s and 1990s, and that the 1950s and 1960s were that marvellous period when we all talked about a large number of issues.

Nor do I agree with you that there are not columnists in this country who differ from the dominant line. If you want to look at the *Financial Review*, look at John Quiggin. If you want to look at the *Australian*, look at Phillip Adams or look at Humphrey McQueen. It is just not true that there are no dissident voices. I do not see this ideological uniformity existing now or a dearth of political ideas around now as compared to the marvellous period you were talking about.

Professor Walter — I must have expressed myself very badly on that earlier period. I did say at several points that, of course, we cannot go back to the 1950s and 1960s. The conditions that sustained the sort of economy that we had then simply are not there. Nor do I think that it was a time of great ferment and stimulating ideas. In fact, I said for example that

we could not go back to the model that Menzies suggested. I was trying to say that there was a clearer sense of those three spheres existing then even on the conservative side of politics, and that that has been seriously eroded.

It is not a question of going back and somehow thinking that the answer is there. It is a question of going forward and recreating the conditions for the interdependence of the three modes to be productive. As for the 1980s, I am not suggesting that there were not ideas around. In my view, they were not political ideas. That is what I am trying to argue. We have to recover a language of politics.

As for the third point, of course we have Humphrey McQueen, Phillip Adams and so on. I was talking about the financial press. They do not actually publish in the financial pages of the papers to which you referred. There is some room for dissidence and critique, but it does not cut much ice, it seems to me, when you turn to the financial section and read what is happening there. I think the best account of this is a very good forthcoming book by Graeme Turner, *Making It National*, which will be published by Allen and Unwin towards the end of this year, which spends several chapters analysing the media on these issues and from which I was glossing considerably. I think there is a case to be made.

Questioner — Would the political language you are referring to refer to communitarianism in the global village? In that respect, the crucial element would be distance so that in so far as world communication is concerned — electronically or by satellite — you have communication with the world, but physically we need to look towards the development of community centres which are accessible to all people.

It is probably a matter of local community self-sufficiency and, possibly, even local access to the law, for instance. You have already referred to the matter of a sense of identity and this would give people at the local community level in the global village a different or enhanced sense of identity through more participation in the decision making process. Involved in this would be certain cooperative endeavours which could involve long-term unemployed in the production of food, dealing with health, workshops and things like that. Therefore, in relation to planning, what you need to do is have an awareness of better community facilities at the local level, which are accessible to all members of the economic society.

Professor Walter — I would agree with that. As many of you will be aware, there is considerable contemporary literature on rethinking civil society. A great deal of it concerns the issue of where you start, and a lot of it is arguing that you do have to start at the local level. Obviously, in those local networks and associations you do learn about connections with others, responsibility, obligations and so on.

There is, of course, the issue of how you get these many little polities, as it were, together into a political entity. There is a real question about whether we have a common interest. Does Australia as a geopolitical entity have a common interest? I think it does, but there are articles that say there is no national economy, for example. There are articles that argue that the whole thing cannot be put back together again in some crucial way. I think that the way to do

it is to think about processes and citizenship and to look at what happened. Let me say instantly that I am not suggesting a return to the 1890s or the ideas of the 1890s, but the fact is that the Australian state was self-consciously constructed. The acts that created the federation and the constitution were carefully worked out. They did not emerge from tradition.

Helen Irving's work seems to suggest this. It is far from the view that Manning Clark put that federation was all a slide into complicity with imperialism, we could have been a republic and were not, and so on. Helen Irving's work on the contrary suggests that federation became a genuine popular movement and that we do have this heritage of a state that is, in a sense, self-consciously constructed. We can learn about that process and we are going to have to do that again. I think these debates about citizenship, rights and entitlements are the starting point now. They are the way of thinking about what it is that binds the many little polities together in a productive way.

Questioner — I notice from your brief résumé that you have written a number of books. It just sparked off the question in my mind about university intellectuals, whether in fact they are giving sufficient dissemination of their ideas through other media such as television, for instance. The level of debate on the radio seems to be more intellectual or slightly more in depth than what we get on television, which tends to be somewhat glib and all fairly rushed.

If you think of the '7.30 Report' or something like that, you get a few minutes from various people. Occasionally, when a university lecturer has appeared on a television show such as 'Good Morning Australia', I have noticed — just as a general member of the public and a former public servant — that where there has been a university person, suddenly the level of incisive thinking in the debate has risen markedly. But we do not seem to be exposed to it very often; besides, who reads learned tomes? They are read mainly by other intellectuals. I wonder if university people such as yourself have considered popularising some of your ideas?

Professor Walter — I think that is a fair comment. I think that is also part of that specialisation of intellectual life that I talked about earlier. There has been debate for some time about the levels of jargon and inaccessibility of many academic books, and the extremely arcane levels of theoretical debate. For some time there have also been powerful arguments against this and arguments for popularising and for being accessible. Some years ago Ken Inglis wrote a very good piece on this. Judy Brett has written quite a bit about this and tried, I think, successfully, to deal with the very complicated questions about Menzies in an accessible way in her book on Menzies.

There are two or three problems. I understood, for instance, that Ken Inglis tried to get *Australians, a Historical Library*, published by Fairfax, Syme and Weldon, reissued in a paperback edition. They tried to consolidate that work so that it could be used for schools and they immediately ran into problems with the economics of the publishing industry. That project, which looked very promising, fell through. There are all sorts of issues like that which come up.

One is confronted by a difficulty of debate when one goes on radio or television. Some of the questions that you want to deal with cannot be answered in a two-minute grab. I certainly find this on the few occasions that I do it. This may be my problem, but I think some things take longer to elaborate. It is not so much a question of language, but a question of space.

On the whole, the electronic media has some difficulties with that, except on shows such as Phillip Adam's late night radio show, 'Late Night Live'. I think the whole debate about the obligations and responsibilities on intellectuals to be public intellectuals must be pushed further.

Questioner — Are you saying that basically we are moving from an apolitical stance to a non-political stance, or vice versa? If not, perhaps this is a dialectic moving us towards those issues which we really should be focussing on. This is almost a learning process; moving away from perhaps the constructive political ideals to those ideals which will actually benefit society maybe in 10 or 15 years. This is looking from Australia, particularly.

Professor Walter — I am saying that the strategies that we have adopted have not delivered what was promised. There is a real potential for disruption and breakdown if those strategies are not addressed. One of the answers to that would be, 'The economy is picking up now and some of our anxieties will be satisfied. Have faith and last a bit longer.'

I think it is even more important now that the economy is picking up to think about the other issues, and for us to demand that things be changed. I am not arguing that there is a sort of wilful, apolitical period and we are going through some learning curve and things are going to get better. I think every period has to be assessed in terms of the context facing the people who are trying to deal with it at that time. The 1980s and 1990s were a time when it was very difficult to resist the economic paradigm, because the things that we thought had worked in the past were breaking down. The world had changed so rapidly that we needed some framework, and this was the framework that came to hand.

I am trying cautiously to say that we cannot, of course, blame everything on our political élites. It is not enough simply to say that those policies have not produced the outcomes that people were hoping for. Unless we can learn from that, we are not going to move on productively to the next stage.