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***Papers on Parliament* No. 31**

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The Media and Parliament: Image-Making and Image-Breaking*

Anne Summers

THE SUBJECT of today's lecture is one of perhaps deceptive significance. Both the media and the Parliament are such well-known and familiar institutions within Australian life and politics that it is easy to take them for granted. Or, at least, to be complacent about their existence and their functions.

Today's lecture provides an opportunity to take a fresh look at these two institutions and their relationship with each other and to offer some thoughts on the evolution of that relationship and its possible future directions. I speak to you as someone who has had a varied relationship with both institutions. I was a member of the parliamentary Press Gallery from 1979 to 1983 while I was employed first as political correspondent and later as Canberra Bureau Chief for the *Australian Financial Review*. I served as a member of the Press Gallery Committee for some of that time and was a member of the Committee that worked with the Presiding Officers of the Parliament on arrangements for the media in what we then referred to as the 'New and Permanent' Parliament House.

In 1983 I was elected President of the Press Gallery, a position which required me to interact closely with the Presiding Officers and other officials of the Parliament and which allowed me to gain better insights into the operations of both the Parliament and the press. I had not, for instance, fully appreciated before holding this position just how much the media were expected to regulate themselves as far as their occupancy of space in Parliament House was concerned.

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 1 August 1997.

Unfortunately, I occupied this position for only a few months before resigning from the media to join the bureaucracy as head of the Office of the Status of Women. From inside the Prime Minister's Department I had a very different perspective on the Parliament.

Whereas as a journalist my job was to report on the activities of members of Parliament, especially those who were Ministers [in the Fraser Government], and to look for signs of conflict or scandal, as a bureaucrat I had very different responsibilities. Now it was part of my job to try to anticipate questions that might be asked of the Prime Minister [Bob Hawke] by Opposition members and to provide answers to those questions for him. Each parliamentary sitting day we would update our list of PPQs [Possible Parliamentary Questions] which would then be consolidated into the Prime Minister's Question Time Brief. It was also our responsibility to provide answers to questions placed on the parliamentary Notice Paper by members, and to attend parliamentary Estimates Committee hearings to defend departmental budgets and programs.

Six years later, in 1992, I returned to Parliament House—which was no longer being referred to as either 'new' or 'permanent'—to work as a consultant in the Office of the Prime Minister, Paul Keating. This was very much a political job and so my responsibilities, and hence my perspective on both the media and the Parliament, were again very different.

It is fair to say that I spent a good deal of time either trying to avoid the media or else trying to persuade individual journalists to the point of view the Prime Minister's office wanted advanced. As far as the Parliament was concerned, I was once again involved in drafting PPQs and also 'Dorothy Dixers'—those questions which were planted with government backbenchers to enable the Prime Minister to make a point or reveal information that was otherwise not being aired.

But being in a Prime Minister's office, which is of course located inside Parliament House, it is easy to forget that just because the Prime Minister runs the country, and the government, does not mean he runs Parliament House! While there is usually a high degree of cooperation between the parliamentary departments and the Government, especially the Prime Minister, there can be occasions when the relationship is less than cordial.

I well recall the day of the 'True Believers Victory Dinner' to mark the re-election of the Keating Government which was held in the Great Hall of Parliament House in March 1993 and which I organised. As part of the celebrations I had brought in Yothu Yindi, the Aboriginal band, who of course needed a sound stage with full amplification. They brought their roadies with them to build and set up the stage.

At around 5.00p.m. on the evening of the dinner, and while we in the Prime Minister's office were engaged in an almighty brawl about the composition of the new ministry, I was informed by someone from the Joint House Department, the body that actually runs Parliament House, that their tradesmen—being fully unionised—objected to the Yothu Yindi people working inside the building. They also laid claim to wanting to operate all lighting and sound equipment that evening, and to performing various other functions that we had been required by the band and the party planner to hire their own people to perform.

This was not a nice dilemma for a *Labour* Government staffer to have to resolve, at such short notice, in the middle of a major political stoush, and with a tangible absence of good will evident as tempers flared and the arguments got heated.

It all got resolved in the end, of course, although I think we ended up having to pick up a sizeable overtime bill for people who did not actually perform any duties that night—and which threw the dinner into the red financially. I recount this incident only because it serves to illustrate that the operation of the Parliament is a far more complex operation than most people would glean from seeing the grab of Question Time on the nightly news, or even from undertaking a tour of Parliament House.

The most common public perception of the Parliament would surely be that it comprises the two chambers and little, if anything, else. (This perception is in fact reinforced by the public tours of Parliament House, concentrating as they do on the chambers, the Members' Hall and the public spaces). Most outsiders would be unaware of the other operations of the Parliament, such as the Library, Hansard and Sound and Vision, and are unlikely to have given any thought to the army of staff ranging from caterers and gardeners to electricians and cleaners who, in addition to the professional staff in the departments, keep the institution and its services running.

I suspect there is a similar degree of ignorance about the workings of the media. Although most people are probably aware that the media are physically located within Parliament House, I doubt if there is widespread comprehension of why this is so and of the kinds of compromises and constraints it entails. Nor would most people be aware of the fact that there is a dynamic and not always friendly relationship between the media and the Parliament.

Which brings me to the heart of the topic assigned for today's lecture: what is the nature of the relationship between the media and the Parliament? And how are our images of both institutions affected by that relationship?

The Australian Parliament has until very recently always provided the media with free office accommodation within Parliament House itself. This arrangement is, as far as I am aware, unique in the English-speaking democratic world. The American media has correspondents located within the White House, to cover the executive of government, and within the Congress, to cover the legislature, but their head offices in Washington DC are located outside these public buildings. Similarly, the British Parliament houses the lobby correspondents of the English media but not their entire political staffs.

In Australia the tradition has been that *all* the Canberra staff of all the media organisations, large and small, are accommodated in Parliament House. This has meant that newspapers, radio and television stations, wire services, newsletters and even freelance journalists with no affiliation have been provided at no cost with office accommodation and such services as light and power. Over the decades, this has amounted to a subsidy worth surely many hundreds of thousands of dollars—if not more—from the taxpayer to media organisations.

It has been a very cosy arrangement for all concerned.

It suited the media, needless to say. For the media owners, it meant they could maintain a Canberra operation without having to pay rent. For journalists it meant being able to operate

within the cosy confines of Parliament House where propinquity ensured constant social as well as professional contact with MPs and Ministers. For parliamentarians it meant having the media on tap, so to speak; an MP who wanted to get a point across had simply to stroll up to the Press Gallery, a few flights of stairs away, and in a very short time could drop in and speak to every major media outlet in the country. How efficient! How self-serving!

In fact, the mutually reinforcing nature of this arrangement for both politicians and the press was clearly demonstrated in the early 1980s when an increase in the number of senators and members presented an accommodation crisis in the old Parliament House. The Presiding Officers briefly entertained the notion of either evicting the media, or moving them to new temporary offices outside the main Parliament House building in order to house the new MPs. When the Government got wind of this proposal, the Prime Minister—Bob Hawke—made very clear (in typical salty language, I understand) that he believed such an action would so alienate the media it could cost the government the next election. So, the new members of Parliament were put into the temporary offices—and the Press Gallery stayed put.

This, it seems to me, was a potent example of parliamentarians' perception of the power of the media to shape and even determine not just its image—but its very future.

During my time as Bureau Chief for the *Financial Review* I argued strongly that we should move out of Parliament House. Needless to say, my proposal was extremely unpopular with all concerned. The senior Fairfax executives in Sydney could not see why they should move from a rent-free situation to a rent-paying one. And my journalistic colleagues could not see why they should give up the cosiness of their current situation.

In fact, the extreme cosiness of the arrangements in the old Parliament House was the only argument that had any currency at all with my colleagues. Most Gallery offices were unbelievably cramped; in our case, we had seven people working in a space that was about 2 metres by 6 metres so some journalists were prepared to at least entertain the notion of moving to somewhere more spacious. But at the end of the day, no one wanted to break away from the pack. The Press Gallery operates like a tribe, or even a herd, and then as now, there is safety and comfort in being part of it.

What were my arguments then for wanting to move? I only repeat them because I believe they are perhaps even more relevant today, and are certainly pertinent when it comes to the images of Parliament, and parliamentarians, that are projected by the media. I took the view that the disadvantages of our being in Parliament House outweighed the advantages.

The benefits were obvious. In addition to those I have already outlined, there was the efficiency with which government and non-government information was able to be distributed via the Press Gallery boxes. There was also the ability to view in person Question Time and major debates or motions due to the proximity of the chambers to the Press Gallery, the ability to—often, literally—run into ministers and other MPs in the corridors and exchange gossip and information.

Against this, being located in Parliament House encouraged us to equate Parliament with Government. It was easy to believe that the business of government was totally confined to that building. (This myopia was not the exclusive province of journalists; even though most ministers were provided with offices in their departments, it was rare for them to ever visit let

alone spend prolonged periods in them.) The focus of concentration on Parliament House meant that whole areas of government and political activity, e.g. the bureaucracy, the High Court, the military, were easily overlooked. This no doubt suited the Government as it made news, and journalists, easier to manage but it reduced the scope of political coverage.

In those days some journalists still interviewed bureaucrats in their offices rather than on the phone but it was becoming rare. Yet in my experience it was always worthwhile; I believe that unless you already know the person pretty well you always get more out of a face to face conversation than you do from a phone interview.

The other problem with the Press Gallery arrangement, then and now, is that it reduces or even eliminates competition amongst the media and this results in an extraordinary uniformity of the coverage coming out of Canberra. The physical location of the media organisations cheek by jowl with each other in the Gallery in conjunction with the fact they are all covering the same stories day in and day out produces common thinking and a like-mindedness which is at odds with the usual journalistic competitiveness.

A degree of this is inevitable inasmuch as the story *is* the same most of the time. What happens in Parliament each sitting day is likely to be a major news story and although individual commentators might have different ‘takes’ on the events, the facts of the situation are going to be the same for everyone.

In addition, these days governments are adroit at managing news and they, too, do their best to orchestrate the next day’s headlines by controlling the outflow of information. Sometimes an individual journalist is favoured by a Minister or an authorised staffer with an exclusive or a leak, but most of the time the story is meted out via a press conference or other mechanism and all are doled out the same information.

The result is that the same story is filed by each media organisation in the Press Gallery and their head offices are likely to complain if they do not receive that story. Thus uniformity is encouraged. Not just by the physical location of the Press Gallery journalists but also by the attitude of their news editors or others they report to in Sydney or Melbourne.

Nor is initiative encouraged, it seems. I get the impression that few outside Parliament House, bureaucrats for instance, are used as sources these days although, to be fair, governments over the past decade or so have put the clamps on the public service to such an extent that it would be a brave bureaucrat who would give even an off the record interview these days.

Nevertheless, the sameness of the Canberra coverage is—particularly if you are a consumer of more than one daily newspaper, for instance—somewhat depressing. It lacks the excitement that rivalry and competition can generate. In other areas of the media, journalists thrive on scoops, on beating the opposition, on having exclusives. Why should Canberra, and political coverage, be any different?

There have been two major changes since I worked in the Press Gallery and, I would argue, both of them have weakened the media’s position and made them more beholden to the Parliament than they used to be.

In August 1988 the new Parliament House was opened and, like the old building, the Press Gallery was an integral part of its design and operation. Special galleries overlooking the chambers allowing Press Gallery reporters to observe proceedings at close quarters had been incorporated and, unlike the old building, they included areas nearby where reporters could file urgent or breaking stories without having to return to their main offices which, in turn by the standards of the old House, were barn-like in size.

The other important change has been the televising of Parliament which has given the public an opportunity to see for themselves what politicians are like and how they perform—and this makes them somewhat less reliant on journalists' descriptions and interpretations of Parliament.

Although the media has far more space in the current Parliament House than it enjoyed in the old, I would argue that the media are worse off now than it used to be. The media have far less physical access to members as whole areas of the building are now off limits in a way that was unenforceable in the design of the old House. The media are now totally prevented from entering the Senate or House of Representatives lobbies, or from wandering around the corridors in the executive wing, making chance meetings with ministers virtually impossible. Even if a journalist does run into a minister, strict observance of the rules should prevent a conversation from ensuing unless it is instigated by the minister.

In the old House, journalists became practised in the art of lurking outside the chambers or the party rooms or ministers' offices on the off chance that one could waylay a source and extract some valuable information. Today such exchanges are more likely to occur on the telephone and this requires the journalist to have to run the gauntlet of vigilant staffers before they can be put through to their quarry—and then there's always the chance staffers are listening in, which is a great inhibitor to the minister dropping any decent information.

The Presiding Officers in consultation with the Press Gallery Committee, have always stipulated rules that determined media access and activities within the building. These rules, for instance, lay down where microphones and cameras can be used and thus where interviews can take place. The notorious and undignified 'doorstop' interviews occur mainly because the various entrance doors to Parliament House are the only sanctioned places where ministers and members can be bailed up and asked questions. Apart from that, permission must be obtained for filming or tape-recording to take place inside the House unless at press conferences or inside the media's own studios.

I understand there has recently been some dispute between the Gallery and the Parliament on protocols for the taking of photographs of members in the chambers. An effort had been made to prevent photographers from snapping anyone except the member or senator who has the call, and is therefore on their feet, thus preventing them from having the opportunity to obtain candid pictures of parliamentarians in unguarded moments.

Ironically enough, many of the rationales for having the media in Parliament House have either lessened in importance or disappeared altogether in the new building. The fax machine has made the Press Gallery boxes less significant than they once were. (In fact, I understand ministers' offices more often than not fax releases to media offices rather than stroll up the stairs to 'box' them.) Television monitors in media offices allow journalists to watch

Question Time and other proceedings from their offices rather than walk down to the viewing galleries.

And, as I have already outlined, restrictions on journalists' movements make it less likely that they will have the privileged casual contacts with MPs that used to occur and that used to enable journalists to observe, and report on, so much of the drama of politics.

I remember, for instance, the two legendary leadership struggles in 1982 and 1983—between Andrew Peacock and Malcolm Fraser, and Bob Hawke and Bill Hayden. These occurred while Parliament still occupied the old building when journalists could come and go from the protagonists' offices—I well recall long lines of journalists waiting to see Hawke and Peacock who, for a time, had adjoining offices in the backblocks of the House of Representatives office quarters—and were an integral part of the drama.

But journalists were also allowed to mingle only a few feet away from the party meetings where the challenges were mounted and could observe the comings and goings and the caucusing, as well as being right on the spot when the results were announced. How different from the situation in 1991 when Paul Keating trooped into a committee meeting room to announce to the media that he had won his challenge against Bob Hawke.

I believe it is possible to argue that the balance of power between the media and the Parliament has now changed, and is tilted more Parliament's way. Perhaps the greatest indication of this can be found in the fact that the Parliament now successfully levies a form of rent from media organisations. Since July 1, 1991 organisations in the Press Gallery have been required to pay a so-called 'service charge', a fee which is worked out on the basis of the total space occupied in the Gallery. Television organisations pay at a higher rate to reflect their greater consumption of power and air conditioning. These charges do not equate to market rents, and so media organisations are still getting a good deal, but it is interesting that despite paying these fees they are not accorded tenants' rights. The Presiding Officers of the Parliament have retained the power to determine their rights of occupancy—and to rescind these if necessary.

Such dire threats are unlikely to ever be put into effect. Although relations between the media and the Parliament are sometimes tense and, on occasions, even hostile, it is hard to see them ever reverting to the kind of stand-off that occurred in 1955 when two journalists, Browne and Fitzpatrick, were hauled before the bar of the House and censured and ordered to be imprisoned for writing an article about the then Member for Bankstown to which he took exception.

These days, when a member or senator takes exception to media behaviour—as Senator Colston did recently concerning being photographed in a manner which breached the rules—the matter is likely to be smoothed over in a more diplomatic fashion. It is in no one's interests to have a 1955-style confrontation. For despite all of the advances in information technology, the Parliament remains very dependent on the media to inform the people about its activities. For this reason, the media is given access to services such as Hansard and the research facilities of the parliamentary Library that used to be unavailable to ordinary mortals.

That, as we shall see, is changing and yet another shift in the balance of power between Parliament and the media may be underway—although it is very early days yet.

But the televising of Parliament represented the beginning of a process whereby the media's monopoly on parliamentary information has been to some extent weakened. Televising of parliamentary proceedings has given the public an independent means of assessing the performance of their MPs and ministers. Even the short grabs of Question Time shown in the nightly television news enable voters to see, and judge, the interactions between various members and to make up their own minds what they think of them. Previously, the public had to rely on the interpretations put on those interactions by journalists. It is an interesting fact that the public perception and the perhaps more seasoned view of the journalists were often not in sync.

For instance, Paul Keating took the view that television had damaged his public image. While Press Gallery journalists mostly loved his tough language and combative style, and described him admiringly, on television he too often came across as an over-aggressive, ranting fanatic. For women especially, it was a big turn-off. So the televising of parliamentary proceedings can be seen as something of an erosion of the media's previous monopoly on disseminating images of the Parliament at work to the wider world.

The key roles of the media are to provide information and to supplement this with comment, or assessment of the information. There are obviously many types of information, from printed sources to whispered corridor conversations, from leaked supposedly secret documents to physical descriptions of how a Prime Minister (or other Minister) looked as he handled a tough press conference. There are also various means of purveying information, from the very general reports on television and radio or in mass circulation newspapers to the necessarily more technical and detailed advice to be found in specialist newsletters. To the extent that any of this information can be obtained from non-media sources, the media's previously unassailable role as the main purveyor of images of Parliament may be under threat.

Take what is available on the Internet for instance.

As an exercise while preparing these remarks, I spent several hours roaming through the home page of the Parliament of the Commonwealth of Australia (<http://www.aph.gov.au/>). This site contains a range and depth of information that was both unexpected and, without exaggeration, breath-taking. Let me give you a few examples by retracing the steps I took.

The first and most basic thing to do was to scan the index to the Australian Parliament's home page. This provides a summary of what the three main parliamentary departments (the House of Representatives, the Senate and the Parliamentary Library) have on offer. Available, should you want them in your very own home, are transcripts of all parliamentary committee hearings and their ultimate reports; copies of all bills and explanatory memoranda; the Notice Paper of each day of sitting; the standing orders of both chambers and each day's Hansard.

As well, there are lists of contact details of all current members and senators in addition to lists going back to the first Parliament of 1901 of all prime ministers, ministers, opposition leaders, women members and a break down of the state of the parties in each of these Parliaments. You can also get the Australian Constitution, Odgers' classic *Australian Senate Practice*; and everything you ever wanted to know but were afraid to ask about federal elections, by-elections, electorates and referenda. And, beginning next session of Parliament,

there will be individual web sites for each member and senator. At present only ministers have them, provided by their departments, or party leaders, provided by their parties and most of them are so far pretty uninteresting.

The Parliament's home page, on the other hand, contains an impressive body of research, far more than most of us would ever have occasion to consult but invaluable for students and, even, journalists wanting to check a date or other fact. To test the system and see just what it had to offer, I went via my computer into the parliamentary Library and asked for an index of their *Current Issues Briefs*. I recall that when I was a Press Gallery journalist these briefs, legendary for the quality of their research, were not available to us. Now they are there for any member of the public who has a computer, a modem and a printer. From the list of Briefs from the past two years I selected a paper on a subject I've been meaning to bone up on. Entitled *Copyright and Monopoly Profits: Books, Records and Software*, it had been prepared by a member of the Economics, Commerce and Industrial Relations Group, and when printed came to 16 pages of single-spaced text, altogether a comprehensive and impressive document. I then looked at what other kinds of parliamentary information was on offer and found that I can access any Australian state parliament—including the Hansards of most of them—as well as a number of parliaments in other countries.

I was short of time and so did not visit the US Congress or the European Parliament, but I will do so in the near future. (I am already an avid fan of the White House web site and have used it to obtain printed copies of the speeches President Clinton made while he was in Australia late last year.)

Finally, I browsed the list of other, non-parliamentary Internet resources which the parliamentary Library says it makes use of and dipped into ABS (Australian Bureau of Statistics) and some of its recent media releases before delving into the world's bank of statistics to pull out some figures on the circulation of North American daily newspapers from the *UNESCO Year Book* of 1996, and then some recent briefings on its publications from the OECD. All in all, I was able to gather an impressive amount of research data in less than an hour and without leaving my desk.

Now I don't for a moment suggest that this kind of information is going to put newspapers and the electronic media out of business. Most people want short, snappy reports preferably with pictures and the Parliament isn't providing that. Yet.

It will certainly soon be possible for Parliament to have available on its web site edited grabs, provided by its sound and vision people, of some of the more dramatic exchanges from that day's Question time. For the true aficionados of Parliament this could become required viewing, especially if it is accompanied by expert commentary by, say, a scholar-in-residence at the Senate.

The kind of information already available on the Internet is more likely in the short term to pose a threat to some of the specialist newsletters unless they respond by acknowledging that they need to provide further value in addition to the specialist information they already gather for clients. Otherwise, many of these clients might decide they can save money by having existing staff members trawl through the Parliament's home page each day to retrieve—for free—whatever parliamentary information they now get from expensive newsletter subscriptions.

I think we all understand that information is many things. Information is fact but information is also interpretation and assessment. This kind of information requires background knowledge, an understanding of context and the ability to weigh and appraise facts in a way that gives unique insight. That is what the media can do and in the future may be called upon to do considerably more of in order to complement the avalanche of purely factual information that will be increasingly available to us all.

There are many changes and trends in Parliament which deserve scrutiny and exploration. For instance, the rise of independents and of small parties has changed the way in which governments work. It has in fact made government much more dependent on parliamentary numbers and procedures than was the case when governments had parliamentary majorities and could get by using the weight of their numbers.

There is indeed a whole new repertoire the media can make its own. This is just one example. Just because Parliament is giving the media a run for its money when it comes to providing information, doesn't mean the battle to control the images is over. Not by a long shot. Or should that be a big byte?



Question — You were talking about the decline of the media in being able to present news and information. Could I suggest that, in an open democracy, that is something tremendously valuable. I think that the media had far too great a monopoly on power, in not only responding to and interpreting things in Parliament and so forth, but actually setting the agenda. I think that the decline, to some extent, in the power that the media wields is actually a good thing. I would actively encourage greater access to things like the Internet, to the televising of Parliament, because I think we are thinking people and we do have a capacity to be able to assess and appraise information as individuals and I believe it is a little bit arrogant for the media to purport that they are the only institution that is capable of doing that.

Dr Summers — I am not sure I am trying to suggest that the media has declined. I think what I was trying to suggest was that perhaps the balance of power between media and the Parliament had altered somewhat. I certainly think it is important that there be other sources of knowledge and therefore power, but I think the overall question of the extent to which the media determines agendas is a rather more complex one than might seem at first. When you think about the amount of effort that governments and political parties and business lobbyists and so on put into trying to manipulate the media, and the extent to which they succeed, the question of where these agendas come from, I think, is a rather more complex one than journalists simply sitting around thinking ‘oh well, let us have a go on Mabo today’, or ‘let us decide today’s issue is whatever’. These questions are ones we could debate and find examples and case studies of over a very long period of time. But the main point I would make in response to that is that I think we do acknowledge in democracies that the media does have a key role. It is called the fourth estate; it is regarded as a key, if not essential element, of the democratic process, which means that the press, the media as a whole, has responsibilities, and duties, in addition to simply exercising power. And of course, the more

commercial the media is, the more we need watch-guards to observe that power. But it is a huge question you have opened up and I probably could stand here and rave on for half an hour on it but there may well be some other people who want to make comments along those lines, or others, so that is all I will say for now.

Question — Just along those same lines if you do not mind, with the new building and the layout and everything you mentioned, the parliamentarians and staffers are increasingly isolated or able to isolate themselves from the media. I am just a young tacker, only been politically aware for ten years or so, but in that time I want to say that politicians have become isolated increasingly from public opinion. Do you think the role of this building itself and the increasing power of politicians to set the agenda where the media are concerned, has led to them becoming more isolated from the views of the public, given that the media is the arena in which politicians and the public interact?

Dr Summers — I know this Parliament House has been operating for almost ten years now, so it probably sounds pretty stupid to be waxing sentimental about the Old House. I was very amused to see reported in the press yesterday that Malcolm Fraser had made a speech saying he is very sorry he spent all that money and agreed to all this and he would like to go back to the old one. I do not know where that is coming from because he, together with his ministers, was one of the main forces insisting on this physical separation of government members from the media. They did not want to be bothered by journalists tripping over them and accosting them as they went to the loo or came out of their offices, and so he was the one who insisted on this separation, so it was pretty funny to see those remarks.

In the Old House there used to be the somewhat self-conscious perception that yes, this is, sort of like the *Titanic*, it is a completely unique, isolated experience, it has got nothing to do with the real world, and you know I think that was true. But if it was true of the old building, it is ten times more true of this building. You can walk into this building at eight or nine in the morning and not leave till midnight and everything you need is here. You can eat here, you can do your banking here, you can do your dry cleaning, all your friends are here, you can have lunch, you can have dinner with different people, you can go and have coffee, you can go to the post office, you never need to leave the building. As somebody who has spent a total of seven years in the old building and this one and has since spent a lot of time in other places, I do think the perceptions are somewhat artificial. I think that however much time you spend on the phone and however much time you might spend visiting other parts of the country (and most Canberra journalist do not travel except as part of an entourage with the Prime Minister and Opposition Leader, because it is the nature of the job that you do not travel outside Canberra very much except in those circumstances) it is very easy to become isolated and remote from the vast majority of people and it is one of the big problems of political coverage. It is interesting that the political parties, which of course are also based in Canberra, use research methods, focus groups and polling and what have you, to tap into what people are thinking.

Now in terms of members of Parliament, given that they all go back to their electorates each week and supposedly, particularly the House of Reps people, are in touch with the people who put them here, they should not really be in a position to be as isolated as perhaps the people who work in this building and never go to another part of Australia. So, I do not think the members of Parliament really have any excuse for being out of touch with the electorate.

If they are, it is because they are choosing not to listen or because they enjoy the luxury of a safe seat and do not have to worry.

Question — I just want to add a very small research footnote to Anne's very interesting paper today. Anne rightly said that the parliamentary home page represents a terrific boon to people doing research on Parliament. This is correct, but unfortunately it is only from inside Parliament House that you can actually access the online *Hansard* going back to 1981. If you are operating from outside Parliament, you can only access online *Hansard* from 1995, and this means a considerable handicap for people who want to do content analysis and look at the way the subject matter of parliamentary debate has been changing over time. At the moment, apparently, there simply are not the resources to make online *Hansard* from 1981 available from outside Parliament House, because all sorts of other things take priority, like of course home pages for MPs and other such things, but I trust that in the near future this issue of the needs of researchers are going to take slightly higher priority.

Dr Summers — I guess this is one of the intrinsic problems of having this extraordinary amount of information available. The more we have, the more we want, and the thought of even being able to photocopy *Hansard* a couple of years ago seemed to be pretty terrific and now we are annoyed if we cannot get as much as we want at home now. In fact I was trying to print out some *Hansards* from the Victorian Parliament yesterday, just to test the system, and unfortunately my computer did not have enough power to be able to do it and I had a transfer interrupted signal. If you look at the state parliaments too, some of their *Hansards* go back to 1991, others only go back to 1996 and some of them, the South Australian Parliament I think, do not have *Hansard* at all on their home pages yet.

Question — I was wondering if you think the media's coverage of women politicians, backbenchers and ministers and also women's issues, has changed in correlation with changes to the press gallery with more women becoming senior within the ranks of the press gallery?

Dr Summers — I think it has changed quite a lot in the last ten years. It was interesting that at the time I was Bureau Chief at the *Financial Review* there were actually three women bureau chiefs, Michelle Grattan at the *Age*, Gay Davidson at the *Canberra Times* and myself. There were a lot more women in the Gallery at that time than had been previously and everybody thought, well, isn't this great, but the culture was still such that if you wanted to do your job well, you had to go with the main stories. In the time I was at the *Financial Review*, I probably wrote two or three stories about subjects that happened to be close to my personal feelings, like women's refuges and so on, but they were not the sort of stories I could devote a lot of time to without people wondering seriously if I had gone off the rails and was not able to do the job properly. I think one of the things that has changed, for the better in my opinion, in the last few years, and maybe it is a reflection of there being more women in the Gallery but I do not think so, I think it is more a reflection of the change in the culture of the media generally, is that there are now specialist correspondents to cover those sorts of areas, particularly child care and other issues of interest to women. There is also much more demand from readers to know about these subjects and I think you also have to say that governments have sort of forced it on to the media. I recall when I was working for Paul Keating in the time of the 1993 federal election, and he announced some very major child care initiatives as part of an economic statement, it was part of my job to brief the press on those changes, and all the journalists said to me, well, look, this is just ridiculous. Why is he raising child care in a really important speech about the economy? And I said, trying to make

the point that child care is an economic issue, women go out to work, they need childcare, we are trying to broaden the understanding of economic issues; and it was very difficult to persuade a lot of journalists that that was a legitimate place to talk about child care. I think in the four or five years since then that there is more acceptance that child care is an economic issue, and in fact, this admittedly and unfortunately is in an environment of cutbacks, the issue is now being covered in a serious fashion in a way that would not have happened in the past, and I think that is a good thing.

The other point I make is that we do have at the moment a record number of women members of Parliament, most of whom are on the conservative side, and I am quite surprised at how little coverage there is of those members. Whether this is because they are not doing anything and therefore there is nothing to report, or whether the press is ignoring them, which I think is unlikely, I do find it interesting that some of the changes in women's policy which are coming out of this particular administration are occurring at a time at which there are a record number of women members. That is an irony that I will leave others to comment on. But I think generally the coverage has improved and I think is more diverse and provides a better reflection of the world the way it really is.

Question — Perceptions are very important, and prior to the previous election I was in South Australia doing consultations on constitutional issues and what came out were the very strong perceptions of some people that Parliament is not representing them. I would like you to answer a question on your experience of both the media and the Parliament, and that is, why is so much time spent on the negative things like the rorts etc. which could be attended to in a very short time, and less on what is required to develop and run the country? The perception is that there seems to be so much time spent on what is not really considered important, and this is losing a lot of respect for politicians. So are you able to share with me some of the psychology behind that, because what does zoom out to the community out there, to the outback, to the regions, is question time and such things. As you are aware, so much time was spent on one senator's alleged rorts, when the view out there is it could have been resolved with a police investigation that could have happened in a very short time, and if it was Aboriginal people they would have been locked up in five minutes. So could you just share with me some of the psychology?

Dr Summers — I think it is a very important question you raise, the question of who determines what is news and who determines what stories will run. One of the points I tried to make is that there is an amazing, and I think, unfortunate uniformity in approach, so that you do get the same story and the same angle on the story often ad nauseum in every single piece of media. I think that people are sick of that, and I think the evidence of that is that newspaper readership is declining, and I heard on the radio this morning that even the number of people watching the very popular six o'clock news on television is declining. People are turning off the mainstream media. That needs to be investigated as to why, but I would hazard a guess that people are a bit sick of only hearing a very narrow band of news. I am not saying that we should be Pollyanna-ish and provide good news; people say they want to read good news, but they do not, they will not buy newspapers that are full of Pollyanna-type stories. But I do think you can argue for a broader range of stories, and I think we could give more coverage to perhaps what we might call the uplifting, the leadership, the vision, the way forward. I think a lot of people are very perturbed about the direction of this country at the moment and are searching for ideas, wanting to know what people are doing in a wide range of areas, and the media could do more of that, still fulfilling its responsibility to report the news as it sees fit.

But I do think that the definition of what that news is should be subjected to a bit more debate and self-analysis. I agree with you.

Three Generations: The Changing Values and Political Outlook of Australians*

Hugh Mackay

IT HAS BECOME conventional wisdom that the *essential* characteristic of contemporary Australian society is its diversity. In the world of marketing, people are starting to talk about ‘particles’ (rather than the more traditional ‘segments’) of the market. Most of the traditional generalisations about Australian society can be made with less confidence than before, and many of them can no longer be made at all.

We have been living through a period of turbulent and relentless social change, and this has been re-defining the character of our society. The roles and responsibilities of men and women are being radically reassessed. Patterns of marriage and divorce have been through revolutionary upheaval. As a result, patterns of family formation and dislocation have been irrevocably changed: the one-parent family is now ‘mainstream’ and 25 per cent of babies are born out of wedlock.

Patterns of work and leisure have been destabilised by high unemployment, the rise of part-time work and the increasing casualisation of the workforce. Electronic technology (especially information technology) has revolutionised the workplace, the retail environment and, increasingly, the home. Money is becoming invisible and the credit revolution has wrought a culture shift in our attitudes to saving and spending.

Feminism, environmentalism, multiculturalism and republicanism have all re-shaped our agenda and our way of thinking about ourselves. There is now more diversity of thought, of

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attitudes, of values, and of behaviour and it is therefore becoming increasingly difficult to talk about ‘typical’ Australians or about ‘mainstream’ attitudes—including political attitudes.

In the midst of all this, it is easy to overlook another source of diversity in our society, and another set of changes which are progressively re-shaping us socially, culturally and politically. These are the changes in values and outlook which have been occurring, from generation to generation, since World War II.

The term ‘generation gap’ was coined to describe the social and cultural gap which opened up between the Baby Boomers and their parents. To the horror of the Boomers, however, a new gap is opening up between them and their children which might turn out to be even wider than the one they created between themselves and their own parents. To understand the remarkable differences between the three dominant generations in contemporary Australia (the Baby Boomers, their parents and their children), and to appreciate their impact on political attitudes and voting behaviour, we need to recognise some of the dominant influences upon those generations during the formative years of their childhood and adolescence.

1. Born in the 1920s

The generation now in their late sixties and early seventies—our tribal elders—were the children of the Great Depression. The Depression was the shadow across their childhood.

They recall childhood as being tough and deprived. (Indeed, if you invite them to reflect upon childhood memories, they will try to outdo each other with tales of hardship and deprivation.)

And yet, this is the generation that *celebrates* the role of the Depression in their lives; the generation who believe that, thanks to the impact of the Depression on their families and neighbourhoods, they got their values straight at an early age. They learned about loyalty (to a marriage partner, a family, an employer, a bank); they learned about the value of hard work; they learned to accept their social obligations (particularly to the even-more disadvantaged of their neighbourhood); they learned, above all, to be prudent and cautious, and to plan carefully for their future. They also learned about the comforts of political and religious prejudice: the line between loyalty and fierce loyalty is a thin one, and many of that generation learned to hate their opponents (Catholics/Protestants; socialists/conservatives; free traders/protectionists) with unbridled passion.

This generation then became the adolescents and young adults of World War II. Again, they regard the dark years of that conflict as having been ‘character-forming’; in spite of the further deprivations it visited upon their lives, they saw it as another period when values were clarified and the national focus was sharpened: ‘We knew who we were, and we knew what we were doing.’ (And, of course, ‘We knew who the *enemy* was.’)

After such a tough beginning, they came to adulthood—and to the process of career-building and family-formation—at a time when Australia was experiencing an unprecedented economic boom. They arrived, to their own surprise, in a land flowing with milk and honey.

Looking back, they describe themselves as ‘the lucky generation’, because they enjoyed that unique combination: a set of sound values shaped by the hardships of their parents’ generation, and a subsequent period of economic comfort and prosperity undreamed of by those parents.

This is the generation who look back with pride at their stable marriages, stable work patterns, and good fortune in having had a life-cycle in fortuitous phasing with the economic cycle. It’s also a generation who have tended to be stable in their voting patterns and to disapprove of the trend towards ‘swinging’; a generation where the wives tended to take their voting instructions from their husbands (who had typically taken *theirs* from their fathers).

The ‘lucky’ generation see themselves as having laid a solid foundation for coping with prosperity: they were going to benefit from it but not be ‘swayed’ by it.

2. The Postwar Baby Boomers (1946–61, but especially 1946–55)

That phasing of the ‘lucky’ generation’s life-cycle could not have been more different from the experience of their children—the babies born in record numbers during the 15 years following World War II.

Every generation is characterised by its contradictions, and the Baby Boomers certainly found themselves in the grip of a most peculiar paradox. On the one hand, they were the children of the boom years of the 1950s and 1960s. The construction boom, the manufacturing boom and the mining boom all created a period of unprecedented growth and prosperity. There was so much work to be done that we set out to attract as many immigrants as we could to help us get on with it. It was a time when Australians typically believed that the economic escalator would go infinitely upwards, and that created a mood of great optimism for the baby-boom generation. They were, in many ways, the symbols of their parents’ belief in a peaceful and prosperous future.

On the other hand, they were the children of the Cold War. They grew up with the idea of World War III as a kind of ‘future historical’ reality. The possibility of the nuclear holocaust was planted firmly in their minds: they knew there was a chance some Russian or American would push the wrong button deliberately or accidentally—and blow us all to pieces. This created a most peculiar tension: the tension between belief in a rosy, easy future on the one hand, and no *future at all* on the other.

What would such a tension do to a generation who grew up with it? You might expect it to produce an obsession with instant gratification, encouraging people to the view that they should *have it now*. Impatience, in everything from the consumption of material goods to education, travel and sexual relationships, might be the expected outcome.

In short, such a combination of contradictory influences would be likely to produce what it did produce: the Me Generation—a generation whose catchcries became ‘Do your own thing’ and ‘Look after Number One’. This was a generation who were destined to become poor planners, unenthusiastic savers but voracious consumers. (‘We’re not here for a long time; we’re here for a good time.’)

Its formative influences were the very opposite of those on its parents' generation. Coming out of a period of comfort and prosperity, this is the generation who hit the turbulence of the Age of Redefinition: the period since 1970 when we have been destabilised by relentless social, cultural, economic and technological change; the period that cast the Boomers in the role of social pioneers.

Their parents' generation had their values established *before* they hit the 'soft' patch. The Boomers had the soft patch as their formative influence—a start which resulted, inevitably, in a lack of a clear moral framework and of a solid value-system comparable with their parents'. The things their parents said about values, religion and morality tended to be overwhelmed by the evidence of a materialist society. And, in any case, the Boomers were the iconoclasts who wished to create a new social order!

So the Boomers were ill-equipped for what would happen to them in their middle years. In their quest for the happiness they so desperately sought, they have become our most divorced generation. In their quest to maintain a high standard of middle-class comfort, they have created the two-income household as the norm. In the process, they have redefined the dynamics of family life.

They are the generation who were on the leading edge of the gender revolution, as the Boomer women rebelled against the ideal of feminine domesticity which had been presented to them by their married and settled mothers (who had donned their postwar aprons and settled down to the serious business of creating the postwar baby boom, surviving comfortably on the income of their husbands).

This is also the generation who, having grown up with the ideal of egalitarianism, have been horrified to find our society splitting into the haves and have-nots at such an alarming rate.

Not surprisingly, the Baby Boomers are now heavily into *nostalgia*. They are reluctant to part with their youth, because they associate it with a time when everything looked rosier than it does today. They are the generation who are still trying to stuff themselves into blue jeans in their late forties (partly to pretend that they are not as old as they are, and partly to 'stay close' to the children with whom they are desperately trying to find some 'quality time'). They are still playing the music of their youth and young adulthood; they are still inclined to prefer long hair; they are determined not to act their age!

If their parents thought of themselves as 'lucky', the Baby Boomers seem to think of themselves as *stressed*. They are acutely conscious of their own anxieties and their own frequent retreat into alcohol, tranquillisers and other drugs as a means of easing the pain. 'Why does it all have to be so hard?' is a question they are often asking themselves as some of them confront the difficulties of a second or third marriage, and the strain of raising someone else's children, and others reflect wistfully on the gap between the expectations of the 1960s and the reality of the 1990s.

3. The Rising Generation, born in the 1970s

Generalisations are always dangerous, and I have already offered too many of them. When it comes to the rising generation of young Australians, though, generalisations are particularly hard to make. We can't talk about 18 and 19 year-olds in the same breath as 23 or 24 year-olds, and one of the characteristics of this generation is their resistance to the idea of generalisations being made about them. But there are certain things we can say about those who are now in the early years of their adulthood. These are the children of the Age of Redefinition.

Because they have grown up in a period of rapid social, cultural, economic and technological change, they are not conscious of the fact that it is a period of change at all: constant change is the air they breathe; this is simply the way the world is.

This is the generation for whom the women's movement was an established historical fact. It is the generation who take equality between the sexes for granted; who know that 50 per cent of university students are female and 45 per cent of the workforce is female. They know that 'girls can do anything' and that most mothers combine motherhood with paid employment outside the home (because that's precisely what most of their own mothers do).

They have grown up with the reality of a rising divorce rate (and they have probably heard of the widespread predictions that their own generation will experience a divorce rate around 45 per cent). They are postponing marriage: only five per cent of today's young women are married by the time they are 20 (Compared with 30 per cent of the women of the Baby-Boom generation). They are postponing the birth of the first child, and often using that as the trigger for a decision about whether or not to marry at all.

They know they are facing a tough job market. For some of them, work has already come to seem like an option which might or might not be exercised: 'I tried work once, and I didn't like it.'

For them, multiculturalism is a reality, the republic is an inevitability, and the environment is a precious resource which earlier generations abused.

The idea that technology is constantly changing is integral with their thinking. They know that today's technology will soon be superseded by something else, just over the horizon. E-mail, mobile phones, fax machines, personal computers, the Internet, virtual reality and interactive media are all rather ho-hum. (This, after all, is the generation that seemed able to program a VCR without even reading the manual.)

This is the generation who have grown up in the presence of AIDS, who know there is a drug culture in their school or their suburb and who know how to gain access to it if they wish. This is the generation who have spawned significant numbers of street kids, and it is the generation who have doubled the youth suicide rate.

If their grandparents' buzzword was 'lucky' and their parents' buzzword is 'stress', what is the buzzword of the rising generation? I think it is '*options*'. This is the wait-and-see generation; the 'hang loose' generation; the generation committed to flexibility and openness to change.

This is the generation who are inclined to postpone commitments—whether to a system of religious belief, a political philosophy, a political party, a course of study, a sexual partner or even a brand. (This is the generation whose parents say they are reluctant to commit themselves to the question of whether they will be home for dinner on Saturday night. They want to keep their options open until the last moment. And it is the generation who, when they leave home, take as little as possible with them, so that, once again, they can keep their options open.)

Ironically, this is also the generation which feels itself to be more independent than any other but which is, in fact, more dependent than their parents' or grandparents' generations: they are staying at school longer, being supported by their parents for longer, and going onto the dole sooner—and in larger numbers—than any previous generation of Australians.

For all their differences, the three generations seem to have one important thing in common: their insecurity.

For the older generation, insecurity arises from their uneasiness about the direction in which Australian society appears to be moving; fear for the future of their grandchildren; and fear for their own safety.

The Boomers are stressed by the relentless impact of change on their lives and the unexpected instability of their middle years.

The rising generation, for all their cool adaptability—for all their tendency to 'hang loose'—often feel alienated, depressed and unfocused (as reflected in their retreat into drugs and, most tragically, into suicide).

The most interesting question about Australian society in general—and politics in particular—at the end of the 20th century, therefore, is this: how will we deal with our insecurities?

Some of us are dealing with them by retreating into nostalgia; by distracting ourselves with a constant flow of information; by converting our homes into fortresses.

Some of us are responding to our insecurities by calling for more and more rules and regulations to control the behaviour of everyone else, and there's a real political hazard there.

Some of us are crying 'back to basics!' and calling for a return to so-called 'traditional values' in morality, religion, education, commerce.

Some of us have realised that the most effective antidote to insecurity is to re-establish our communal links and to re-connect with each other. Already, the signs are emerging that Australians are searching for ways to reconnect with 'the herd' or 'the tribe'. In everything from adult education classes to book clubs, choirs and bush-walking groups—to say nothing of clean-up campaigns—people are looking for new social contexts which will help to restore the sense of identity and security which we draw from belonging to herds. (Work groups are emerging for many people as a ready-made herd; surrogate extended families—often

comprising a number of households within a street or suburb, where working parents are prepared to share child-care, cooking, shopping and other domestic tasks—are another.)

Three Implications For Politics

Obviously, all the strategies that people can think of for dealing with their anxieties, uncertainties and insecurities will show up in the political process. Voters will clamour for tougher legislative solutions to all kinds of social, cultural and economic problems (calls for tougher censorship and ‘truth in sentencing’ are typical.) Similarly, voters will demand more information and explanation of policies and their consequences, in an attempt to restore some feeling of predicability to the political process. Even the ‘back to basics’ movement is bound to find expression in a return to more clearly distinguishable differences between the two traditional sides of politics.

But there are three other implications for our politicians which seem to flow from the changing mood in contemporary Australia.

The demand for ‘strong leadership’

The older generation tend to be rather philosophical about the comings and goings of political leaders. Rather in the way they might support this or that football team, their allegiance to a political party tends not to be affected by changes in the captain or coach.

The Baby Boomers are less complacent. Nursing their own insecurities, they yearn for the security of a leader who can articulate an attractive vision and a clear sense of direction. They are more concerned about strength in leadership than they are about having a leader with ‘the common touch’ or even a leader who can demonstrate a strong sense of empathy with the electorate. At a time of uncertainty and change, the Boomers are listening for the strong and confident voice of a leader who can compensate for their own lack of confidence.

At such a time, therefore, there is an additional pressure on political leaders: the demand for them to appear ‘strong and confident’ is correspondingly greater, simply because those are the very qualities which appear to be lacking in the community at large. (For the rising generation, of course, the question of leadership appears to be rather less significant than for older voters: they are neither as interested in politics nor as willing to be impressed by leaders as their parents and grandparents are. Indeed, they are likely to assume that today’s leaders will soon be replaced anyway.)

The cry for strong leadership is, in part, also an expression of the community’s desire to shake off its own cynicism. Political cynicism is running at a very high level: indeed, cynicism is the dominant theme in Australians’ discussion of contemporary politics. But people wish it could be different. They wish that they had more confidence in political institutions and in political leaders.

The great antidotes to cynicism are trust and confidence. Until voters—especially the Baby Boomers—believe that they are entitled to replace cynicism with trust, the call for strength in leadership will continue to be heard.

Is there a real choice?

One of the undoubted appeals of the One Nation party is that it seems to offer a tangible *difference*: Labor and the Coalition have, for many years, seemed to voters to be edging towards some kind of central position in which the philosophical differences between them are blurred to the point where they are almost indistinguishable.

The old meanings of Left and Right seem to be evaporating, and voters are no longer sure about what to expect from either side of politics. (Who is more committed to privatisation? On which side of politics would you expect to find the most enthusiastic economic rationalists? Who will lead the fight against inflation? Who first proposed a GST?)

For older Australians, policy shifts are confusing and sometimes perplexing but, in the main, they do not shake loyalty to one party or another.

For Baby Boomers, however, policy shifts are just another symptom of the Age of Uncertainty, or the Age of Discontinuity or the Age of Redefinition—call it what you will. Their sense of blurred distinctions between the major parties has been a significant factor driving the swinging vote up from about five per cent to about 30 per cent within the past 25 years. Feeling that the philosophical basis for distinction between the parties has weakened, middle-aged voters now acknowledge that the game has moved to ‘personality politics’ and they accept that this has already made their own voting patterns more volatile. Younger voters view all this with a jaundiced eye. Cynicism about politics and political institutions, in fact, is at its worst among young Australians. Teenagers and young adults report that they find little to interest or excite them in politics (and there is some evidence to suggest that, if voting were not compulsory, a very large minority—if not a majority—of them would not bother to vote). The rising generation—the *keep-your-options-open* generation—are characteristically disinclined to be committed to a political party; content to ‘see how things go’, from election to election; more inclined to regard loyalty as a sign of inflexibility or insensitivity. Their parents have been passionate about the need to choose, and about the significance of the choices they make. The rising generation, by contrast, are less interested in choice because they are so accustomed to it. A choice, for them, is unlikely to imply a commitment and their perception of contemporary politics only serves to confirm the wisdom of that attitude.

Will the politics of tribalism re-emerge?

Given the insecurities of the present era, it would not be surprising if new political alignments occurred, based on a new sense of political tribalism. (One Nation is a symptom of a possible future trend.)

Even though voters are currently confused about the hard policy content which might discriminate between Labor and the Coalition, they would like to feel more emotionally attached to one side of politics or the other. Here again, the question of cynicism arises: voters would feel better about voting if they felt less cynical about the process and more able to put their faith in one side of politics or the other.

This point connects with the leadership issue: a new sense of tribal passion is likely to emerge when recognisable and credible ‘tribal elders’ emerge. When voters call for a higher standard of integrity in their political leaders, and for a stronger sense of vision and inspiration, they are really asking for more wisdom and more maturity at the highest level of politics. They want to feel confident in aligning themselves with a leader, whether or not that implies alignment with a strong policy framework as well.

To some extent, the current state of Australian politics—as viewed through the eyes of these three generations—is another example of a fundamental culture shift. From our passionate attachment to the idea that ‘seeing is believing’ (which translates in politics as ‘show me your policies’), we might be moving back to a more ancient idea that ‘believing is seeing’. Perhaps our cynicism will finally yield to the idea that we have no alternative but to trust the person, not the system; the leader, not the policies.

If that is the way we’re going, what will become of the Westminster system as we now understand it?



Questioner — You spoke about tribal policies in a negative way. In your social analysis, have you come up with anything positive in that area that identifies any positive philosophy, or prophetic vision, or labels, or words that we can grasp hold on to, to see a light of hope for the twenty-first century?

Hugh Mackay — In the political context the answer is no. I wish I could say something encouraging. When Australians talk about leadership in politics, there is no doubt in their minds about what they want. There are three characteristics of political leadership which are desirable in this electorate. One is strength, I’ve mentioned that. Another is integrity and the third is inspiration; and when people look around federally and in the states for the leaders who meet those three criteria there is no-one who is seen as embodying those three characteristics. On the subject of strength, Jeff Kennett in Victoria goes off the top of the scale; whatever else you say about him, he appears to be strong. On the subject of integrity, Cheryl Kernot is very highly rated. On the subject of inspiration, I cannot actually give you a single name, there is a bit of a vacuum. Now that is where a lot of the cynicism comes from, but how it is going to work itself out in the political arena, I do not know. In the social arena more generally, I think the message the rising generation are giving us is ‘do not forget your friends’, which translates as, ‘relationships are really the most important resource we have got’. The hopeful thing that I see happening in our community at large is a much stronger interest in the idea of community, of building and nurturing social networks, of taking your friends seriously; among young people you even hear comments like ‘well, yes, we might get married and if we do get married ten years might be a good innings, but we will have our friends for life’. I do not know what that says about the status of a spouse. The idea is that there is a community we can count on. Even the revival of street gangs in Sydney and Melbourne, which are not always socially approved of, is a symptom of a growing feeling in the community that we need each other; that relationships are the most precious resource. Information is not the most precious resource; a swimming pool in the back yard or three cars in the drive, these are not precious resources that are going to still our anxieties or relieve our sense of uneasiness. The rising generation know how to do that better than the rather self-obsessed baby boom generation did.

Questioner — Picking up on the point about the elements people want for political leadership, something very funny is going on in Britain around Tony Blair. If you look at the research, he is seen as having the integrity, seen as having the strength, seen as having the

inspiration. What is coming out, is people think he is not stupid. Every time he opens his mouth, he seems to have the capacity to come at things from different angles. So the issue of intelligence might be quite important too, as perceived by quite ordinary people. I do not think that people know that is what they like about him.

Hugh Mackay — I think that is probably right. There is certainly evidence here, that one dimension of the cynicism in the community, is not that people are saying our leaders are unintelligent, but that they seem to be trapped in rhetoric, they seem to be trapped in platitudes and slogans and that does dull the sense of imagination, creativity, the sort of things that might add up to a feeling of intelligence. I think that is an issue for us. One of the things that has appealed to people about Pauline Hanson, strangely enough, and many people think of her as unintelligent, is that she seems to speak with what they regard as a kind of freshness, as though she is outside the conventional, traditional, political language.

Questioner — You have written a very interesting article: ‘Re-inventing Anzac Day’. Would you like to expand a bit on that?

Hugh Mackay — I think Anzac Day as a symbol is becoming more important, rather than less important in contemporary Australia, but that its meaning is changing, and a lot of old diggers do not like this, so that when that article appeared I received some very hostile mail from people saying ‘don’t you tamper with Anzac Day’. I was not tampering with Anzac Day, I was trying to describe how perceptions of it seem to be changing. It does seem as though Anzac Day is taking on a new kind of focus which is not about Gallipoli, and not even about war, but is something to do with the question of what we have done with the society secured for us by military sacrifice. Anzac Day, it seems to me, has the potential to become, is already becoming in fact, a national day of celebration of what we have achieved, of what kind of society we are creating, of our extraordinary stability in the face of our diversity; a celebration which has less and less to do with military questions and more and more to do with cultural questions; more to do with outcomes.

Questioner — As you are aware, in 1788, before white settlement began, Aboriginal people were 100 per cent of the population. We are now 1.97 per cent, at the last count. We have just celebrated (although I don’t know if you could call it a celebration) the 30th anniversary of the 1967 referendum.

Canberra is a wonderful place to live, depending on who you are, and I would like to put this to you: how do you see the Aboriginal people’s future in relation to the reconciliation process, in view of what you have said about inter-generational differences; and also our future generation’s political influence; whether we will get people into Parliament; and whether our children will have to work as hard as we have to be recognised; that’s one aspect of it, our future as a political entity in this country. I would also like to ask you your view on what effect it will have on us if the country becomes a republic; and the last thing, whether there is hope for us?

Hugh Mackay — Well, there is hope for all of us is what I would say in response to the last question. It seems to me that the good news is, particularly coming out of the reconciliation convention of this year, that there is now a level of awareness in the community about the need for Aboriginal reconciliation, to do something about the Aboriginal question, which I have not previously detected with such intensity. In fact I think a very significant change is

under way from a position where white Australians really did not want to know that there was an Aboriginal question because it was just too puzzling, too daunting for them. At least, in the light of Mabo and Wik, white Australians now have something to focus on. They now grasp the whole idea of land rights and the possibility of co-existence in ways that they have previously not been able to articulate because they did not actually have a framework. In fact a long standing criticism of black Australians by white Australians has been we do not actually know what they want from us. I think that is changing, I think we are beginning to understand. So, while there is of course a debate raging in the community at the moment about whether Aborigines should receive special treatment because of their special history, or whether they should just be treated the same as everyone else, my sense is that that debate will be resolved in favour of recognition that their history is such and our history is such that the so-called special treatment is actually not very special at all. It is a unique case that needs unique handling. So I think there are grounds for hope.

The question of the republic, I think, is not relevant to it. I cannot see that people will say in the process of Australia becoming a republic that has some implications, that are different from the implications that exist now about the need for Aboriginal reconciliation. In fact, I think it is probably fair to say on the subject of the republic that the urgency in general seems to have diminished, partly because of the sense of inevitability. I mean that is one of the problems about Aboriginal reconciliation as well. The worst thing that could happen would be a feeling that some grand gesture or some incremental program towards Aboriginal reconciliation is inevitable, therefore we do not have to worry about it. That is certainly what is happening to the republic.

I think there would be enormous resistance in the community to affirmative action on behalf of Aborigines, or women, or any other defined group. When it comes to the crunch, people will vote for candidates who appeal to them, for whatever reason, and I am absolutely confident that in the electorate at large, an Aboriginal candidate would be evaluated as a candidate not as an Aborigine. In the same way as female candidates, by and large, will be evaluated as candidates.

Questioner — I am one of the parents of the Baby Boomers (and I did not wear shoes, by the way, when I was young). When it came to the fifties and sixties, when the government of the day put on recessions which I suppose today we would call a miniature depression, there were thousands out of work. Your friend and my friend the banks took over homes; but it gave my children an idea that jobs were never 100 per cent secure. It was the whim of government. That went on through my family, and I think it did something for my family. I think they had the idea that in the future they would have to work hard for their job, they had to realise that the job was their security. What is your opinion of all that?

Hugh Mackay — I agree, of course, with what you are saying. You are talking about the experience in your own family and of course I accept that is the experience. I think it is true, nevertheless, that the experience of the fifties and sixties which was that life was going to be easy and that employment was certain, was the more influential determinate because that is what created the expectations that led to the disappointment. If that period had not been as buoyant and as promising as it was, then the revision that you have described in your own family would not have felt as harsh as it did. I think that is the peculiarity of the fifties and sixties that it created expectations that were never going to be met, but you had a whole generation hoping, and in a way still hoping, that those expectations will be met.

Questioner — I remember reading your article ‘My generation’, in 1995, which was very similar to this talk today. My question is more on the research behind these talks as the pine cone effect, the narrowing of the bulge of the Baby Boomers, comes into effect. How will you discern the wishy-washy effect of the fewer numbers heading in the same direction; the different age groups interacting?

Hugh Mackay —Clearly a major social and cultural effect will occur as a result of declining numbers. The markets and facilities and infrastructure created for the Baby Boomers will turn out to be excessive for the following generations. The most recent figures I have looked at tell us that in the under five age group, there are 200,000 fewer members of the pre-school generation in Australia now than there were thirty-five years ago. Our birth rate is at an all time low at the moment. So that is going to affect the nature of our society as we adapt to the idea that there are just simply fewer kids, then fewer adolescents, fewer young adults, and so on. I am not sure that it is an issue particularly for research. We are still continuously engaged in the process of trying to understand the relationship between the formative influences and the attitudes and outlooks that result from those. I do not think that will change. What is changing is that you do not have this enormous muscular group coming through. You have people, and perhaps this is what you meant by the wishy-washy factor, who are in a sense in the shadow of this vast baby boom generation.

It is interesting to look at the generation born immediately after the boom, those who are now in their late twenties and early thirties. I was not talking about them specifically today, but we have just completed a study on them, and they are a generation who in a way are the happiest group that I can find in contemporary Australia. They are very relaxed. The Baby Boomers have done all the pioneering, that was great, our parents worked really hard to get us educated and started, that is great, thanks mum and dad, I do not want to be like you, but I am glad you were like you, I do not want to be like the Baby Boomers, we are not heavily into social pioneering here, we are going to have—their favourite word is lifestyle—we are going to create a good lifestyle. Now that is almost like a counter-revolution in the wake of the boomers and I guess that is part of what you are describing. It is the counter-effect.

Mirrors, Mouthpieces, Mandates and Men of Judgement: Concepts of Representation in the Australian Federal Parliament*

Marian Sawer

OVER THE LAST few years there have been a number of major debates in Australia which have raised issues concerning the meaning of representation. These have included the debate over Pauline Hanson, the euthanasia debate and the debate over quotas for women.

Thanks to the Clerk of the Senate, I was able to spend some time in late 1996 as Honorary Senate Fellow exploring these issues with current members of the federal Parliament. Semi-structured interviews were conducted with 14 members of federal Parliament in November and December 1996. Included in the sample were seven members of the House of Representatives and seven senators, of whom five were Liberal, one National Party, four Labor, two Democrat, one Green and one Independent. Half were male and half female and there was also a mix of other demographic characteristics, such as age and ethnicity, as well as a balance between newcomers and long-serving members or senators. Interviewees were asked what representation meant to them; their personal representational priorities; how they balanced the interests of majorities and minorities; whether there were groups which needed better representation and, if so, how this could be achieved. This paper reflects the range of views on representation I was exposed to through these interviews, and relates these views to academic discourses on representation.

One perspective on representation which has gained much media attention over the past year is the populist view associated with the Member for Oxley, who claims that existing political

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 19 September 1997.

parties do not represent ordinary or mainstream Australians. The argument here is that political parties become captured by special interests of one kind or another (ranging from ‘the Aboriginal industry’ to agencies of world government) and so do not represent the ordinary Australians who have voted for them. Populists such as Pauline Hanson claim to be the unmediated ‘voice of the people’.

Another debate touching on the understanding of representation has been the euthanasia debate. As an editorialist in the *West Australian* (6 August 1997) wrote, politicians do not in general have a mandate to decide issues of personal morality. These are not usually issues included in election platforms, on which political parties base their so-called mandate from the people. In the case of euthanasia, as in the case of abortion, the consciences of politicians differ from majority views of the community as revealed by opinion polls. It has been an issue which has brought to the fore the view of representation expressed by Edmund Burke in 1774—that members of Parliament owe the electorate their informed judgement rather than the slavish following of local prejudice or majority opinion.

The argument over quotas for women has been in part about the mirror theory of representation—that parliaments which are 80 per cent male, as is the case in Australia, are unrepresentative and undemocratic. I shall discuss this view of representation and its implications at greater length below, but suffice it to say here that this argument assumes the importance of embodiment and that only those who have shared the experience of being treated as a woman (or as a person with a disability, or an immigrant from a non-English speaking background etc.) can adequately represent the issues involved.

One final issue concerning representation which I wish to touch on here, although it does not directly relate to federal Parliament, is the recent decision of the Rev. Dr Dorothy McRae-McMahon to resign from the position of National Director for Mission of the Uniting Church because she felt that she was unable to represent effectively a range of people within the church who had difficulty with her declared sexual orientation. In this case the overt embodiment of difference was felt to impair her ability to function as a representative.

I shall now look at some of the conceptions of representation which have currency in federal Parliament. Basically the conceptions of representation expressed by those I interviewed can be categorised in terms of electorate representation, party representation, representation of the national interest, functional representation, mirror representation and representation of various voteless constituencies. I shall begin with one of the perspectives on electorate representations, the idea of the representative as the voice of the people, or as ‘mouthpieces’, the term I have used in my title.

Mouthpieces

The idea of the MP as the mouthpiece or delegate of the electorate is usually contrasted with the trusteeship model of representation originally expressed by Edmund Burke. The trusteeship view of representation was articulated in Australia by Sir Robert Menzies in his collection of wartime speeches published under the title *The Forgotten People and Other Studies in Democracy*.¹ Here Menzies poured scorn on the belief of electors that ‘the function

¹ My thanks to John Uhr for alerting me to this source.

of their member of Parliament is to ascertain, if he can, what a majority of his electors desire, and then plump for it in Parliament'.² Menzies called this the 'phonograph' or 'sounding board' concept of representation which permitted knowledge (of the legislator) to be overthrown by the temporary clamour of electors.

Most of those interviewed for this project were careful to distance themselves from populist constructions of representation, but there were exceptions. One MP explained that she was unable to accept the concept of a 'conscience vote' because: 'it's not me that's talking in parliament. I'm there to represent people. It's like working in a shop—you may have to sell a product you don't necessarily believe in but it's your job to do so'. The same MP said that she was representing the view of the people of her electorate on euthanasia, but if they had expressed the contrary view she would also have represented that.

One obvious problem with the mouthpiece concept of representation is the transient nature of the majority views which the representative claims to be articulating. A well-known example is the effect of different wording in opinion polls, meaning that a majority in favour of lower taxation will evaporate if the consequences in terms of reduced health and education expenditure are spelled out. As well as being transient, majorities on different issues are differently constituted. Or, to put it another way, we are all part of a minority on some issue.

Democratic theorists also argue that those caught up in deliberative forums, ranging from community organisations to parliaments, are inclined to modify their views both because they need to defend them in rational rather than purely self-interested terms and because they need to address opposing points of view.³ The claim of populists, by contrast, is to articulate the immediate concerns of the electorate unmodified by the process of democratic dialogue.

Another issue is, of course, the priority given to 'majority' or 'mainstream' opinion as determined by the populist representative. This not only overrides the views and rights of minorities, but also constructs the majority as the victims of minorities. Noisy minorities have pushed their interests at the expense of the mainstream who supposedly feel 'utterly powerless to compete with such groups'. Moreover the mainstream is silenced by the imposition of political correctness by minority interests. Only the populist leader can reverse this situation and speak for the silent majority.

Within populist discourse the silent majority is also construed as those who produce real value in society—minorities are the parasites who live at the expense of the mainstream. The chattering classes who promote political correctness, 'fat cat' bureaucrats and, of course, representatives of industries, such as the welfare industry, Aboriginal industry, multicultural industry and so forth, all have an interest in maximising redistribution away from the real producers of wealth, those who have worked for their land as the Member for Oxley would say. In another version of this trope the mainstream are the taxpayers, minorities are those who live at the expense of taxpayers. Minorities are never construed as taxpayers themselves

² R.G. Menzies, *The Forgotten People and Other Studies in Democracy*, Angus and Robertson, Sydney, 1943, p. 37.

³ Jane Mansbridge, 'A deliberative theory of interest representation', in Mark P. Petracca, *The Politics of Interests: Interest Groups Transformed*, Westview Press, Boulder, Colorado, 1992.

who, like all citizens, need community support at vulnerable times in the life-cycle or migration process.

The interviewee in my sample who most clearly articulated elements of populism believed that mainstream Australians had not been as effectively represented in Parliament as they might have been in recent years, particularly considering ‘they also contribute very strongly to the wealth of Australia which can then be redistributed’.

Historically populism has been associated with the resentment stemming from economic insecurity and falling living standards. It is characteristic for this resentment to be redirected by populist politicians (or talk-back radio hosts) towards visible minorities who are made the scapegoats for the economic distress being experienced. Eva Cox argues that such resentment has been exacerbated in Australia by the ever-tighter targeting of public benefits—so that instead of citizens seeing themselves as both contributors to and beneficiaries of the public purse, a line is drawn in the sand between those categorised as dependent on welfare and everyone else.⁴

Recent manifestations of such politics of resentment have included a backlash against anti-discrimination policies which recognise and accommodate significant difference. Measures taken to ensure that citizens who differ from the ‘mainstream’ have equal opportunity, such as ramps for those with disabilities, are reconfigured as forms of ‘special treatment’ at the expense of mainstream Australians or taxpayers. As we have seen, minorities are not conceptualised as taxpayers or as those who can become taxpayers if they are provided with ramps, English language teaching and/or childcare. The Member for Oxley articulated such views in her first speech in Parliament, apparently believing that equal treatment means same treatment.

Where priority is given to voicing mainstream fears and frustrations, not only are the rights of minorities at risk but the rights of unpopular individuals may also be sacrificed along the way. The attitude that there was no need for a trial in the case of the Port Arthur gunman, Martin Bryant, was one example cited to me.

Men of Judgement

The Burkean position concerning the importance of the independent judgement of the legislator was put to me in this way: ‘You have to be conscious of aspects of legislation which perhaps the community is not familiar with. There is an additional responsibility in representation when constituents may not necessarily have the full picture ... You have to be in a position to make a decision which reflects their best interests even though that may not necessarily be their expressed will or view. Most people do not have the opportunity to read legislation, I do that on their behalf, deal with practical aspects, develop an in-depth view of how the legislation will work. In many cases people would not have the expertise or training to be familiar with how the legislation will work. Public sentiment is very dynamic, it will ebb and flow as particular events occur’.

⁴ Eva Cox, ‘Feminism, racism and populism’, *Refractory Girl*, 52, 1997.

Another MP expressed similar views, talking of transient majorities in the electorate which were likely to shift if people were exposed to the full range of arguments: 'My role as a representative is to reach a judgement on what's right, regardless of the polls'.

The Burkean view of representation also emerged as legislators discussed their role in taking up issues of the national interest, issues such as foreign policy and international human rights, issues which were not necessarily of interest to their constituents. In dealing with these issues legislators transcended their geographical electorates and became representatives of Australia. One MP talked of these issues in terms of 'providing direction and leadership in the national parliament, a focus for where Australia might be heading'.

Women MPs have generally been found to be less comfortable with the Burkean view of representation than are men (hence 'men of judgement' in my title) and to put more stress on setting up adequate consultative mechanisms through which community views can be crystallised and expressed. This emphasis on consultation and participation has generally been associated with women's contribution to politics, both in Australia and elsewhere.⁵ This was reflected in my sample, where women generally were more likely to talk in terms of context and process than in terms of their own judgement.⁶

Mandates

Modern political parties were early to develop in Australia and levels of stable party identification have been very high by world standards, even if eroding in recent times.

Parties are still largely the gatekeepers to Parliament and party or factional loyalty is usually the price of political success. Political scientists have long found that party allegiance is the most important predictor of the attitudes of legislators in this country and have also shown that Labor representatives are more likely to stress party factors than non-Labor representatives.⁷

This latter point, the claim that party discipline was more significant in the Labor Party, was taken up by one of my Liberal interviewees who argued that in his party, 'while we generally push the agreed party line', there was greater scope for the exercise of personal discretion and putting the electorate before party. Not surprisingly, a different view was put by the Independent, who talked about the degree of 'duress' applied to backbenchers, particularly when they were all competing to get onto the first rung of the ladder.

The primacy of party representation was certainly put forward most strongly by a Labor senator who claimed that, contrary to the views of the Clerk on the role of the Senate, the

⁵ Anne Phillips, 'Democracy and representation: or, why should it matter who our representatives are?' Paper presented to the Humanities Research Centre, ANU, 29 April 1994.

⁶ Exceptions included a male parliamentarian who spoke extensively about how parliamentary consultative mechanisms and outreach might be improved and another who spoke of the continuous and inclusive process of policy-making in his party.

⁷ Donley T. Studlar and Ian McAllister, 'Constituency activity and representational roles among Australian legislators', *Journal of Politics* 58 (1), 1996. See also Ian McAllister and Donley T. Studlar, 'Gender and representation among legislative candidates in Australia', *Comparative Political Studies*, 25 (3), 1992.

Senate was the more party political House ‘because most people here would never make it except for their position on a party ticket’. This senator praised the primacy of party in terms of the discipline it provided and its centrality to responsible government. This meant that voters had a much better idea of what would be delivered by government than, for example, under the American system. A Labor member of the House of Representatives agreed that: ‘It’s what party politics teaches you—that you’re not there because of yourself but because of your party’.

Another angle was provided by a senator who spoke of frequent conflicts between the views of his electors and the views of the party he represented, the latter being constrained by coalition arrangements. He spoke of the need on occasion to fulfil the trust of his electors that he would represent their views, against the line adopted by his party. He also stressed the need to be selective in choosing the issues on which to go with his electorate rather than the party, ‘otherwise I would have to be an Independent’. The same senator was the most explicit of the interviewees in discussing the role of representing broader functional groups as well as a geographical constituency—although this topic of functional representation did emerge in some of the other interviews.

An interesting version of the mandate view of representation comes from senators from minor parties—these senators are representing political minorities, or perhaps a series of political minorities. One senator told me that he was constantly having to remind others that he was not in Parliament to represent the majority viewpoint. He did, however, feel an obligation to represent the majority viewpoint where this was being ignored by the major parties. This occurred, he believed, because of the undue influence of the corporate sector. There are no senators currently in Parliament who take the view adopted by former senator Jo Vallentine that she not only represented a political minority but that her mandate was restricted to a limited range of issues.

This importance of party was expressed in a different way by both Liberal and Labor interviewees who stressed the importance of representing underlying party philosophies and of taking an active role in guiding their respective parties back to these principles. One Liberal parliamentarian described himself as a ‘custodian of the principles of modern liberalism, an advocate for them and applying them on a daily basis’. In his view, ‘the Liberal Party was never meant to be a conservative party’. The same parliamentarian stressed the significance within liberal philosophy of protecting the rights of minorities, whatever the view of the majority.

An Independent MP no longer bound by a party mandate pointed out that this created an interesting problem for him. Contrary to his own expectation that there would now be greater scope for his individual judgement on issues, the expectation of people in his electorate was that since he was no longer bound by party discipline he would be freer to express *their* views.

Representing Individual Constituents

Both senators and members of the House of Representatives talked about their work, and that of their staff, in representing the interests of individual constituents—whether as first port of call for information or as an avenue of appeal against bureaucratic decisions. Interviewees cited immigration work, family law and social security issues as being the most common forms of individual casework. The mix varied in accordance with features of the electorate, such as the proportion of people from non-English speaking backgrounds and average household income. Some spoke of the need to generalise from this individual casework, such as that relating to pensions, and use it as a base for detailed policy research and development.

One MP with a strong policy bent has written about the sometimes daunting tasks of individual constituent representation. Former MP John Langmore had the experience of being woken at 4.00a.m. by a female constituent who had herself been woken by a rubbish truck and thought that, as it was a government truck, her representative should share this experience.⁸ This insistence that parliamentary representatives share at first hand the life experience of their constituents is much stronger in Australia, where representatives are expected to live in their electorates, than in the United Kingdom, where the MPs may only visit their constituency for a monthly ‘surgery’.

Representing Voteless Constituencies

Another form of representation considered by some of my sample revolved around the representation of the interests of voteless constituencies. Such constituencies might include future generations, endangered species, the planet itself, overseas communities suffering from disaster or oppression and, of course, children.

While members of Parliament are elected to represent living voters, some feel strongly concerning the need to balance the rights and interests of future generations against the demands of the present. This was expressed as protecting future generations against the economic fundamentalism of the present. Another issue raised with me was the representation of ‘the living fabric of the planet, the need to balance the rights of human and other species’. This parliamentarian felt that the current system constrained representations on behalf of the myriad of non-human species. Such representation could only be articulated in other than anthropocentric terms if it were to be taken seriously—that is, in terms of the utility of biodiversity to human beings.

Nonetheless there is clearly a section of the electorate that is concerned with these issues, even if they are a minority. This is the post-materialist constituency identified by political scientists and there is indeed now a certain amount of competition for this post-materialist vote.

⁸ John Langmore, ‘Parliamentarians, econocrats and the people’ in Julian Disney and John Nethercote, *The House on Capital Hill*, Federation Press, Annandale, NSW, 1996.

Another MP saw herself as having a particular role as an advocate of the rights of children. Advocacy on behalf of children has historically been viewed as part of the role of the woman MP.⁹ Indeed it has been striking that it has been women MPs in both state parliaments (including NSW, Queensland and South Australia) and in the federal Parliament who have been at the forefront of raising the issue of paedophilia. In doing so, these MPs have often referred to their own embodiment as women and mothers as the reason they feel driven to raise this difficult issue.¹⁰

Politicians have often expressed the view that there are no votes in taking up overseas humanitarian issues, part of the received wisdom that voters are basically moved by the hip-pocket nerve. This perspective is strongly contested by the Australian Council for Overseas Aid and, regardless of votes, a number of politicians expressed a sense of responsibility to represent such issues. Another variant on the voteless constituency is the concept of representing ‘disenfranchised views’—views which have been denied a hearing in the mass media and which would be largely unheard if not taken up in the parliamentary arena. This issue was raised, in particular, in relation to the monopolistic representation of one particular economic viewpoint in the mass media and the lack of representation of alternative economic viewpoints, even those which were majority viewpoints until 20 years ago.

Mirror Representation

The prevalence among MPs of traditional views of representation was to be expected, although somewhat at odds with the rise in post-modern societies of forms of political identification other than those defined by party or geographical unit.¹¹ What was interesting was the extent to which emphases on embodiment and the politics of presence emerged in the comments on representation made by interviewees. These post-modernist views of representation were quite strong in about half of my sample of parliamentarians, who talked about the importance of representing some aspect of their identity shared with others in the broader community, in addition to more traditional party and electorate representation.

These parliamentarians believed that some degree of ‘mirror’ representation of the community was important in strengthening the legitimacy of Parliament and ensuring that the interests of different sections of the community were not overlooked. Examples given of under-represented groups included Australians from non-English speaking backgrounds, Australians of Asian backgrounds, indigenous Australians, people with disabilities, young people, people of low socioeconomic status and women. I was told: ‘I’m sure there are a lot

⁹ Marian Sawer and Marian Simms, *A Woman’s Place: Women and Politics in Australia*, 2nd edn, Allen & Unwin, Sydney, 1993.

¹⁰ In relation to children, the representation of a voteless constituency shades into the mirror representation of mothers. In the ACT Legislative Assembly a woman MP told of her personal experience of sexual abuse as a child and spoke of the importance of having people in public life who had shared such life experiences.

¹¹ Ian Marsh, *Beyond the Two Party System*, Cambridge University Press, Cambridge, UK, 1995.

of groups out there who feel that nobody here is culturally attuned to them or able to assist them in that more focused way which might be possible if MPs shared their characteristics’.

A gay parliamentarian spoke of how under-represented gay and lesbian groups felt by a Parliament which often seemed to avoid their issues, fearing they would be politically unpopular. Because of his personal identity, these groups looked to him in particular to raise these issues, despite their not being vote-winners in his electorate. As political scientist Carol Johnson has said, a number of aspects of identity are currently being marginalised at the national level as ‘private matters’, making public representation of such issues that much harder.¹²

A parliamentarian from a non-English speaking background articulated the additional representational tasks which this brought him. He was called upon to represent the interests of minority ethnic communities in general or of multiculturalism—not just his community of origin or the communities found in his electorate. He found that for his parliamentary colleagues issues only rated attention if they appeared in the English-language media—they did not try to represent the issues of concern to the ethnic media. As Gianni Zappalà has found, MPs from non-English speaking backgrounds (NESB), whether representing electorates with a high proportion of NESB Australians or not, are more likely to take on a broader representational role in relation to issues of multicultural policy and ethnic rights.¹³

A young senator talked of representing her age group. She said that beyond her obligations to her state and party, she felt a special obligation to represent the interests of young people. One reason was the generally low priority given to issues affecting young people and a problem with negative stereotyping. While she was often called upon to speak on ‘youth issues’, she felt that it would be naive and arrogant on her part to claim to be able to represent all young people in view of their diversity: ‘many would not identify with me for a minute’. There were similar issues in relation to the other constituencies with whom she identified, namely women and feminists. In view of the diversity of each of these constituencies she felt that a first priority was to seek broader representation of them in Parliament. As well as broader representation there was also a need for better representation, including more structured consultation with representative groups.

A state upper house MP, born in Hong Kong, has spoken of the way in which she embodies multiple political identities and representational roles. She sees herself as a representative of a political party; as someone from a non-English speaking background who has shared the experience of migration and linguistic exclusion; as an Asian Australian subject to the kind of discrimination experienced by those who are visibly different, whether or not they are Australian-born; and intersecting with all of these, her identity as a woman.¹⁴

While in these cases embodiment led to an expectation of issue representation, in other cases

¹² Carol Johnson, ‘John Howard and the revenge of the mainstream: some implications for concepts of identity’, Paper presented to the Political Science Program, RSSS, ANU, 7 May 1997.

¹³ Gianni Zappalà, *Four Weddings, a Funeral and a Family Reunion: Ethnicity and Representation in Australian Federal Politics*, AGPS, Canberra, 1997.

¹⁴ Helen Sham-Ho, ‘Ethnic women in politics’, *Without Prejudice* 7, 1994.

embodiment may present a barrier to such expectations. One senator pointed out that the Democrats, seen as middle-class ex-teachers, who did not engage in populist rhetoric, and whose support came in particular from the well-educated, were not seen as embodying the interests of the ‘battlers’. She saw this as an image problem for a party whose economic policies had been more concerned with the interests of the ‘battlers’ than had the major parties. She believed that at the end of the day, workers would not identify with the Democrats, despite the latter’s opposition to policies catering for ‘the big end of town’.

While the Democrats may feel that their middle-classness is a barrier to acceptance as representatives of blue-collar workers, middle-classing has also been taking place in the Labor Party, which no longer provides the kind of avenue into Parliament for manual workers which it once did. There is only one person in the thirty-eighth federal Parliament who lists their occupation prior to entering parliament as ‘tradesperson’—and that is a National Party MP. While a handful of Labor parliamentary representatives have trade backgrounds, their pathway to Parliament has been as union officials. On the whole Labor parliamentarians now embody quite different characteristics, such as higher education and professional qualifications, than do voters in the Labor heartlands. These changed attributes of Labor representatives have been implicated in what some have seen as the betrayal of traditional Labor values such as solidarity and egalitarianism.¹⁵ Current Labor representation is contrasted with the postwar reconstruction governments where manual workers made up almost half of the ministries led by J.B. Chifley, himself a former train driver. Since that time the workforce has changed under the impact of mass migration, increased female participation, service sector expansion and the decline of manufacturing. Nonetheless, blue-collar workers are the most under-represented occupational group in federal Parliament.

While there has been a decline in blue-collar representation, Parliament has become more representative in terms of gender and ethnicity. A number of parliamentarians in my sample spoke of the way that representation of such characteristics added another layer to their representational tasks. One MP spoke of his representational tasks in terms of three constituencies: firstly, his local electorate; secondly his party, its supporters and the ideas and philosophy it encapsulated; thirdly, that section of the community that shared an aspect of himself and that was under-represented in Australian parliaments—Australians from non-English speaking backgrounds. A senator spoke of four constituencies—electorate, party, nationwide constituencies with which she had a natural affinity, plus a parliamentary constituency: ‘the secretaries of every committee you serve on demanding your time’.

Apart from the issue of physical presence, parliamentarians were mostly able to identify groups of citizens who faced systemic barriers in terms of access to Parliament and who were not effectively represented through existing peak advocacy bodies. One senator identified the new working poor as lacking in advocacy groups and consequently suffering from lack of parliamentary representation of their interests. Another respondent believed that this was true of the poorest people generally, whether in or out of the workforce, because of the political timidity of peak bodies such as ACOSS which were reliant on government funding. It should also be noted that a number of peak bodies representing groups categorised by

¹⁵ eg., Andrew Scott, *Fading Loyalties: The Australian Labor Party and the Working Class*, Pluto, Sydney, 1991.

parliamentarians as under-represented have recently been defunded. This includes the Association of Non-English Speaking Background Women of Australia (ANESBWA).

Theoretical Arguments about Mirror Representation

The mirror theory of representation, also called descriptive, microcosmic or social representation, has been much discussed in the theoretical literature¹⁶ and it must be kept in mind that a representative from a specific group will not necessarily be more responsive to that group or represent the interests or views of that group better than someone from outside that group. Twenty years ago political scientists went so far as to say: 'No one has demonstrated that differences between representatives and the represented have an impact on actual behaviour or public policy'.¹⁷

Feminist political science has called into question such extreme statements about the irrelevance of embodiment to representation. It has always been easier for members of the dominant group to be accepted as disembodied political agents for whom characteristics such as gender or race are irrelevant. It is harder for an indigenous Australian to win acceptance as an impartial representative of all Australians than is the case for an Anglo-Australian. Similarly, while the pronoun 'he' has been happily taken to subsume the interests of 'she', the reverse is much less the case. And as we have seen, heterosexual Australians do not always believe they can be adequately represented by gay Australians.

There are real issues involved, however, in linking embodiment to representation. For example, Rosabeth Moss Kanter has provided an extremely influential analysis of the importance of numbers in group life. Token representatives of difference are placed under peculiar pressure to assimilate to the expectations of the dominant group. They have to overcome distrust arising from difference and survive loyalty tests which may involve distancing themselves from the group whose characteristics they embody.¹⁸

Another issue is the lack of formal accountability mechanisms in most cases between representatives of difference and their constituencies.¹⁹ The constituencies are self-defined identity groups (such as the gay community) with no formal membership or electoral mechanisms. Another issue is that the assumption that embodiment is necessary for adequate representation may also reduce the pressure on legislators to seek to understand and represent issues of difference.

The relevance of mirror representation to interest representation should not, however, be dismissed out of hand. Evidence has been coming in of what happens when female

¹⁶ eg., Hannah Pitkin, *The Concept of Representation*, University of California Press, Berkeley, Cal., 1967.

¹⁷ Jill Vickers, *Reinventing Political Science: A Feminist Analysis*, Fernwood Publishing, Halifax, NJ, 1997, p. 108.

¹⁸ Rosabeth Moss Kanter, 'Some effects of proportions on group life: skewed sex ratios and responses to token women', *American Journal of Sociology* 82 (5), 1977.

¹⁹ Judith Squires, 'Quotas for women: fair representation?', *Parliamentary Affairs* 49 (1), 1996.

parliamentary representation reaches what is termed critical mass (30 per cent). This is the level where women's issues become interesting rather than dismissed as marginal and marginalising for those who raise them. Content analysis of Senate debate indicates this sea change: issues such as violence against women have been raised three times as often in the Senate as in the House of Representatives.²⁰

The pressures on token minorities to conform with dominant group values and priorities noted by Kanter would appear, however, to militate against the effective representation of groups which constitute a relatively small part of the population and cannot expect critical mass representation. For example, there are some 120 ethnic communities in Australia quite apart from indigenous communities. For such groups, the development of forms of nonparliamentary representation, as through democratically constituted peak bodies, may be equally important as parliamentary representation in ensuring an adequate voice. A peak body may play a crucial role in ensuring that the interests of a section of the community are represented in policy development which affects them. Overseas, the principle of subsidiarity, or devolution of decision-making, has been described as one way to ensure that different groups are involved in different levels of decision-making.

Apart from interests and voice, there are also issues of legitimacy tied up in the mirror theory of representation. As one of my sample commented, there is the symbolic issue that when people can look and see people like themselves, they are much more likely to identify with an institution and have a sense of ownership of it. As well as this symbolic issue there is the more substantive issue of equal rights. In modern times the legitimacy of government has been closely linked to the provision of equal right to participate in the political process. Australia is party to international instruments such as the International Covenant on Civil and Political Rights that reinforce this democratic right to participate in public life on an equal basis. Where some social groups appear to be locked out of public decision-making, this casts doubt on the legitimacy of government because of what it says about equal rights to participate and equal opportunity in political careers, quite apart from the representation of interests.

Another argument associated with the equal opportunity argument is the utility argument—that only by removing the systemic barriers to some groups participating in public decision-making will institutions of government be able to draw on the best talent available in the community. This is the kind of argument put forward a couple of years ago in the Karpin Report on Leadership and Management Skills—that only by increasing diversity at the top can Australia become competitive in world markets.²¹ There are also arguments from partisan advantage—that parties with a deficiency of female votes, like the Labor Party, will make themselves more attractive to this constituency by increasing the visibility of women in their ranks.

Representation of Women: A Matter of Simple Justice?

²⁰ Historic *Hansard* (1981–93) records 69 items in the Senate on the subject of violence against women and 74 speakers. Of these, 55 were women. By contrast, the House of Representatives only records 19 items on this subject over the same period, and women made only six of the contributions on the subject.

²¹ David Karpin, *Report of the Industry Task Force on Leadership and Management Skills*, AGPS, Canberra, 1995.

Women have, in the 1990s in particular, successfully politicised their absence from parliaments.²² In doing so they have drawn on the rich ambiguity of political language which tends to distress political theorists seeking rigour and precision in the definition of terms. For example, there has been much talk of under-representation of women, which has blurred the distinction between representation of interests, the representativeness of the legislature and the equal right to act as a representative. As noted above, a more representative legislature does not guarantee the more effective representation of interests—in other words men may act as effective representatives for women and women may not. However, as we have also seen, embodiment is relevant in a whole number of ways to representation and to the way representative roles are performed. Furthermore, the politicising of women's absence was helped along by the televising of Parliament and increasing community rejection of the 'aggression and confrontation formula of the old order'.²³

As Carole Pateman has pointed out, women have been differentially incorporated as citizens, meaning that their primary obligations as citizens have historically been construed as being in the private rather than the public realm. In other words, women have been expected to put their families before fame, or their domestic duties before service to the broader community. Political parties have rescued women from the kind of serious interruption to domestic duties which might be caused by preselection for safe seats. It is only in the last 20 years that there has been real discussion, let alone action, on how public life might be changed to accommodate family responsibilities. Prior to this, women's family responsibilities were construed as insuperable barriers to equal participation in public life.

Instead women achieved a token presence and, as we have seen, serious constraints are imposed on token representatives of difference. This means that while women parliamentarians come under such pressure to behave as honorary men and while their male colleagues roll their eyes or groan when issues of special concern to women are raised, the representation of women is very difficult. It has been suggested that critical mass or critical events²⁴ are required before women can bring about a politics conducted 'as if women mattered', to use Canadian political scientist Jill Vickers' expression.

The importance of numbers has been one justification for the target adopted by the Australian Labor Party in 1994 of 35 per cent representation of women among its parliamentarians at Commonwealth, state and territory levels, to be achieved by 2002. Federal intervention in preselections would be invoked if the target had not been reached by that point. This proportion, around a third, is seen to be that where women can exercise real influence on the political culture. There has been considerable resistance to the achievement of this target in

²² Campaigns were begun by Labor women, such as the 'Half by 2000' campaign; non-government organisations formed a new coalition called Women into Politics; women's advisory councils and women's policy units put out 'how to' material; and the Liberal Party Women's Forum undertook training programs and provision of support networks for women contesting preselection. All of this was underpinned by international instruments and commitments relating to the increase of women in public decision-making.

²³ Rod Cameron, 'Address to the 11th National Convention of the Public Relations Institute of Australia', Canberra, 19 October 1990.

²⁴ Drude Dahlerup, 'From a small to a large minority: women in Scandinavian politics', *Scandinavian Political Studies* 11 (4), 1988.

some branches of the party, particularly in Queensland and NSW. In Queensland, Labor women became so frustrated that some broke away from the party to create the Australian Women's Party.

Coalition parties criticised Labor Party quotas as 'patronising to women' or putting gender before merit. By contrast, a delegate to the National Conference which adopted the quotas pointed to the hold which male-dominated concepts of merit had over the party: 'a bit like testing people for preselection according to how far they can kick a football or how well they sing bass baritone'.²⁵ Prime Minister Paul Keating supported quotas by drawing on the utility argument of the need to harness the talents of all people in the community.

A different concern to that over merit was the fear that factional leaders would put forward 'tame' women who would do more to promote factional interests than the interests of women in the community. This is where a new initiative, headed by former Victorian Premier, Joan Kirner, comes in. EMILY's List, inspired by its American counterpart, seeks not just to increase the number of women in Parliament but to increase the number of feminists. EMILY's List is a vehicle for providing financial and other forms of support to Labor women candidates who have been preselected for winnable seats and who have 'demonstrated a commitment to and ongoing advocacy of women's rights'.

Before being selected for support, candidates are interviewed on issues such as the policies they would advocate to help people balance their work and family responsibilities. EMILY's List was launched around Australia in 1996–97 after a prolonged struggle over its control between the Labor women initiating it and the National Executive of the party. It is now completely independent of the male structures of the party. The first six candidates to whom it has given endorsement and support are contesting the South Australian election.

Of my sample of federal parliamentarians, most of the women believed they had a special role to play in safeguarding the interests of women while numbers in Parliament remained so low. Conversely, women in the community tend to look to women MPs to support their causes, expecting that those who have shared their life experiences will have greater empathy with their concerns.

Parliamentarians articulated the dilemmas involved in being called upon to represent all women and saw one important role as being to provide resources to community organisations, or allowing their offices to be used as a base, to assist women or indigenous groups to represent themselves. These natural affinities had to be balanced with the interests of the electorate, which might be somewhat different. Such dual responsibilities also involved representatives dressing for different parts on different days. This kind of juggling was seen as something which women's lives prepared them for quite well.

One interesting fact was that when asked to nominate groups who might be under-represented in Parliament, male respondents were often more comfortable in talking about specific groups of women such as indigenous women or those from non-English speaking backgrounds than in talking about women who might be closer to home. For example, in discussing the

²⁵ Candy Broad, 'Affirmative action and the Australian Labor Party' in Marian Simms, *The Paradox of Parties: Australian Parties in the 1990s*, Allen & Unwin, Sydney, 1996, p. 82.

responsibility of political parties to make the Parliament more representative, one senator said: ‘You might say, let’s get a black woman in and that’ll kill two birds with the one stone’. Another MP identified women from non-English speaking backgrounds as both under-represented and ‘almost unreachable’, being cut off by language and patriarchal family structures.

It is clear that the major parties appreciate the symbolic importance of mirror representation. Liberal Ministers have routinely deflected criticism of impact of their policies on women by referring to the large increase of Liberal women sitting in the House of Representatives—these women have in some sense become an alibi for policy. There is also the matter of ‘smoke and mirrors’. Female MPs are commonly allocated the seats directly behind the Prime Minister and the Leader of the Opposition, so that the images of Question Time seen on the television news give the impression that women are present in the parliamentary parties in much greater numbers than they really are.

Conclusion

The major findings of the study were, firstly, that despite the salience of populism and constructs of the ‘mainstream’ in electronic media such as talk-back radio, parliamentarians were in most cases anxious to disassociate themselves from such views of representation.

Secondly, and perhaps more interesting, was the extent to which parliamentarians expressed post-modernist views concerning the importance of embodiment and the politics of presence—that is, that difference needs to be physically represented to be fully registered. This was not a view of representation that emerged at all in the most recent published study of the views of Australian legislators concerning representational roles.²⁶ This was, perhaps, because of the nature of the survey instrument used.

I believe that the understandings provided by parliamentarians when they have the opportunity to expound more fully their views of representation provide a richer picture and one which accords more with the complexity of contemporary political identities. These identities are not confined to political party or territorial unit, and this complexity is reflected in the way in which our parliamentarians are now thinking about their roles.



Question — You have mentioned emerging diversity and recognition of diversity, greater complexities. What implications do you think that has for the shape of political parties as we know them, in the future?

²⁶ Donley T. Studlar and Ian McAllister, ‘Constituency activity and representational roles among Australian legislators’, *Journal of Politics*, 58 (1), 1996.

Dr Sawyer — In Australia, as elsewhere, there has been a certain amount of partisan de-alignment, which means that people identify less strongly with political parties than they have in the past. One consequence of that is that they are more volatile in terms of voting. It also seems to leave more space for Independents and new minor parties to emerge. I think those are some of the consequences of the weakening of the old forms of political identification in Australia.

Question — You spoke with some scorn of the populist or mouthpiece politician. I am curious to know how would you see the role of representatives at the upcoming constitutional convention, given that a majority of the people are in favour of a republic; getting rid of the Queen, electing an Australian head of state, and so on. In fact, most people do not even know that we have a Constitution, let alone what is in it, and the desire for a major change can be dismissed by those who have studied the Constitution. Harry Evans, for example, has pointed out that we are already a republic, and Sir David Smith has pointed out that the Queen is only the ceremonial head of state. The real powers belong to the Governor-General. Would you say that those who mouth the populist, ignorant view for a republic are doing their jobs or should they be providing some education for the people?

Dr Sawyer — I think that we will find in the Constitutional Convention there will be men of judgement on both sides of the debate over the head of state and it is not as though there is emotion on one side and reasoned judgement on the other. I think that we will find that emotion and judgement are part of both sides of that issue and the way it will be represented.

Question — It seems to me that one way to reflect what you referred to as the post-modern view of representation is actually to change the electoral system. For example, to move towards some form of proportional representation as occurred in New Zealand. Did any of your interviewees make reference to such a possibility?

Dr. Sawyer — Half of my interviewees were senators who already enjoyed the benefits of proportional representation in terms of the flow-on effect of greater diversity of embodiment. It was not raised by any of the members of the House of Representatives, I have to tell you. Clearly, if we are talking about more effective representation of diversity, proportional representation will bring that about. But, even so, we will still have all those issues of unrepresented minorities and, in that case, I think we have to look towards their representative bodies outside Parliament and to ensure that those can access Parliament. Another issue, of course, is what in Europe is called subsidiarity, trying to devolve decision-making so that more and different minorities can be involved in government at different levels.

Bad King John and the Australian Constitution: Commemorating the 700th Anniversary of the 1297 Issue of Magna Carta*

Harry Evans

A SUGGESTION was made by a number of organisations that something should be done to mark the 700th anniversary of the 1297 inspeximus issue of Magna Carta which is on display here in Parliament House. The Senate Department decided to oblige by devoting one of its occasional lectures to the subject before it was known that other and grander events were planned. Considering other anniversaries which are commemorated from time to time, however, perhaps this is one which should be marked by more than one event.

In 1952 the Australian government purchased a copy of the 1297 inspeximus issue of Magna Carta of Edward I for the sum of £12 500, a lot of money in those days. The copy had long been in the possession of a British school which needed to sell it to raise money for school improvements.

An inspeximus issue of a charter is one in which the granter states that an older charter has been examined (Latin: inspeximus, we have examined), and then recites and confirms the provisions of that original.

The 1297 statute of Edward I confirms and enacts the principal provisions of the original Magna Carta which King John was forced by his rebellious barons to sign in 1215. The 1297

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House on 17 October 1997.

statute was enacted by Parliament (which did not exist in 1215) and is still in force in part in the United Kingdom and, indeed, in the Australian states and territories.

The purchase of the copy by the Australian government indicated a belief that the document is an important part of Australia's constitutional and legal heritage and that we ought to have a copy upon which we can gaze with awe and reverence.

Is Magna Carta significant, and should we gaze upon it with awe and reverence?

There is certainly a long history of reverence for Magna Carta. It was constantly cited during the struggle between Parliament and King Charles I in the 17th century. Parliament's Petition of Right of 1628 referred to the Great Charter and alleged that King Charles had violated its terms. Its virtually sacred status came to be encapsulated in a phrase which was repeated throughout the 18th and 19th centuries. Magna Carta was called 'the palladium of English/British liberty'. A palladium is something without which the city falls, and this phrase implied that the Great Charter was the essential basis of the whole structure of the British constitution. The phrase was also employed by some of the American colonists during their revolution.¹

On the other hand, there has been an equally long history of debunking of Magna Carta. Oliver Cromwell was very rude about it when the judges cited it against him, and incidentally provided a chilling foreglimpse of modern times when he scorned the old English republicans who regarded it as holy writ.² Some of the rebellious American colonists referred to it as a symbol of the genetic defects of the British system of monarchical government and of the radical difference in the republican foundation of their constitution.³ As will be seen, this disagreement amongst the Americans about Magna Carta was very significant.

The document has therefore long had a mixed reputation.

The actual content of Magna Carta is now not conducive to awe and reverence. Most of it consists of a lengthy and very tedious recital of feudal relationships which not only have no relevance to modern government but which would be of interest only to the most pedantic antiquarian. Here are two samples of what most of it is like:

No scutage or aid shall be imposed in our kingdom except by the common council of our kingdom, except for the ransoming of our body, for the making of our oldest son a knight, and for once marrying our oldest daughter, and for these purposes it shall be only a reasonable aid; in the same way it shall be done concerning the aids of the city of London.

If any one holds from us by fee farm or by socage or by burgage, and from another he holds land by military service, we will not have the guardianship of the heir or of his land which is of the fief of another, on account of that fee farm, or socage, or burgage; nor

¹ Noah Webster, 2 articles of 1787, in *The Debate of the Constitution*, Library of America, 1993, vol. 1, pp. 158, 669.

² Edward Hyde, Earl of Clarendon, *The History of the Rebellion and Civil Wars in England ...*, ed. W. Dunn Macray, Oxford University Press, Oxford, UK, 1969, vol. vi, p. 93.

³ Alexander Hamilton, *The Federalist*, No. 84, 1788, Everyman ed., p. 438.

will we have the custody of that fee farm, or socage, or burgage, unless that fee farm itself owes military service. We will not have the guardianship of the heir or of the land of any one, which he holds from another by military service on account of any petty serjeanty which he holds from us by the service of paying to us knives or arrows, or things of that kind.

Whether King John was entitled to the money to marry off his eldest daughter for the first time and whether somebody was obliged to supply him with knives and arrows do not now appear to be matters of great constitutional importance.

There are two provisions only in the document which strike the reader as being of some significance, and these are the provisions which are always quoted as evidence of Magna Carta's continuing importance and contribution to constitutional development. The provisions are as follows:

No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.

To no one will we sell, to no one will we deny, or delay right or justice.

These provisions certainly have a more modern ring and appeal to them. This is partly because they appear to anticipate subsequent declarations of the rights of the citizen.

Rudyard Kipling wrote a charming story to account for the language of one of these two provisions amongst the feudal minutiae. His story tells of a Jewish money lender, a member of a despised and persecuted race, who uses the influence he has gained as a result of lending some money to the barons to have inserted in the document the reference to 'no one' being denied justice, in the hope that some day these words will be taken literally and extended even to members of his race.⁴

The occurrence of the words certainly has the appearance of an historical breakthrough requiring more than the usual explanation. As one authority puts it, 'Magna Carta ... assumed legal parity among all free men to an exceptional degree' (but 'free men' was a restricted category).⁵

There is a conventional view that these two provisions are the foundation of English law about the liberty of the citizen. While this may be true, it can lead to exaggeration. It is often said, for example, that the provisions are the origins of the entitlement of the citizen to due process of law. This phrase has assumed enormous importance in the jurisprudence of all common law countries, and particularly in the constitutional jurisprudence of the United States because the phrase appears in the Bill of Rights in the first ten amendments of the United States constitution.

⁴ 'The Treasure and the Law', in *Puck of Pook's Hill*, 1910, various eds.

⁵ J.C. Holt, *Magna Carta*, 2nd ed., Cambridge University Press, Cambridge, UK, 1992, p. 278.

Magna Carta, however, does not refer to due process of law; it provides that free men are not to be dealt with except in accordance with law. What this meant was unclear in 1215 and in 1297.

The phrase 'due process of law' first appears in a statute of Edward III of the year 1354. This statute, which is referred to by the title Liberty of the Subject, contains the following provision:

... no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.

The first chapter of this statute provided 'That the Great Charter ... be kept and maintained in all points', so it is clear that the provision about due process was thought to add something new and different. (The documents were in Latin and French respectively, but the English translations are literal.) The Petition of Right also separately cited the 1354 statute.

The direct influence of the 1354 statute can be seen by comparing its provision relating to due process with the corresponding provision from the 5th amendment of the United States Constitution:

No person shall ... be deprived of life, liberty, or property, without due process of law.

The provision thus reached out over four centuries into the modern world in a more striking survival than any influence of Magna Carta.

There is a very great qualitative difference between a right to be dealt with according to law and a right to due process of law. According to law simply means in accordance with whatever the law provides; due process of law implies what the law should provide. This is certainly how the United States Supreme Court has interpreted the expression: as an entitlement to standard processes conducive to just results.

The statute of 1354 is therefore the real historical breakthrough. It is of greater significance to the constitutional heritage than Magna Carta. Perhaps the Australian government should have spent its money on a copy of the later statute so that we could gaze with awe and reverence upon the original use of this highly significant phrase.

It is true that Magna Carta may also be of some residual legal significance. In 1973 the Australian Capital Territory Law Reform Commission prepared a report on imperial statutes still in force in the Territory, recommending which statutes should be repealed and which should be retained in force. The report recommended that the 1297 version of Magna Carta, which is still in force in the ACT, should be retained. The Commission mildly dissented from the conclusion of its New South Wales counterpart that the value of the statute is chiefly sentimental. The ACT Commission thought that the phrase relating to the deferral of justice may make it unlawful for the executive government to delay unreasonably the rights of the citizen.⁶ Similarly, in June of this year the ACT Supreme Court referred to Magna Carta as

⁶ Law Reform Commission of the Australian Capital Territory, *Imperial Acts in Force in the Australian Capital Territory*, AGPS, Canberra, 1973, p. 7.

creating an overriding right to be dealt with by a court in relation to the traffic laws of the ACT.⁷ So Magna Carta may be regarded as a living statute.

Even so, the conclusion may be drawn that the two provisions in question are a mere legal fragment, hardly worth the purchase of 1952 and the regard for the document before and since.

I want to suggest that Magna Carta has a significance which is not dependent on its content. This is its contribution to the history of constitutionalism, and, in particular, to the development of the concept of a constitution.

In order to appreciate this significance, it is necessary to realise that many concepts and institutions of government which we now take for granted and which we regard as obvious developed extremely slowly over a long period and in very small accretions. Even the most simple ideas and institutions have been a long time in developing. It is also necessary to appreciate that there are very few really new ideas or institutions. The modern epoch has made very few original contributions to government. A history teacher of mine used to ask his pupils to imagine that a Roman citizen of the 2nd century BC was brought back to life early in the 18th century, 2000 years later, to find that there were very few things in the world with which he was not familiar. If he were revived merely 200 years later, he would be amazed by the things he saw around him. Suppose, however, he were brought to this building and taken into the Senate chamber. He would immediately recognise the physical layout, the institution and its function. He would know that he was in a senate, a body for debating and resolving public affairs on behalf of the community. He would no doubt be delighted to learn that its very name is taken from his language and his institution. And however amazed he might be by the technology of the modern world, he would not be unfamiliar with most of the institutions and methods of government of the modern state. No doubt the vast scale of modern societies would surprise him, but there would be few political institutions not essentially similar to their ancient counterparts. (It is not true that representative government is an innovation of medieval times; it too was known to the ancients.⁸)

There have been two inventions in government in modern times. One of them is federalism as we now understand that term, the constitution by a people of two different levels of government each having a direct relationship with the people through election and the application of laws. Another modern invention is the written constitution. Both of these institutions were invented by the founders of the United States, justifying the boast of one of their mottos that they created *novus ordo seclorum*, a new order of the ages.

The idea of a written constitution, a supreme law of the country to which all other laws are subordinate and which can be changed only by some special process different from that applying to ordinary laws, now appears to us to be too obvious even to think about. Most countries now have constitutions. Historical references to the British constitution remind us that constitutions were not always the modern type of written constitutions; the expression

⁷ 'Speed fine makes slow trip through court', *The Canberra Times*, 23 June 1997, p. 1.

⁸ As James Madison pointed out in *The Federalist*, No. 63, 1788, p. 324.

was used to refer simply to the system of government of a country, which until modern times was prescribed simply by ordinary laws and practices.

The written constitution, although it first appeared at a particular point in history, was also the product of a very slow process of evolution. It was not discovered overnight by the gentlemen of Philadelphia in 1787.

There were two essential stages in the evolution of the written constitution. The first stage was the medieval charter. We would regard it as a massively simple and obvious concept that some of the principal rules of government should be codified and set down in writing. This also, however, had to be developed in stages. Ancient states largely depended on practice and custom, and when Aristotle set about collecting the 'constitutions' of states what he collected were descriptions of the governmental practices of the ancient cities. There were certainly some ancient antecedents of law codes, such as the Twelve Tables in which the principal laws of the early Roman Republic were codified. Medieval charters, however, added a significant new element. They were granted by kings to their subjects. The kings were placed in their positions by God, but they granted boons to their subjects. Medieval government was highly monarchical and personal: the king *was* the government. On the other hand, feudalism and the church created a sort of primitively pluralistic society. Those grants therefore often were concerned with agreed limitations on the otherwise unrestrained personal powers of kings and agreed rights of the subject (if only *great* subjects) which kings ought not to take away. Thus came about the notions of limitations on the power of governments and of subjecting governments themselves to law, as well as the notion of rights of citizens which could not be taken away by governments. These were great discoveries, however simple they may appear to us now, and they represent the contribution to constitutional history made by the medieval charters. The ancient republics had contributed checks and balances, the division of powers between different institutions of government and different office-holders, whose individual powers were limited, but the power of government itself was thought to be by definition limitless. The concept of personal rights was embryonic in ancient times. The notions of limiting the powers of government itself and recognising rights of the citizen against government were essentially medieval contributions.

Of course, kings were sometimes forced 'at the point of the sword' to agree to limitations on their powers and to recognise rights of their subjects. This was famously the case with Magna Carta. King John was not only tyrannical but exceptionally devious, and so when his grand subjects rebelled they determined not only to make him change his ways but to force him to sign an agreement which would be difficult for him to slide out of in the future. It could be said that in this process bad kings make good laws: the more oppressions your king engaged in, the more prescriptions against them you would seek. As we know from A.A. Milne's poem and *1066 And All That*, King John was a very bad king, and when he was brought to book, without intending any pun, he made an exceptionally good law by the standards of the time. Thus occurred Magna Carta, the Great Charter. The statutes of 1297 and 1354, usually depicted as the work of wise and benevolent monarchs co-operating with good parliaments, had a great deal to do with those monarchs' need of money.

It is significant that the barons of 1215 had the advice and assistance of a clerk, in the original meaning of that title, the Archbishop of Canterbury, Stephen Langton. Clerks have a proclivity for writing things down. In its uneasy relationship with the secular powers, the church had a great interest in protecting its rights and in getting things in writing, and this also contributed to the development of charters.

Magna Carta was repudiated by King John virtually immediately after its signature, and, although confirmed by needy sovereigns on subsequent occasions, was also ignored by other monarchs. This only served to ensure its survival, because every subsequent resistance to royal power, especially those of the 17th century, was able to have history on its side by appealing to the Great Charter. What is often called the myth of Magna Carta reflected the relative successes of the English revolutions.

The other stream contributing to the development of the written constitution was the covenant, an agreement between a people and their God, and later between people to constitute a church, a society and ultimately a form of government. The biblical idea of a covenant was revived during the Protestant Reformation and played a large part in the revolution and civil war in England in the 17th century. It was taken by the refugees from those events to the New World. Covenants were a feature of the American colonies from the earliest settlement. The Mayflower pilgrims agreed to 'covenant and combine together in a civil body politic'.⁹ The history of colonial America thereafter is littered with covenants, which became more and more secularised and more sophisticated as they developed one from another. They were the forerunners of the various state constitutions which were the forerunners of the federal constitution of 1787.

Of course, America also had royal charters, and these also influenced the development of the various constitutions, in a significant way, as will be seen.

Establishing a system of government by a covenant meant that the covenant could be changed only by agreement of the whole people, which necessarily involved a procedure different from that applying to ordinary laws. The institution of federalism also reinforced the special status and different method of changing the constitution: because it was an agreement between the people of the states it could be changed only by the people of the states speaking through their representatives at state level, and necessarily it had to be supreme over state laws. Thus arrived the modern written constitution.

The founders of the United States were insistent that their constitution was a covenant not a charter, in other words, an agreement between a people not a grant from a king. They retained, however, the charter tradition of limiting government power and recognising rights. This was so even before they amended the constitution to include a bill of rights: the unamended constitution of 1787 contained a number of prohibitions on the national government and protections of the rights of the citizen.

The subsequent debate over whether the constitution should include a bill of rights illuminates the vital contribution of the medieval charter to constitutionalism. Reference has been made to the ambivalent attitude of the Americans to Magna Carta. Those who favoured a bill of rights, that is, provisions explicitly limiting the power of government in respect of the expressly recognised rights of the citizen, tended to look favourably upon the great precedent of the Magna Carta. Those who opposed a bill of rights did so partly on the basis that the concept of a bill of rights was derived from medieval charters such as Magna Carta which were handed down by kings, and was therefore inappropriate to a constitution established by

⁹ W. Berns, *Taking the Constitution Seriously*, Simon and Schuster, New York, 1987, p. 25.

the contrary process of an agreement between people. James Wilson, the greatest constitutional theorist among the founders, explained that a grant of rights like Magna Carta could be made only by a king with sovereign powers, not by a government with a limited delegation of power by a sovereign people who retain their *natural* rights.¹⁰ Contrary assessments of Magna Carta were thus central to the debate over a bill of rights.

As the debate progressed it became clear that agreement to a bill of rights was essential to achieve the adoption of the constitution. Opponents of central government regarded it as worthy of the same suspicion as kings. The operations of the new state constitutions had also taught a valuable lesson: even popularly elected governments should be explicitly limited; rights had to be safeguarded against popular majorities as against kings. The leading opponents of a bill of rights therefore undertook to support amendments to insert one. So a bill of rights was included by the first ten amendments in 1791. The charter and the covenant were combined and the medieval discoveries represented by Magna Carta thereby entered into the modern world.

The Australian Constitution exhibits an explicit combination of the charter tradition and the covenant tradition. It is a charter in the sense that it was handed down by the British sovereign through her Parliament and bestowed on the people of the country. It is a covenant in that it was drawn up by the representatives of those people and approved by them in a referendum, and it can be changed only by the same means. It neglects the charter tradition, however, by not having a statement of rights. In that respect the American constitution emphasises the charter tradition to a greater extent than its Australian counterpart. It is ironic that by the 19th century the British had repudiated the charter tradition by their hostility to declarations of rights.

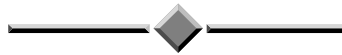
If Australia becomes a republic one of the changes required will be to turn the Constitution into a completely autochthonous product instead of a document bestowed by the monarch. This requirement particularly affects the so-called covering clauses of the Constitution, the provisions which are part of the British statute containing the Constitution but not part of the Constitution itself. There are differences of opinion about whether the covering clauses can be amended by the people in a referendum under section 128 of the Constitution, or whether they would need to be amended at all if the change were to take place. This problem is really a problem of turning a charter bestowed by a monarch into a covenant agreed to by a people. On the other hand, if a bill of rights were to be included in the Constitution this would introduce and emphasise the more significant element of the charter tradition.

In one respect Australia could benefit by a large injection of the charter tradition. Perhaps because of our convict origins, when we started with governors possessing absolute powers, we do not have a great understanding of the virtues of limiting governments and putting safeguards between the state and the citizen. We tend to think that, provided that governments are democratically elected, they should be able to do anything. In short, we do not have a strong tradition of constitutionalism properly so called. Our version of the so-called Westminster system encourages our leaders to think that, once they have foxed 40 per cent of the electorate at an election, they have the country by the throat. Our prime ministers and

¹⁰ Debate in the Pennsylvania Convention, 1787, in *The Debate of the Constitution*, vol. 1, p. 808; see also items in notes 1 and 3, and G.S. Wood, *The Creation of the American Republic, 1776-1787*, Norton & Co., New York, 1972.

premiers are averse to being told that anything is beyond their lawful powers, and are angered by restraints applied by upper houses or judges. They frequently behave in ways which make King John and Charles I seem moderate by comparison. When they have majorities in both houses of parliament they become more like those monarchs' eastern contemporaries. We have not had a Magna Carta, or a Petition of Right, or a Bill of Rights as part of our own history, and we have not sufficiently valued what we have inherited from those great events. We should, particularly at this time, tap into that inheritance.

So perhaps after all we may gaze upon our copy of the Magna Carta with some awe and reverence, not because of its content or for its legal significance but for the contribution it made to the development of the written constitution and the concept of rights of the citizen. In a sense, all written constitutions, including our own, and all declarations of rights, are its descendants. Remembering that, and other aspects of history to which I have referred, may help us a little on our way into another century.



Question — You remarked earlier in your address, rhetorically I took it, that we might have to question whether we got value in the twelve and a half thousand quid we paid for our copy of the 1297 edition. In view of the present climate of government, and bearing in mind the strong investment interest in collectables, would there be anything to prevent our 1297 edition of the Great Charter being offered in the next round of asset sales?

Mr Evans — Now I am really getting into dangerous ground. I think there would be a lot of people who would say, 'Are we that desperate?' Whenever we are told that Blue Poles is now worth umpteen million, I often say 'Quick, flog it off before it drops'. But whether I would say the same about Magna Carta I am not entirely sure. Perhaps we could swap it for a copy of the 1354 charter, if anybody has got one of those.

Question — You said that the Magna Carta that we have here is a copy of the 1297 issue. Does that mean that it is one of a number of copies made at the time, that is in 1297 and would you have any idea how many copies of the *inspeximus* still exist?

Mr Evans — I think that is what I would call a hard question. What we have in the argon gas-filled glass case around there is a 1297 copy, and that means copied by hand onto vellum, of the statute which was agreed to by Edward I, and these copies were sent out to various people around the country so that they would be aware that this law had been made. This was sent to some official in Somerset, if I remember rightly, and somehow it came into the possession of the school. So it is a medieval document, because obviously they had no printing and certainly no Internet, so that was their version of publishing, of sending out these copies and that is one of those. I am told that in all there are sixteen copies of the various versions of Magna Carta. So if you take all the versions across the centuries, or century, there are sixteen copies. So it is a pretty valuable document worth some millions I am told, to go back to that earlier question.

Question — Could you name the school?

Mr Evans — It was the King's School at Bruton. It is an ancient school which was founded way back in the dim dark ages, and how this copy came into their possession we are not entirely sure. It was sent to some sheriff or another and it is believed that the descendants of this sheriff had something to do with the school, and it passed down through the family, and it got into the possession of a very eccentric history master in the school and nobody knew it was there except him and a couple of other people. When the governors of the school found that they had it, they said 'Wacko, we'll flog that off quick smart and we will be able to repair the east wing', and that is how the Australian government got hold of it, because they put it on the market.

Question — I would like to give first a comment and then a question. The comment is that a plate, just beside the Bridgewater's, then the British Museum's, copy of the Magna Carta, reminded us that between the initialling of Magna Carta, and I cannot say exactly which and when, probably the 1215 version, there were in fact, I think, thirty-eight amendments slipped in, between the initialling and the final illuminated copies which were made. That tells us probably that nothing much has changed. More seriously, I did not have the sense to come to Australia early and when I came in 1979 I was rather puzzled because there were various things going on which suggested that the Constitution was defective in many ways. The only interpretation I could put upon those defects, was that they did not write down a lot of things which the average person growing up in Britain would take for granted because of that accumulated history from Magna Carta onwards. Is that a reasonable assessment of what happened? Such fundamental things as the right of peaceful assembly and so on, which just are not in our constitution. Am I right for thinking they were taken for granted?

Mr Evans — Yes, absolutely. Most of the people who drew up our Constitution had a great faith in the common law and the democratic election of the legislature. They tended to say that with the combination of the common law and British law, including Magna Carta and the democratic election of the legislature, we do not have to worry about rights. They will be sufficient safeguards of rights. Now there were some dissenters. Andrew Inglis Clark, from Tasmania, wanted to insert something of a Bill of Rights into the Australian Constitution and, as I said, he was met with the reaction, 'We do not want any of that American and French stuff thank you very much, we are British here.' The ironical thing being, as I said, that declarations of rights, like the American Bill of Rights, are taken straight out of those medieval charters of which us British people were so very proud. Had they put in a bill of rights, they would have been following in the footsteps of Magna Carta to a greater extent than they did. So there is a little irony there. But I think your analysis is quite correct.

Question — Can I ask you a question about a bill of rights? As you have explained very well, the bill of rights is well-placed, or reasonably well-placed, in American history, and because of the flow-through, as you said, from the covenants and the early history of the American states, how can we, in the review of the Constitution, inject into the media and to politicians, the historical need for a bill of rights for this wide, brown land? But before 2001, hopefully, now we are looking at the Constitution.

Mr Evans — Well, I am very carefully trying to avoid the question of whether I am in favour of a bill of rights or not, because that leads to acrimony and disputation which I always try to avoid. A large part of the process could have been reminding people that bills of rights are not modern inventions of wretched Americans and French people, that they have a long history to them and they come down to us via those medieval charters. In fact the medieval charters

were early bills of rights, grants of rights, recognitions of rights, and bearing that in mind, we may not be so hostile to them. But there is another reason for the hostility of course, and people will tell you very readily that if you put a bill of rights in the Constitution you will only increase the power of those judges to go about making laws and interfering with the running of the country, and that offends our so-called democratic theory of government. That theory of government that I mentioned before, that you get 40 per cent of the vote at the election and then you can ride roughshod over everyone for the next three years until the next election. That is democracy according to the Australian tradition, and the idea of judges restraining politicians is very alien to our tradition, and there have been some hostile words said about that in recent times. Another element in it is that if you adopted a bill of rights, without reforming Parliament, that would lead to a head-on confrontation between an all-powerful executive government and a judiciary trying to interpret the bill of rights in accordance with their lights. You would have only two people in the state and they would be like old King John and his barons fighting it out, the judges on the High Court, and the cabinet sitting over here in Parliament House, and that could be dangerous, to adopt a bill of rights without reforms in other parts of the Constitution.

Question — Before we get too carried away with bills of rights, can you offer any explanation as to why the United States, after they adopted the bill of rights, were able to retain slavery for nearly one hundred years, and even today in 1997 have more than three thousand prisoners awaiting execution on death rows around the country?

Mr Evans — Well, the first point is very interesting actually and it goes back to that little Rudyard Kipling story that I told you. In Rudyard Kipling's story the Jewish money-lender inserted in the document 'no-one shall be denied justice', in the hope that some day even his race would not be denied justice, and the American Constitution is very like that. This is a matter of great disputation between historians, but the principles of the Declaration of Independence and the Constitution are totally incompatible with slavery and the people who drew up those documents knew that, and if you asked them, 'What do you mean all men were created equal when you've still got slaves down there on your plantation?', they would have said 'Oh, well, it is a difficult issue, but we are quite confident that slavery will disappear in the next ten years or so; it is a dying institution, it will die out; and then those words will mean what they literally say'. Well, of course, we all know it did not die out, the Poms started opening up cotton mills and the southern planters started planting cotton and the institution did not die out, and disposing of it was much more painful. But that is the great thing about declarations of rights. If you get someone to sign a piece of paper which says that everybody is equal before the law, sooner or later someone will take that literally and will say 'Hey, what about this?' After all, that is partly how the old Soviet Union collapsed, because of the great gaps between these documents enshrining rights and so on, and the actual practice. So I think that is the answer to the question about the American Constitution and slavery, and of course, people became hostile to slavery because they said it is incompatible with what we committed ourselves to when we founded this country, and of course Abraham Lincoln said that.

In your second question, you mentioned the death penalty. Well, lots of countries have the death penalty, and interestingly enough the documents which I quoted contemplate the death penalty, because Magna Carta, the statute of 1354 and the provision in amendment 5 of the American Bill of Rights all say that no one will be put to death without due process of law. So capital punishment was very much in contemplation in all of those documents, and if you get into an argument in America about that you will get plenty of people who will tell you that the founding fathers did not object to capital punishment as such, which they did not.

Question — I am rather intrigued as to what was going on in 1952 in this country. Not only did we buy a copy of Magna Carta, but we also gazetted in the parliamentary triangle, Langton Crescent. Have you any idea what was the motivation of these two actions? Was it purely a product of Sir Robert Menzies as prime minister, or were there other people who were encouraging these actions?

Mr Evans — I do not know the answer to that because I have not researched it, but from what I do know about it, I think Sir Robert Menzies had a lot to do with it. I think if he had not been prime minister in 1952 we may not have bought that document. I think he had a great deal to do with it. The naming of the crescent I do not know anything about at all but I suspect again, if you look into it, that he had something to do with that. But I do not know the answer for sure. It is also rather ironical that the Magna Carta and the declarations of rights, which are its descendants, tend to be quoted by people who are of a rather left wing disposition. I am sure Doc Evatt at some stage said to Robert Menzies when they encountered each other in the corridors of the old building ‘What do you mean, buying Magna Carta, when you have just tried to ban the Communist Party, you old devil.’ And probably Doc Evatt when he turned up before the High Court could have said, if he did not actually say, ‘I am here for Magna Carta and to prevent these latter day violations of it’.

Aborigines and the 1967 Referendum: Thirty Years On*

Henry Reynolds

I WANT TO DO three things. I will begin by making some remarks about the referendum itself. I then want to consider the question of Aboriginal rights in the generation before 1967 and then in the generation after and look at the present situation. And I want to place that discussion about rights in an international context.

So I begin with the question: why was the referendum important? One could perhaps ask: was the referendum important? After all, the referendum did not, as is popularly thought, give Aborigines the vote; it did not extend social welfare benefits to Aboriginal people; it did not provide for equal pay or wage justice; it did not in itself dismantle the state systems of protection; and although it allowed the Commonwealth to legislate for Aborigines, it did not require the Commonwealth to assume full responsibility for Aboriginal affairs. And nor has any federal government subsequently. In fact the referendum failed to meet the demands which humanitarian organisations had made over and over again from the early years of the century, that Aborigines become a national responsibility. And the most pertinent question then might be why it took so long to change the Constitution and above all, the so-called race power under section 51 clause 26, given that so much effort had gone into the question in the 1920s and the 1930s. However, despite all that, the referendum must be seen as an event of central importance. A symbolic event enshrined in history because it did require a referendum and which necessitated a long and intense campaign and it called upon the whole electorate to make a decision on the place of Aborigines in Australian society. It was highly significant that the measure was passed with such commanding majorities in almost every part of the

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 14 November 1997.

continent. So, the referendum does stand as an important milestone. It stands beside the equal pay decision, the 1976 Northern Territory Land Rights Act, the Mabo judgment of 1992 and the Wik judgment of 1996.

Having made those brief remarks about the referendum, I want to turn back to the 1920s and the 1930s, before then coming forward to the present.

If you look at the referendum in the context of what was going on in the 20s and the 30s amongst reformers and humanitarians, what strikes you is how modest and how conservative the agenda of the reformers was in the 1960s, compared to their counterparts of a generation earlier. To illustrate this I will compare two petitions to Parliament, that is, the 1962 petition of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders, which sought the removal of discrimination to achieve equal citizenship for Aborigines. But compare that to the petition of 1927 presented to Parliament from the Aborigines Protection League, which asked the Parliament firstly to constitute a model Aboriginal state, to be ultimately managed by a native tribunal as far as possible by their own laws. This Aboriginal state was to have representation in the federal Parliament on the lines of the situation in New Zealand. Now that was a very much different agenda to what was being proposed in 1967. But it is probably necessary to say a little more about the ideas of the main figures behind the 1927 petition and the Aborigines Protection League.

It was based in Adelaide. The two most important figures were Colonel G.C. Genders and the leading feminist Constance Cook. They thought that two things were necessary for Aboriginal advancement. One was land rights and the other was self-government. So in a League document of the early 1930s called *A Native Policy for Australia* we read:

... if the Aborigines are not to be destroyed they should not be dispossessed nor subject to a system that is alien to them but they should be secured in all their tribal territories and encouraged to adapt to new needs all that is best in their traditions under their own leaders under the form of government that they understand, the direction of their day-to-day affairs by a tribal council of their own choosing.¹

It was, in other words, an agenda of separatism, of land rights, of self-government and it was strongly against the sort of assimilation which was still talked about as a commonplace in the 1960s. Thus Colonel Genders in writing to the Anti-Slavery Society in London said assimilation could only be considered, and I quote:

when we have learnt not to discriminate between the colour of the skin—a very far cry—and when under indirect rule the Australian aborigine has achieved national pride with his own government, chiefs etc, has his own universities, colleges, and Oxford and Cambridge men, then it will be time enough to talk of assimilation.²

¹ Aborigines Protection League, *A Native Policy for Australia*, Adelaide 1932, p. 4.

² Genders to Anti-Slavery Society, no date, Anti-Slavery Papers, Rhodes House, Oxford, S.22/6.378.

So, what do we make of this seemingly radical agenda in the past? It seems to me the reformers of the 1920s were using quite another language than those of the 1960s. Their proposals were far more radical, far more wide-ranging than those proposed in the 1960s. Even today their plan for self-governing Aboriginal territories is beyond the borders of mainstream politics. I think one of the reasons for this is the international environment in which they worked, and I will point to two things, that is British imperial policy of the time and secondly the League of Nations. I will consider those each in turn.

The Australian humanitarian reformers of the 1920s and 30s referred to the policies being pursued elsewhere in the Empire. Australia was still seen as part of the Empire, and the Aborigines were therefore seen as a colonial people. The then progressive policies of indirect rule appeared to be relevant to Australia. So too was the emphasis in the 1920s and 30s on protecting native land ownership and both of these provided powerful models to which Australian activists could refer. The 1930s saw a great deal of discussion about providing land rights particularly in east Africa and this was what Australian reformers referred to. Thus Colonel Genders, who constantly referred to colonial policy in Africa, explained in 1930 that it was coming to be recognised throughout the world that non-Europeans should have legal property in their land. In discussions going on overseas he said one principle predominated: the recognition that colonised people should have land in inalienable possession. So they referred then to what was happening in other parts of the Empire because at the time, that seemed relevant.

They also referred to the League of Nations. Now the League, as you may know, was deeply involved with the problem of minorities. The creation of new states out of the ruins of the Turkish and Austro-Hungarian empires produced the situation where many national minorities found themselves imprisoned within the new countries dominated by majorities which were, as often as not, traditionally hostile to them. So the League of Nations negotiated a whole series of minority treaties to ensure the cultural survival of the minorities. They were about groups, not about individuals. They were about minority rights. Equally, in the case of Germany's overseas colonies a system of mandate was created and Australia accepted the mandate for territories in the Pacific which committed the federal government to promote to the utmost the material well being and social progress of the inhabitants of the territory. It was an international commitment, a sacred trust of civilisation which Australian reformers could demand as well for Aborigines. They argued: if we now have these international responsibilities for Papuans and New Guineans and other peoples of the Pacific, surely we must also have international responsibilities for Aboriginal Australians. And so in the 1920s and 1930s the destiny of Aborigines and New Guineans was seen as trending in the same direction. Policies adopted in the mandated territory seem to be directly relevant to Australia.

Well that, very briefly, is a consideration of some of the radical reformers' thought of the 1920s and the 1930s. But you will remember I began with 1967. I want now to pass back towards 1967 on my way to looking at the present. Let us consider why things were different in 1967 than they had been in 1927 when that petition was presented to Parliament.

In the 1960s there was little British Empire left and few Australians thought of themselves as being part of that Empire. Colonial policies, or what was left of them, no longer seemed relevant to Australia. The sense that the Aborigines were in a similar situation to other colonized people had been lost. The only reference point seemed to be Australia itself. The consciousness of there being a fourth world, a world-wide movement of indigenous people,

had not yet emerged. Papua New Guinea, for instance, was, by 1967, heading one way, and the Aborigines another. That is, New Guineans were to be citizens of an independent country, whereas Aborigines thought that they would become equal citizens of Australia.

There is also a strong contrast between 1927 and 1967 when we consider the position of the League of Nations, as opposed to the United Nations, particularly in relation to minority policies. Whereas the League had thought a lot about minorities, the United Nations put the emphasis on the rights of individuals on the one hand, and the rights of states on the other. There was no other body between the individual and the state that could be assumed to have rights. That is, the emphasis was on the protection of individuals rather than of minorities against discrimination. The whole thrust of UN policy and documents was until recently assimilationist. This will be seen most apparently in the ILO (International Labor Organisation) Convention 107 of 1957. It was in some ways an important convention because it was the first post-war document that dealt with the rights of indigenous people. But it was strongly assimilationist in tone. 'These populations', the document declared, 'shall be allowed to retain their own customs and institutions where they are not incompatible with the national legal system or the objectives of integration programs'.³ So in 1927 it was possible to consider separatism as a serious consideration. By 1967 the emphasis was on assimilation and integration.

Despite the change of international scene, there is no doubt that the international situation was still significant for Aboriginal policy. In their book on the 1967 referendum, Atwood and Marcus write 'the 1967 referendum was initiated by a government keenly aware of the likely impact on Australia's image overseas of a successful deletion of the discriminatory clauses in the constitution'.⁴ And so, it is to that question that I now wish to turn, that is, to the present and the international climate in which current policies are unfolding.

In an article in the *German Year Book of International Law* in 1992, the author, B.R. Howard, observed that, 'over the course of the past twenty years a new and urgent voice has reached the international arena, the voice of the world's indigenous people'.⁵ The rights of minorities have received far greater international attention in the last ten years than at any time since the end of the Second World War. In 1992 the UN General Assembly passed without dissent the declaration of the rights of persons belonging to national or ethnic religious and linguistic minorities. Article one of that declaration urged states to protect the existence and the national or ethnic cultural, religious and linguistic identity of minorities within their respective territories and to encourage conditions for the promotion of that identity. The idea that there should be international protection for the identity of minorities is now clearly on the world agenda.

Meanwhile, the draft declaration on indigenous rights continues its slow progress through the United Nations. Drafting began in 1985 and it was presented to the Commission on Human Rights in July 1994. The forty-five articles of the draft constitute what are considered to be in

³ P. Thornberry, *Minorities and Human Rights Law*, Minorities Rights Group, London, 1991, p. 14.

⁴ B. Atwood and A. Marcus, *The 1967 Referendum*, AIATSIS, Canberra, 1997, pp. 35–36.

⁵ B.R. Howard, 'Human rights and indigenous people', *German Year Book of International Law*, vol. 32, 1992, p. 105.

the words of the document itself, 'the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.⁶ But in the meantime the most important international document concerning minority rights is the Covenant on Civil and Political Rights which was endorsed by the General Assembly in 1966 and which came into effect early in 1976.

Without doubt the Covenant is the world's single most important international human rights document. It maintains the emphasis of the UN on individual rights, but in one article, that is article 27, the situation of minorities is addressed. Individual members of ethnic, religious and linguistic minorities, 'shall not be denied the right in community with other members of their group to enjoy their own culture, to profess and practice their own religion or to use their own language'.⁷ The British international jurist, Patrick Thornberry, observed that the article is the only expression of the right of an identity in modern human rights conventions intended for universal application.⁸ It is in fact the first real attempt in the history of international law to provide such a universal right. As such, it bears a considerable burden. And as such, it is particularly significant for Australia and for the situation of indigenous people within Australia. The Covenant itself has inbuilt provisions to encourage observance by states. Under article 2, they bind themselves to implement the provisions. States are obliged to report to the Human Rights Committee, and as a result of the so-call optional protocol, to which Australia is a signatory, aggrieved individuals can take their case to the Committee, provided they have exhausted legal remedies in their own country, as we saw in the case of the Tasmanian laws concerning homosexuality.⁹

What is the significance to indigenous Australians of the Covenant? I suppose the most important statement about significance was made in the Mabo case by Justice Brennan with Mason and McHugh concurring, when they declared that the opening up of international remedies for individuals pursuant to Australia's accession to the optional protocol, of the Covenant, brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.¹⁰

What international standards can be found in article 27 which can be assumed to apply to indigenous Australians? It was quite quickly assumed that article 27 implied more than a passive role for the state in actually protecting minority rights rather than just leaving minorities alone. One of the important documents is by a special rapporteur, Franco Cappelletti, who conducted a study on the rights of people belonging to ethnic, religious and linguistic minorities. He insisted that implementation of the rights in question called for

⁶ Unpublished draft of U.N. Declaration on Indigenous Rights, ATSIC, Canberra.

⁷ Thornberry, *Minorities and Human Rights Law*, op.cit.

⁸ P. Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, Oxford, 1991, p. 142.

⁹ W. Walker, 'The remedies of law of the International Covenant of Civil and Political Rights', *New York Journal of International Law and Politics*, vol. 20, 1988, pp. 525-555.

¹⁰ Mabo v Qld, no. 2, 175 CLR, 1992 p. 42.

active and sustained intervention by states, because a passive attitude would render rights inoperative.

But what rights come under the rubric of enjoying culture and practicing religion? That in a way is the most important question. To answer this I will consider two things. I will look at a statement of general principles by the United Nations Human Rights Committee on this question and then I will consider a number of cases that were taken under the optional protocol relating to indigenous rights.

In 1994 the UN issued general comments on article 27 in which it was emphasised that the article, although expressed in negative terms, (people shall not be prevented from enjoying their culture etc.) put the governments in question under an obligation, 'to ensure that the existence and the exercise of this right was protected against denial or violation, particularly against acts of the state, whether through its legislative, judicial or administrative authorities'.¹¹ The right to enjoy a culture was not just an empty one but had real practical implications. The capacity to enjoy that culture might well consist 'in a way of life which is closely associated with territory and the use of its resources'. This may particularly be true of members of indigenous communities constituting a minority. Culture, the enjoyment of a culture, might well depend on access to territory and the right to pursue a particular way of life. In the general comments the Committee observed:

... that culture manifests itself in many forms including a particular way of life associated with the use of land resources especially in the case of indigenous people. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.¹²

Apart from this statement of general principle, particularly about the importance of land and traditional ways of life for the enjoyment of culture, the Human Rights Committee has elaborated its attitude in response to cases brought before it by individuals under the optional protocol.

Four cases heard between 1977 and 1992 are particularly relevant to the matter at hand. Two concern Canadian Indians and two Sami from Scandinavia, from Finland and Sweden. I will talk about them each in a moment, but in general it was determined that the right to enjoy one's culture could not be determined in abstract but had to be placed in its local context. The right could be threatened by being denied access to traditional communities, to traditional land, or by being denied the right to engage in traditional economic activities or by traditional life-styles being disrupted by mining or logging. But let me turn to the four cases in question. I will just say something about them briefly.

The first one, decided in 1981, was the one of Sandra Lovelace versus Canada. Very generally, it turned on her right to return to her reservation, having married a non-Indian, and the Human Rights Committee determined that indeed she was being denied her right under article 27 to enjoy her culture. Her capacity to enjoy her culture was dependent on her ability

¹¹ General Comment, no. 23 (50), Human Rights Committee, 1994, C. A. Supplement (A49/40), pp. 108–109.

¹² *ibid.*

to actually live on the reservation in a specific place where her culture, and not a generalised Indian culture, her specific culture, was practised. She could only enjoy her culture in that particular place.

The second case was decided in 1985, the case of Ivan Kitock versus Sweden. Kitock took his case to the Human Rights Committee because, he said, a government regulation prevented him from reindeer-herding and he was therefore not able to enjoy his culture as Sweden committed itself to under article 27. The decision in this case came out in favour of Sweden, but both sides of the argument accepted, as did the Committee, that reindeer-herding was a critical factor in being able to enjoy Sami culture and that although government regulation tried to prevent Kitock, he was able to hunt and herd, if he wished, and therefore, the critical factor in allowing him to enjoy his culture had not been completely denied.

The third case, in 1990, was that of the so-called Lubicon Lake band of Indians in northern Alberta versus Canada. This turned on the question of whether economic development in the tribal territory threatened the right to enjoy culture—whether article 27 included the right of persons to engage in economic and social activities which are part of the culture to which they belong. Now in this, the UN decided that indeed economic developments of the sort that were being proposed for the area would cause irreparable damage to the traditional way of life of the Indian band and Canada therefore felt obliged to take remedial action.

The fourth case, of 1992, was another Sami case, of Larndsmann versus Finland, when Larndsmann (of course individuals have to take cases) said that quarrying in his territory interfered with reindeer-herding and thereby prevented him from enjoying his culture. The Committee concluded that at present the quarrying in question was not large enough to threaten enjoyment of the culture, but if it expanded it could well do so, in which case such economic activity could be seen as directly threatening the right to enjoy traditional culture.

Those four cases from Canada and Scandinavia do, I think, have considerable relevance for Australia. I think they have particular relevance for what is currently taking place, in this very place. If the present legislation does, in effect, extinguish or limit native title rights on pastoral leases (and I am not here to say whether it does or does not, that is not my purpose at the moment) that is, if in one way or another people are denied access to traditional lands, it will be almost certainly in direct breach of Australia's obligations under article 27 of the Covenant on Civil and Political Rights. As we have seen, the view is that the capacity to practise culture relates to specific places and specific forms of economic activity. Sandra Lovelace could only practise her culture on her own reservation. It was not enough simply to have some access to Indian culture, it had to be her own specific band culture that she had a right to enjoy. Quite clearly, in Australia, the right and the capacity to participate in the culture, relates to the traditional land and the capacity to have access to it. So too, I imagine, would the obligation to provide the capacity for people to practise their religion also be closely related to whether or not people could have access to their own traditional lands. For that matter, certainly under the Convention of the Rights of the Child, it could also be argued that if people have not access to their traditional land, if children do not have access, they cannot enjoy their culture or practise their religion.

If it is the case that access to traditional lands is going to be limited or actually taken away, compensation will have little bearing on this particular question. Compensation in itself does not allow you to practise your religion or to enjoy your culture. And the problem perhaps for

Australia is that this issue cannot be contained within Australia because of the terms of the optional protocol. So what would happen is that if Aboriginal litigants took a case to the High Court on this question and lost in the High Court and had thereby exhausted legal remedies in Australia, there is no doubt they could take a case straight to the United Nations where I am sure they would have a very sympathetic hearing. If the UN Committee was to follow precedent that has already been established, it seems to me that Australia would have great difficulty in not finding the judgment going against it. In that case, Australia would find itself in the company of countries notorious for their treatment of their peoples and notorious for their record on human rights. At its worst, that would reawaken all those suspicions about Australia, about Australian racism, which have not fully been laid to rest in other parts of the world. And what would disturb me, this would begin to undo all the credibility that has been slowly built up by the Wik case, the Mabo case, the *Northern Territory Land Rights Act 1976* and the referendum of 1967. If that was the case, then much of the progress we have seen in the last thirty years since the referendum would be seriously threatened, particularly in relation to Australia's position in the world. And that, in conclusion, is a prospect which many of us look upon with some despair.



Question — One of the problems that seems to arise in terms of talking about legal rights is that whether you talk about international bodies or domestic, we still seem to be working within a very constrained language and discourse, which seems to be all about exclusivity. It seems that the problem, particularly in the domestic case, is not so much about exclusivity of rights but the quality of access and the potentials for co-existence. Could you just comment on that?

Dr Reynolds — In the specific situation I do not think anyone would say that to enjoy culture in the terms of the Covenant, Aboriginal people have to have exclusive use of a piece of country at all. I would have thought the capacity to access the country almost in the way that was considered and designed by the imperial government in the middle of the last century, of access to the country for cultural and economic reasons, would seem to me to be sufficient to be accepted as fitting within the obligations that Australia has taken on to allow minorities to practise their religion and enjoy their culture. I do not think it at all means exclusive use of the country, it certainly means access to it for cultural and religious purposes. Now, of course, article 27 is extremely limited. I mean that was the furthestest that international treaties have gone in creating rights for minorities, and it had to be phrased in terms of individuals still, but none-the-less, its meaning has undoubtedly been expanded over the last twenty years, far beyond what was probably thought appropriate at the time. It is now a much more significant and broad right than appeared when it was first drafted. I do not at all think it means an exclusive use of country. It is access for cultural and religious purposes. There may be all sorts of other issues, but in a way I wanted to talk about it in relation to the critical point that Australia has committed itself to the most important human rights document we have, and a breach of that on a large scale would be very serious indeed for Australia's international reputation. There is no question about that.

Question — Dr Reynolds, I know you are not a lawyer, but you might be able to comment. Does that significance of access to land granted for cultural and spiritual reasons, have implications for other reasons? For example, if an Aboriginal community is given access to traditional lands but then in the course of time decided that there was attachment to the land other than simply cultural and religious reasons, and actually wanted to engage in economic practices that had nothing to do, say, with culture and religion, would that mean that they forfeit the grounds on which they gained access to the land in the first place? Does that count them out on being able to pursue any economical development?

Dr Reynolds — No, I do not think so. The Covenant talks specifically about culture and religion and language, but as thinking about it has developed, it is clearly apparent that the relevant UN bodies now see that you cannot talk about culture without considering the economic life on which that culture is dependent, so that reindeer-herding has been judged as being critical for the survival of Sami culture, that quarrying might well threaten Sami culture if expanded. So in that sense it is most significant where people say a particular mining project is threatening our way of life, and it occurs to me that if a case was lost in the High Court, and you have to exhaust your domestic legal possibilities, then that would certainly be a case that would be considered and would have a reasonable chance of succeeding. As you say, I am not a lawyer, that is quite true, but, if you read the evolution of the jurisprudence of the Human Rights Committee, then that seems to be the way it is heading. Of course you cannot predict what would occur, but there is no question in my mind that it is in that sort of area where economic activity is important. I cannot see that this in any way would prevent people from using their land in other ways. It simply is not about that sort of thing. It is about a state, in this case Australia, promising to not prevent people from enjoying their culture. That is the critical point.

Question — I am interested in the issue you raised about compensation, being almost beside the point in relation to international human rights, because domestically just say the legislation, the bill before Parliament, is constitutional under the racist power, one of the issues is when property is acquired by the commonwealth just compensation has to be given. The question of ‘just’ I think is becoming increasingly complex in light of international human rights discourse and the impact of international human rights on the High Court’s interpretation of the Constitution. I actually did not know you were not a lawyer, but I am sure you can answer this question: do you have a sense of how the High Court will consider the word ‘just’ in the Constitution, in terms of international human rights, and stopping people’s access to culture etcetera, and how it is possible that the bill itself will again be unconstitutional on the grounds that ‘just’ compensation when a culture is being potentially eradicated, cannot be given?

Dr Reynolds — There are sometimes advantages in not being a lawyer. You do not have as much respect for the law which is probably often a good thing. There seem to be two issues. One is the question which clearly no one really knows and let alone the AG’s department I imagine, as to what compensation would actually mean on just terms in relation to this issue of it also having important cultural and religious implications. After all, it seems to me now, there is a growing international sense that states are responsible for the survival of cultural minorities within their boundaries and that survival as the UN Committee now sees, is related to access to land. So, you would suppose that compensation would have to be considered on a much larger and different scale to simply the economic value of the land. Now, where it would go is very very difficult to predict, but I suspect compensation would probably have to

take into consideration those things. In terms of the extent to which the High Court would take into consideration the international law on this, once again it is hard to say, but as we saw with the Mabo judgment, Brennan and others said that because Australia has opened up its law by the optional protocol, by allowing people to go out of Australia in a sense to take their cases beyond the High Court to the UN, then this offers a conduit by which international law can flow into Australia and clearly affected the judgment in Mabo. Whether that view would prevail in the High Court now is very difficult to say. But undoubtedly all of these things would have to be considered with what result I do not think anyone can predict and quite clearly there are all sorts of people doing sums around Canberra as to what it might cost.

Question — So you do not agree with our leader that Wik is just a land management issue?

Dr Reynolds — I think it was quite possible in the nineteenth century for people to say: ‘Look, these people do not really own the land they just wander across it and it does not matter whether they have this bit or the next bit, we can push them off. They are simply nomads’. We now know beyond question, that particular pieces of land are of critical importance for Aboriginal groups, not just economically but also deeply important for their cultural and religious life. We know that. We cannot say now, we do not have the excuse of the pioneers, ‘We did not know’. We do know, so we cannot possibly consider it a matter of land management only. It is clearly something of far greater significance and indeed may well determine the cultural survival of some groups, that is, if they are permanently denied access to their own country, then that seems to me to have serious implications. Not just for Australia, but for the whole world. I think the whole world is concerned in the cultural survival of these very small groups, indigenous groups, and it is not enough to say they have access to a generalised Aboriginal culture. I think that is quite clear.

Question — The High Court and the government have so far limited native title to crown land and leasehold land. Given what you are saying about the United Nations, would Aboriginal people be able to use the United Nations to extend native title claims and/or compensation claims to freehold land and, God forbid, leasehold land in the ACT?

Dr Reynolds — No. I do not think that is the case. What we are talking about is access to land for cultural purposes, which is the critical thing. If there was some particularly important cultural site, then I suppose people could argue that they should have access to it for cultural purposes and that indeed would have to be presumably taken through the courts. I think that it is not a question of ownership of land, it is having some access, some bundle of rights over land over which other people have other bundles of rights. That seems to me to be what we are talking about in relation to pastoral leases. The question of if there is an important cultural site which is of great cultural significance to a group of people who say the survival of our culture depends on having access to this site occasionally, then it would seem to me it is something which should be taken seriously and should be negotiated before it has to be taken through the courts. But it would seem to me there is a case that could be argued in a court on that question.

Question — What does the black armband view of history mean?

Dr Reynolds — Well, I have an investment in the black armband version of history, I mean I clearly have made my reputation by peddling it. I think it is important in Australia as a corrective to what went before, which I like to call the white blindfold version of history. And

I think it is a process of history we had to go through, as many countries in the world are going through, a process of truth-telling and reconciliation. All over the world this is happening, and it is as though the pace of these developments speed up towards the end of the century. Now I think the black armband view of history was critical in reaffirming old truths which people were quite happy to talk about in the nineteenth century. Where political correctness, it seems to me, did have an important and deleterious effect was the political correctness of the early twentieth century which wrote out much of the story of conflict and dispossession. Now, in a way, it is the problem we have that generations, including myself, grew up with a far too heroic picture of Australia's history. I think soon we should be in a position where we can throw away both the white blindfold and the black armband because I think we are getting to a stage where we can accept that there are good things and bad things and they are not mutually exclusive, they do not cancel one another out.

Question — I was wondering does the Covenant which you referred to lay down what constitutes a cultural minority and who its members are, or is that left to individual sovereign states to determine. Could the Australian government, through legislation, determine a criteria for who is a member of the Aboriginal cultural minority and who is not?

Dr Reynolds — Yes, that is a good question. The UN has had trouble in defining what exactly a minority is, although there are some fairly good definitions in some of the various studies that have been done. They certainly do not think that this question can be left to states because quite obviously states would say we do not have any minorities, as the French have done. The French signed the Covenant but added a reservation saying there are no minorities in France. When they consider France as including Polynesia, it is pretty extraordinary. The Bretons have had great trouble taking cases because they get there and the Committee says 'Oh yes, well, it looks as though French cultural imperialism (they do not use those words, but that is what they mean) is giving you a bad time, but we cannot deal with it because the French only signed with that reservation'. So, there are problems about that, but certainly the question of what is a minority, is not left to states to define and I would have thought that given that indigenous minorities have, for quite some time, been involved in the UN process, there is a clear understanding of who the indigenous minorities are and I would think there is no question in anyone's mind that the Aborigines are seen throughout the world as an indigenous minority, regardless of what any Australian government did.

Question — We have been talking a lot about the United Nations and it seems to me that in Australia we do have specific groups of people who reject the United Nations and the extremists in fact talk about it as though it is a sort of a world conspiracy. Some of that thought shows itself occasionally in some of our more conservative political parties, so what is the situation? If it does go to the United Nations, if we have signed the protocols, these are people who will say that does not matter, we do not have to honour that, we do not have to have any obligation under it because the United Nations is 'phut'; it does not mean anything.

Dr Reynolds — Yes, I am sure that would be the reaction. But in the case of the Covenant in particular, quite clearly the High Court has already determined that through the actions of Australian governments in ratifying it even if they have not actually legislated it into law. If there is a doubt in the common law then you can look at international law, and in particular in relation to article 27, it does seem to me that there is a strong argument to say that this now has to be considered as an influence at least on Australian domestic law. In terms of what would happen if Australia was called before the Human Rights Committee to justify what it

had done, it would be very difficult for Australia not to go, because it has agreed that it will go under the optional protocol, in a set time period, it cannot just ignore it, and I think Australia would feel obliged to put up a case. Now it depends just how much Australia wants to continue to see itself as a major player in the question of human rights in the world. We may, in fact, be receding from that—I do not just mean this government at all—we may be receding from that view of ourselves. It is as though we feel our current environment is no longer conducive to those sort of ideas. If that is so, that is distressing, but for the moment Australia values its reputation and a simple refusal to do anything about this question would have a very serious effect on our reputation, and in a way, because of our situation, we have to be above suspicion. We carry around with us the legacy of the white Australia policy. After all, Australia was professedly a racist state for sixty years of this century. We have made admirable changes at a remarkable rate; that does not mean the legacy does not remain, so we are constantly in the world battling against those perceptions and if we make a mess of this, if we simply say the UN can go and jump in the lake in Geneva, then I think that would have very serious implications, and that affects all sorts of practical things, as we have seen. Tourism, education, trade, all of these things get bound up with the way the world sees Australia and on this question we cannot avoid international attention. There has always been international attention on the position of indigenous Australians, right from the nineteenth century, and now, that is much more formalised. The world takes an interest in the fate of indigenous people. We may well say well that is nothing to do with them, this is our business, but the rest of the world will not accept that as an argument so it does matter to our reputation, if we still believe that is important.

Question — There have been some suggestions in the High Court and elsewhere that the commonwealth government can only use the racist power in the Constitution to pass laws which are beneficial for Aboriginal people rather than discriminatory laws. I was wondering if you could comment on that?

Dr Reynolds — Yes, the argument that you can discriminate but only in favour of people. Well, that is an argument which I find persuasive but quite clearly it is not by any means certain what the High Court would do. That seems to be a consensus of legal opinion. But that would be one of the questions which we cannot be certain about until there is a definite judgment.

Question — Is John Howard correct when he says that without the amendments Aborigines have power of veto over seventy-eight per cent of Australia?

Dr Reynolds — No, I do not think that is true. That is a question for other people, of which there would be many around here. I do not think that is the case, but I do not want to go into that sort of detail.

Question — Is it an easy way out to give compensation to the Aborigines and not give them their culture, to try to influence them by offering them something more than their culture should give them? To offer the Aborigines money or whatever, as compensation, is not giving them the right to go through the land the way they should be able to do, to do with their culture. Is that a fair assessment of what is being offered?

Dr Reynolds — If it is a case where people do not have access now, or will lose access to their country, as we have said, compensation would certainly be required and it may turn out

to be compensation of a considerable magnitude; but that really begs the question of whether or not the capacity to enjoy your culture and practise your religion depends upon having access to that particular place on the surface of the earth. If that is the case, then denial of access to country is using the power of the state to prevent people from enjoying their culture, and that seems to me to directly contravene the Covenant. In the nineteenth century when they profoundly believed in Christianity and that there really was an after-life, they were convinced that that was more than compensation enough. We may have taken your land but we are going to give you the secret to eternal life. But most of us do not, unfortunately, feel that is compensation, otherwise it would be easy. Simply say, look, your compensation is to have our religion and that will ensure that you will live forever.

Question — Dr Reynolds, I would like to get your reaction, to a fact that I happened upon myself only last week, and a fact which is probably little known throughout this country, which is that nearly all the people, or at any rate most of the people, who end up in gaol for not voting, in Australia, are Aboriginal people. In other words, people gaoled for the offence, if you call it an offence, of not participating in the political affairs of Australia.

Dr Reynolds — Well, this in a way touches on much of what I was talking about in the paper. This takes us back to the time when enlightened opinion both Aboriginal and non-Aboriginal, seemed to want that Aborigines should have all discriminatory measures against them removed. Amongst that clearly was the right to vote and then to be like all other Australians, and to be required to vote was seen as a necessary and progressive reform. But as you say, there are now people who say by voting we concede that we are citizens of Australia and we do not think we are and therefore we will not vote. So, indeed it is a dilemma of very considerable dimensions. The only way around it, it would seem to me, would be ultimately to put the question to the Aboriginal community itself and see whether they want to vote, and maybe go back to voluntary voting. But then that discriminates. We would be held up as being discriminating against Aborigines by not requiring them to have the same provisions about voting as everyone else has. We have compulsory voting. So we are, you see, dealing with two quite different intellectual traditions. The tradition of 1967 and the tradition of the model state petition of 1927 which was going off in quite a different direction. So that is not an answer, but that is maybe an elaboration of your question.

Robert Arthur Broinowski: Clerk of the Senate, Poet, Environmentalist, Broadcaster

Richard Broinowski

BORN IN MELBOURNE on 1 December 1877, Robert Arthur Broinowski was the sixth of eight children of a Polish refugee, Gracjusz Josef Broinowski, and his wife, Jane Smith, the daughter of an English whaling ship captain. In Australia, Gracjusz became a prominent explorer and artist and teacher, whose speciality was Australian mammals and birds. He was a friend of Adam Lindsay Gordon and Edmund Barton. From all accounts, he identified strongly with his adopted home and its unification in Federation, and he passed his values and his intellectual curiosity onto his children. As his son Robert wrote to a friend in 1924, ‘my father was a Pole, whose life was full of interest, who was a man of culture and wide knowledge, and who encouraged me to pursue the things that really matter’.¹

Robert Broinowski was only four when his father moved from Melbourne to Sydney in 1880. Most of his brothers were educated at the new Jesuit school of St Ignatius at Riverview, but after attending Milson’s Point Primary School, he was sent to another newly-established Jesuit school, St Aloysius, first situated in Woolloomooloo, then in Surry Hills. Many teachers at St Aloysius had no degree or educational qualifications, or the skills to communicate with pupils. Harsh physical punishment was rife. Yet Broinowski came through with a solid educational grounding, although not with any religious convictions. He seems to have remained free of these throughout his life.

Two recollections of Broinowski’s youth in Sydney showed his love of historical events, and encouraged his growing vocation for public service. One was the parade he witnessed in 1885 outside his father’s front door in Macquarie Street, of the New South Wales contingent marching off to the Sudan War—‘The Soudan Contingent’. The other was his participation as a spectator in the ceremony in Sydney’s Centennial Park on 1 January 1901 when the

¹ Quoted in *Australian Dictionary of Biography*, vol. 7.

Governor General declared Australia a Commonwealth. Both were described in detail in ABC Radio broadcasts he made following his retirement.

Broinowski's first job, obtained without university education, but with the help of his father's friend Edmund Barton, was as a clerk in the fledgling Department of Defence in Melbourne. He joined on 10 February 1902, and remained until 24 January 1907, when he became Private Secretary to the Minister of Defence, T.T. Ewing. He served as Private Secretary for four years—to Ewing, and then to his two successors Sir Joseph Cook and Sir George Foster Pearce (the latter for two periods—in the first Fisher Ministry from November 1908 to June 1909, and in the second Fisher Ministry in 1910 and 1911). He accompanied his ministers, especially Senator Pearce, on many of their travels in Australia, including going with Pearce to greet the first RAN vessels, the torpedo-boat destroyers *Yarra* and *Parramatta*, on their arrival in Perth from England. Broinowski also wrote speeches and press releases. For Pearce, he always carried in his luggage the current Commonwealth Year Book and latest Hansards. Armed with Broinowski's research, Pearce felt he could handle any press query or win any argument in the Senate.²

On 1 March 1911, Broinowski resigned from Sir George Pearce's office and was appointed to the staff of the Senate as a clerk and shorthand writer.

Federal Parliament had by now been in the Victorian Parliament House in Spring Street, Melbourne for ten years since Federation. During this period, the first eight federal ministries (those of Barton, Deakin, Watson, Reid/McLean, Deakin, Fisher, Deakin and Fisher again) had put together fundamental legislation to run the new Commonwealth, and procedures to make the nascent Parliament work. And for the first time since Federation, a ministry, the second Fisher ministry, enjoyed majorities in both Houses, and thus the strength to push through more legislation.

Broinowski joined a group of 53 parliamentary staff, divided between five departments—those of the Senate, the House, the Library, Hansard, and the Joint House (responsible for amenities and catering). The principal characteristics of the parliamentary bureaucracy were, and remained throughout Broinowski's time, order, respect for the status quo, a measured progression through the hierarchy, and a heavy emphasis on the importance of apprenticeship. Promotion depended on seniority and knowledge of parliamentary practice, which had nowhere been written down. The powers of the two Clerks of the Houses were significant, due to their ability to influence members and senators through the advice they gave.

Broinowski's career, as a committed parliamentary man, reflected these traits. From shorthand writer he was promoted to Clerk of Papers on 1 July 1915, and then to Usher of the Black Rod, Clerk of Committees and Accountant of the Senate on 28 August 1920. At the beginning of May 1927, Robert moved from Melbourne with all other parliamentary staff to Canberra when Parliament was relocated there, and was present in his capacity as Usher of the Black Rod for the opening of the new Parliament House by the Duke of York on 9th of that month. From 30 December 1930 until 31 December 1938 he was Clerk Assistant and Secretary of the Joint House Department, and from 1 January 1939 until his retirement on 30

² Peter Heydon, *Quiet Decision: a Study of George Foster Pearce*, Melbourne University Press, Carlton, Vic., 1965.

November 1942, Clerk of the Senate. As Clerk of Committees, he acted as secretary to a number of select committees, one of the most important of which, under the chairmanship of Senator R.D. Elliott, inquired into the whole parliamentary committee system and its value.

Although there is little on the record about his concrete achievements in procedural matters, there is much anecdotal evidence that in all these capacities, Broinowski was efficient and effective. He had many friends among parliamentarians, and was respected as a man of sound judgment and erudition. His advice was often sought on matters substantial as well as procedural. On matters of protocol, he was also accomplished.³ But Broinowski was also conscious that his position as adviser, helper and enabler to parliamentarians was sensitive, to be handled always with discretion. He tried not to be in the spotlight. As he wrote to a literary friend, Kate Baker, on 5 September 1917, ‘in the corner where I am, a man must keep out of politics, although he is surrounded by them. I may stand in the centre of the merry go round, but I must never ever ride on the horses.’⁴

He also had the reputation of being a fierce defender of Senate dignity and procedure. He was, as Gavin Souter described him in *Acts of Parliament*, ‘a stickler about formality and propriety ... a quirky amalgam of sophistication, erudition and severity ... [who] did not shrink from such unpopular decisions as banning poppy-sellers from the precincts on Remembrance Day, and stopping parliamentary staff from playing ping-pong’, inspiring C.J. Dennis, in 1930, to write of him the following verse:

Oh, his brows were wreathed with thunder
as he gazed in stupid wonder,
As he heard the sinful pinging and the
sacrilegious pong.
And he said, ‘Henceforth I ban it. If I
knew who ’twas began it
I would have him drawn and quartered,
for ’tis obviously wrong.’
Then back adown the corridors, unbending
as a god,
Went the adamantine Usher of the Big
Black Rod.⁵

³ As secretary to Defence ministers, Broinowski had been required to handle visits by senior visitors and ships. He made all the arrangements, for example, to receive Australia’s first RAN units in Perth, *Parramatta* and *Yarra*. He carried this experience into Parliament, and looked after the Duchess of York at the opening of the new Parliament buildings in 1927. He was also responsible for all arrangements for a visit to Canberra of the Duke of Gloucester in 1934.

⁴ Broinowski Papers, MS 599, National Library of Australia.

⁵ Gavin Souter, *Acts of Parliament*, Melbourne University Press, Carlton, Vic., 1988, p. 262.

Another portrait of him, this time as Clerk, came from the pen of *Daily Telegraph* journalist Richard Hughes, in an article following the Senate's disallowance in June 1942 of a regulation permitting the sale of beef from the Werribee Sewerage farm in Victoria. Headed 'Those meddlesome old men of the Senate', the article called the Senate 'a comfortable Home for Old Men', whose real ruler was not the President 'with his verandah of rare hair which sheltered his forehead in mute protest against the absence of a wig', but the Clerk, Broinowski, who was described as 'a thin querulous fellow, with a beaky nose, light, angry eyebrows, and a small wig. He hisses acid instructions and advice to the timid senators like a bad-tempered stage prompter.' As a result of the article, Hughes and four other Consolidated Press journalists were banned from Parliament House for several months.⁶

As Clerk, Broinowski narrowly failed to defend the dignity of Parliament by having another journalist banned, a photographer from the *Daily Telegraph*, for hiring an elephant from a local circus and snapping it with its head inside the entrance of Parliament House with the caption 'An elephant looks at a White Elephant'. This time the journalist was saved by the sense of humour of the President of the Senate, Sir Walter Kingsmill, who let him off with a warning over a whisky.

There is no doubt about Broinowski's considerable physical presence. Rupert Loof, his successor but one as Clerk of the Senate, remembers the fine, tall figure he cut in his black trousers and gaiters and lace as Usher of the Black Rod, leading the procession from the House of Representatives into the Senate on 9 May 1927, when the Duke of York opened the new Parliament House in Canberra.

But there are two other areas where Broinowski made a significant contribution to Parliament, and the growth of Canberra as the federal capital. One was the national attention he helped focus on Canberra through the development of a rose garden during the Great Depression. The other was to dissuade the architects of Canberra from building a national library in the grounds of Parliament House.

From the laying of the foundation stone for Canberra on 12 March 1913, bureaucratic infighting, inertia and controversy impeded growth of the national capital. Walter Burley Griffin was almost constantly involved in jurisdictional battles with officials. The First World War caused cancellation of a design competition for the new Parliament House, and delay in its construction and completion. The Depression caused federal budgets to be cut and several major building projects to be shelved. From 1929 on, there was a drastic slowdown of public servant transfers from Melbourne, and residential and commercial leases were abandoned. The miseries and harshness of Canberra, 'the bush capital'—small, pokey houses, inadequate transport, few amenities, red dust, sharp winds, unsealed roads and footpaths, millions of blow flies from the surrounding sheep country—were as yet not alleviated by development. Australians outside Canberra were trapped in their own Depression miseries, and had no thought, sympathy or support for the national capital or its growth, or Australia's new Parliament.

⁶ G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901–1988*, Melbourne University Press, Carlton, Vic., 1989, p. 440.

In 1931, as Secretary of the Joint House Department, Broinowski initiated a national buying campaign of roses to beautify the barren paddocks on both sides of Parliament House. Tennis courts (initially on the Senate side), and a bowling green and courts (on the House side) had been constructed in 1927, but nothing else.⁷ Supported by the President of the Senate, Sir Walter Kingsmill, Broinowski first approached the National Rose Society of NSW, which got a Mr Rex Hazlewood, who had a rose and tree business, to prepare designs. In late June 1932, Broinowski wrote to national rose societies in Victoria and South Australia, and prominent rose growers in Queensland, Western Australia and Tasmania, for contributions and support.

In 1933, Broinowski broadened his search for potential donors to the Brisbane City Council, Goodyear Tyre and Rubber Company (Aust) Ltd, OR Ltd (who made Kia-ora fruit juices), North Sydney Council and the NRMA. Individuals were invited to buy a rose bush and have it planted in Canberra for one shilling and fourpence. Staff and journalists at Parliament House were carried along by Broinowski's enthusiasm and also contributed. On the House side, in 1933, he persuaded Dame Mary Hughes, Dame Enid Lyons, Lady Gullett and other parliamentary wives to contribute to a 'Ladies Rose Garden'. In 1937, roses were planted in the House side garden in memory of Captain John Macarthur, founder of the merino wool industry in Australia. Signs denoting contributors were erected beside plants (most have now regrettably disappeared, although the Macarthur sign is still among the few that survive).

In 1935, Broinowski invited the Japanese trading company Mitsubishi Shoji Kaisha in Sydney to contribute, and they responded with 100 Japanese lily bulbs. Bulbs from Holland, and later from Britain, were also sent. Broinowski also initiated tree plantings in the gardens, including donations from Canada and the United States. As they matured and flourished, the gardens were regularly used for formal events associated with the Parliament as well as the recreation of senators and members. One parliamentarian set up his bee hives there.

Broinowski's other contribution was to resist successfully an early plan by Cabinet, conceived in December 1933, to erect the new National Library in the Senate gardens. The decision became public, almost certainly through intervention by Broinowski. In its report, the *Sydney Morning Herald* wrote: 'The site is at present occupied by a part of the national rose garden, for which gifts of roses have been sent from all parts of Australia, and by the Parliamentary tennis courts and cricket pitches.'⁸ Acting with speed through the Christmas-New Year period, Broinowski enlisted the support of Sir Walter Kingsmill as Chairman of the Joint House Committee to appeal to the Prime Minister, J.A. Lyons, against the decision. The appeal succeeded and the scheme was dropped. Had it proceeded, it may have inhibited the development of the National Library as a separate entity independent from Parliament. The Library was constructed instead in King's Avenue, and moved in the 1960s to its permanent location beside Lake Burley Griffin near Commonwealth Avenue Bridge.⁹

Broinowski retired as Clerk of the Senate on 30 November 1942. This was noted with

⁷ A full account of the history of the gardens at Parliament House and attempts to restore them is contained in *Restoration of Old Parliament House Gardens* written by John Gray, a consultant in Canberra, and published in May 1994.

⁸ John Gray's report, para 3.4.

⁹ The National Library was separated from the Parliamentary Library by the National Library Act of 1960, and in 1968 the National Librarian, H.L. White, and his staff moved the library into its new home.

speeches in Parliament and motions of appreciation. On 22 August 1950, Senator John McCallum wrote to the Minister for Fuel, Shipping and Transport Senator G. McLeay pointing out that, just prior to Broinowski's retirement, the then President of the Senate, Senator J.B. Hayes, intended to recommend him for a decoration, but Hayes had ceased to be President before he could do so, and had been succeeded by Senator Cunningham. Cunningham had made a verbal recommendation to the then Prime Minister Mr Curtin that Broinowski get a C.M.G., but Curtin had explained that it would be against the policy of the Labor Government to do this. On 30 August 1950, McLeay appealed to the new Prime Minister, Mr Menzies, who said 'the matter would be taken into consideration when the question of Honours is under review'. Perhaps it was considered, but there is no record available of these considerations, and Broinowski never got his decoration.¹⁰

Broinowski's non-parliamentary life was diverse and somewhat complicated. While in Melbourne he had married Grace Creed (Daisy) Evans, a violinist, in 1906. He had two sons by her, Robert and Theo Philip. They were divorced in 1926. On 20 April 1927, just before moving to Canberra for the opening of the new Parliament House, Robert married Kathleen Elizabeth Knell. They had one daughter, Ruth, who later became a senior librarian at the National Library.

Broinowski's main interests were in literature, especially poetry, and in bush walking, and the natural environment. In Melbourne he contributed to the literary magazine *Birth*, and edited *The Spinner* and the poetry page of *Stead's Review*. In this way he became known to a large number of Australian poets, and supported their work.¹¹ Also in Melbourne, in 1916, Broinowski met and became a friend of the social anthropologist Kaspar Bronislaw Malinowski when the latter was on leave from his work in the Trobriand Islands. The friendship lasted until Malinowski's death in 1942. The two would go bush walking together, and Broinowski developed an interest in anthropology as a result, an interest he pursued during his only trip outside Australia, to New Guinea and Papua with the then President of the Senate, Senator Hayes, in 1939.

Between 1927 and 1942 in Canberra, the bush capital where people had to contrive their own entertainment, Broinowski worked hard for drama, poetry and literature, and sports. He was president of the original Arts and Literature Society, and donated a cup, the Broinowski Cup, for the winner of an annual tennis tournament among public servants. He arranged a similar trophy for hockey players in Canberra.

After retirement, Broinowski and his wife and daughter moved to Sydney, where he became a regular ABC radio broadcaster and a reviewer for the *Sydney Morning Herald*. He joined the panel on 2CH's *Stump The Experts*. His range of subjects was very wide, including environmental issues, international affairs, anthropology, aboriginal folk-lore and classical mythology. He made records of his poems, some of which were bound in typescript as 'Themes and Songs' (Canberra 1962). He also made records of children's stories and plays for Columbia Records. He was an excellent mimic of animal and bird sounds, and used this skill with great effect in his children's record 'Betty and Byamee the Kangaroo'. In Sydney,

¹⁰ From papers on Broinowski held in the Australian Archives, Mitchell ACT, series A463/61.

¹¹ They included Dorothea Mackellar, Zora Cross, Mary Gilmore, Louis Lavater, Furnley Maurice, R.H Croll, Kate Baker, John Shaw Neilson, Marie Pitt and E.A. Vidler.

as in Canberra, he was a prominent member of Rotary, and a member of various literary societies.

Broinowski died at his Lindfield home on 16 August 1959 at the age of 83. The cause of death was cardio-vascular degeneration and cerebral arteriosclerosis. He was cremated at the Northern Suburbs Crematorium with the Presbyterian Minister the Reverend George Nesbitt officiating. Many tributes were sent, from parliamentarians, organisations such as Rotary, and friends. He was survived by the two sons by his first marriage, and by his second wife and their daughter.

Referral of Bills to Senate Committees: An Evaluation*

Kelly Paxman

SINCE 1990, procedures for the systematic referral of bills have been in place in the Australian Senate. This paper evaluates the referral process, its achievements, and areas of concern.

A primary achievement of the system has been the enhancement of the Senate's legislative function, in its ability to scrutinise the activities of the executive. The taking of written and oral evidence by committees from government officials, and from the broader community, opens up government policy making to public scrutiny. In addition, a wider range of interests is consulted through the committee process than would otherwise be the case, and thus the public interest is better served.

The bill referral process has also resulted in the improvement of many pieces of legislation. In the consideration of bills through public hearings, committees have, for example, become aware of undesirable consequences of bills, and have been able to recommend amendments to those bills.

Greater public participation has also been achieved, and a wider range of groups are now able to have an input into the legislative process. The conduct of public hearings has evolved since 1990, with hearings now held all over the country, not just in Canberra, and with different formats now being employed, including round-table discussions and video/audio conferencing.

An aim of the new procedures was the more expeditious processing of legislation. Whether or not this has been achieved is hard to determine, but at the very least there is evidence that

* This article is a revised version of a paper written while the author was a participant in the Australian National University's Internships Program.

chamber debate following committee consideration is more informed and focused. The overall educative effect for senators of committee consideration of bills has been a great side-benefit of the system. Senators from minor parties have particularly benefited in this regard, but have also gained from the scope the committee system allows them to increase their participation in the legislative process.

Several concerns exist, however, regarding the bill referral process. It is, say some, too rushed, and despite the increased public participation, some feel there are still groups which are not included. Most concerns, however, revolve around the way that the bill referral process is inescapably linked with politics, and how this link limits the effectiveness of the process. A cynicism exists about the impotence of committees to do little more than merely 'go through the motions' of public consultation, when the real battles are fought out on the floor of the chamber. Oppositions can use bill-referral as a delaying tactic, and governments resent this (even though they themselves may have done so in the past, and may again in the future). Committee reports on bills are also seen as political documents, with reports regularly being polarised between government and non-government senators. Whilst the evolution of procedures concerning bill referral will no doubt continue, and improvement may occur, prospects for fundamental change to the bill referral system are limited while party politics has such a large influence over the whole process.

1. Introduction

In 1990, the Australian Senate adopted new procedures for the regular and systematic referral of bills to committees. The reforms were a long time coming, Australia being relatively slow compared with other countries in using committees for legislative scrutiny. A system of standing committees had been established in the Senate in 1970, but in the ensuing 20 years, bills were only occasionally referred. The reforms were a result of recommendations of the Senate Select Committee on Legislation Procedures, reporting in 1988, which recognised the benefits of committee referral in improving the legislative process.¹ The Select Committee put forward recommendations it hoped would achieve the dual aims of more thorough examination of legislation and more efficient (expeditious) processing of legislation. Since the implementation of the new procedures, referral of bills has increased markedly. From 1990 to 1996, 279 bills were referred, whereas only 30 bills had been referred in the preceding 20 years. Thirty per cent of bills are now commonly referred.

The aim of this study has been to evaluate the referral process, to identify the achievements over its seven years of operation so far, and to identify any areas of concern. Research has been undertaken using both documentary analysis (of committee reports, Hansards, and various Senate publications), and by interviewing a range of participants in the process, including Senate staff, senators' staff, and senators. None of the interviewees are identified in the report, for reasons of confidentiality. As a case study, research has been focused for some aspects on the Senate Legal and Constitutional Legislation Committee and its activities in the period May 1996–May 1997.

The Selection of Bills Committee, which was set up as a result of the 1988 Select Committee, considers all bills before the Senate except appropriation bills, and makes recommendations for the referral of bills to committees. The committee, which comprises nine senators,

¹ Senate Select Committee on Legislation Procedures, *Report*, Canberra, 1 December 1988.

including party whips, meets regularly during sitting weeks. A member of the Committee (usually a non-government senator) proposes that a bill be referred to a committee, giving reasons for referral, nominating a committee and a possible reporting date, and suggesting witnesses from whom submissions or evidence may be obtained. If the proposal is agreed by the Committee, which is usually the case, the bill is recommended for referral in the Committee's report to the Senate.

Bills can be referred to one of eight standing committees, and are occasionally referred to select committees. The committee receiving the referral is free to seek submissions, and take evidence at public hearings. Evidence at public hearings is recorded in Hansard. Following the receipt of evidence, both written and oral, the committee produces and tables a report. The committee can make recommendations for amendments but does not have the power to actually amend legislation.²

2. Achievements

The revised bill referral procedures were introduced with a view to improving the legislative process in the Senate. This section will deal with the positive achievements of the system, and how the legislative process has been improved.

2.1 Enhancement of the Senate's legislative function

A fundamental achievement of the new procedures and the increased referral of bills has been the enhancement of the Senate's legislative function.

A principal function of a legislature is to make laws: to examine and approve proposals for legislation put forward by the executive. Under the doctrine of separation of powers the legislature is separate from the executive, but in the Australian Parliament, this separation is confused by the fact that the executive government is formed by a majority in the lower house of the Parliament, the House of Representatives.

The legislature thus sustains the executive government, and the executive government controls and dominates the legislature. In this situation, proper scrutiny and accountability of government is hard to achieve. Governments traditionally resist scrutiny and are by nature secretive.³

The Australian Senate provides an antidote to this affliction of government dominance, because in the Senate, with its proportional representation electoral system, governments do not necessarily have a majority. For many years now, governments have not had a majority in the Senate, and are unlikely to ever have a majority in the future. But an undominated Senate is not enough. It is only a capable and empowered committee system within the Senate that enables the Senate to perform its scrutiny role effectively, and the revised referral procedures since 1990 have gone a long way towards creating a more capable and empowered

² Full details of the referral procedures are given in *Odger's Australian Senate Practice*, 8th edn, edited by Harry Evans, AGPS, Canberra, 1997.

³ J.A.G. Griffith and Michael Ryle, *Parliament: Functions, Practice and Procedures*, Sweet & Maxwell, London, 1989, p. 517.

committee system. There is evidence that the ability of Senate committees to scrutinise governments has been much enhanced.

Crucial to this enhancement of scrutiny has been the ability of committees to take oral and written evidence at public hearings, and by doing so to consult openly with those who make policy, and those who are affected by it. The natural tendency of governments to privacy and secrecy is thus overcome, and is replaced by openness and publicity.⁴

Beyond this level of 'openness' achieved by committee scrutiny, is the further benefit that not only is government consultation with favoured groups brought out into the open, but other less favoured groups are given the opportunity to make submissions and the chance to influence legislation. The public interest is thus served, because a wider range of interests is consulted than would otherwise be the case. And there is evidence that this wider consultation not only keeps executive power in check, but results in better legislation.

2.2 *Improved legislation*

In establishing the revised procedures for bill referral, the 1988 Select Committee recognised that committee consideration of bills could result in 'more effective' and 'vastly improved' legislation.⁵

There are many examples of bills that have been considered over the past seven years which have been improved as a result of referral. Earlier writers have highlighted some of the early success stories of the new procedures.⁶ The Education Services (Export Regulations) Bill 1990 sought to reduce the financial burden to the taxpayer of having to pick up the pieces when independent educational colleges collapsed and overseas students who had paid fees in advance were left in the lurch. Committee consideration found that the remedy proposed by the Bill was flawed, and that neither the rights of students nor institutions were adequately addressed. The committee recommended extensive amendments to the bill, which were taken up by the government.

The Australian Nuclear Science and Technology Organisation Amendment Bill 1992 has been held up as another example of a committee producing improved legislation. The public hearings into the bills stirred considerable community concern over the activities of the organisation, and compelled the government to amend the bill.⁷

More recent examples of improved legislation include the Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996. This bill sought to increase the period that newly arrived residents to Australia would have to wait before receiving social security benefits, from 26 weeks to 104 weeks. The inquiry into this bill, conducted by the Senate Legal and Constitutional Legislation Committee, attracted submissions and witnesses from a wide range of groups representing migrants, such as the

⁴ Harry Evans, 'Parliamentary committees and the public interest', *Legislative Studies*, vol. 8, no. 1, Spring 1993, p. 16.

⁵ Senate Select Committee on Legislation Procedures, *Report*, 1988, p. 3.

⁶ Brenton Holmes and Doug Hynd, 'Committees and the legislative process', *Committee Bulletin*, February 1994, p. 6; and Harry Evans, 'Parliamentary committees and the public interest', *Legislative Studies*, vol. 8, no. 1, Spring 1993, p. 17.

⁷ Harry Evans, 'Parliamentary committees and the public interest', p. 18.

Immigration Advice and Rights Centre, and the Australian Council of Social Services. As a result of the committee's consideration of evidence presented, it became clear that for some categories of migrants, significant hardship would result, and several amendments were recommended and taken up by the government.⁸

An even more recent example is the inquiry into the Copyright Amendment Bill 1997, which seeks to amend various provisions of the Copyright Act 1968, including provisions relating to moral rights. The inquiry by the Senate Legal and Constitutional Legislation Committee prompted a concerted campaign by screenwriters who felt that their moral rights as primary creators of film productions were being taken away by the legislation, and the appearance of a bevy of well-known writers at public hearings attracted a deal of media interest. As a result of their representations, the committee has in its recent report recommended amendments to the Senate that will maintain screenwriters' moral rights. These amendments have bipartisan support, and should be received positively by the whole Senate when it considers the bill.⁹

These few examples indicate the value in referring bills for detailed consideration by committees, in particular committees that have the power to call witnesses from all parts of the community. This ability to refine and improve legislation is a clear achievement of the new processes.

It has been pointed out elsewhere that this improvement in legislation is less likely when bills before a committee are more controversial.¹⁰ Opposing parties are more likely in these cases to use committees to 'rehearse their arguments' for and against a bill, with little chance of reaching agreement over its contents or possible amendments. This shortcoming of the committee process is directly related to the party political influences which overlay all parliament's activities, and which especially affect the effectiveness of the committee system. This issue of the political overlay of committees will be addressed later in this paper.

A factor which can negatively affect the ability of committees to improve legislation is a lack of time. Governments are always keen to minimise delays to their legislative program, and seek to impose short timeframes on committee consideration of bills. Earlier writers questioned the ability of committees to adequately digest large amounts of information on bills in the short timeframes allowed, and the capability of interest groups to produce a useful input with only short notice for a submission or hearing.¹¹ In the early days of systematic bill referral, an inquiry period of only one week was envisaged. Since that time, the period for inquiries has extended, with very few limited to only one week. Bills inquiries in the Senate Legal and Constitutional Legislation Committee over the period May 1996–May 1997 generally extended over one to two months, with extensions of reporting time being sought

⁸ See Senate Legal and Constitutional Legislation Committee, *Report on the Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996*, Canberra, 10 September 1996.

⁹ See Senate Legal and Constitutional Legislation Committee, *Report on the Copyright Amendment Bill 1997*, Canberra, 27 October 1997.

¹⁰ Brenton Holmes and Doug Hynd, *op.cit.*, p. 6.

¹¹ 'Legislative Friday—the effectiveness of Senate legislation committees' *Committee Bulletin*, December 1993, p. 6.

and granted to seven of the nine inquiries. Details are at Appendix A. Nevertheless, short timeframes imposed on bills inquiries remain a concern.

2.3 Greater public participation

The previous section explored how the process of committee consideration has been able to improve legislation, largely because of input to the consideration process by the wider community, and by groups that government may not normally consult when formulating policy. It is timely here to delve a little into the process whereby this public participation is achieved, and into how public hearings are conducted. This section will then explore the diversity of public input.

2.3.1 Seeking public input

On receipt of a bill referral, a committee will, through its secretariat, seek submissions from interested parties. Representative groups and individuals known to have an interest and/or expertise in the area are invited to submit written submissions, and may be invited to give oral evidence at a hearing. Advertisements seeking submissions are placed in major metropolitan newspapers, and on the Internet. Specific groups may be targeted by selected advertising: rural newspapers to reach wheat growers affected by a wheat marketing bill, for example, or foreign language newspapers to reach residents of inner city Sydney suburbs affected by a bill relating to aircraft noise. Advertising tends to draw little response, though, according to several committee secretaries. Most submissions to bills inquiries are by groups or individuals who are already aware of the bill's existence, or who are contacted by politicians or their staff, or by the committee secretariat. In proposing that a bill be referred, the member of the Selection of Bills Committee usually includes a list of suggested witnesses. The proposal to refer the Social Security Legislation Amendment (Work for the Dole) Bill 1997, for example, suggested that witnesses include relevant government departments, trade union groups, Australian Council of Social Services, representatives of organisations which use volunteers, and representatives of older unemployed people. Witness recommendations for the referral of the Immigration (Education) Charge Amendment Bill 1996 included the Refugee Advice and Casework Service, Women's Electoral Lobby, and an academic lawyer from Sydney University.

2.3.2 Conduct of formal hearings

When the systematic bill referral process was first set up, it was envisaged that one day each sitting week would be set aside for committees to meet.¹² Friday was eventually settled on as the day for meetings, in Canberra, before senators returned to their home states for the weekend. Over time, however, the process has evolved and developed, and public hearings are now held all over Australia, on any day of the week and often in non-sitting weeks.

A survey of bills inquiries conducted by the Senate Legal and Constitutional Legislation Committee over the period May 1996 - June 1997 showed that for the eight bills inquiries taking evidence publicly, 21 different hearings were held, an average of 2.6 hearings per bill. The hearings were held primarily in Canberra, but also in Sydney, Melbourne, Adelaide and Darwin. Details are included in Appendix B.

With their ability to travel out of Canberra (accompanied by Hansard reporting staff), Senate committees are able to go where witnesses may be concentrated, and 'take the Senate to the

¹² Senate Select Committee on Legislation Procedures, *Report*, 1988, op.cit., p. 14.

people'. One committee secretary pointed out that this can be 'good PR' for the Senators, and for the institution of Parliament itself. An example of a well-travelled committee is provided by the inquiry into the Workplace Relations Bill 1996, which visited 13 different cities and regional centres, holding 18 public hearings.¹³

The format of public hearings can vary depending upon the location and the subject matter. A common format is for committee members to face witnesses across a table, or on separate tables, interviewing one group or individual at a time. A round table format, with all groups and individuals participating in discussions, is another arrangement that is used. Participants find this useful in terms of being able to respond immediately to points raised by those from different groups.

A development in recent years has been the use of audio- or video-conferencing, particularly when taking evidence from a witness who is remotely located, who may otherwise be unable to attend a hearing. Some participants find offputting the shortcomings of current video-conferencing technology, such as the sound-vision delay. Others see this method as being particularly valuable, and useful in disciplining committee members in their questioning of witnesses. Modern technology can be used not only to enable remote witnesses to 'attend' a hearing, but senators may also 'attend' in this way. Standing orders were amended in 1997 to allow both members and witnesses to participate in committee proceedings by electronic communication, without being present.¹⁴ This development has been welcomed, particularly by Western Australian senators, who can thus avoid long distance travel, especially when hearings are held in non-sitting weeks.

2.3.3 *Who participates?*

Having surveyed the processes for gathering and hearing evidence from the public, the question needs to be asked: Who gives evidence, and whose voices are heard when legislation is referred to committees? Are all the voices heard which should be heard when a particular piece of legislation is being considered?

One way of addressing the question of who gives evidence is by surveying the lists of submissions received by committees and the lists of witnesses giving evidence at hearings. A survey of the submission and witness lists for bills inquiries by the Senate Legal and Constitutional Legislation Committee in the period May 1996 – May 1997 shows that a diverse range of evidence was received. Of the bills inquiries which involved public hearings, and excluding the Euthanasia Laws Bill 1996, an average of 20 submissions were received, and an average of 16 witnesses were heard.¹⁵

The Euthanasia Laws Bill is excluded because it was a highly unusual bill, being a private member's bill and dealing with moral issues that aroused strong emotions. This bill alone

¹³ Senate Economic References Committee, *Report on the Workplace Relations and other Legislation Amendment Bill*, Canberra, 22 August 1996.

¹⁴ Senate Procedure Committee, *Second Report of 1995*, Canberra, October 1995. Provisions for electronic communication were incorporated into Standing Orders in February 1997.

¹⁵ Details are included at Appendix B.

attracted 12,577 submissions, and its inclusion would thus seriously distort any statistical analysis.¹⁶

At public hearings, witnesses invariably include representatives from the executive arm of government: from the public service agencies responsible for implementing, or affected by, legislation, and often but not always, the responsible minister. The majority of witnesses, however, are those representing various organisations and groups from the community that have an interest in, or are affected by, the legislation. Also appearing at hearings regularly are expert witnesses, such as an academic expert on education or migration, or a Queen's Counsel, when expert legal advice is required.

An example from the Senate Legal and Constitutional Legislation Committee will illustrate the diversity of witnesses. Evidence taken at public hearings in June 1996 concerning the Social Security (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996 was given by 38 witnesses from the following organisations:

- Minister for Social Security
- Department of Social Security
- Department of Immigration and Multicultural Affairs
- Department of Employment, Education, Training and Youth Affairs
- Attorney-General's Department
- Human Rights and Equal Opportunity Commission
- Australian Council of Social Services
- Migrant Resource Centre of Canberra and Queanbeyan Inc
- National Welfare Rights Network
- Ethnic Communities Council of New South Wales
- Immigration Advice and Rights Centre
- NSW Grant-in-Aid Migrant Welfare Workers and Agencies Cooperative Ltd
- Fairfield Migrant Interagency
- Fairfield Migrant Resource Centre
- Australian-Serbian Welfare Centre
- Refugee Resettlement Working Group
- Legal Aid Commission of New South Wales

In addition, two academic witnesses from Sydney and Monash Universities gave evidence.

Many of the groups listed would not normally have had access to government decision-making processes, and the process of bill referral to committee allowed them the opportunity to have their views heard, and placed on the public record. As mentioned earlier, several amendments were made to this piece of legislation as a result of evidence received at these public hearings. There was wide agreement among participants interviewed that the broadening of community participation facilitated by the referral of bills to committees has been a great achievement of the reforms since 1990.

A criticism sometimes levelled at the process, however, is that bills inquiries regularly attract submissions and witnesses from the same organisations, and 'witness cliques' develop around certain issues, such as immigration and industrial relations. Governments and opposition

¹⁶ Senate Legal and Constitutional Legislation Committee, *Report on Euthanasia Laws Bill 1996*, Canberra, March 1997.

parties alike are accused of ‘rounding up the usual suspects’ to support their positions. An implication of this criticism is a cynicism that the same old paths are being trodden as particular issues regularly arise, with predictable outcomes.

While it is difficult to determine whether this criticism is valid, most participants interviewed expressed confidence that a wide range of viewpoints were being represented at bills inquiries. The regular attendance at hearings by established interest groups is in any case to be expected, as they are performing their role in a pluralist society, of representing to government the interest of the members of their groups. The example list of witnesses above suggests that this particular bill inquiry, which had major ramifications for migrants to Australia, attracted a fairly wide range of groups, not just the major migrant advocacy groups. Nevertheless, some participants interviewed pointed out that participating in committee inquiries was difficult for some groups, particularly smaller groups and voluntary organisations with limited resources. This difficulty was increased when only short timeframes were given for preparing submissions.

Dissatisfaction of some with the range of groups consulted is exemplified by a recently tabled report of the Senate Community Affairs Legislation Committee on the Child Care Payments Bill 1997. The report included a dissenting report from the Opposition, critical of the inquiry for being ‘rushed’, and for limiting witnesses to peak national organisations, to the exclusion of the ‘full range of groups concerned’.¹⁷

It is worth noting that those interest group representatives who have become familiar with inquiry procedures by regularly writing submissions or appearing as witnesses are often able to represent their organisation’s interests more effectively.

2.4 More expedient processing of legislation

We have seen how revised bill referral procedures have enhanced the Senate’s legislative role, produced better legislation and increased public participation. But what of the hope that the increased referral of bills would lead to the more efficient use of chamber time, and assist in the expedient processing of legislation? Whether or not this aim has been achieved is difficult to measure. A comparison of time spent on bills referred with those not referred carries little meaning because bills likely to be even slightly contentious are generally referred, and the bills not referred tend to be those of a more routine, non-controversial nature, to do with the machinery of government. Bills that were not referred over 1996-97 included the following:

- Laying Chicken Levy Amendment Bill 1996
- Labelling of Genetically Manipulated and Other Foods Bill 1996
- Flags Amendment Bill 1996
- Radio Licence Fees Amendment Bill 1997

Bills such as these are likely to pass swiftly through the Senate, often being listed for debate on a Thursday lunchtime, the designated time for non-controversial legislation.

¹⁷ Senate Community Affairs Legislation Committee, *Report on Child Care Payments Bill 1997, Child Care Payments (Consequential Amendments and Transitional Provisions) Bill 1997*, Canberra, October 1997, p. 22.

Of the bills that are referred to committee, it is difficult to determine whether the time spent in debate in the chamber once the committee has reported back to the Senate is less than it would have been had the bill not been referred. Some participants interviewed felt that post-committee debate in the chamber was often more informed and focused as a result of the educative process resulting from committee hearings. The need to spend chamber time just coming to grips with an issue from scratch was thus avoided. One participant suggested the possibility that on occasion, *more* time was spent in chamber post-committee, because senators were better informed, and had more to speak about.

A survey of time spent on bills referred to the Senate Legal and Constitutional Legislation Committee, details of which are in Appendix B, paints an inconclusive picture. The bills considered differ in complexity and degree of contentiousness. Public hearings and private meetings for consideration of the Migration Legislation Amendment Bill (No. 3) 1996, which, among other measures, sought to limit the numbers of visas issued, took a total of 6 hours and 14 minutes, followed by debate in the chamber of 2 hours, 37 minutes. For the Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996 previously mentioned, committee time was nearly 12 hours, and chamber time nearly 5 ½ hours. In both cases the time spent in the chamber was about half the time spent in committee. Yet in the consideration of the Constitutional Convention (Election) Bill 1997, which established a process for the election of delegates to the Constitutional Convention, the committee consideration of just over 10 hours was followed by 16 ½ more hours of chamber debate. Governments have expressed frustration at lengthy chamber debates following committee consideration, but the 1988 Select Committee recognised the inappropriateness of trying to restrict chamber debate on bills that had been referred to a committee. As the report stated:

Contentious, complicated or significant bills are likely to attract debate [in the chamber] regardless of how thoroughly a standing committee has considered them. The more consideration a bill has attracted in a standing committee, the more likely it is to attract consideration at various stages in the Senate itself.¹⁸

If conclusions on the expediency or otherwise of bill referrals are hard to draw from time data alone, it is possible that the successful takeup by the whole Senate of recommendations for amendment in committee reports may be a suitable measure. But this approach too, has its problems. Committees can only recommend amendments, not pass them. When suggested amendments have the support of all committee members, then the passage of the amendments in the chamber is usually straightforward. But for bills where committee members are split, usually on party political or ideological grounds, recommendations in the report, made by the government majority, have little hope of easy passage in the chamber. The question of political influences on the bill referral process will be discussed in a later section.

The success or otherwise of committee recommendations for amendments may not be the only measure of the value of committees in saving chamber time. One participant interviewed, an opposition staff member, pointed out that committees can be used as a forum for opposition parties testing out ideas for amendments, and attempting to determine whether or not a proposal has merit or is viable. In this process, possible amendments may be tested, and rejected, and never see the light of day in the chamber, thus saving chamber time.

¹⁸ Senate Select Committee on Legislation Procedures, *Report*, 1988, p. 17.

Some participants interviewed, with long-term experience, felt that chamber debate had been shortened as a result of committee consideration, but overall, it would have to be said that the evidence on the benefits of bill referral in making more efficient use of Senate time is inconclusive.

2.5 Committees as educators

When interviewing participants in the bill referral process, a frequently mentioned positive aspect was the educative benefit of public hearings for all those involved, particularly senators. Public hearings can have the effect of providing senators with a comprehensive, balanced, and up-to-date briefing on the issues involved in the particular bill being considered. This educative process often runs in parallel with similar exposure in other committee forums, such as those considering annual estimates of expenditure, annual reports of government departments, and inquiries on specific issues (not concerning particular bills).

As previously mentioned, the presence in the Senate chamber of committee members who have been informed through the committee process can have the effect of raising the level of debate and avoiding poorly-informed contributions. In addition, committees provide a significant opportunity for backbenchers of all parties, who otherwise take a back seat in the legislative process to question ministers and shadow ministers. They can become informed and be involved in the legislative process in ways they could not be if the committee process did not exist, and the systematic referral of bills to committee since 1990 has expanded this exposure.

Participants interviewed believe that there has, to some extent, been a development of expertise by some senators as a result of the expanded bill referral process. Senators, who often have managed to get themselves on to a committee which matches their interests, usually stay on a particular committee for the life of the Parliament, and often into the next Parliament. In this way they are regularly exposed to issues, as legislation on the same issues crops up repeatedly.

The reports produced by committees can also be a useful educative tool, especially for minor party and independent senators who have limited resources to participate in committees. The reports are often fairly comprehensive documents, detailing the arguments for and against particular pieces of legislation, and documenting the different viewpoints presented at public hearings. They can thus provide senators with an easy way of becoming briefed about legislation that is before the Senate.

2.6 Minor party perspectives

Participants interviewed agreed that the expanded committee consideration of legislation has had a beneficial effect for minor parties and independents in their ability to play a part in the legislative process. In an electorate where votes for candidates of non-major parties regularly reach over 14% of the total,¹⁹ it is important in terms of democratic representation that the elected representatives of these parties have the ability to contribute to the legislative process. Participation in the committee consideration of bills plays a vital role in enhancing this ability.

¹⁹ Harry Evans, 'Government and Parliament' in Gwyn Singleton, *The Second Keating Government*, Centre for Research on Public Sector Management, University of Canberra, 1997, p. 23.

Minor parties can benefit in several ways from participation in committee consideration of bills. Participants from minor parties interviewed saw committees as an opportunity to get their viewpoints across, and to ensure that witnesses supporting their position were able to give evidence at hearings. Some minor party senators felt that committees enabled a focus on issues, rather than on the party political debate that tended to dominate in the chamber.²⁰

Minor party senators in particular feel the great benefit provided by committees as educators. One former minor party senator has said:

If you can get a selection of experts before the committee and ask questions, you are likely to get to the nub of the issue in an authoritative way very quickly.²¹

For minor party senators with limited staff resources, these opportunities are invaluable.

Another benefit for minor parties is the way committees can be used to raise public awareness of issues that may otherwise be marginalised. This is particularly so if a Private Senator's Bill is introduced, and then referred to committee. Evidence from what might be considered 'non-mainstream' groups can thus be taken and put on the public record. These issues receive greater exposure than would be the case if consideration of the bill was confined to the Senate chamber.

Despite the benefits for minor parties, they nevertheless face the problem of trying to 'cover all the bases' with only a small number of senators, limited time and limited staff numbers. Having representatives able to participate on all committees, for all bills, is very difficult. For independent senators, it is impossible.

3. Political Aspects of the Committee Process

This report has so far documented what has been achieved over the last seven years since systematic referral of bills to committees was established as the norm. The report has focused on the positive aspects of the process, including the enhancement of the Senate's legislative role, the increased scrutiny of legislation and the improved legislation that has emerged, and increased public participation in the legislative process.

Optimism about the committee process was expressed by all participants interviewed, but at the same time, a generally pessimistic and cynical view was also apparent. This cynicism has its basis in the way that all facets of bill referral are affected, and pervaded, by politics. This section will address the way politics, in particular party politics, dominates the process of committee consideration of bills.

3.1 Are committees just going through the motions?

A common criticism levelled at the process of bill referral to committee is that committee consideration does not change anything. Positions on a bill, it is said, are decided along party lines before the bill goes to committee, and the committee process is just 'going through the motions'. Outcomes are already known, and all the committee process achieves is to enable the parties to 'line up' those witnesses who will support their respective positions. The real

²⁰ 'The role of minor parties in the committee process', *Committee Bulletin*, February 1994, p. 3.

²¹ *ibid.* (Former Democrat Senator Sid Spindler).

test will occur when the bill is put to the vote in the chamber, where achieving the numbers necessary for passage (or rejection) of the bill is all that matters.

This criticism discounts the benefits that can be gained, and the improvements to legislation that have been achieved, through detailed scrutiny of bills. But on anecdotal evidence, the criticism does seem valid for controversial bills, especially those where the parties are divided on ideological lines. Issues surrounding industrial relations and privatisation of government assets are examples of such issues.

3.2 *Is bill referral used as a delaying tactic?*

Governments are always keen to have their policies implemented through legislation without any hindrance or delay, and the committee consideration of bills is often seen as a tactic used by oppositions to delay the programs of government. There is evidence that this latter accusation is true. On the basis of advice from long-term political staffers from both major parties, who have gained experience from both government and opposition perspectives, the use of bill referral as a tactic to ‘mess up’ a government’s program is not uncommon. From an opposition perspective, few tools are available to successfully counteract the dominance of the governing political party, and bill referral is one of these tools. By delaying legislation, oppositions can not only act as ‘spoilers’ but they also gain time. Time can be important to an opposition with limited resources and without the backing of a government department to provide advice and services. Time allows an opposition to become better informed on the issues involved, and this is important with the large volume of legislation dealt with by Parliament. Time also allows the mustering of support from constituency groups, who may be able to mount protest campaigns through the media.

The effectiveness of bill referral as a delaying tactic has arguably been reduced in recent years, due to developments in the bill referral process. When the original reforms were put in place, it was envisaged that referral to committee would commonly take place after the bill had been through its first and second readings in the Senate. It is more common now, however, for the *provisions* of bills to be referred, in anticipation of and before the bill actually is introduced to the Senate. In the period May 1996–June 1997, 86% of bills recommended for referral by the Selection of Bills Committee fell into this category.²² The result of this development is that not only is the delay reduced for some bills, but for others, delay is non-existent, because bills are being referred, scrutinised, and reported on before they are even introduced into the Senate. Of the nine bills recommended for referral to the Senate Legal and Constitutional Legislation Committee between May 1996 and May 1997, five were reported back to the Senate *before* formal introduction. Full details are included in Appendix A. Even once introduced, a bill and the committee’s report may not be considered by the whole chamber for some time, due to heavy loads of legislation before the Senate.

3.3 *Do committee members ‘keep their powder dry’?*

Another criticism levelled at committee consideration of bills is that committees are not effective in providing a forum for open discussion of issues. Instead, senators do not flag their true intentions in committee, and ‘keep their powder dry’, saving their substantive contributions for the debate in the chamber. One opposition staff member pointed out that although this sometimes did occur, often what appeared to be ‘keeping powder dry’ on the

²² Of the 78 recommendations for referral made by the committee during this period, 67 were made on the basis of provisions. Details of the referral of bills may be found in the Senate publications *Business of the Senate* and *Work of Committees*.

part of opposition senators was really a case of opposition committee members genuinely not having all the information they needed until after the committee had reported. With limited resources to cope with the large volume of legislation being processed, non-government senators may not, at the time of committee consideration, have had time to become fully cognisant of all possible aspects of the bill.

3.4 1994 changes to the committee system

The procedures put into place in 1990 involved referral of bills to the then existing group of standing committees. Each of the seven (later eight) standing committees to which bills could be referred had six members, with the government holding the chair, and a casting vote.

In 1994, the then Opposition sought changes to the committee system so that committee composition and chairmanship better reflected party representation in the Senate chamber. A dual system of committees was established, with each standing committee splitting into a Legislation and a References Committee, with an overlapping membership, and a shared secretariat. Government control of the Chair was retained for the Legislation Committees, which have the task of legislative scrutiny and examination of annual estimates and reports, but References Committees, which conduct general inquiries, are chaired by a non-government senator.

This new dual system, set up for largely political reasons, has proved on some accounts to have its drawbacks, which themselves are politically related. In the three years since its implementation, some participants see that it has degenerated into a two-sided system, with Legislation Committees seen as ‘the Government’s show’ and References Committees as the ‘non-government show’. As a result, it is seen that the committees do not work as constructively as they might. The extent of this ‘degeneration’ varies from committee to committee, and can depend on the individual senators involved.

3.5 Referral of bills to references committees

Despite the intention of the 1994 changes that bills would be referred only to Legislation Committees, non-government senators in 1996 used their numbers on the floor of the chamber to have two contentious bills referred to References committees, where non-government senators held the chairs. The bills were the Telstra (Dilution of Public Ownership) Bill 1996 and the Workplace Relations and Other Legislation Amendment Bill 1996, and their referrals to References committees were politically motivated. Non-government senators were able to take advantage of having control of the committee through the chair, and conduct a relatively long and detailed inquiry. Use of this tactic has not occurred recently, however, and it could be that the use in 1996 can be explained in terms of an opposition examining the major policy planks of a new government. It seems unlikely to become a common feature of the bill referral process.

3.6 Committee reports

The reports produced and tabled at the completion of the inquiry process are also affected by party politics. Because the committee report is a report of the majority, and therefore of the government, it is inevitable that the report will reflect the government view. Although the reports from most committees attempt to present a balanced coverage of viewpoints expressed in inquiries, the conclusions and recommendations of the report are those that have the support of government. This sometimes can have the effect of engendering cynicism on

the part of many participants, including witnesses who may feel their views have been ignored.

Reports produced in the early days of the new procedures after 1990 were generally fairly short, by comparison with the reports currently produced. Reports on bills produced by the Senate Legal and Constitutional Legislation Committee in the period studied (excluding the Euthanasia Laws Bill) had an average length of 64 pages, and generally followed a format of detailing arguments for and against the bill.

Non-government members have the ability to prepare minority or dissenting reports, which are attached to the majority report. Because of the tight timeframes imposed for reporting, only a limited amount of time is available for the preparation of minority reports by non-government senators. Nevertheless, comprehensive minority reports are often produced.

3.7 Bill referral and party politics in a positive light

Although party politics can clearly have a negative effect on the effectiveness of committee consideration of bills, it is also the case that the bill referral process can be seen in a positive light in relation to party politics.

The procedures of the Selection of Bills Committee are seen by most in a positive light. Recommendations to refer, or not refer, a bill tend to be made on a consensual basis. If one member of the Committee wishes to refer a bill, then that bill is referred. There is little merit in the government whip opposing a referral, because non-government senators can take the matter to the whole Senate, and take up valuable time in debate. According to one participant, the Selection of Bills Committee process ‘takes the heat out’ of the referral process, because a bill referral is now usually a simple process, not one that attracts debate on the floor of the chamber.

Another positive aspect is the bipartisan cooperation that can occur on legislation committees when considering bills. Despite the party conflict that can be played out in the committee process, it is nevertheless possible for senators on opposing sides of politics to pursue a genuine spirit of inquiry on many issues, especially those of a less controversial nature.

In conclusion, politics pervades all aspects of the bill referral process, from the referral itself, through to hearings and reports, and the surrounding procedures.

4. Conclusions

The systematic referral of bills to committee for legislative scrutiny has had its achievements and successes but, as this report has shown, these achievements, and any future achievements, are tempered and limited by the influence of politics.

The revised arrangements have enhanced the ability of the legislature to scrutinise the executive government, by opening up the government’s consultative process, and by increasing the chance that a wider range of interests will have an influence on legislation. Non-government senators are better able to be true legislators, because through the committee process they become better briefed. The enhancement of the Senate’s legislative function that results, however, has limits. While the process may help non-government

senators become better informed, the additional information received is unlikely to match or counteract the information and resources of the executive government.

Similarly, the ability of the committee process to affect legislation has its limits. Although the revised arrangements have sometimes seen the emergence and endorsement of improving amendments, with bipartisan support, partisan differences nevertheless dictate that a large number of bills will report back to the full Senate with little or no agreement on desired outcomes. In addition, the pressure placed on committees to complete their inquiries quickly will not dissipate as long as the executive government seeks to push through its legislative program with minimal hindrance. Meanwhile oppositions are not likely to let up on their attempts to slow down the process, seeking to use every tool at their disposal which will enable them to counteract the power of the executive government.

Prospects for improvements to the system are limited. It has been suggested by some that partisanship in Parliament is increasing, and this clearly limits the receptiveness of all parties to any changes that may require a certain level of bipartisan cooperation and a traditional, parliamentary approach.

It has been suggested that committees be empowered with the ability to pass amendments to legislation. The inability of committees to do this underlies cynical views about the committee process being merely 'going through the motions' with the real battle being fought out on the floor of the chamber. Empowering committees with the ability to pass amendments is not, however, a reform that is likely to gain support, unless a way could be found to make committee composition accurately reflect representation in the whole Senate. Clearly, this is impossible in a situation where independents can hold only one or two seats in a 76-seat chamber, and where the balance between the government and opposition parties can hinge on one seat. Not even a committee of 38 senators, or even 50, would be truly representative.

Apart from reforms that might attempt to redress the political overlay of the bills referral process, it might be asked whether there are any procedural or structural changes possible that might improve the process. One suggestion has been the disbanding of the standing committee system as far as bill referrals are concerned. Instead of referring bills to eight standing committees plus select committees, bills could be referred to ad hoc committees, supported by a central bills secretariat, which would have the responsibility for progress of a bill through all its stages, and have suitably qualified staff who could draft (and re-draft) amendments. Support staff would also include a pool of specialised research officers, who would be assigned accordingly as each bill was referred. Very often, bills cover a wide range of issues that cut across the responsibilities and expertise of several of the current committee secretariats. The current standing committee system creates an artificial distinction between subject areas. Committee composition itself could vary from bill to bill, senators nominating themselves according to their interests, but still retaining the existing balance of party representation.

Another reform that has been suggested attempts to improve the procedures for processing amendments to bills. Following consideration of a bill by a committee, committees could be given the responsibility of sorting amendments into those that have general agreement and those where dispute remains. Debate on a bill could thus be streamlined, with consideration in the whole chamber concentrated on the central areas of disagreement, while areas of agreement could be 'fast-tracked'. Given the appropriate resources, committee secretariats could actually draft the amendments, and this would further streamline procedures. These

procedures may be applicable on only a small number of bills, possibly at the discretion of the Senate, but would be very worthwhile for those bills with large numbers of amendments.

The systematic referral of bills to committees in the Australian Senate has proved to be a significant and in many ways a successful innovation. The increased exposure of executive government to the scrutiny of the legislature, and through it, the public, has been a substantial achievement. So has the increased and more open public participation that has occurred. However, the limits imposed on the system by the conflict between the executive and the legislature, and by party politics, act to restrict the ability of committees in the Australian Senate to effectively take on the executive government.

Appendix A

REFERRALS TO THE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE, MAY 1996•MAY 1997

Bill title	Date referred by Senate	Date report tabled	Time from referral to tabling of report	Extensions	Date bill introduced to Senate	Time from introduction of bill to tabling of report	Length of report
Social Security (Newly Arrived Resident's Waiting Periods & Other Measures) Bill 1996	30 May 96	10 Sep 96	3 months 10 days	2	30 May 96	3 months 10 days	94p.
Migration Legislation Amendment Bill (No. 2) 1996	24 Jun 96	27 Jun 96	3 days	0	20 Jun 96	7 days	32p.
Bankruptcy Legislation Amendment Bill 1996	28 Jun 96	9 Sep 96	2 months 11 days	1	8 Oct 96	1 month before introduction	18p.
Hindmarsh Island Bridge Bill 1996	31 Oct 96	5 Dec 96	1 month 5 days	1	18 Nov 96	17 days before introduction	49p.
Migration Legislation Amendment Bill (No. 3) 1996	31 Oct 96	5 Dec 96	1 month 5 days	1	5 Feb 97	2 months before introduction	52p.
Euthanasia Laws Bill 1996	7 Nov 96	6 Mar 97	4 months	2	12 Dec 96	2 months 24 days	205p.
Human Rights Legislation Amendment Bill 1997	6 Feb 97	26 Jun 97	4 months 20 days	2	27 Jun 97	1 day before introduction	135p.
Auditor-General Bill 1996 (Clauses 35 & 37)	6 Mar 97	15 May 97	2 months 9 days	0	5 Mar 97	2 months 10 days	48p.
Constitutional Convention (Election) Bill 1997	26 Mar 97	15 May 97	1 month 20 days	1	26 May 97	11 days before introduction	84p.

Appendix B

TIME SPENT IN CONSIDERATION OF BILLS REFERRED TO THE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE, MAY 1996 • MAY 1997

Bill title	Time spent in committee	Submissions	Witnesses	Hearings	Time spent in Chamber		
Social Security (Newly Arrived Resident's Waiting Periods & Other Measures) Bill 1996	Public hearing	10:45	29	40	4 hearings, Sydney, Canberra	2nd Reading Debate	2:35
	Private meeting	1:14				Committee of the Whole	2:53
	Total	11:59				Total	5:28
Migration Legislation Amendment Bill (No. 2) 1996	Public hearing	4:50	8	10	1 hearing, Canberra	No debate yet	
	Private meeting	1:18					
	Total	6:08					
Bankruptcy Legislation Amendment Bill 1996	Public hearing	0:00	10	-	None	2nd Reading Debate	0:00
	Private meeting	0:16				Committee of the Whole	0:00
	Total	0:16				Total	0:00
Hindmarsh Island Bridge Bill 1996	Public hearing	8:08	24	13	2 hearings, Canberra	2nd Reading Debate	2:09
	Private meeting	0:23				Committee of the Whole	4:39
	Total	8:31				Total	6:48
Migration Legislation Amendment Bill (No. 3) 1996	Public hearing	5:51	14	17	2 hearings, Canberra	2nd Reading Debate	1:33
	Private meeting	0:23				Committee of the Whole	1:04
	Total	6:14				Total	2:37
Euthanasia Laws Bill 1996	Public hearing	24:39	12 577	76	3 hearings, Canberra, Darwin	2nd Reading Debate	0:00
	Private meeting	9:11				Committee of the Whole	16:35
	Total	33:50				Total	16:35
Human Rights Legislation Amendment Bill 1996	Public hearing	4:47	45	22	2 hearings, Canberra	No debate yet	
	Private meeting	0:27					
	Total	5:14					
Auditor-General Bill 1996 Clauses 35 & 37	Public hearing	3:55	3	6	1 hearing, Canberra	2nd Reading Debate	0:00
	Private meeting	0:24				Committee of the Whole	1:37
	Total	4:19				Total	1:37
Constitutional Convention (Election) Bill 1997	Public hearing	9:35	36	20	2 hearings, Canberra, Adelaide	2nd Reading Debate	5:07
	Private meeting	0:28				Committee of the Whole	11:23
	Total	10:03				Total	16:30

Powers of Presidents in Republics*

Juliet Edeson

THE QUESTION of Australia becoming a republic has sparked intense and often impassioned debate. This debate revolves around whether such change is necessary or important, and extends to what this symbolic change would entail in practice. The role of an Australian President as Head of State is an essential element of such discourse. It is vital that debate over a desirable role for the President draws on the broadest scope of opinion and information possible. Australia must not only look within to determine these issues, but must also draw on the experience of other republics, not only as models but as working systems.

The intention of this paper is to provide a comparative analysis to assist in an informed debate on Australia becoming a republic. It will reveal the practical roles of presidents in certain republics as compared with their formal constitutional roles. Each country will be examined separately, and certain themes will be identified in a final evaluation.

Twelve democratic republics, each of which has experienced political stability for twenty-five years or more, were selected for inclusion. They are: Austria, Botswana, Finland, France, Germany, Iceland, India, Ireland, Israel, Italy, Switzerland and the United States of America.

The aim was to provide a reasonably detailed analysis of the powers of presidents in these democratic republics. This has been achieved by identifying the formal constitutional powers of the presidents, and then consulting recent secondary sources for information on the practical application of those powers. A major obstacle was lack of information in several instances. Often the most telling indicators of the powers of a president was the complete lack of information on them.

The paper is divided into two parts. The first part provides the main focus of the paper, which is an evaluation of the practical application of the constitutional powers of the president in

* This article is a revised version of a paper written while the author was a participant in the Australian National University's Internships Program.

each country. In each country there are factors particular to both the formal structure of government as well as political realities that determine the use of presidential power and its effectiveness. Thus there is a breadth in the differences between the real roles of presidents that is greater than the differences to be found in the constitutions. Reference to the formal constitutional provisions for the powers of presidents is provided in the appendix.

The second part provides an evaluation which seeks to identify broad themes in the use of presidential power. The main findings are that presidential power is significantly increased when the president can effectively select the prime minister and other members of the government, or has substantial influence in this area. Power to direct foreign affairs and to command the military, and power in the legislative process are other major determinants of the role of presidents. Limits on the use of presidential power have also been addressed. Here the role of political parties in the nomination process is cited as the most common deterrent to independent action of presidents. The impact of the mode of election on the powers of presidents is also addressed, and this is found not to be a determinant of power in its own right.

Part A: Presidential Powers in Practice

1. The President of Austria

In reality the Austrian presidency has never achieved the importance intended for the office.¹ The Chancellor is the undisputed head of the government, and the President has never transcended the role of merely symbolic head of state.

The President's powers are exclusively negative, in the sense of the ability to block proposals. However, no President has ever refused to sign a bill adopted by the Parliament, fulfilling a role, therefore, of merely certifying the constitutionality of bills.² Presidents do, however, assert the right to information, which at times may give them a pre-emptive influence on government politics.³

The power to select the Federal Chancellor does not generally provide an instance where the President's discretion could prevail over the outcomes pre-determined by the parliamentary political parties. After World War II a two-party system, with one minor third party, developed. However, as the number of parties represented in the Parliament has grown, it has been predicted that the President will by necessity become more active in negotiations on the formation of governments. An instance when the President has become influentially involved in these negotiations was in 1953 when President Körner refused to nominate a coalition government that would have included a smaller right-wing party. Ostensibly in doing so he was 'interpreting the will of the electorate', though it must be noted that Körner was a socialist, and his political sympathies lay elsewhere.⁴

¹John Fitzmaurice, *Austrian Politics and Society Today: In Defence of Austria*, Macmillan, London, 1991, p. 77.

²Stefan Hammer, 'Austria', in *Heads of State: A Comparative Perspective*, Australian Constitutional Centenary Foundation, Carlton, Vic., 1993, p. 13.

³ *ibid* p. 11.

⁴ *ibid* p. 13.

In foreign policy, the President fulfils a ceremonial role, and must in any case obtain the counter-signature of a minister for any acts. Similarly, the role of the President as Commander-in Chief of the armed forces is considered to be nominal only.

2. The President of Botswana

It seems that the President fulfils the role provided in the Constitution. Due to lack of available information, it cannot be said whether this is the case in all respects.

The current President, Quett Ketumile Masire, who has been in office since 1980, is also head of the ruling party in Botswana, the Botswana Democratic Party. This party has had power since independence in 1966.⁵

3. The President of Finland

The presidency is a position of great power and importance in Finland, and presidents have exerted their constitutional powers.

Presidents have played a vital role in the formation of governments. The weakness and instability of the multi-party system has led to the necessity of an activist President in this area. A convention has arisen that before a new government is formed there is a 'presidential round', during which time the President meets and negotiates with the various groups in the Parliament.⁶ When sufficient agreement amongst the parties seems impossible, the President has on several occasions appointed caretaker governments of officials.⁷ Often this power has been used by Presidents to determine policy outcomes. For example, in 1975 President Kekkonen installed a Government of National Emergency specifically to address the problem of unemployment, after 'inconclusive' election results. More frequently, however, this power has been utilised in order to determine foreign policy.⁸

The area of greatest presidential power is in foreign affairs. It has become a tradition that the President's choice of foreign secretary is respected.⁹ Presidents in the postwar era have given particular attention to relations with the Soviet Union. In order to keep these amicable, the President has often used the constitutional powers to their fullest extent. This pre-eminence in foreign policy has increased the extent to which presidents may influence domestic policy. The President has been known to overlook particular parties during the process of government building, on the basis that it would jeopardise relations with the Soviet Union, the predominant issue in Finland's foreign relations in the postwar era. Often this censorship of particular parties has disregarded compelling factors in the composition of the

⁵ *The Europa World Yearbook 1996*, vol 1., Europa Publications Ltd, London, 1996, p. 630.

⁶ David Arter, *Politics and Policy-Making in Finland*, Wheatsheaf Books, Brighton, Eng., 1987, p. 90.

⁷ *ibid* p. 90.

⁸ *ibid* p. 92.

⁹ *ibid* p. 93.

Parliament.¹⁰ Power over foreign policy has also led to the President playing an active role in issues relating to trade and commerce. This can be seen, for example, in the role played by the President in the 1973 EEC Free-Trade Agreement and the 1977 Long-Term Programme of Economic Cooperation with the Soviet Union.¹¹

On the whole, Presidents have sought to act in accordance with the advice of the government. For example, use of the power to dissolve Parliament without the consent of the government has been avoided. Presidents have been able to determine the future of governments without resorting to such measures. For example, the demise of the Karjalainen II government was effectively brought about when the President expressed his dissatisfaction with the government.¹² The power to veto bills, at least temporarily, by refusing to ratify them has been used with some frequency.¹³ Presidents have also made use of the ability to introduce proposals to Parliament and to suggest amendments to existing legislation.

The importance attached to the position of head of state can be seen in the system of dual chairmanship of the cabinet. Weekly meetings occur with the President as chairman of the cabinet, when issues that fall within the realm of presidential power are discussed. It is in these meetings that the President authorises the submission of bills to Parliament, and makes senior appointments.¹⁴ The President does not play a merely formal role, and may actively pursue his or her own agenda. For example, at times Presidents have opposed the majority view of the government over issues of appointments, as well as the content of legislation.¹⁵ However, the most important source of power for the Finnish President relates to power over foreign affairs and influence in the formation of governments.

4. The President of France

Pompidou, in 1969, stated that the President of the Republic of France is:

both head of the executive and guardian and guarantor of the Constitution. In this double role, he is charged with giving the fundamental impetus, defining the essential directions, and assuring and controlling the proper functioning of public authorities: an arbiter with primary national authority at the same time.¹⁶

In practice the powers of the President transcend those specified in the Constitution. When the majority in Parliament is of the same party as the President, the head of state also performs the role of head of government. This is the norm in French politics. When the majority in the Parliament are in opposition to the President, the Prime Minister is the real

¹⁰ *ibid* p. 91.

¹¹ *ibid* p. 110.

¹² *ibid* p. 94.

¹³ Jaakko Nousiainen, *The Finnish Political System*, Harvard University Press, Cambridge, Mass., 1971, p. 227.

¹⁴ Arter, *op. cit.*, p. 94.

¹⁵ *ibid* p. 97.

¹⁶ John Bell, *French Constitutional Law*, Clarendon Press, Oxford, Eng., 1992, p. 15.

head of government.¹⁷ During such a period of “cohabitation”, the President is still involved in foreign and military policy, but no longer determines other political directions.¹⁸ In these instances, the President continues to perform those functions allocated by the Constitution.

The Premier, in accordance with the Constitution, is nominated at the sole discretion of the President. Usually the President chooses a Prime Minister who is in agreement with his views, and who consequently considers himself responsible to the President. The tenure of the Prime Minister is also very much dependent on the will of the President. Presidents can change Prime Minister when, for example, seeking to change the government’s direction. It has become an unwritten rule that if the President believes it to be necessary, the Prime Minister must resign, though this has not been tested during a period of cohabitation.¹⁹ Furthermore, the appointment of the rest of the government, which should be done on the advice of the Prime Minister, is actually subject to presidential intervention. Presidents take a great deal of interest in these appointments, and have on occasions appointed ministers who do not meet with the approval of the Prime Minister. President Giscard, for example was said to base the entire composition of government ‘on a rather personal basis’.²⁰ Such a practice would not, however, be possible during a period of cohabitation.

The power to dissolve the National Assembly has been put to use by Presidents. In 1962 and 1968 for example, de Gaulle dissolved the Assembly, and in 1981 and 1988 Mitterand used this power in the hope of winning parliamentary majorities.²¹

The President does not have the power to veto bills, but does have the authority to request re-examination of bills.²²

While the President theoretically does not play an active role in the law-making process, it is at the President’s initiative that constitutional amendments may be sought. The President may also call for a referendum. There have been six during the Fifth Republic, which followed the stipulations in the Constitution. De Gaulle, however, did not adhere to these in 1962.²³ The prerogative to submit a law or an international treaty to the Constitutional Council to determine its constitutionality has also been employed by the President, for example, with the Maastricht Treaty in 1992.²⁴

The emergency powers referred to in article 16 of the Constitution have been used. These were adopted by President de Gaulle in response to the Algerian Crisis between 16 April and

¹⁷ O. Duhamel, ‘The Spirit of French Institutions,’ *Label France*, no. 21, August 1995, p. 5.

¹⁸ *ibid* p. 6.

¹⁹ Pierre Avril, ‘A Government “under the Presidency”?’ *Label France*, no. 21, August 1995, p. 13.

²⁰ M. Donald Hancock et al, *Politics in Western Europe*, Chatham House Publishers, Chatham, Eng., 1993, p. 108.

²¹ Jean Gicquel, “‘Presidentialism’ With a French Accent’, *Label France*, no. 21, August 1995, p. 10.

²² Hancock et al, *op. cit.*, p. 10.

²³ *ibid* p. 110.

²⁴ Gicquel, *op. cit.*, p. 10.

30 September 1961. It is at the President's discretion to end the use of these powers, and, disregarding suggestions from the Constitutional Council, de Gaulle continued them for longer than was perhaps necessary in 1961.²⁵

The President has a high profile internationally, and fills the assigned constitutional role in the negotiation and ratification of treaties. As commander-in-chief of the armed forces, the President is responsible for the decision to use nuclear weapons.²⁶

5. The President of Germany

In practice, the President functions as a symbolic head of state. Due to occurrences in German history prior to the framing of the current Constitution, the Constitution of 1949 severely curtailed the powers of the President.²⁷

The President is sometimes referred to as 'guardian of the Constitution'.²⁸ This perception arises from the requirement of the President's signature to enact bills, and from the President's oath. However, this role is actually performed by the Constitutional Court, and the requirement for the President's signature on federal laws has been interpreted as meaning that the President must sign if the correct procedural rules have been followed. No President has declined to sign such bills.²⁹ However, when the President has had reason to query whether the correct procedures have been followed, this power to decline signing has been utilised. For example, the first President, Theodor Heuss, refused to sign bills on such occasions. He set a precedent by questioning whether a particular law that had been passed by the Bundestag only needed also the Bundesrat's approval. He consequently withheld his signature when the Constitutional Court ruled that the approval of both houses was required, and the bill never went into effect. Ultimately, however, the Federal Constitutional Court has the authority to determine such questions. In these instances, the signature, or the refusal thereof, of the President is seen as an advisory opinion.

The appointment of the Federal Chancellor by the President is also a formal power. The President must appoint the candidate who can receive majority support in the Bundestag. However, there are two occasions on which the President may exercise discretion in the nomination of the Chancellor. First, the President would be required to become involved in negotiations if the political parties could not come to an agreement over a candidate, as occurred in 1961. Second, the President would have to become involved if the candidate could obtain only a relative majority in the Bundestag, although this situation has not occurred.³⁰ With regard to the appointment of ministers, the President is obliged to accept the choices of the Federal Chancellor. The President may seek to influence choices by expressing

²⁵ Bell, *op. cit.*, p. 16.

²⁶ Gicquel, *op. cit.*, p. 11.

²⁷ O. Kimminich, 'Germany' in *Heads of State: A Comparative Perspective*, Australian Constitutional Centenary Foundation, 1993, p. 22.

²⁸ *ibid* p. 23.

²⁹ *ibid* p. 23.

³⁰ William B. Paterson and David Southern, *Governing Germany*, Basil Blackwell, Oxford, Eng., 1991, p. 83.

opinions publicly, but does not have the power of veto. In 1963 President Lübke opposed the appointment of Gerhard Schröder as Foreign Minister, but was unsuccessful in altering the Chancellor's decision, revealing the extent of this power in practice.

The most explicit power of the President relates to international relations. However, while the President performs the assigned duties, such as accrediting and receiving diplomatic envoys, in practice this and the other main duty according to the Constitution, the conclusion of treaties with foreign nations, is fully entrusted to the Ministry of Foreign Affairs.

6. The President of Iceland

In practice, the extensive powers vested in the Icelandic President are not used, and the President's role is formal. The executive power is exercised by the cabinet ministers who are responsible to the Althing.³¹ The President acts on the advice of the government in the fulfilment of presidential duties. It is generally understood that the President must and will sign all laws that have been passed by the Althing.³²

7. The President of India

While the Constitution grants the President executive authority, this is widely acknowledged to be a formal power only, with executive power actually being exercised by the Prime Minister and Cabinet (Constitutional Amendment 1976, to the effect that the President 'shall act on the aid and the advice of his Council of Ministers').³³ In essence, the President is merely a titular head, but there is scope for expansion of the role of the President in the exercise of executive authority, and on certain occasions the President has transcended this role.

There are two occasions on which the President does not have to act on the advice of the Prime Minister and Cabinet: when the Council of Ministers has lost the confidence of the House of the People (Lok Sabha), and when their advice violates the law or Constitution of India. Furthermore, the 44th amendment of 1977 asserts that even when neither of these situations prevails, the President is permitted to disagree with the Council of Ministers and may ask them to reconsider their advice.³⁴

The President is not expected to publicly criticize the government, though implicit criticism has been tolerated by premiers. The relationship between the Prime Minister and the President has had great bearing on the extent to which presidential power has been exerted. The first two holders of the Prime Ministership and the Presidency (Nehru and Prasad) tested

³¹ Albert P. Blaustein & Gisbert H. Flanz (eds), 'Iceland' in *Constitutions of the Countries of the World*, Oceana Publications Inc., New York, 1988 • .

³² *ibid* p. 5.

³³ R. Venkataraman, 'The Indian Presidency: An Emergency Lamp', in C.K. Jain (ed.), *Constitution of India: In Precept and Practice*, CBS Publishers, New Delhi, 1992, p. 15.

³⁴ M. Bhatia, 'The President and the Council of Ministers', in C.K. Jain (ed.), *Constitution of India, In Precept and Practice*, CBS Publishers, New Delhi, 1992, p.19.

the limits of their powers on two particular occasions. In one instance the President publicly challenged the Prime Minister's bill to reform Hindu personal law, and in another, he delayed giving his assent to a land reform bill. On both occasions the Prime Minister threatened to resign and the President yielded.³⁵

After this the most serious challenge to the authority of the Prime Minister from a President came during Rajiv Gandhi's premiership. President Singh openly complained that he was not receiving even minimal information from Prime Minister Gandhi, contrary to the Constitution. He drew further attention to his complaint by threatening to withhold assent from a piece of legislation and openly expressing his dissatisfaction with the Prime Minister in press interviews. These questions were never resolved, as they remained until Singh retired. His successor, President Venkataraman, however, went even further, and took executive action. During the polling in the 1989 election, the President instructed the Election Commission to ensure a repoll in sections of Prime Minister Rajiv Gandhi's constituency where violence had been organised by Congress Party activists. Impeachment of the President was not seriously discussed by the Prime Minister and Cabinet in this instance.

The power to impose President's Rule, that is direct rule from New Delhi, over a particular state has been used on various occasions, especially during the 1975 to 1977 period while Indira Gandhi was Prime Minister. This was not an exertion of presidential power, as the action was advised and compelled by the Prime Minister. Similarly, President Ahmed imposed a state of emergency, also on the advice of the Prime Minister, who felt that this was required for her to remain in office.

Such actions were the result of the leverage Prime Ministers can have over the President due to the central role the Prime Minister plays in the election of the President.

Under the Constitution, the President selects the Prime Minister, and an electoral college selects the President, but the system is not so clear in reality. The very complex election of the President by an electoral college is usually subject to the wishes of the Prime Minister. There were two occasions during Prime Minister Nehru's premiership when his preferred candidate did not win the presidential election. Usually, however, presidents owe their position to the Prime Minister, as was often the case when Indira Gandhi chose candidates based on their presumed pliability. This led to those situations when presidents used far reaching powers on the advice of the Prime Minister, without requesting even reconsideration, and did not act necessarily in the best interests of the country as required by the presidential oath.

The selection of the Prime Minister is only a formal power of the President, as the President must choose the candidate who can command a majority in the Lok Sabha. However, the President can play a role of increased importance when no one party can command a majority in the Parliament. In this situation the President is important as a 'referee' and in assisting in the construction of stable majorities.³⁶ In 1979, defections from the ruling party left the Prime Minister without majority support in the Lok Sabha. The President was central in determining

³⁵ Much of the information in this section is drawn from: James Manor, 'The Prime Minister and the President' in B. D. Dua, *Nehru to the Nineties: The Changing Office of the Prime Minister in India*, Hurst & Company, London, 1994, pp. 115–137.

³⁶ *ibid* p. 136.

the outcome of this situation. He decided who was asked to attempt to gain the confidence of the Parliament, and whose advice he ultimately accepted with regard to dissolving the Parliament when there was no Prime Minister able to gain the confidence of the Parliament.

8. The President of Ireland

While the Irish President is not explicitly referred to as the Head of State in the Constitution, this has come to be understood as the President's true position.³⁷ This role, however, is a formal one, with the President exercising discretionary power in only a very limited area.

While the President is popularly elected, the nomination procedure, requiring the backing of one of the main parliamentary parties, ensures their dominance in determining the outcome of elections. If the main parties agree on a candidate, and only one is put forward, an election is not held, and presidential elections have been the exception rather than the norm.³⁸

The only discretionary power of the President used with any frequency is the right to refer a bill to the Supreme Court. In 1976, such a referral by the President led to his resignation when he incurred the derogatory remarks of a minister for this decision.³⁹ This shows that the President probably was acting independently in this instance, and, conversely, that independent action in conflict with the wishes of the Government is also perceived as unacceptable.

The power to convene a meeting of the Parliament has been used by some presidents. For example, President de Valera convened both Houses to mark the fiftieth anniversary of the first Dail in 1969, and, more recently, President Robinson did so in 1992, to indicate the direction of her presidency. However, given that the Government has control over the content of the President's presentation, this power is not considered to be of great import.

There does exist scope for an increase in the power of the President within the confines of the Constitution. The example of President Mary Robinson indicates that legitimacy for actions may be sought externally to the Constitution. President Robinson is the first President to have undertaken regular foreign travel as a representative of Ireland, even though the Constitution does not assign any role in foreign relations to the President.⁴⁰

9. The President of Israel

The role of the Israeli President is that of symbolic figurehead. It is a position of great prestige, but no real power.⁴¹ In accordance with the Constitution, the President acts only on

³⁷ James Casey, 'Ireland', in *Heads of State: A Comparative Perspective*, Australian Constitutional Centenary Foundation, 1993, p. 32.

³⁸ Michael Gallagher & Michael Marsh, 'The 1990 Presidential Elections: Implications for the Future', in Ronald J. Hill & Michael Marsh (eds), *Modern Irish Democracy*, Irish Academic Press, Dublin, 1993, p. 63.

³⁹ G. Hussey, *Irish Politics Today*, Manchester University Press, Manchester, Eng., 1993, p. 12.

⁴⁰ *ibid* p. 21.

⁴¹ A. Shalev, 'Israel', in *Heads of State: A Comparative Perspective*, *op. cit.*, p. 39.

the advice of the Government, signing laws enacted by the Knesset (the Parliament) and international treaties ratified by the Knesset. The President's powers to appoint judges and other office holders are similarly exercised. The President's pardoning power is also formal, and in practice exercised only on the advice of the Minister of Justice.⁴²

Prior to the 1993 enactment of the new Basic Law, the Constitution gave the President the responsibility for appointing the Prime Minister. It was customary for the President to delegate the task of appointing the Prime Minister to a representative from the largest party in the Knesset. The new Basic Law provides for the direct election of the Prime Minister. The President under the new law may play a role in dissolving the Knesset when the Prime Minister recognises that a majority in the Knesset oppose the Government.⁴³ However, these new arrangements operated for the first time in May 1996, and there is still uncertainty about the extent to which they affect the power of the President.

10. The President of Italy

The Italian President is considered to be a symbolic head of state. However, it is considered a strategic position by the political parties, one in which a strong personality may have a great deal of influence, and is therefore much sought after.⁴⁴ While the President's powers are formal powers, there has been cause for the President to exercise discretion consistently in one particular area. This relates to the power to nominate the Prime Minister.

Since the 1950s the President has played a key role in selecting the Premier. The unstable multiparty system in Italy has led to a situation of precarious coalition-building. As each of the frequent government crises unfolds, the President must undertake a great deal of negotiating and investigation to find a successor government or leader.⁴⁵ A convention has arisen that the President should seek to avoid legislative elections, and rather to attempt to build new coalitions.⁴⁶ The effect of this can be seen in the difference between the number of changes in Government compared with the number of elections.

The President has further asserted this power in forming governments in recent times. President Scalfaro in 1993 appointed the first Premier of the Republic who was not a member of Parliament. He appointed Ciampi, Governor of the Bank of Italy, to form a new government comprised predominantly of bureaucrats. The President entrusted this government to pursue an express legislative agenda to enact electoral reform and to promote economic recovery by reducing the deficit.⁴⁷ The Constitution does not articulate such a role

⁴² *ibid* p. 40.

⁴³ *ibid* p. 40.

⁴⁴ Michael Keating, *The Politics of Modern Europe*, Brookfield, Vermont, 1993, p. 195.

⁴⁵ Dante Germino & Stefano Passigli, *The Government and Politics of Contemporary Italy*, Harper & Row, New York, 1968, p. 68.

⁴⁶ David Hine, *Governing Italy: The Politics of Bargained Pluralism*, Clarendon Press, Oxford, Eng., 1993, p. 99.

⁴⁷ Carol Mershon and Gianfranco Pasquino, *Italian Politics: Ending the First Republic*, Westview Press, Boulder, Col., 1995, p. 15.

for the President in the legislative process. The Dini government provides another example of the President's use of the power to appoint the government from outside the Parliament. The power of the President to refuse a request from the Prime Minister to dissolve the Parliament has also been used. For example, in 1995 President Scalfaro refused to grant Prime Minister Berlusconi early elections as he intended to follow a particular legislative agenda before he allowed an election to take place.

Presidents have also declined to promulgate laws. In a well known instance in 1993, President Scalfaro declined to sign the cabinet's decrees on Tangentopoli, which entailed approving the decriminalization of illicit party financing.⁴⁸ Furthermore the President spoke out publicly against such moves, exerting pressure on the government by making public addresses.

The constitutional provision that the President may send messages to Parliament was not initially utilised. However from 1978, when Pertini became President, this power was adopted by presidents. It has been used as a way to express dissatisfaction with the government, or to suggest new directions.

Presidents have made use of their office to address a broad range of issues and problems with many institutions. President Cossiga, for example, made scathing criticisms of the party system, focusing on its inability to provide viable alternative governments to the electorate.⁴⁹ Ironically Cossiga had been a member of the (then) main political party, the Christian Democrats, and had served a time as Prime Minister. Scalfaro, who had similarly been a long-serving member of the Parliament, expressed the hope that future governments would contain few professional politicians.⁵⁰ These publicly-uttered sentiments reveal the extensive degree of autonomy that the Italian President may assert.

11. The President of Switzerland

As a member of the Federal Council (which is similar to a cabinet), the President does not have greater powers than the other members of the Federal Council, but rather has a different range of formal duties. The President presides over the Council and nominally over the Swiss confederation.

The President is important to the extent that the federal government is important. The greatest constraint on the President's power is the confederal structure of Switzerland.

The President retains a portfolio (one of Foreign Affairs, Interior, Justice and Police, Military, Finance, Public Economy, Transport, or Communication and Energy), and continues to be responsible for that department. In one sense this makes the Swiss President comparatively powerful, due to the unique situation of being responsible for a ministry. However, in practice

⁴⁸ *ibid* p. 91.

⁴⁹ Hine, *op. cit.*, p. 162.

⁵⁰ Mershon & Pasquino, *op. cit.*, p. 38.

the President's powers do not essentially extend beyond those of a minister. By custom the person elected as Vice-President in one year will serve as President the following year.⁵¹

12. The President of the United States of America

The American Constitution sought to create a system of checks and balances with divided responsibility between the three arms of government; the executive, the legislature, and the judiciary. In reality this separation is not so clear, and, in the case of the President, the generalities of the Constitution have led to an involvement in the other arms of government often at a level not intended in the Constitution.

The electoral college, while still in existence, works very differently from the intentions of the Constitution. In effect, the public votes for an elector who runs on a party platform and guarantees to vote for that party's presidential candidate. This has become institutionalized to the extent that the common perception is that the President is popularly elected, which is in effect how the electoral college works. The two major political parties effectively determine and limit the public's choice in this area. Presidents must in practice receive the backing of one of these parties in order to win an election.

The question of who, for example, controls the legislative agenda is difficult to determine. Many refer to the President as the 'chief legislator'. While this can be misleading as to the extent to which the President may shape the legislative agenda, the President does exercise influence at a level beyond that which is intended in the Constitution.⁵² The President has a great deal of influence in shaping the legislative agenda, but does not exercise de facto power. Presidents have their own agendas which they attempt to make Congress adopt, but success is very much determined by, for example, the lobbying skills of the individual President, the manoeuvrings of political parties, and the perceived mandate of the President. The most effective tool the President may use to influence legislative outcomes is the constitutional power to veto. This power is usually effective.⁵³ It has also been used with some frequency; between 1789 and 1994, presidents vetoed 2,513 bills, and only 104 vetoes were overridden by Congress.⁵⁴

The duty to 'take care that the laws be faithfully executed' in practice puts the President at the head of the Federal bureaucracy. This has become increasingly large and complex, giving the President greater responsibility, and also extensive power which is at odds with earlier interpretations of the office and beyond the scope of the power intended by the framers of the Constitution.

⁵¹ Walter S.G. Kohn, *Governments and Politics of the German-Speaking Countries*, Nelson-Hall Inc, Chicago, Ill., 1990, p. 210.

⁵² Robert L. Lineberry, George C. Edwards and Martin P. Wattenberg, *Government in America*, Harper Collins, New York, 1994, p. 468.

⁵³ *ibid* p. 469.

⁵⁴ Bruce Wetterau, *Congressional Quarterly's Desk Reference on American Government*, Congressional Quarterly Inc, Washington, D. C., 1995, pp. 42–44.

The President throughout American history has exercised the powers of commander-in-chief of the armed forces, though in different ways. While President Washington in 1794 himself led the army to quell a rebellion, in more recent times presidents have made important military decisions rather than participate in war as such; for example, President Truman selected the target and the date for dropping atomic bombs on Japan, President Lyndon Johnson selected targets for bombing in North Vietnam, and President Reagan made the decision to send troops to Grenada and to bomb Libya.⁵⁵

The Constitution assigns the power to declare war to Congress, but presidents have increasingly disregarded this stipulation, making military commitments without seeking the approval of Congress. Congress's constitutional right to make these decisions was also disregarded in the case of the Vietnam and Korea conflicts, as they were never officially declared to be wars.⁵⁶ Even after the War Powers Resolution,⁵⁷ presidents did not consult with Congress before entering wars (as seen, for example, during the Bush presidency).

Presidents have further extended their power in the area of treaty making. 'Executive agreements' with other executive heads of state are frequently utilised, which do not require the Senate's approval. These have been used extensively since World War II.⁵⁸ In accordance with the Constitution, the President has made use of the power to extend diplomatic recognition to other nations, as did President Carter, who extended recognition to the People's Republic of China, and ceased US relations with Libya.

The constitutional provisions for the appointment of officials have been widely used by presidents. In particular the President takes a good deal of care and interest in the selection of Supreme Court judges. While the President cannot influence the judges after their selection, usually an attempt is made to select judges of a similar ideological position, in the hope of this leading to judgements in accordance with presidential views.

The presidential power of pardon has been used; for example President Ford granted former President Nixon a pardon.

The only President who has been impeached was Andrew Johnson in 1868, although it was seriously considered for President Nixon.⁵⁹

Part B: Evaluation

⁵⁵ Lineberry, Edwards and Wattenberg, *op. cit.*, p. 480.

⁵⁶ *ibid* p. 481.

⁵⁷ This was passed in 1973, over President Nixon's veto, and was intended to allow Congress greater influence over commitment of the Armed Forces to overseas hostilities. It requires Presidents to consult with Congress prior to such commitment wherever possible, and further, if 60 days after the engagement of troops Congress had not declared war or granted an extension, the troops would be withdrawn.

⁵⁸ Wetterau, *op. cit.*, p. 45.

⁵⁹ *ibid* p. 60.

The powers of presidents in each of the countries under analysis provide interesting case studies as to the manifestations of constitutional powers of presidents. While the use of presidential power in the countries examined differs a great deal due to peculiarities of the individual systems and political environments, there are several themes in the use of presidential power that can be identified. Identification and evaluation of these trends provides analysis upon which to base further discussion on the powers of an Australian President.

Mode of election

An issue of great importance, in the Australian republican debate, is the question of the impact of the mode of election on the powers of presidents. On the basis of the research conducted for this paper there can be no definitive conclusion drawn on this issue. While in certain instances the fact that a president was popularly elected may have contributed to the legitimation of the aggrandisement of power, it is only one of many factors. There are as many non-powerful as powerful popularly elected presidents.

The three most powerful presidents of the twelve examined are popularly elected. They are the Finnish President, the French President, and the US President (popularly elected in effect). This however, does not lead to the conclusion that this power is a result of popular election, or that this is the norm for popularly elected presidents. These presidents have extensive constitutional powers. Undoubtedly the extent of these powers would not have evolved further in the absence of a perceived popular mandate, but this is not sufficient in itself. Furthermore, the other countries with popularly elected presidents, Austria, Iceland and Ireland, have presidents among the least powerful. This would indicate that political, as well as other factors, such as extensive constitutional power, are required to increase the powers of presidents. Another important point is that the presidents of India and Italy, for example, who are both appointed by an electoral college, are in the possession of more extensive powers in practice than the presidents of Austria, Iceland and Ireland.

Forming Governments

There are other, more compelling, factors in the explanation of the exercise of presidential power. The example of Italy is illustrative of the tendency in weak multiparty systems for the president's importance to increase in the process of forming governments. The Italian President is a symbolic head of state whose functions are largely formal, with the exception of the power to appoint the Prime Minister. Due to the frequent instability as a result of the inability of the political parties to forge and maintain stable majorities, the President is required to act as an arbiter in these situations. Finland provides another example of presidential intervention in the formation of governments becoming the norm due to problems of maintaining cooperation between parliamentary groups. The Indian President has also played an important role when the Parliament has not been able to form a stable majority. It is also predicted that the Austrian presidency will evolve to become more important as a result of the increasing number of parties gaining representation in Parliament.

In a party system such as Australia's, however, this power would not be of such importance, and there would not be a need for the President to exercise discretion in the formation of coalitions, as the outcome would be predetermined by the political parties on the basis of clear majorities and stable coalitions.

The power of the French President has also been expanded as a result of the constitutional power to select the Prime Minister, and effective power in choosing the rest of the government at certain times. At certain times this allows the President to act as effective head of government as well as head of state. This does not relate to parliamentary instability as such, but more to the inherent weakness of the Prime Minister in relations with the President.

In the case of the Finnish and Italian presidents, this power has involved the ability to impose technical governments. In both cases, presidents have imposed governments of their choosing to solve the problems caused by a parliamentary impasse. This has enabled these presidents to pursue policy objectives, as these technical governments are contracted by the President to address specific issues. For example, the Italian President in 1993 appointed an interim government specifically to address the budget deficit, and to enact certain reforms of the electoral system. The Finnish President has also used this power in a similar way, as when President Kekkonen installed a technical government to address the problem of unemployment. The power to nominate prime ministers and other members of the government, therefore, can be of great significance in certain political systems.

Foreign Affairs and Military Powers

The power to conduct foreign relations has proved important in the expansion of presidential power in certain cases. The increasing complexity of international relations has come to include, for example, issues of trade and commerce, and has impacted on the scope of the powers of those presidents who have responsibility for foreign affairs. Finland provides the most remarkable illustration of this connection. Authority over foreign affairs has been the major determinant in the increase of the Finnish President's power. This was effectively seen to legitimise the increase in the President's influence over domestic issues, for example, in the ability to exclude parties from governments on the basis of their lack of international acceptability. This power also relates to issues specific to Finland, in that the increase in power over foreign affairs of the President coincided with the perception that amicable relations with the Soviet Union were of supreme importance, enabling the President to use discretion as to how these were to be maintained.

The French President has an important international profile at all times, whether during a period of cohabitation or under more normal arrangements in French politics. However, this has not of itself been a major determinant in the expansion of presidential power in France, given the role of the President, more often than not, as simultaneous head of state and head of government. The French President is also effective head of the armed forces, which further reinforces supremacy in the realm of foreign affairs.

The US President is similarly head of the armed forces with the power to conduct foreign affairs. These work in tandem to enhance the power of the President, both internationally and nationally.

Overall it can be concluded that effective power over foreign affairs does tend to contribute to the expansion of presidential power in other areas, although certainly to varying degrees between the different countries.

In the case of Austria, Italy, Germany, Iceland, India and Italy, the power to conduct foreign affairs is formal only, exercised in accordance with, and on the advice of, the government, as is, in the case of the Italian, Irish, Indian, Austrian and Finnish presidents, control over the

armed forces. The prestige of the position of President is further enhanced by the formal duties associated with foreign affairs.

Legislative Powers

Legislative powers are not generally the domain of heads of state. However, regardless of the constitutional intentions for the exercise of this power, some presidents are able to be activist with regard to legislation and are able to pursue a legislative agenda. This has been shown with the ability of the Italian and Finnish presidents to create a policy agenda through technical governments. The US President also has extensive influence over the legislative process.

The most effective tool, however, is the ability to veto legislation. The US President's power of veto is the most extensive power in this context; the veto has had a great deal of success, and may be implemented for a variety of reasons. In most of the other countries, this power is predominantly a suspensive veto, and refers usually to the constitutionality of a bill. The presidential prerogative to request that the Parliament reconsider a bill, as, for example, in the cases of Ireland, Germany and Austria, is merely a formal power relating to the constitutionality of a bill.

Independence of Presidents

Another theme which must be explored in evaluating the powers of presidents is, conversely, who exercises power over them. The most recurrent theme is the pervasiveness of political parties. Political parties generally control the nomination process, and consequently the election of presidents, be the election a popular ballot, by an electoral college or by the Parliament. This leads to two important outcomes. First, this ensures that the position of President, with few exceptions, will be filled by a politician or ex-politician. Second this increases the likelihood that the President acts on the basis of political partisanship, rather than on a neutrally-determined conception of the national interest. The Finnish President reveals these traits most conclusively, though it is also true of the Italian President, the Austrian President and the Indian President, while it is presumed of the French and US presidents.

A further issue which arises from the power of parties to determine the nomination process, is the central role in some cases that the Prime Minister plays in being able effectively to determine who shall fill the presidency. India provides an interesting example here. Though the President is officially elected by an electoral college, prime ministers can generally influence the outcome in accordance with their own wishes. The Prime Minister is generally understood to select presidents on the basis of their loyalty, or their pliability. This has had the desired effect in many instances in India, where presidents are indebted to the Prime Minister for their position, and Presidents have shown their willingness to accord greater precedence to the demands of the Prime Minister than to what may be considered the best interests of the nation.

In the Australian context, these issues are of concern in the debate over the role of the head of state. It is not inherent in the position that political bias or gratitude will pervade the actions of the President, but the aforementioned conditions for the occurrence of this should be given due consideration.

Concluding Remarks

These are some of the many issues that must be addressed in the debate over the Australian republic. The finding that popular election does not necessarily lead to an expansion of a president's power is valuable not only as a challenge to the assumption by many that this is the case, but also to the centrality of this issue. It seems that the nomination process determines the outcome of all forms of presidential election in one sense, in that overwhelmingly presidents are politicians. Furthermore, the trends in the greatest sources of power for presidents should be taken into consideration. These pertain to the ability to nominate prime ministers and ministers, and the ability effectively to conduct foreign affairs, and in certain instances to intervene in the legislative and policy process.

APPENDIX

Summary of constitutional provisions for presidents. References in the text are to sections in the constitution of the country examined.

Austria

The President is popularly elected (Article 60).

The President is responsible to the Federal Assembly (Article 68. 1). All acts of the Federal President are undertaken on the proposal of the Federal Government or the relevant Federal Minister (Article 67. 1). All acts of the Federal President require for their validity the countersignature of the Federal Chancellor or the relevant Federal Minister (Article 67. 2). The President convokes the National Council for ordinary sessions (Article 28. 1), and may also do so for extraordinary sessions on the recommendation of the National Council or the Federal Council (Article 28. 2).

The President appoints the Federal Chancellor and, upon the Chancellor's proposal, the other members of the Government (Article 70. 1). Other presidential appointments include federal officials (Article 65. 2a), judges (Article 86. 1), and members of the Constitutional Court (Article 147. 2).

In foreign affairs, the President represents Austria internationally, receives envoys, authorizes the appointment of foreign consuls, appoints the consular representatives of the Republic abroad, and concludes state treaties (Article 60. 1). The President is Commander-in-Chief of the armed forces (Article 80. 1).

The President may exercise the prerogative of pardon (Article 65. 2c).

In order for the Federal President to be deposed, the National Council, in a meeting of at least half its members, must vote, with a majority of two thirds or more, that the Federal Chancellor be requested to convene the Federal Assembly to determine whether a referendum to that effect should be put to the people. If the referendum is put and the vote is positive, the President is deposed; if it is negative, the National Council is dissolved. (Article 60. 6).

Botswana

The President of the Republic of Botswana is elected by the Parliament.⁶⁰

The President is the Head of State (Article 30), and is vested with executive power (Article 47. 1). In the discharge of presidential functions, the president acts only on his own deliberations (Article 47. 2).

⁶⁰ The elections of the members of Parliament and the election of the President are linked; if there is more than one candidate for the presidency, each candidate for office in the Assembly must declare their support for a presidential candidate.

The President is ex-officio a member of the National Assembly. The President is entitled to speak and vote in all proceedings (Article 58. 1). The President receives advice from the Cabinet with whom the President is obliged to consult as far as is practical (Article 50.1, 2). The President appoints the members of the Cabinet (Article 42), may constitute and abolish offices of Botswana (Article 56), and may appoint members of the armed forces (Article 48. 2a, b).

The President is Commander in Chief of the armed forces (Article 47. 2).

The President has the prerogative of pardon (Article 53a).

The President retains office until the Assembly is dissolved or it passes a motion withdrawing confidence in him (Article 32. 8).

Finland

The President is popularly elected (Article 23),⁶¹ on the nomination of candidates by political parties with parliamentary representation (Article 23. a).

The Constitutional powers vested in the Finnish President are extensive. The President holds executive power (Article 2). In the oath of office, the President swears to uphold the Constitution and laws of Finland and to promote the prosperity of the people (Article 24).

The President may propose legislation to the Parliament, may request that any existing act be amended or repealed, may propose a new act to Parliament, and also may issue decrees (Article 28). The President may refer acts to the Supreme Court (Article 14). Parliament can be convened for an extraordinary session and dissolved by the President (Article 27). The President may demand information from government agency heads (Article 32), and the Chancellor of Justice is to report to the President once a year (Article 48). The President may present and also withdraw government proposals to Parliament.⁶²

The President appoints the Prime Minister and members of Cabinet (Article 36), the Chancellor and Assistant Chancellor of Justice (Article 87. 1), Presidents of the Supreme Court (Article 87. 3), heads of central state agencies and County Governors (Article 87. 5), officials in the Council of State, the Supreme Court (Article 87. 6), and army and naval officers (Article 90).

Foreign relations are conducted by the President, who may conclude treaties which must then be approved by Parliament (Article 33). The President is the Supreme Commander of the armed forces (Article 30).

⁶¹ This is as a result of the 1991 Constitutional Amendment which introduced popular election instead of the existing electoral college. The electoral college in practice was representative of the popular vote.

⁶² Parliament Act Section 28.

Based on an opinion from the Supreme Court, the President may grant pardons (Article 29).

If the Council of State or the Chancellor of Justice consider that the President has committed high treason or treason, the Parliament may then determine, by at least three quarters of votes cast, that charges are to be brought. The charges are prosecuted by the Chancellor of Justice in the Supreme Court (Article 47).

France

The President is popularly elected (Article 7).

The constitutional powers of the President are extensive, and it is the broad duty of the President to ensure that the Constitution is respected (Article 5). The President presides over the Council of Ministers (Article 9). Most acts of the President are discretionary; the President may convene both houses of Parliament for the purpose of communicating a message (Article 18), and declare the dissolution of the National Assembly (Article 12).⁶³ The President may submit a bill to referendum (Article 11) and may also submit laws to the Constitutional Council (Article 61). The President may request that the Government reconsider laws (Article 10).

The President appoints the Premier (Article 18), and three of the nine members of the Constitutional Council are appointed by the President (Article 56). Appointment of the other members of government are made on the proposal of the Premier (Article 8), and appointments to civil and military posts also require the countersignature of the Premier or the appropriate minister (Article 13).

In foreign affairs, the President accredits ambassadors and envoys (Article 14), and negotiates and ratifies treaties (Article 52); these acts require the countersignature of the Premier or the relevant minister. The President is Commander-in-Chief of the armed forces (Article 8). In emergency situations, the President shall 'take the measures commanded by these circumstances' (Article 16).

The President has the power of pardon (Article 17).

The President may be indicted by a majority vote in each of the Assemblies voting in open ballot, and by an absolute majority of both Assemblies. The only charge which may be laid against his exercise of office is high treason, and he must be tried by the High Court of Justice (Article 68).

Germany

The President is elected by the Federal Convention without debate; this body consists of the members of the Bundestag and an equal number of members elected by the Land Parliaments by proportional representation (Article 54. 2. 3).

⁶³ This may occur after consultation with the Premier and the Presidents of the assemblies, and cannot occur within the first year following elections.

The President's oath requires the President to 'dedicate efforts to the well-being of the German people, enhance their benefits, save them from harm, uphold and defend the Basic Law and Laws of the Federation' (Article 56).

Any order or directive from the President requires for its validity the countersignature of the Federal Chancellor or the appropriate federal minister (Article 58). The President may declare legislative emergency on a bill declared urgent by the Government at the request of the Government (Article 81).

The President nominates the Federal Chancellor who must have the confidence of the Bundestag (Article 63. 1, 2). The federal ministers are appointed by the President on the proposal of the Federal Chancellor (Article 64. 1). Other presidential appointments include federal judges, federal civil servants and officers of the armed forces (Article 60. 1).

In foreign affairs, the President represents Germany and concludes treaties with other nations (Article 59. 1).⁶⁴

A motion to impeach the Federal President, for wilful violation of the Basic Law or any federal law, must have the support of at least one quarter of either house of Parliament, and must be carried by a two-thirds majority in either house. The President is tried before the Federal Constitutional Court, and if found guilty, may forfeit his office (Article 61).

Iceland

The President is popularly elected (Article 2).

Executive power is vested in the President (Article 3), and is exercised through the ministers (Article 13).

Legislative powers are vested jointly in the Parliament (the Althing) and the President (Article 3). The President presides over the State Council which is composed of the ministers; laws and important government measures are to be submitted to the President in Council. The signature of the President with the countersignature of a minister validates an act of Government (Article 14); if the President is opposed to a law it shall be submitted to a popular referendum (Article 26). The President can submit bills and proposals to the Althing (Article 25), and may also summon, as well as dissolve, the Althing (Article 22, 24).

The Cabinet is selected by the President, who determines the number of ministers as well as their duties (Article 15). The President has other broad powers of appointment (Article 20).

In foreign affairs, the President may conclude treaties. The President has emergency powers (Article 28).

⁶⁴ Those treaties which regulate the political relations of the Federation or relate to matters of federal legislation require a federal law to be enacted.

The President has the prerogative of pardon (Article 29).

Members of the United Althing may resolve, by a three quarters majority, that a plebiscite shall be held to determine if a President should cease to hold office before the expiry of his term. If the plebiscite is defeated, the Althing is dissolved (Article 11).

India

The President is elected by an electoral college which consists of the members of both Houses of Parliament and the members of the legislative assemblies of the states (Article 54).

Under the Constitution, executive power is vested in the President (Article 53. 1). All executive action is to be taken in the name of the President (Article 77).

There is a Council of Ministers headed by the Prime Minister to aid and advise the President, who shall act in accordance with this advice (Article 74). The President may require that the Council of Ministers reconsider its advice (Article 74). It is the Prime Minister's duty to keep the President informed of all decisions of the Council of Ministers and to provide the President with information relating to the administration of the affairs of the state and proposals for legislation, as the President requires (Article 78a, b).

The Prime Minister is appointed by the President, and the other ministers are also appointed by the President on the advice of the Prime Minister (Article 75. 2). The ministers hold office at the pleasure of the President (Article 75. 2). The Attorney General is also appointed by the President, and gives advice to the Government on legal matters (Article 76. 2).

The President may, on the advice of the Prime Minister, exercise emergency powers (Article 352). The President has the power to grant pardons (Article 72).

A charge may be brought against the President for violation of the Constitution if a resolution signed by one quarter of the members of a House of Parliament is moved in that House and passed by a two thirds majority of the membership of that House. The charge is investigated by the other House, and, if two thirds of the membership of that House vote to sustain the charge, the resolution has the effect of removing the President from office (Article 61).

Ireland

The Irish President is directly elected by the people (Article 12. 1. 2).

There is a Council of State to aid and counsel the President, which consists of the Prime Minister, the Deputy Prime Minister, the Chief Justice, the President of the High Court, the Chairman of the House of Representatives and the Chairman of the Senate, and the Attorney General (Article 31. 1).

Da'il Eireann (the House of Representatives) is summoned and dissolved by the President on the Prime Minister's advice (Article 13. 2), although the President may refuse dissolution in

certain instances (Article 13. 2. 2).⁶⁵ The President may convene meetings of the Oireachtas (Parliament) (Article 13. 2. 2). After consultation with the Council of State, the President may communicate with the Oireachtas by message or by address (Article 13. 7. 2). The President's signature is required to promulgate laws, which shall be given for every law made by the Oireachtas (Article 13. 3. 2), although the President may refer any bill to the Supreme Court to determine its constitutionality after consultation with the Council of State (Article 26. 1. 1). On petition by members of Parliament, the President may submit a bill to popular referendum prior to promulgating it (Article 27. 1). The President shall be kept informed on matters of domestic and foreign policy by the Prime Minister (Article 28. 5. 2).

The President is required to nominate the head of Government (the Prime Minister), and, on the Prime Minister's advice, appoint the other members of the government (Article 13. 1, 2). Judges of the Supreme Court, as well as seven members of the Council of State, and officers of the armed forces, are appointed by the President (Articles 35, 31. 8).

The President has supreme command of the defence forces (Article 13. 2).

A notice of motion signed by at least thirty members proposing to prefer a charge against the President for 'stated misbehaviour' can be raised in either of the houses of the Oireachtas. The proposal must be adopted by a two thirds majority of the membership of the House in which it is raised. The charge is then investigated by the other house of the Oireachtas, and, if it determines by a two thirds majority that the charge has been sustained and is such as to render the President unfit for office, the President is thereby removed from office (Article 10).

Israel

The Knesset (the Parliament) elects the President (Article 39). The President is the head of state (Article 36).

The functions of the President are to promulgate laws (Article 41 a. 4) and sign conventions with foreign nations that the Knesset has ratified (Article 41 a. 2). The countersignature of the Prime Minister or a minister is required in conjunction with the President's signature on official documents (Article 41 d).

The President appoints judges upon their election by a Judges Election Committee (Article 147 a), and confirms the appointments of foreign consular representatives (Article 41 a. 3). In foreign affairs, the President accredits diplomatic representatives (Article 41 a. 3).

A complaint that the President 'is unworthy of his office owing to conduct unbecoming his status as President' may be brought before the House Committee by at least 20 members of the Knesset. The House Committee may propose to the Knesset, on a vote of three quarters majority of its members, that the President should be removed from office. A majority of three quarters is required in the Knesset. The President has the right to defend himself before the House Committee and the Knesset (Article 20).

⁶⁵ This is at the sole discretion of the President.

Italy

Election of the President is by an electoral college which consists of a joint sitting of the two houses of Parliament and three delegates from every region (Article 83). The President is the head of state (Article 87).

The President provides for the election of a new Parliament (Article 87), and may also dissolve one or both chambers after consultation with their Speakers (Article 88).⁶⁶ Laws are promulgated by the President (Article 73), who may request further consideration of them by Parliament (Article 74).⁶⁷ The President is authorised to send messages to Parliament, and authorizes the submission of bills moved by the government to Parliament (Article 87). The President may issue decrees which have the force of laws and regulations (Article 87). All acts of the President must be countersigned by the relevant ministers, or the Prime Minister (Article 89).

The President appoints the President of the Council of Ministers (the Prime Minister), one third of the members of the Constitutional Court, as well as other state officials (Article 92).

In foreign affairs, the President is vested with the power to accredit and receive diplomatic representatives, and, on the authorization of Parliament, to ratify international treaties. The President commands the armed forces, and presides over the Supreme Defence Council (Article 87).

The President may confer honours, grant pardons, and may provide for a referendum (Article 87).

The President may be impeached by both houses of Parliament in joint session and tried in the Constitutional Court, supplemented by sixteen persons chosen from a list drawn up by Parliament every nine years (Articles 134, 135).

⁶⁶ Though not during the last six months of the President's term of office.

⁶⁷ If the bill is passed again the law must be promulgated.

Switzerland

The Federal Assembly elects the Federal Council (Article 96. 1), which consists of seven members, including a President and a Vice President (Article 95).

The Chairman of the Federal Council is the President of the Confederation (Article 98). The Constitution does not concisely describe the role of the Federal President. Federal powers are limited to begin with, given the confederal structure of Switzerland (Article 5). Subject to the rights of the Cantons, the supreme power of the Confederation is exercised by the Federal Assembly, which consists of two Houses, the National Council and the Council of States (Article 71).

The President does not have powers additional to those of the other members of the Federal Council, which include powers to conduct federal affairs and to ensure compliance with the Constitution (as well as the constitutions of the Cantons) (Article 102). The Council must manage disputes between Cantons (Article 102. 5), and examine agreements between cantons and with foreign states (Article 102. 7). The Council is in charge of external affairs (Article 102. 8) and security (Article 102. 9). It manages military affairs and all branches of federal administration (Article 102. 12), and has limited power to raise troops if the Federal Assembly is not meeting (Article 102. 11). The Council manages the finances of the Confederation (Article 102. 14), and should submit reports on the state of the Confederation to the Federal Assembly (Article 102. 16).

The Constitution does not specify how a President may be removed from office. A President, in any case, cannot hold office for more than one year in succession.

United States of America

The President is elected by an electoral college, consisting of a number of electors in each state equal to the number of senators and representatives that the state has in Congress (Article II, Section 1, and Twelfth Amendment).

The Constitution of the United States vests executive power in the President. The President must swear to preserve, protect and defend the Constitution (Article II, Section 1).

While legislative powers belong to Congress, the President does have some power in this area. The President may recommend legislation to Congress (Article II, Section 3). The President may also veto legislation, although the veto can be overruled by Congress with a two thirds majority (Article I, Section 7). On extraordinary occasions, the President may convene both Houses of Congress and adjourn them if they cannot agree on a date themselves (Article II, Section 3). The President is to 'take care that the laws be faithfully executed' (Article II, Section 3).

The President appoints public officials and judges, on the approval of the Senate (Article II, Section 2).

In foreign affairs the President may make treaties with the support of two thirds of the Senate. The President is also Commander-in-Chief of the armed forces (Article II, Section 2).

The President may grant reprieves and pardons (Article II, Section 2).

The President may be removed from office following impeachment and conviction for treason, bribery, or other high crimes and misdemeanours (Article II, Section 4). Impeachment is brought by the House of Representatives and tried in the Senate, with the Chief Justice presiding (Article I, Section 3). The President may be convicted on the concurrence of two thirds of the senators present.