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A Single-Chamber Australian Parliament?*

David Solomon

This lecture was originally due to be given five months ago but it had to be postponed because I was unable to travel down from Brisbane. In the meantime we have experienced the referendum on the republic. The results of that referendum, together with the associated public opinion polls which help to explain what influenced the Australian people to reject the proposal, persuade me that I should continue to place in the public arena the proposals for an elected executive presidency that I put forward two years ago in my book, *Coming of Age*,[1] and to argue that they be given serious consideration when the time comes for different and better models for an Australian republic to be developed and debated by the people. That will not happen in the immediate future. The next debate about the republic will be the one we should have had last year—about whether we want to have a republic (of any kind at all) rather than maintain the present monarchical form of statehood. Once that is resolved—and that could happen relatively quickly if the polls are any guide—then we could get down to the detail of what kind of republic the Australian people want. It will be important next time that choices are available and that the voters are not alienated from the process as many of them thought they were last year.

In *Coming of Age*, I described the faults in the present system and then proposed my various solutions. It was not written as the manifesto for a political movement. Rather it presents the views I have developed about the way I believe our political system should change, some of which I first wrote about in 1976, in *Elect the Governor-*

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 18 February 2000.

[1] University of Queensland Press, St. Lucia, 1998.

General![2] In that book I noted the huge range of powers that the Constitution gives to the Governor-General. In practice these are mostly exercised by the government of the day, but a literal reading of the Constitution would allow the Governor-General to govern the country in much the same way (and with the same kind of powers) as an American president. The *conventions* of responsible government, however, mean that governmental power is exercised by the party controlling the House of Representatives. I suggested in that book published in 1976 that, if the Governor-General were *elected*, the conventions could be scrapped and we could have a government headed by a Governor-General elected by the whole nation, instead of a prime minister chosen by the majority party in the House of Representatives. All this could be done without changing a word of the Constitution. We could change our system of government, but not of course change from monarchy to a republic. That was not my primary concern.

The aim of writing *Coming of Age* was to open a debate about the way we are governed and explore some of the ways in which we might improve the system. It examined a large number of issues—whether we should have presidential or prime ministerial government, the role of parliament, the power of the federal government vis-a-vis the states, whether we should have a Bill of Rights to guarantee personal, political and other freedoms and to limit the powers of governments and parliaments, the place of the judges in the system, the electoral systems we use, people power and how we might get better politicians. It presented no single agenda, but many possibilities. It also dealt with the issue of the republic, which in my view is a desirable but not necessary precondition for improving the real part of the governance system. In practical terms, changes will occur either simultaneously with a change to the republic, or subsequent to it.

Let me outline the bare bones of a system of government I believe would serve Australia better than our present system, and then present the arguments relevant to one of the more controversial aspects of it—namely, a single-chamber Australian federal parliament.

- First, there should be a president elected by the national electorate, who would be head of government as well as head of state—in other words, a president whose role and powers would be similar to those of the American President.

- Second, the president would be free to choose people from outside the parliament as ministers, though the system would probably operate best with the inclusion of a few ministers chosen from the leadership of the president's party in the parliament.

- Third, the parliament would be reduced to a single chamber, with an electoral system a mix of the two systems used for the present two houses.

- Fourth, both the president and the parliament would be elected on the same day, for the same fixed term.

[2] Nelson, Melbourne, 1976.

- Fifth, the states should remain, but their independence should be enhanced through increased taxing powers. I suggested they should have access to sales taxes, but to some extent the advent of the Goods and Services Tax prospectively changes the situation and should increase the financial viability of the states.

- Sixth, we should have a Bill of Rights, initially at state level, then federally.

- Seventh, our rights should be protected by an independent judiciary.

This then is the context of the proposal for a single-chamber Australian parliament. This is not the system of responsible government of the kind to which we are accustomed in Australia, but a system where there is an executive president in charge of the government, and a parliament whose primary responsibility is to consider legislation. The government would be *accountable* to the parliament however, and in a manner which I believe would be more effective than our present system of keeping the public informed of the government's activities.

But why the need for change? Does the system we have at present really need to be fixed? The argument that follows is an edited version of the chapter on 'Making Parliament Work' in *Coming of Age*. I will raise some issues that were not dealt with in the book about the relationship between governments and parliament under the present system and under the system I would prefer.

Australian parliaments are not working adequately. The problem is not necessarily caused by their members, though the failings of some of those elected to parliament does contribute to the poor performance of the parliament. The real problem is structural. Parliaments are largely incapable of doing what they are supposed to do. They are not able to work in the way that representative democratic parliaments are intended to operate. The way they function is quite different from the way they did a century ago. They remain essentially nineteenth century institutions which did not change sufficiently to meet the quite different political circumstances of the twentieth century, and have little prospect of meeting the demands of the twenty-first century.

Fundamental changes need to be made to allow Australian parliaments to do what they are supposed to do. Forty years of tinkering with minor reforms have failed to give the parliaments a relevant role. The real problem is that executive governments have come to completely dominate the lower houses of parliament. That problem cannot be overcome unless the executive is moved out of parliament almost altogether. What is needed is a system which restores the classical idea of the separation of powers—with the roles of government and of parliament performed by different institutions. If that is done, major surgery can be performed on the federal parliament also, amalgamating the existing two houses into a more effective body concerned primarily with making law—operating more like the Senate than the House of Representatives.

The present parliamentary institutions in Australia are proving more and more inadequate to meet the heavy demands which our system of parliamentary democracy puts on them. In theory, the functions required to be performed by parliament include legislating, scrutinising the government and holding ministers and the administration

responsible for their actions, determining who should be in the government, providing a political stage and allowing the people to keep in touch with parliament, and keeping parliament in touch with the people. But not even parliament's most ardent defenders would claim that modern parliaments achieve all or even most of these aims. Defenders of parliaments have been forced to redefine what parliaments are expected to do and to lower expectations about what they can achieve.

The pressures on modern parliaments are enormous, particularly the pressures imposed by the volume of legislation which they have to consider. In 1901, the year the Commonwealth came into being, parliament passed only seventeen laws. In its first ten years, it averaged about 23 laws a year. During that same period the House of Representatives normally sat for more than 90 days each year. Parliament first passed more than 100 acts in a single year in 1952. By then it was sitting less frequently—74 days in that year. By the mid-1990s, legislative pressures had further intensified, but parliament—or more precisely, the House of Representatives—had barely responded to that pressure. In 1901, parliament passed a law every sixteen or seventeen days it sat. By 1946 it was passing a law for each day it sat. Now the House of Representatives spends two to three hours on average for each bill it considers. That time includes the introductory and explanatory speech by the minister responsible for the bill or his or her minister assisting, plus the considered reply by the Opposition's shadow minister, together with two or three other speeches. No one pretends that the House of Representatives is fulfilling any serious role as a legislator with this approach. It is true that the averages quoted above are slightly deceptive. Because of constitutional requirements to separate various kinds of money bills, legislation to accomplish a single policy end sometimes has to be considered by way of four or five separate bills, which will be debated together. The same considerations, however, applied to the way legislation was considered by the parliament in the past.

The House in the mid-1990s made two responses in acknowledgment of the fact that it rarely pays any significant attention to the legislation it passes. First, it decided to refer some legislation to its specialist committees. Second, it created a new committee of the whole House (the Main Committee), sitting in a separate room, to consider designated bills, from first reading to report stage, before formal adoption by the House. The main reason for adopting this procedure was to reduce the number of bills on which discussion was limited by use of the guillotine. In effect, the House of Representatives was able to increase the time it spent on legislation by creating a second chamber, which meets at the same time that the House is sitting and which normally deals only with non-contentious but very detailed legislation.

The only way in which it can seriously be argued that parliament as a whole is effective as a legislator is to accept that the responsibility for legislation has been transferred almost entirely to the Senate. These days the Senate sits longer and devotes more time to legislation than the House, and because the government does not control proceedings, the Senate considers more amendments from senators representing the Opposition and minor parties, and indeed passes some of those amendments. The Senate's ability to be an effective legislator is a consequence of the government not having a majority in that chamber. That is a result of the fact that the Senate is elected by a different system from that used for the House of Representatives, and that many voters choose to vote for different parties in the Senate from those which they vote for in the House.

Since the mid-1960s, first through the actions of 'rebel' Liberal senators (at a time when there was a Liberal-Country party government), then through the votes of the Democratic Labor Party (DLP) senators, then other independents, and more recently the Australian Democrat and Green senators, the Senate has been mostly outside the control of the government of the day—be it Liberal or Labor. The only exception was during the time when Malcolm Fraser was Prime Minister in the second half of the 1970s. Since the 1960s, senators have professed an interest in their responsibilities as legislators which is markedly different from that adopted by their predecessors. Previously, their scrutiny of legislation was political, in the sense that it was aimed at quite specific matters of policy. However, from the 1970s, the Senate has asserted that it is in control of the whole legislative process. It has made it clear that it is prepared to amend any piece of legislation which does not suit the philosophical bent of its majority. Perhaps its most significant action was to pass a resolution which laid down a timetable for its consideration of proposed laws—it told the House of Representatives that unless it received bills by particular dates, it would not even consider those bills in the current sittings of the Senate. That was the moment when the House of Representatives—that is, the government—finally lost control of the legislative process in the federal parliament.

The Senate had earlier taken over parliament's function of subjecting the government's financial proposals to detailed scrutiny. In 1969–70, the Senate agreed to an amalgam of proposals by its Clerk, Jim Odgers, the Opposition Leader, Lionel Murphy QC, the Leader of the Government in the Senate, Ken Anderson, and the DLP Leader, Vince Gair, for the establishment of a series of policy and estimates committees. As they developed, these committees subjected the government's budget and other appropriation measures to the most intense examination ever. The budget debate in the House of Representatives was merely an excuse for a wide-ranging political debate in which MPs could ride various hobbyhorses—unnoticed by the public at large. The Senate process allows a serious examination of the details of the government's expenditure, though it does not prevent grandstanding by senators who want to target individual public servants. Yet despite the House's privileged constitutional position in financial legislation, it has conceded to the Senate the primary legislative role even in this area. It is not unreasonable to describe the House as a rubber stamp for the financial and all other legislation proposed by the government, and the Senate as the only part of the parliament which acts as an independent check on the government.

The same is true of the House's supposed responsibility for monitoring the executive actions of the government and its bureaucracy. Although the House of Representatives belatedly followed the lead of the Senate in creating a series of parliamentary committees, those House committees are restricted to the subject matters dictated by ministers and, with some exceptions, the reports of the committees (which are controlled by government backbenchers) cause little concern for the government. The Senate's committees are a different matter. They are not controlled by the government, and the matters they investigate tend to be chosen by the Opposition and minor parties, rather than by the government. The matters they investigate are often politically sensitive and potentially embarrassing, both in their hearing phase and when they are reported upon.

Another function of the parliament where its recent performance has been inadequate is that of communicating information to the public. Australia was one of the world pioneers in allowing the (radio) broadcasting of federal parliament, and in taking that step the politicians were very conscious of the need to make their work available to the public. The parliament was much slower in agreeing to allow televising of some of its proceedings, because the politicians were concerned at the way they might be portrayed. Strangely enough, despite the availability of these communication tools, including the presence of the press gallery—about 200 journalists and media representatives permanently based in Parliament House—politicians have made less and less use of parliament as a forum for providing information. Ministerial statements were once a significant method adopted by governments to announce government policies and to debate them. In the early 1970s, for example, the House heard an average 75 such statements each year, and devoted over two per cent of its total time to them. In 1993 there were only six such statements, which took one hour and 28 minutes of the House's time. In effect, ministerial statements had become irrelevant.

Probably the main reason for this is that governments see no political value in making announcements in the parliament, or in having them debated there. Parliament is rarely considered to be an appropriate place for such announcements, because what happens there (other than in question time) is mainly ignored by the media. While there are good reasons for parliament ceasing to have any significant role in the communication of government policy to the people, the fact that it no longer has this function further diminishes its significance. Governments certainly feel no obligation to inform parliament of their policies, and there is no evidence that backbenchers are concerned at this diminution of parliament's role.

Question time, which is the activity by which the success of the House of Representatives must be judged, rarely lives up to its dramatic potential. If it represents the essence of parliamentary democracy, then the institution is seriously flawed. The fact that it simply does not match the expectations which surround it has been recognised in the continuing attempts by parliamentarians to reform it.

The parliamentary game which is played in Australia—at least in lower houses—is not directed towards legislative outcomes. It is not about producing the best possible laws. It is about holding onto or winning government. The aim of the Opposition is to break down the government's hold on power. It may sometimes use parliament to try to promote its own policies, but it will normally prefer to do that outside the parliament (just as governments now do) because it will not want to provide an easy opportunity for the government to reply to its policies.

Whether there ever was a period when parliament did fulfil the functions which political scientists say that parliaments are supposed to perform does not matter. It is certainly true that there has been deterioration in parliamentary conduct in recent decades. Parliament has been passing more and more legislation and spending less and less time considering it. To some extent, the media must take responsibility for parliament's decline. Television in particular has helped trivialise the reporting of politics. Every politician tries to master the 20 or 30 second 'grab', to put in just a few sentences his or her version of the current controversy. More often than not, the news report will be about a clash or dispute or brawl. Television news does not try to

explain or explore policy issues. The newspapers are better at analysis, but no longer bother to provide much space for the coverage of debates by politicians in parliament.

Whatever the cause, the image of politicians and the parliament has suffered grievously. None of the reform proposals which have been advocated and implemented has reversed the trend. For example, the greatly expanded committee system has certainly been beneficial. Most parliamentary committees undoubtedly do a good job. They often present thoughtful and useful reports which sensible governments are able to use. They provide a means by which interest groups outside the parliament can try to influence public opinion—though if those interest groups want to achieve significant changes in government policy they will work directly on ministers and senior public servants rather than rely on what committees might recommend.

In 1966, at the beginning of the period when the Senate was emerging as an institution which had a role independent of that of the House of Representatives and beyond the control of the government, the then Clerk of the Senate, Jim Odgers, wrote a sixteen page submission for cabinet, in which he attempted to define the role of the Senate and its relationship with the government. Mr Odgers said that the Senate must face up to and accept the fact that it is not the governing House. 'The House of Representatives is, and must always be, the policy making chamber. The worst thing that could happen to the Senate is for it to attempt to compete with the House of Representatives as a policy maker. If it did, it would, in the process of time, risk emasculation, as the House of Lords was eclipsed.' He continued by saying:

> If it disagrees with policy, the Senate has the right, indeed the duty, to project its viewpoint by the process of amendment or suggestion, but it is submitted that the Senate should not—except where state interests are seriously threatened—insist upon amendments disagreed to by the policy making Chamber. The will of the House of Representatives should prevail and, if that House errs, it can safely be left to the sanction of the people at election time.

The purpose of Odgers' submission was to try to persuade the government to allow the Senate to develop its committee system. The government, however, decided that the submission should be regarded as no more than a private expression of the Clerk's views. It decided 'that it would not receive the paper or take official cognisance of it.'

Odgers did not keep his views to himself. In *Australian Senate Practice* he stated that if there was a disagreement between the two houses on a matter where the government had a clear mandate the Senate 'may yield'. More than twenty years later, the latest edition of *Odgers' Australian Senate Practice*, edited the current Clerk, Harry Evans, adds a rider to the suggestion that the Senate may yield, with the words 'but the test is always likely to be the public interest.' The public interest is of course assessed by the Senate itself, not by the government.

The Holt government, however, refused even to consider the Odgers submission. That it took such a stance is understandable only on the basis that all Australian governments reject and resist any suggestion that they should not be able to put into law any proposal upon which they have determined. In effect, they do not accept the

notion that the parliament (or some part of it) has a role independent of government to consider independently and fashion the laws, to question and demand answers about the way in which the government is conducting the affairs of government, and to provide a form of public accountability. They will not acknowledge the extent to which they are supposed to be accountable to the parliament, let alone surrender to the parliament the power to fulfil its theoretical responsibilities. Governments have preferred to forget that the people elect members of parliament to represent them.

Although the Australian Constitution devotes separate 'chapters' to the Parliament, the Executive Government and the Judiciary, very much along the lines of the United States Constitution, it does not follow the American model for a true separation of powers between those three organs of government. There was considerable debate at the Constitutional Conventions 100 years ago about what system of government the new nation should adopt, though almost all those present were committed to the system to which they were accustomed, the system of responsible government which required ministers to be members of parliament and to be responsible to the lower house of the parliament.

The Australian Constitution required that ministers should be members of parliament. This destroyed any possibility of a separation of powers between government and parliament, and, with the development of political parties, led to the control of the parliament (or at least, the lower house) by the ministers. The American Constitution prevented this from happening by providing for the election of a president in whom the executive power of the United States (i.e. the government) was vested, giving the President power to appoint the various officers of government, but specifying that members of Congress could not be appointed to any 'civil office' nor could holders of government office be members of Congress.

The President's powers were limited in various ways. His appointments of members of government had to be confirmed by the Senate. His power to make treaties with other countries was even more limited, in that he had to obtain a two-thirds majority vote for them in the Senate. He could not directly introduce legislation into Congress. He could not send Congress off to an early election if it disagreed with him.

On the other hand, the President could refuse to approve legislation passed by Congress, though Congress could override any vote by a two-thirds majority in each House. Congress could also remove the President, the Vice-President, or any officer of the government from office by a process of impeachment (involving both Houses of Congress) for 'treason, bribery or other high crimes and misdemeanours'. Otherwise the President enjoyed a full term of office (four years), irrespective of any change in the political composition of Congress.

Members of the President's cabinet do not face questioning by either House of Congress. But they frequently have to appear before congressional committees, to explain their policies and to justify their views about appropriations for their departments, or legislation which is being considered by Congress. This is not comparable in any way to the questioning which ministers in an Australian parliament have to face when parliament is sitting. American cabinet ministers are aware in advance of the particular focus of the questioning they will face.

The American President has no political responsibility for what Congress does. The President may not be able to get the legislation he wants through Congress, but the public will blame (or praise) Congress for what it does, not the President. Congress is elected to do a different job—to make laws. The President is elected to govern. While the President and Congress can each make the other's task difficult, the lines of responsibility are reasonably clear and distinct. And because of this separation of responsibility as well as power, the American political system has developed in a different way from the Australian system. American political parties are not as disciplined as Australian parties. Members of Congress are less dependent on their party label for election—and in most cases where the party is important, the public has a role in choosing between members of the party who want its endorsement at a coming election (through primary elections, held many months before the congressional elections).

The fact that politicians are less certain that mere endorsement of them by their parties is sufficient to secure their election, requires them to act more independently in Congress and in its committees. Their voting habits will be recorded by the media, pressure groups, their constituents and their political friends and foes, to see whether they are more liberal or conservative than their fellows, whether they support or oppose gun control, or government aid for schools or government assistance for health services, and their legislative response to bills on such issues as conservation, spending on defence projects and crime control. This makes members of Congress far more responsible, answerable and accountable to those who elected them than are Australian members of parliament who are primarily responsible only to the political parties which nominated them for election. Members of Congress actually have to think seriously about how they will vote on most issues which come before them, instead of following a party line which their party's platform or their party caucus (fellow members of parliament) have decided. Australian members and senators may have to justify their votes to their electors, from time to time, but they are expected by their electors to follow the party line, not to make independent decisions which could affect the fate of legislation. In Australia we treat our MPs as cannon fodder, as automatons who have to vote the party line, whereas Americans expect their representatives and senators to speak and vote to support those they represent.

In the United States, ministers do not have electorates to which they are responsible at all. They do not have to spend any time acting as an ombudsman for their electors (a function Australian ministers generally delegate to one or two staff members). They are answerable to the President who appointed them, and can be removed by the President if he or she is not satisfied with their performance or their policies. In the United States some ministers will have had some congressional experience (sometimes at state level rather than federally) but this is not essential. The President is free to choose anyone in the country who he considers capable of carrying out the functions of a member of the cabinet—other than a serving member of Congress. Clearly there is a vast range of talent available. In Australia a prime minister is limited to choosing among the members and senators of the governing party. Australian ministers have to be selected from a very small pool. And it shows, in the lack of quality of many who reach ministerial rank.

The same applies to the head of government—the prime minister or the president. In Australia the prime minister must serve a parliamentary apprenticeship, and be elected

by his parliamentary colleagues. In the United States the President need not have served in Congress at all. Nomination by his party requires him or her to win support across the country in a round of preliminary contests which tests the financial backing of the candidates as much as their policies and their characters. There is no doubt that the two systems draw on different qualities and qualifications for candidates for the most senior political office in the nation. But the issue should not just be whether the best person for the job is selected. What matters, is who does the selecting (the people generally, or a political party, or a few members of the party who are members of parliament). Also important is whether the field from which the candidates for office might come is unduly restricted, either by reason of their financial backing, or their need to dedicate many years to parliamentary service.

Both in Australia, where the government-controlled House of Representatives now rarely controls the Senate, and in the United States, where the President's party is unlikely to control both the House of Representatives and the Senate (and it may control neither), deadlocks over particular pieces of legislation are not uncommon. In both countries they are publicised as political crises. In the end some compromise is generally arrived at, after more or less political pain has been suffered by some of the political players (though less frequently by the public, as in the US budget crisis of 1996).

One significant advantage of the American system of separation of legislative and executive powers is that the legislature—Congress—is able to perform more adequately and convincingly the theoretical functions of parliament than is the Australian parliament. As a law maker it is better able to examine the laws proposed by an administration—the cabinet ministers and their civil servants—using committee hearings in both houses to get the opinions of interested parties as well as questioning those sponsoring the proposed laws. Members of Congress are more likely to vote on the merits of legislation and on amendments than they do in Australia, because party discipline is weaker and members of Congress are more likely to have to answer to their constituents for the way they voted on particular measures. At least as important is the fact that members of Congress can and do sponsor significant pieces of legislation in their own right—divorced from the policy of the President or his administration or of any party policy. In Australia, backbenchers (and the Opposition) introduce legislation only infrequently, and it is extremely rare for these private members' bills, as they are called, to pass through both Houses into law. The most notable recent example was Kevin Andrews' bill to prevent the Northern Territory (and the ACT) from making laws concerning euthanasia. Only about ten laws proposed by backbenchers have been passed by the Australian parliament, two other notable examples being the ban on tobacco advertising (1989) and the introduction of compulsory voting for federal elections (1924).

On all sides it is recognised that the Australian parliament is not performing as it should. Its role as a legislator has been essentially taken over by the cabinet. Its ability to monitor the functioning of the government has largely disappeared because of the dominance of the House of Representatives by the executive, as a result of the extremely tight discipline under which the major Australian political parties operate. It is no longer a focus for political debate. To the extent that it does perform a serious legislative role, or monitoring and questioning role, it does so through the Senate.

Reforms which have tried to tip the balance away from government dominance of the parliament have largely failed, except in the Senate. The committee system is not allowed to work to the government's detriment in the House, and the same can be said of question time. Governments have resisted giving the Speaker any true independence.

Governments, having taken control of parliament in the twentieth century, are not willingly going to surrender their powers and increase the ability of Oppositions to upset their legislative programs or to question their actions. Governments are not going to allow proposals for parliamentary reform to reduce the power of governments over parliament, or make governments more responsible to parliaments.

The only way in which genuine reform will be achieved is through the adoption of something like the American system of separation of powers. If the proposition that governments have too much power is accepted, then it is necessary to reduce that power by making the parliament independent of the government. That cannot happen under the present system of cabinet or responsible government where the government is elected indirectly as a result of the election of the House of Representatives. Only if the government (the Prime Minister or President) is elected directly by the people would it be possible to have a separately elected parliament which was not obliged to do as it was told by the government and which could properly assess the laws which are proposed, whether by the government or by the members of the parliament.

One of the proposals for reform of the Australian parliament which has sometimes been made is to improve the performance of the Senate as a legislative chamber by removing from it all ministers. The idea is that the Senate is corrupted by containing members of the government of the day. Senators, it has been argued, would be better able to perform the legislative tasks if they were able to debate proposed laws in the absence of ministers. If people who were elected to the Senate were prevented from winning ministerial rank, the Senate would then be filled with people who wanted to be legislators, not members of the executive government. The proposal has won the approval of many supporters of the Senate, but not of most senators. They still aspire to be ministers. And governments do not want to surrender the power they have over the members of the government party in the Senate, even if they do not control the whole of the Senate.

If parliament were elected separately from the government, there would be no need for it to consist of two houses. A single house could be designed in a way which would provide for representation of the people through single member electorates, plus some form of proportional representation to give the smaller states a reasonable say in the working of the parliament. It would be possible to design a single-chamber parliament which combined aspects of the system used for electing the House of Representatives and the system for electing the Senate. This could resemble the method of election which New Zealanders, at two referendums in the mid-1990s, decided to adopt for their single-chamber parliament. Their problem, however, was that they retained a cabinet system of government where the government was required to have a majority in the parliament. If parliament has no say in the selection of the government, that being done by direct votes of the people, the fact that no party controlled a majority in the parliament would be an asset, not a liability.

Alternatively, a proportional representation system could be adopted based on groups of (say) five of the current electorates. This would retain the notion of senators or members representing a region and having identifiable constituents.

The creation of a single-chamber parliament would reduce the conflict currently possible under the US system, where the two houses can disagree with each other as well as with the President. In Australia the two territories—the ACT and the Northern Territory—have both adopted single-chamber parliaments. Queensland abolished its upper house more than 70 years ago. Such problems of government as they have suffered have had nothing to do with the fact that they have just a single parliamentary chamber and everything to do with the fact that the government has controlled that chamber (though in the ACT no government has had a majority. That territory's problems flow from the fact that the members of the Legislatively Assembly have been more concerned with forming government than with their legislative task.) Curiously only one of the American states has become unicameral—Nebraska—though its members insist on being called senators. There is a proposal in Minnesota for the abolition of one of the two houses but this seems unlikely to succeed. However all the Canadian provinces are unicameral.

There is one modification to the complete separation of powers under the American system which might be beneficial. One of the problems in the US is that there is no official 'Leader of the Opposition' to provide leadership for the main political parties opposed to the President and his party. Parliament could provide an appropriate forum for the non-government parties to air their views—as the present Australian parliament is supposed to do, but rarely succeeds in doing.

But if the Opposition has some official representation in the parliament, so too should the government. There are many European parliaments where the president is represented by a prime minister of his choosing—the prime minister not being the representative necessarily of the party which has majority control. Undoubtedly the parliament could be assisted by there being a prime minister or ministers within its ranks to represent the president's policies and present and defend his legislative program. In the Australian context, however, the use of the term prime minister could lead to a misunderstanding as to who was in political control of the government. If Australia were to have an elected president who was head of government, it would probably be less confusing to voters if only a few members of the parliament in the president's party had ministerial portfolios and responsibilities and there was no person named as 'prime minister'.

A parliament of this kind, with few of its members having ministerial responsibilities, would have no excuse for not spending most of its time sitting as a parliament, or working on committees. Instead of sitting for just 70 or 80 days a year, such a parliament could emulate the US Congress, and meet four or five days a week, for at least three-quarters of the year. Committee hearings could be scheduled at the same time that the parliament is sitting. It would be desirable for some committee hearings to take place outside Canberra, to allow people elsewhere in Australia easier access to those committees. But the aim should be to have the parliament sitting almost full-time in the national capital, performing its task as the nation's legislator and as a watchdog over the executive government.

The model I am proposing would require the government to be answerable or accountable to the parliament, but not responsible to it. Would that matter? I think it would, but not in the negative way defenders of the present system suggest.

The notion of 'responsible government' is in any event something of a myth, or at least a misnomer. It is interesting to read the latest analysis of the theory of responsible government in the judgments of members of the High Court in *Egan v Willis* (1998)[3], a case which concerned the power of the NSW Legislative Council to require one of its members—a minister—to produce certain government documents. The joint judgment of Justices Gaudron, Gummow and Hayne is particularly instructive. They provide (p. 451) the traditional description of responsible government as 'the means by which the Parliament brings the Executive to account' and they say that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'. They quote John Stuart Mill, writing in 1861, who spoke of the task of the legislature 'to watch and control the government: to throw the light of publicity on its acts.' And they endorse a remark of the Queensland Electoral and Administrative Review Commission (of which I was one of the authors) that 'to secure accountability of government activity is the very essence of responsible government.'

Two pages later they say:

> One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the Ministry must command the support of the lower house of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of a chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them. Nor is it a determinative consideration that the political party or parties, from members of which the administration has been formed 'controls' the lower but not the upper chamber. Rather there may be much to be said for the view that it is such a state of affairs which assists the attainment of the object of responsible government of which Mill spoke in 1861.

There are a number of points to be made about this statement.

The first is the suggestion that ministers are only responsible to their own chamber for the conduct of the executive branch of government. This is natural enough under our present system. In the case of Mr Egan it meant that he was responsible to the Legislative Council and the Council was able to discipline him for his failure to obey its directives to produce various documents. The High Court was doubtful about the extent to which he might be punished—the various judgments give the impression that suspension for an indefinite or lengthy period, let alone expulsion, was probably not available. Of course the Legislative Council has other means of dealing with recalcitrant ministers—such as refusing to consider their legislation or delaying it—

[3] 195 CLR 424

that would be equally available for a legislature under a system where there was no minister in the House who could answer directly to the chamber for the government's sins and omissions and failure properly to account to it. The conclusion must be that the presence of ministers in a legislature is not an essential prerequisite for legislative scrutiny of the activities of government—as is clear enough from the committee activities of the US Congress.

The second point is the way the relationship between the government and the parliament has been reversed after 150 years or so of responsible government. Mill considered it was the parliament that watched and controlled the government. Now it is the political party that forms the government that controls the lower house. Far from this being a situation which, to quote Justices Gaudron, Gummow and Hayne, 'assists the attainment of the object of responsible government of which Mill spoke in 1861', by turning the notion of 'control' on its head, it destroys the fundamental idea of responsible government. The government controls the lower house, and is in *no* sense responsible to it.

Does it matter that we now have cabinet government instead of responsible government? Yes it does, because the myth persists that the parliament controls the fate of the government. Of course it does in the rare case when a government is in a minority situation and relies on the support of independents, though even then the amount of control is minimal, if recent experience in Queensland is relevant. The trouble with the myth is that it distorts the political debate and the voters' understanding of the system of government we operate in this country.

The argument that a change to a presidential system of government—with a president elected by the people—would reduce parliament's control over the government has no force in view of the High Court's analysis that it is the government that controls the lower house of parliament, and not vice versa. That conclusion accords with any modern analysis of the relationship between government and parliament under our cabinet system. In other words, a presidential system would be no different from the cabinet system in the degree of parliamentary control over the executive that would exist. The amount of parliamentary supervision under a presidential system would arguably be greater, because the parliament would more likely be a full-time body and the executive would need to co-operate with it to obtain its legislation. This would mean that parliamentary committees would be at least as effective in scrutinising the activities of government as they are now—but probably more so because they would be able to build more expertise among both legislators and staff.

The other problem with the traditional analysis of representative government is that it leads to statements such as that by the High Court in *Egan v Willis* that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament.' This is a nonsensical statement or at least a circular one. As the traditional modern analysis of who controls whom demonstrates, the statement means at best that the executive's primary responsibility is to itself.

It would be a different matter if the head of government were elected by the people. Then the government's responsibility would be to the people as a whole, not to a lower house majority controlled by the government. While it is true that the government of an elected president could not be sacked by the lower house and forced to an early

election, and the president himself or herself could not be dismissed by his or her party in parliament, that is scarcely a drawback.

The evolution of the Senate over the past 30 years has demonstrated that there is still life in one of our parliamentary institutions. But the parliament will not achieve its full potential under our present system of cabinet government. It will do so only if we do away with the myths of responsible government and do away with the chamber—the House of Representatives—that is the government's lap-dog under our present system.

The Australian people would be better served by a government whose head they directly elect, and a parliament (preferably a single chamber) separately elected. The parliament would function primarily as a legislature, but it would also scrutinise the activities of government. We would have a real system of checks and balances of a classical kind, not a parliament that is incapable of carrying out its supposed function under our present system.

Question — In relation to your statement about checks and balances, why not keep both houses? Get the executive out, but keep the Senate and the House of Representatives like the American model. I don't quite understand your rationale for going into a single deliberative body.

David Solomon — Basically because I believe there are enough checks and balances of government versus 'the Parliament', that having a further system where the two houses can be in disagreement as well adds nothing to good government or to the proper functioning of the legislature. It's simply reducing one area of conflict, while making it possible to have more balance where it really counts—between the government and the parliament.

Question — The speech that you've just given seems to me to create confusion. You said that we could have a mixed electoral system, and then you gave New Zealand as an example of that, then you later said that, alternatively, we could have a proportional representation system. I am sure that you're aware that the New Zealand system is not a mixed system at all, it is a proportional representation system, because the party vote determines the overall composition**.** Now what are you proposing? If you are proposing a mixed system it is actually quite likely that a single party would get a majority in the single house of parliament, even though it may only have say 41 per cent of the vote. I am just curious to know what you are actually proposing.

David Solomon — I'm not really wedded to any particular proposal. What I tried to do was to put forward three or four different suggestions. It's the principle that matters, rather than the detail. I accept what you said about New Zealand. The difference of course is that most of the members actually represent particular electorates, and then you have a topping up system using proportional representation. As I say, I'm not particularly wedded to any system, but my personal preference is for a proportional representation system of some kind, so that different views in the electorate are properly represented in the parliament.

Question — You seem very focused on a comparison with the American system, and you haven't really considered other systems. I put it to you that perhaps you don't need to go to an elected separate executive. You could, for example, move to the system they have in Sweden, where proportional representation ensures a wider range of parties and essentially ensures there is no government majority. The prime minister, even though elected by parliament, is not a member of parliament, and therefore can undertake his duties and leave the parliament free. But you don't have the situation where the president—or the prime minister in the case of Sweden—ends up in opposition to the parliament.

David Solomon — The reason that I chose the American model is because it is the model that's best understood in Australia. In fact, it's probably understood better by most people than our own system. There have been several interesting surveys which have shown that many people actually have a better knowledge of the American system than they do of the Australian system. Many of them believe that aspects of the American system—such as, for example, a Bill of Rights—are part of our system. I suppose I am attracted to the American system anyway, but I think it would be very useful to have a system which can easily be understood by most people.

Question — We could do well in this country to put more study into it than we do, notwithstanding that we claim we know a lot about the American system. However, I was struck by a consideration that you did not mention which distinguishes our political system from the political systems of all of the democracies—we have compulsory voting, they don't. I wonder if you would care to comment on compulsory voting, which is a corrupting influence and has never been adopted by most countries. Those which did adopt it have had the good sense, in almost every instance, to get rid of it in the last 30 years because they've realised its corrupting effect. Do you see your unicameral body being elected by a corrupt electoral system—namely compulsory voting?

David Solomon — I'm in favour of compulsory voting. I don't think it is corrupting, I think the reverse is true. It removes one of the possible corruptions of a political system, namely the way in which a party can persuade voters to go to the polls, either by particular promises or by outright corruption. We will have to disagree on that.

Question — One of your premises was that party discipline and control is excessive. I just want to question whether changing the structures and going to the American model is going to change that in a social sense? When you and I go back to Brisbane we will see a unicameral government with an elected chieftain, namely the Brisbane City Council, where party control is still pretty much absolute.

David Solomon — The elected Lord Mayor of Brisbane controls the Labor majority in his party. Of course you can have a system under our election in Queensland where the mayor will not have control. I agree that we're not going to have a change of party discipline in the short term—I think it is something that would develop. I'm quite appalled by the present system and am prepared to look at almost any change that would reduce the amount of party discipline that there is at the moment.

Question — You said you were attracted to the American model, and that's been quite clear. I have to say that I'm not, really. You didn't mention some of the negative implications in some of the things you've talked about. I agree there's more separation of power and that members of Congress act more independently from their parties, but I'm not convinced that that's necessarily a better system. They have parliamentary inertia, not just checks and balances, and the transparency of how some members of Congress vote is not at all clear. Even though you questioned the value of the small group of parliamentarians from which we get to choose our ministers, I think I'd rather have them to choose from than the current group of American presidential candidates, for example. So I'm not convinced that the benefits that you've outlined really work in practice.

David Solomon — I can't really say any more. I think that we would be better off if we did have more of a choice of ministers, if the person heading the government had more control, and more choice of ministers, and if we the people had more choice as to who was to be our prime minister. I'm not convinced that sitting in the House of Representatives for twenty years trains a person to be a good prime minister. It trains him to be a good parliamentarian, but that does not necessarily carry with it the qualities needed to run a department and to run a cabinet and to run the government.

Question — I have read *Coming of Age* and I enjoyed it a lot, but I am one of thousands who see the party system as the root cause of our problems with governments. When I use the term 'integration' or 'self-interest' I am describing a party. Because of that, I believe that one day we will be able to have politics without parties.

David Solomon — I'm not that optimistic.

Question — Do you agree that it is more than a matter of structure; that it's a matter of culture as well? Would you see any significant transitional problems because of embedded culture?

David Solomon — I agree culture is important, and it's because of that that I think the American system would in fact be fairly easy to change to. There is a consciousness out there among anyone who watches television or goes to the movies of the way the American system works, and I think it would be relatively easy for the Australian people to adopt that system.

Question — Given the requirements of the Constitution—a majority of electors in a majority of states—what chance do you see of any constitutional change being accepted which would lead to the development of a unitary system in the federal parliament, given the attitude of the smaller states towards a constitutional change which would perhaps reduce their influence?

David Solomon — I'm an optimist. I believe that change is possible. I accept that the smaller states could be galvanised into voting against change because they thought their interests might be hurt. But within a relatively short time Queensland is not going to regard itself as a small state, and I think Tasmania will be about the only place that will be resisting on the grounds that they thought they could lose some power.

Question — I recall during your speech you made mention of maybe grouping together electorates to form a proportional system. Is this proposing de-federalisation and the institution of regionalism in Australia, and do you see that as a desirable model in a unicameral parliament?

David Solomon — Frankly, no. I think that in terms of culture and so on—and we have a state system which works fairly well—I can't see any changes being made to that, and I don't think they're desirable either.

Legislating for a Bill of Rights Now*

George Williams

Introduction

What are the rights and responsibilities of Australian citizenship? Do we possess a right to a jury trial? Does compulsory voting infringe upon our right to opt out of the political process, or is it part of our civic duty? Is there an entitlement to basic services for communities in the bush?

Our system of government does not provide answers to these questions. In 1901, the framers of our Constitution avoided such issues. For nearly 100 years, we have continued to do the same. Our democracy is the poorer for this failure.

This is one symptom of other serious problems within the political system. The 1999 republic referendum exposed Australians' lack of knowledge about the current system, as well as their high level of alienation from the political process and their elected representatives. It says much that the two most effective arguments in the debate were 'Don't Know—Vote No' and 'Vote No to the Politicians' Republic'.

We have not set out the role of the people within the political process. Certainly, the Constitution does not do the job. It is no wonder that many Australians are disconnected from the fact that it is they, the people, that are ultimately sovereign.

Some have increasingly searched outside our borders for answers, turning to international treaties and conventions. This has its place, but it cannot make up for the fact that there is no Australian frame of reference on basic questions of human rights.

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 17 March 2000.

Hence, when mandatory sentencing arose as a political issue, attention immediately turned to the United Nations Convention on the Rights of the Child. Article 40 requires that children be 'dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'. Mandatory sentencing is obviously inconsistent with such a requirement.

International law has an important and meaningful role in such debates. Unfortunately, it has also obscured our lack of basic standards on such issues. The Convention has superseded the question of whether the Northern Territory law is inconsistent with our own respect for the right to a fair trial and, if convicted, a just sentence. It should be clear without the need for international assistance that mandatory sentencing is unjust and wrong. The punishment should fit the crime, and judges should be able to exercise appropriate discretion in setting the sentence.

It is a sign of our political immaturity that we do not determine such issues according to publicly acknowledged domestic standards. Political debate in Australia is impoverished by the lack of an Australian Bill of Rights.

A not so 'magnificent' human rights record

Ironically, the very lack of human rights protection in Australia has enabled the myth to emerge that our record on these issues is a good one. The lack of structured protection means that such issues are often ignored and do not attract media attention.

Some Australians, perhaps influenced by United States television programs, believe that we have a Bill of Rights. Of course, this is not true.

Most of us are secure in the belief that our human rights are well protected under the law. In fact, we are fortunate that the rule of law is firmly entrenched in our political culture, and that we have an independent High Court where such issues can be aired. However, our legal system does not protect many of our basic rights. Individual liberty has little protection under our law. Even the right to vote, and freedom from discrimination on the basis or race or sex, exist only so long as Parliament continues to respect them. In the past, this respect has had its limits.

On 18 February 2000, Prime Minister John Howard, in discussing mandatory sentencing on the ABC's AM Program, stated that 'Australia's human rights reputation compared with the rest of the world is quite magnificent.' Here, he expressed the commonly held view. However, this view is not consistent with a careful and considered examination of the historical record.

As the Prime Minister recognised, 'We've had our blemishes and we've made our errors.' The reality is far worse and reveals a longstanding and continuing weakness in our democratic structure. Australia is out of step with other comparable nations such as Canada, New Zealand and the United Kingdom in the protection of human rights. Rather than having a 'magnificent', or even 'sound', approach to these issues, domestically, we are far from the forefront of the protection of human rights. We have lagged behind.

The protection of human rights in Australia

The roots of our current problem lie many decades ago in the drafting of the Australian Constitution. The Constitution was drafted at two conventions held in the 1890s. The framers did not seek to establish the Constitution as a catalyst for the protection of civil liberties. Instead, they infused the instrument with responsible government in a way that would enable some fundamental rights to be undermined by a sovereign parliament even where they might have been recognised by the common law.

This is clearly demonstrated by the drafting of certain provisions. For example, the Constitution that came into force in 1901 said little about indigenous peoples, but what it did say was entirely negative. Section 51(xxvi), the races power, enabled the federal parliament to make laws with respect to 'The people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws', while under section 127 'aboriginal natives shall not be counted' in taking the census.

Section 51(xxvi) was inserted into the Constitution to allow the Commonwealth to take away the liberty and rights of sections of the community on account of their race. By today's standards, the reasoning behind the provision was clearly racist. Even Edmund Barton, later Australia's first Prime Minister and one of the first members of the High Court, stated at the 1898 Convention in Melbourne that the races power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.' In summarising the effect of section 51(xxvi), John Quick and Robert Garran, writing in 1901, stated:

> It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.

One framer, Andrew Inglis Clark, the Tasmanian Attorney-General, supported a provision taken from the United States Constitution requiring the 'equal protection of the laws'. This clause might have prevented the federal and state parliaments from discriminating on the basis of race. The framers were concerned that Clark's clause would override Western Australian laws under which 'no Asiatic or African alien can get a miner's right or go mining on a gold-field'. Sir John Forrest, Premier of Western Australia, summed up the mood of the 1897–98 Convention when he stated:

> It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.

Clark's provision was rejected by the framers, who instead inserted section 117 of the Constitution, which merely prevents discrimination on the basis of state residence. In

formulating the words of section 117, Henry Higgins, one of the early members of the High Court, argued that it 'would allow Sir John Forrest … to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based upon colour and race.'

The drafting of the Constitution laid the foundations for many subsequent human rights violations. What is of particular contemporary concern is how this history continues to play a role to the present day.

In 1998 the High Court heard the Hindmarsh Island case. The federal government sought to persuade the Court that the Commonwealth has the power to pass laws that discriminate against Australians on the basis of their race. This position was supported by the governments of the Northern Territory, South Australia and Western Australia. The question before the High Court was whether the drafting intentions behind the races power still determined the meaning of the power, or whether the scope of the races power had been transformed by the 1967 referendum that had extended it to Aboriginal people.

The Commonwealth argued that there are no limits to the races power so long as the law affixes a consequence based upon race. In other words, it was not for the High Court to examine the positive or negative impact of the law. On the afternoon of the first day of the hearing, the Commonwealth Solicitor-General, Gavan Griffith QC, suggested that the races power 'is infected, the power is infused with a power of adverse operation.' He also acknowledged 'the direct racist content of this provision' in the sense of 'a capacity for adverse operation'. The following exchange then occurred between the Solicitor-General and the High Court Bench:

> **Justice Kirby:** Can I just get clear in my mind, is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary or whatever the words say or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.
>
> **Mr Griffith:** Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.

Of course, without a Bill of Rights or an entrenched Racial Discrimination Act, there was no such over-arching reason. When the High Court handed down its decision on 1 April 1998, it was divided. The Court split on whether the races power could be used to discriminate against indigenous peoples. This fundamental question remains unresolved.

This could hardly be said to be a solid foundation from which to advance reconciliation. It is not surprising that reconciliation requires a re-examination of our Constitution and in the short term the entrenchment of the Racial Discrimination Act.

How can we close the gap between indigenous and non-indigenous Australians when we have yet to address the racist underpinnings of our Constitution?

The Hindmarsh Island case demonstrated very clearly that our fundamental freedoms are often solely dependent on the wisdom and good sense of our legislators. This can be too easily taken for granted, as was shown by the long-standing government policy of forcibly removing indigenous children from their families and communities. This also was challenged in the High Court, but it was held in the Stolen Generation case in 1997 that there was nothing in the Constitution that prohibited such conduct.

Without a Bill of Rights, many of our basic freedoms, possibly even including the right to vote of some sections of the community, can be taken away by federal, state and territory parliaments. Any student of Australian history will be aware of the danger that parliaments can pose to civil liberties. After all, one of the first pieces of legislation passed by the new Commonwealth Parliament was the *Immigration Restriction Act 1901*, which implemented the White Australia policy.

Nearly 50 years later, the federal parliament passed the *Communist Party Dissolution Act 1950*, which outlawed the Australian Communist Party, an organisation then participating, with some limited success, in elections at every tier of government. The Act was far out of proportion to the dangers posed by the organisation to Australian society and was a draconian attack on civil liberties, including upon the freedoms of speech, belief and association. Section 7 even provided a term of imprisonment of five years for any person who knowingly carried or displayed anything indicating that he or she was in any way associated with the Party, such as a badge with the words 'Communist Party Conference 1948'. In addition, under section 9, the Governor-General could declare a person to be a communist or member of the Communist Party. A sanction could be applied not according to a person's acts but according to his or her beliefs. Once declared, a person could not hold office in the Commonwealth Public Service or in industries declared by the Governor-General to be vital to the security and defence of Australia. Should a person wish to contest a declaration by the Governor-General, he or she could do so, but 'the burden shall be upon him to prove that he is not a person to whom this section applies.'

Even today, political agitators can find themselves faced with jail. In 1996, Albert Langer was imprisoned for ten weeks for distributing leaflets encouraging voters to put the candidates of the Australian Labor Party and the Coalition equal last. He challenged this in the High Court, but failed. After the High Court finding, Amnesty International released a statement describing Langer as 'the first prisoner of conscience in the country for over 20 years'.

Lest it be thought that we have made progress since the jailing of Langer in 1996 or that the other examples are from a bygone era, several contemporary controversies clearly reveal that our human rights record is blemished. For example, our treatment and detention of refugees, themselves escaping persecution, torture or even execution for political or other reasons, is hardly humane or consistent with commonly held views about human dignity. Also relevant are the mandatory sentencing laws under which Indigenous children are being sent to prison for extended periods without a judge being able to take account of the actual circumstances of their crime.

Today, our human rights record is far from 'magnificent'. While middle class Australia has little to fear from oppressive laws, this is not the right indicator. What matters is how we treat the vulnerable and weak in the community, such as the poor with little or no economic power, or people living in rural areas with little political clout and dwindling access to basic services. Examined from this angle, our human rights record is poor. Moreover, we have not put the structures in place to reduce the chances of such events happening again. As Brian Burdekin, a former Australian Human Rights Commissioner, has stated: 'It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community'.

An inadequate legal structure

It might be argued that we are simply at par with other comparable nations, which continue to have their own human rights concerns. However, Australia differs from these other nations in one crucial respect. We are alone in not having developed a statement setting out our basic rights and freedoms. Other common law nations have already done this: Canada in 1982, New Zealand in 1990 and even the United Kingdom (from which our own system is derived) in 1998. We have been left behind, our legal system quarantined from human rights developments in other nations with which we had shared a common legal framework. While each of these nations, like Australia, had relied upon the common law tradition to protect rights, they have since recognised the need to supplement this with a Bill of Rights.

The lack of action by Australian parliaments has meant that responsibility has been abdicated to the courts. The High Court has found, for example, that certain rights can be implied from the Constitution, such as a freedom to discuss political matters, as well as other rights such as an entitlement to procedural fairness in the trial process. Individual judges have even interpreted the Constitution as embodying many rights, indeed almost an implied Bill of Rights. Australian courts, and not parliaments, have taken the lead.

There are real and important limits to what judges can achieve. A judge required by legislation to sentence a person to jail for one year for stealing a packet of biscuits has no choice but to do so. The Constitution was not drafted to include a Bill of Rights. To interpret it as containing this would compromise the legitimacy of the High Court. The role of that Court is to interpret the Constitution as it has been drafted, and to adapt the document to changing times and shifting national needs. It would exceed its brief if it were to go beyond those rights expressed by or necessarily implied in the text. This would also compromise the role of the federal parliament as the only body able to initiate, and the Australian people as the only body able to sanction, changes to the text of the Constitution.

If we are to learn from the mistakes and excesses of the past, and advance the protection of human rights in Australia, there is only one real option for change. Parliaments must assert their leadership. They, and not the courts, are the appropriate forum from which to develop the rights attaching to Australian citizenship.

A Bill of Rights now

The current lack of protection for fundamental rights in Australia presents a compelling case for reform. We ought to respond to our human rights record with action designed to ensure that community standards are set into the fabric of our legal system. An Australian statement of rights is long overdue.

A Bill of Rights would make a positive contribution to modern Australia. It would enhance Australian democracy by expressing the core rights of the Australian people, such as the right to vote, as well as promoting a sense of community involvement.

Legislative, not constitutional, change

A Bill of Rights presents a considerable challenge. One only has to look at the record of failed referendums. With the results of 1999 added to the list, 44 referendum proposals have been put to the Australian people. Only eight have passed. There has not been a successful referendum for a generation.

The last eight proposals for change in referendums in 1984, 1988 and 1999 were all defeated. To find a successful 'Yes' vote, we need to go back to 1977, when Australians voted, amongst other things, to require High Court judges to retire at the age of 70.

The 1988 referendum is particularly relevant. Four proposals were put to the Australian people. The second proposal sought to guarantee 'one vote, one value' by requiring that the population count in each electorate not deviate by more than 20 per cent from any other electorate. This proposal would also have inserted a right to vote into the Constitution. The fourth proposal also sought to guarantee basic freedoms, but only by extending the operation of existing guarantees. The right to trial by jury, for example, which in section 80 of the Constitution only applies to commonwealth offences, would have been extended to the states and territories.

All four proposals were defeated nationally and in every state—a dismal result for the proponents of change. The highest national 'Yes' vote was 37.10 per cent for the proposal on 'one vote, one value'. The fourth proposal received an astonishingly low vote. Nationally, 30.33 per cent of voters registered a 'Yes' vote, while 68.19 per cent voted 'No'—the lowest 'Yes' vote ever recorded in Australia. In South Australia the 'Yes' vote was only 25.53 per cent, while in Tasmania it was 25.10 per cent.

The defeat of the 1988 referendum shows that any attempt to create an Australian statement of rights should not be in the form of a constitutional amendment. Instead, we should consider an Act of Parliament. This approach is a pragmatic means of protecting a limited range of the fundamental rights of the Australian people, while allowing the oversight of the federal parliament at every step.

How to begin

In New South Wales, the Bill of Rights process has already begun. State and territory parliaments must be involved, and may indeed lead the way. As in Canada and the United States, it would be possible for there to be separate, but complementary, Bills of Rights at the federal and state levels. The Standing Committee of Law and Justice

of the NSW Parliament is currently holding an inquiry into whether NSW should enact a statutory Bill of Rights. If it did, this could provide a model that could be followed in other states and at the federal level.

A first step for the federal parliament might be to convene a joint parliamentary committee, or a special commission consisting of both parliamentary and community members. This body should publicly examine ways in which the federal parliament could work to enhance and entrench the protection afforded to fundamental freedoms in Australia, perhaps with reference to a draft bill developed by the government. The terms of reference of the body should enable it to examine the success and failures of models from nations such as Canada, New Zealand, South Africa, the United Kingdom and the United States. The body should also identify core rights and freedoms, consistent with the values of contemporary Australians, that are the most deserving of protection, and how these rights could be entrenched.

The value of such an approach is confirmed by the Canadian experience. The Canadian Charter of Rights and Freedoms 1982, which has been praised for its 'success in enhancing the "culture of liberty" in Canada', was forged in what has been called a 'democratic crucible'. A draft of the Charter prepared by the Trudeau Government was scrutinised by a joint parliamentary committee, the proceedings of which were nationally televised. The committee received submissions from over 1,000 individuals and 300 groups petitioning for change. After 60 days of hearings, the committee successfully proposed 65 substantial amendments. The Charter came into effect in 1982, and has been the subject of extensive coverage in the written and electronic media. In a large scale opinion survey taken some six years later, it was found that 90 per cent of English Canadians and 70 per cent of French Canadians had heard of the Charter, with a substantive majority agreeing that it 'is a good thing for Canada.'

Such a process could also work in Australia. This committee process would allow popular involvement in the drafting of a statement of basic rights and freedoms. Australians have already enthusiastically embraced the parliamentary committee system as a way of interacting with their representatives. For example, the Legal and Constitutional Legislation Committee's inquiry into the Euthanasia Laws Bill 1996 received 12,577 submissions. There has also been a sustained focus on the committee system during the recent debate over mandatory sentencing.

The model

In my book, *A Bill of Rights for Australia*,[1] I argue for a gradual and incremental approach that would not transfer ultimate sovereignty from parliaments to the courts, but would heighten human rights concerns within the political process itself. My aim is to strengthen and broaden the scope of our democratic system, not to transfer our decision-making powers to the judiciary. Other models have taken this approach. Instead of adopting the United States system whereby their Supreme Court is able to have the last word on important social issues such as euthanasia and abortion, we

[1] UNSW Press, Kensington, NSW, 2000.

should look to a modified version of the models in New Zealand and the United Kingdom.

A Bill of Rights need not establish the judiciary as the final arbiter of important social, economic and political questions. The bill should be entrenched so as to prevail over other inconsistent legislation passed by parliament, and should in this sense be enforceable in the courts. However, parliament ought to be given the option, as found in the Canadian Charter of Rights and Freedoms, to expressly override any of the rights listed in the instrument (or indeed a court's interpretation of those rights).

This override would be raised as a political issue, and would require strong public justification. My view is that a Bill of Rights is primarily important because it offers a means of improving scrutiny and debate on such issues at the political and community levels. Rather than merely creating a legal text, the aim would be to foster a culture of liberty, including a tolerance and respect of difference. Legal texts are meaningless unless they exist within a supportive cultural and political framework. After all, the 1936 USSR Constitution contained a Bill of Rights at the height of the great purges initiated by Joseph Stalin.

The rights listed in the bill should be carefully and narrowly confined in their drafting and selection. It should not include rights where the ambit is unclear or contested, such as a right to life or a general guarantee of equality. The end result should be a statute recognising and protecting core rights, such as the rights to vote and of association and a freedom from racial discrimination. Even these rights should be subject to repeal or amendment (and hence refinement and development) by parliament. The Bill of Rights might also incorporate other basic economic rights and social justice objectives, such as an entitlement to basic services in rural and regional areas. It should reflect contemporary community concerns.

Once it is in place, a Bill of Rights should provide a central role for the federal parliamentary committee system. The Senate's Scrutiny of Bills Committee already examines bills that come before parliament. Under Senate Standing Order 24, the committee is charged with reporting whether bills and acts 'trespass unduly on personal rights and liberties.' This could be adapted and extended. A joint standing committee of the federal parliament, with membership evenly divided between government and non-government members, or standing committees of both the Senate and the House of Representatives, might be created to examine bills and delegated legislation for compliance with a Bill of Rights.

This would serve two purposes. It would allow the vetting of legislation before enactment so as to reduce the likelihood of Commonwealth legislation breaching basic freedoms. It would also build parliamentarians and members of the public into the rights protection process, the latter through their right to make submissions to the committee. This should contribute to a greater understanding of such issues by parliamentarians and the Australian people through media coverage of committee deliberations, submissions and reports.

In the longer term, it may be appropriate to guarantee certain rights in the Australian Constitution. Which rights and in what time frame would depend upon the operation of a statutory Bill of Rights. The success of legislation such as the Racial

Discrimination Act, which has been part of Australian law for a quarter of a century, may mean that it would now be possible to gain popular and political support for inserting a guarantee of freedom from discrimination on the basis of race in the Australian Constitution. This would be particularly appropriate given the inconsistency between the framers' intent on questions of race and the accepted values of the contemporary Australian community.

Mandatory sentencing and a legislative Bill of Rights

I want to take a step back from the events of the day and examine how the current debate on mandatory sentencing might have been different if we had a Bill of Rights. The debate reveals the ad hoc nature of our response and our lack of a structured and considered approach to such issues.

First, it would have allowed human rights concerns to be raised when the law was passed by parliament, rather than at some later time. Much damage can go unnoticed and unreported if an issue is only aired years after the law has come into force. The consequences can be devastating. Mandatory sentencing has been in place in the Northern Territory since March 1997. Since then, the imprisonment rates of indigenous women and children have risen alarmingly. The issue has reached the national agenda three years too late. Costly delays are inevitable where there is nothing within the parliamentary process itself to ensure that legislation is examined against human rights standards.

Second, a Bill of Rights would create a more appropriate reference point against which to examine proposed laws. Such laws could be debated in parliament and within the community according to a domestically agreed statement of rights and values. This would deepen our appreciation of such issues and would strengthen the law-making process and, through the parliamentary committee system, community interaction with the political system. We would debate such issues not only according to how they meet external international standards, but also on the basis of our own developing sense of human rights.

Third, a Bill of Rights could provide a means for an independent determination of whether a law breaches an agreed right. The courts ought to be given a role in allowing a person affected by government a last chance. It must not be forgotten that majorities do not always make just law, and that the judicial system can provide an important circuit breaker and final point of appeal.

With a Bill of Rights in place, our approach to and debate on mandatory sentencing would be very different.

Conclusion

A gulf lies between Australians and their government. This stems in part from the longstanding failure to set out the rights and responsibilities of Australians within the political process. The lack of an Australian statement of rights undermines any claim Australia might have to a 'magnificent' human rights record. In any event, the record of human rights abuses, ranging from the Stolen Generation to Albert Langer to our treatment of refugees, shows clearly otherwise.

There is an obvious need for reform. Changes such as improved civics education are important, but we also need to reinvigorate our public life by beginning a process that will involve Australians more directly in the political system. We should draft an Australian statement of rights and freedoms. This should be in the form of a Bill of Rights enacted by parliament that would offer a coherent domestic means of addressing our many contemporary debates on individual liberty. This could start a long overdue dialogue between parliament, the courts and the people. We need to legislate for a Bill of Rights now.

Question — I'd like to ask a question about sedition. I refer to a case which occurred in 1950 or 1951 concerning a man called Mr Lance Sharkey. He was asked by Allan Reid of the Sydney *Daily Telegraph*: 'In the event of Soviet troops entering Australia, what should be the response of ordinary Australians?' Mr Sharkey, quite rightly, said that the suggestion was absurd, but Allan Reid pressed him, and Mr Sharkey said: 'If Soviet troops entered Australia in pursuit of an aggressor, then it would be the duty of ordinary Australians to assist Soviet troops.' For that, Mr Sharkey was sentenced to three years in prison. Now, all he did was express a particular point of view. It's not the first time—in 1949 a man called Burns, who again merely expressed a political viewpoint, received six months hard labour. Could you say something about sedition, and whether something like this should be included in a Bill of Rights, and also the right to demonstrate and the right to free speech?

George Williams — You are absolutely right in mentioning the Burns case and the Sharkey case. A lot of people study those, and it was 50 years ago that these cases were dealt with, when people were put in jail, for simply expressing a political belief. They were charged with sedition under those crimes.

My own perspective on that is that we should think about just how little has changed. Albert Langer was put in jail for ten weeks for arguing similarly stirring views in the media and other areas. They annoyed a lot of people, but should we really be putting people like that in jail? Another thing that shows the weakness of our free speech tradition in this country is the banning of the song dealing with Pauline Hanson, called *Backdoor Man*. That was banned and can no longer be played on radio because it was seen as obscene. The Queensland Supreme Court said that there was no particular reason to protect the playing of that song, because it didn't play a part in the political process. If you ask anyone who listens to Triple J whether songs like that are relevant to their political decisions or not, you will realise just how out of touch our legal

system is with basic conceptions of what it is to be a political actor within the Australian community.

We ought to be recognising the importance of looking at those cases by having a Bill of Rights which would include some freedom of expression. Carefully defined, perhaps, to ensure that it didn't entrench into those areas where people thought there was a legitimate reason to restrict speech. But I would have though that it was clear, at least within in the area of political communication, there should be an extremely wide capacity to criticise politicians and to criticise the very nature of the system itself. Criticising the system and saying that we want an entirely different system of government should not lead to someone being put in jail.

We should also have recognition of the right to protest—peacefully—and the freedom of assembly. I think they're the sorts of rights that Australians would generally recognise ought to be protected and indeed we should not be cutting down on the freedom of protest within the community. So I agree with what you say, and I agree that it suggests the need to entrench certain rights.

Question — I accept that each of the states—most of which are unencumbered by a constitution which has to be altered by referendum—could pass a Bill of Rights. But under what head of power could the Commonwealth pass a Bill of Rights which would be mandatory for observance by people in a state?

George Williams — There are a couple of ways of looking at that. You might only draft a Bill of Rights which applies at the Commonwealth level. That may be a politically pragmatic thing to do and you may tell the states to go away and draft their own Bills of Rights, as this was a bill which simply applied to Commonwealth legislative action. If you did want a Bill of Rights that extended to the states and territories, then I think they should also be subject to this override clause that I've talked about, so that they, like the Canadian provinces, have the ability to re-engage in the process if they find that a High Court decision is not to their liking. But again, with the appropriate scrutiny.

If you're looking at the relevant powers to enable the Commonwealth to enact a Bill of Rights, there are several which might be used. Either you could turn to the external affairs power, and use international conventions, but you don't have to implement those conventions word for word. There is a capacity to pick which of the particular rights we think are important in these countries, and to redraft those rights. So long as the High Court is of the view that this is a proportionate implementation of these things, there is a great degree of flexibility to actually say which of the rights we want, and indeed exactly how they should be protected.

If you didn't want to use the external affairs power, there is still considerable scope to impose a Bill of Rights. You look to other commonwealth legislation in trade practices or a variety of other areas, where they have looked to almost a hotch-potch of powers and pulled them together. The difficulty with doing that is that you would not have complete coverage. The other way, if you wanted complete coverage, and you were not prepared to go to external affairs or a mixture of powers, is to seek a reference of powers from the states. Now, it's politically very unlikely that that would occur.

So there are options. It can be done, but a lot of this will be making sure that the legal underpinnings are right. Having looked at this closely, I am confident that this can be done.

Question — I think that a very good argument has been put forward in theoretical terms for the lack of certain rights in this country, but as soon as you start to go beyond generalities, you have to ask yourself how this is going to be put into effect. Are we going to have a special tribunal? If we are, is it going to be within the powers of the High Court to overturn or review whatever determinations are made? I was in Canada in 1982 when their Bill of Rights was brought in, and I discovered that a large number of people were very willing to come forward and push their particular points of view. There are going to be all sorts of people who will immediately come forward—the whole of the Aboriginal movement will want to establish their point, and you're going to have lawyers who are going to use the Bill of Rights for getting boat people out of detention. Who is going to be the defendant when a judgement is made? Is the commonwealth government going to be the main defendant? Is there going to be somebody else? Will there be cross-actions between individuals? You have to move from aspiration to administration. You just can't say that we are short of a particular level of freedom—you must ask yourself how you're going to carry that into effect. Administration is probably more important than legislation. It is going to be a very difficult thing to do. If we've had trouble recently trying to get ourselves a president, I'd say that that trouble was minor compared to the problems that will be raised in bringing this into effect.

George Williams — You are right about the difficulties. When you consider what happened in 1999, that's why I'm saying we shouldn't have a constitutional change. But I think we need to do something. Are we going to simply continue on this path of dealing with human rights concerns like mandatory sentencing after the event, and recognise the injustice that's happened for several years in the interim?

My suggestion is very different to the Canadian model that you point to, which has led to a lot of debate, because Canada has put a range of very broad rights in its Charter of Rights. It's got a general freedom of equality for example, whereas I'm not advocating that, exactly because it does tend to lead to ambit claims. I think we should be determining the scope of such rights at a much earlier stage.

This is, if you like, a minimalist approach to a Bill of Rights, where I'm seeking to propose an Act of Parliament only—not a constitutional change—and the focus of this particular bill would be within the political process, not legal action. That's a last resort, and if there were legal action, that would be brought by someone against the Commonwealth challenging whether its law matches the particular rights. The aim would not be to create actions between individuals—this is a limitation on government power, not private power. It's about enhancing scrutiny in the political process, not enhancing the rights of one person against another. That can happen in a Bill of Rights, and in other countries it does. But I'm not proposing that because I think we are not ready to go down that path, however we should do something to enhance scrutiny within the process itself and that's how I would limit it—without going into the other legitimate concerns that you have, which I don't think apply to this model.

I wouldn't set up any special tribunals, because we should be setting up a process where court action is a last resort and should be dealt with in an appropriate court, and not in a special tribunal of any kind. It should go to our independent judges, not to persons appointed without tenure by the executive and bodies like the Administrative Appeals Tribunal. So leave it to the courts, but set up a system where court action is not the norm under this model, but political action is.

Question — There are numerous matters that would need to be addressed in a Bill of Rights if it were left exclusively to the politicians. An example concerns the right to vote, which you gave primacy in your list of things that ought to be enshrined in a Bill of Rights. Many have considered in the past, and some still do, that the practice of electoral compulsion in Australia is inconsistent with Article 25 of the International Covenant on Civil and Political Rights. Our politicians, however, become very touchy when they perceive possible threats to Australia's quaint system of electoral compulsion.

George Williams — What you are raising is a very legitimate problem within the system—are our politicians acting in our own interests? There are instances where that clearly has not been the case. You can certainly argue as a result of the referendum last year that there was a fairly cosy arrangement about what sort of system we would end up with. But looking at a Bill of Rights, you can't abandon the politicians—indeed, the politicians must be built squarely into the process, because they need to be educated at least as much as the community about these issues.

Question — Do you think the right *not* to vote should be excluded?

George Williams — I support compulsory voting very strongly. When you think about rights you should also think about where our civic responsibilities lie within that process. The right to be free, for example, should not exempt someone from jury service. We should have a balance between our entitlements and our duties within the system. It is also important to remember that we don't actually have *compulsory* voting within this system anyway—it's compulsory to turn up at the ballot box, but there is no compulsion to fill out the form. That's a very appropriate balance between the right to do something, to at least turn up, but then you can't be compelled to cast a preference.

Question — What are your thoughts on how a Bill of Rights would deal with homosexual and religious vilification?

George Williams — We should be debating those in the context of a Bill of Rights, and obviously, in looking at a Bill of Rights, we should be looking particularly at those sections of the community which are particularly vulnerable in certain ways, and religious minorities are a good example of that. We have a freedom of religion in the Constitution, but that is so narrow and has almost been interpreted out of existence by the High Court, and we should recast that in some way within a Bill of Rights itself.

On the sexuality point, I'm in favour of having a freedom from discrimination on the basis of sexuality. That's something that we ought to debate in the context of a Bill of Rights and the community should be heard on how it sees that particular right as

fitting in such a bill. That's a classic example of a particular minority where there is an instance of historic oppression in certain ways.

In the context of anti-vilification laws, we should make up our minds within the Bill of Rights by balancing it against other types of laws. For example, I don't think laws which restrict hate-speech should breach a Bill of Rights, and I think it should be drafted appropriately to respect that. But if you are dealing with anti-vilification, whether it is hate, sexuality, religion or whatever, those types of anti-vilification laws should only be allowed in the narrowest circumstances, and it should be clear that they should be limited to things such as inciting violence against someone. That would be the extent of it, but I think the community would recognise that there should be some scope to allow such laws.

Question — You're proposing a system whereby the Bill of Rights can be altered by the parliament. What is to prevent the parliament from first altering the Bill of Rights and then legislating against a minority?

George Williams — Absolutely nothing, except for the political imperative. Think of the debate over the Native Title Amendment Bill. There was no doubt at that point that if the government had simply repealed the Racial Discrimination Act, then that would not have stood in its way of just extinguishing native title, subject to appropriate compensation. Or, indeed, another context—why not just repeal the Sex Discrimination Act and let the government do what it wants? The fact is, it's not politically feasible, because once the community has an appreciation for a certain right, the political imperative is that politically we are subject to that particular right in a way that means it has a very strong resonance in the community. I think that's actually a far more valuable impediment on parliament than law ever is, because it's something that flows from the community's respect for a right, rather than simply being something on the text of a legal page.

Auditors-General: Policies and Politics*

Tony Harris

Seven years is a reasonable amount of time to spend as the Auditor-General of New South Wales. I think the law-makers in NSW are quite right in saying that it should be a seven year non-renewable term, because at the end of the seven years you're exhausted, and with any auditor-general they're looking for a change by that time. I think in my case they were looking for a change because in some respects I saw the job rather differently from those who went before me, and perhaps from those who would come after me. And as someone said in Canberra, that's a function of where you come from.

Because I had been a public servant in Canberra for over twenty years, and had also worked in Canberra as the head of a minister's office, I had been able to see all of the facets of the Commonwealth public service. And taking that knowledge to Sydney enabled me to apply it in the job of Auditor-General.

This upset a number of ministers because they hadn't before seen auditors-general who had actually audited the relationship between the ministry and the public service. I had made a decision early on to examine that relationship because I thought it was the most useful area to mine.

The law in NSW gives some limitations to the work of auditors-general, and it quite rightly says that auditors-general are not permitted to question the objectives of government policy. That's a sound piece of law, because ministers in their political environment should be able to define the destination that they wish to take the country during their term of office. So I was not allowed to comment on the government's

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policy objectives, but the means used to arrive at that destination did fall within the audit ambit. It fell within the audit ambit because the Act allowed me to examine the activities of government, to consider whether they were effective and met objectives, and whether they were economical and efficient. It also allowed me to look at whether they were lawful, as against applicable law. This performance audit function was legislated in 1992, the same year that I arrived in Sydney.

In some senses I was the first auditor-general to undertake this performance audit function. Prior to it being enacted there was strong opposition from the bureaucracy to performance audits. Indeed, when Gerry Gleeson was head of the NSW Premier's Department, when he saw himself as being fairly powerful in government, he described this period as the 'Wran–Gleeson era'. He objected to performance audits because he said they would lead auditors-general to question the policies of ministers—not the policy objectives, but the policies—and he was right.

The second discussion about this issue that I was aware of occurred between Ches Baragwanath, the famous Auditor-General from Victoria, and Premier John Cain, who had a discussion about the efficiency of cleaning schools. Baragwanath argued that contractors would cost less than staff to clean schools at the same quality. Premier Cain said that the objective was to employ staff to clean schools, to which Baragwanath responded by saying that the objective was to have clean schools. So we saw a debate about the aims versus the means of policy. As Paul Keating said when he was Prime Minister, there's a lot of confusion among politicians between those two issues. Many politicians turn the methods into the aims. They turn the route into the objective, whereas they should have their eye on policy objectives.

The test about policy objectives occurred fairly early in my time as Auditor General, when the lower house by a unanimous motion asked me to look at the sale of the State Bank of NSW to see whether the price was fair and reasonable. That gives you the clue about what the policy objective was. The government was not about selling the State Bank, full stop. It was about increasing the welfare of NSW residents by selling the State Bank, and to do that it had to get a fair and reasonable price. So they asked the Auditor-General to report before the Legislative Assembly agreed to the sale.

It occurred again under the Carr government when, by legislation, the parliament asked the Auditor-General to look at the sale of the Totaliser Agency Board (TAB). The reference was actually unbounded—'report on the sale of the TAB'. As part of the reference, we reported on whether the price was fair and reasonable. But we also reported on an objective that the government had set for itself—that the price it obtained from the sale of TAB would be no less than their unpublished reserve price for that sale. So again, you can see that it wasn't the sale of the TAB *per se* that was the objective of the government, it was a means to enhance the welfare of the state.

Having said that, ministers never became accustomed to the idea that their decisions could be subject to audit; that an appointed official (which auditors-general are), could examine the activities of a minister of state for the Crown. So when we reported on matters where the results were not agreeable to the government, you could sense that it was not an appreciated audit.

Many of these audits related to the tollways in Sydney. Sydney will have seven privately owned tollways in the metropolitan area by the time this government finishes its plans. We will have more tollways in Sydney than any other city in world. We are in advance of the rest of the world, which is a little bit of a worry in its own right, but it is a greater worry when we learn that the government never actually studied whether privately-owned tollways were important or useful or the most efficient way of developing roads in Sydney.

A number of reports were done on this matter, and each report concluded that the government ought to examine whether privately-owned tollways were the most efficient way of providing roads in Sydney. The government never did, until after I left—although shortly towards the end of my appointment, the government did ask one day if I realised that privately-owned tollways were an expensive way of providing roads to Sydney road users. I said I did.

It doesn't really matter why tollways are expensive—what I found important was that there was no policy structure within NSW that allowed that issue to be discussed. If I run down this government's policies on tollways, you will see how difficult it is to avoid comment on policies. Quite soon after the Carr government was elected, it lifted the toll on the freeway between Sydney and Wollongong. It also provided a scheme called 'Cashback', where drivers of privately registered vehicles can get their tolls back from using the M4 and the M5 tollways. So the government was in the spirit of lifting tolls. At the same time it agreed to the imposition of a toll on the M2 privately-owned tollway, and it decided more recently to impose a toll on the privately-owned Eastern Distributor. It decided not to impose a tollway on the Anzac Bridge, which is an important link between the western suburbs and the city, but it will put a toll on the tunnel that feeds onto that bridge when it's built.

You can work out any possible permutation of toll policies that you want and this government will have had one of them, at least. When you ask why they have these policies, you find out that they're driven by intensely political considerations. The fact that they're political doesn't make them unreasonable—that's what democracy is about—but what is difficult is when ministers dress up political reasons into some kind of economic rational reason.

I can give you another example. When he first became Minister for Roads, Michael Knight decided, and announced, that he would move twenty million dollars from the road allocation from the northern suburbs to the western suburbs. The reason given was that the west had a higher need for roads. Had he not provided this reason, the activity would not have been auditable by me. It was an intensely political decision. The Labor government has no seats in the northern suburbs, and the coalition government had no seats in the western suburbs. So it seemed fairly obvious that moving money that the coalition had provided to the northern suburbs to Labor-held seats in the western suburbs was entirely politically rational. Had he stopped there that would have been fine, but he then added: 'we're doing this because of the higher unmet needs in western suburbs.' If you asked the department or the minister for the paperwork to support that statement, they could not show you any because no research was undertaken to come to that conclusion.

One of the reasons that auditors-general can be—and perhaps *need* to be—a little more aggressive in NSW, is the relationship between the Auditor-General and parliament on the one hand, and the relationship between parliament and government on the other hand. The NSW government is in a far superior position with respect to its parliament than governments in most other jurisdictions in Australia—apart, perhaps, from the Northern Territory and Queensland. Thus, if a bill is put up which the upper house (in minority ownership) amends in a way that the government does not like, the government will bring the bill back to the lower house, it will accept the amendments but will not proclaim them. So we seen a situation, which has happened now several times, where each house of parliament has approved a bill, has passed it, and the government has advised the Governor not to proclaim those parts of the bill to which the government objects.

I thought this was reasonably unusual when I came across it, and I had a discussion with the government about it. The first thing they asked was why it should concern me, which was not a bad question—why *should* the Auditor-General be concerned about laws being passed in this way? Fortunately, I had done some research, and discovered that in the United Kingdom the High Court (not the highest) had struck down acts because the government had done the same thing. The High Court said: 'No, Parliament intended the *whole* to be passed, and for you to disagree with part of the whole does not make the Act lawful.'

I mentioned this to the NSW government, however it did not change it's mind on the issue, and indeed has since repeated the practice. I consider that a highly questionable activity. The government can, and has, prorogued parliament in the middle of a year without notice of intention because it didn't wish the upper house to sit and embarrass the government in its debate on a matter that the government would rather not debate.

The Appropriation Bill that appropriates funds for the NSW parliament is not a bill that the upper house can amend. Of course the Senate can amend bills relating to provisions for the appropriation acts in the federal parliament—in NSW the upper house can't. There are a whole series of differences between the way governments in NSW treat their parliament and the way the federal parliament treats its governments so as to allow, or perhaps require—certainly inspire—a different kind of audit atmosphere.

There is also a difference in the relationship between parliament and the Auditor-General. In the Commonwealth—indeed, in half of the jurisdictions in Australia which have bicameral (two chamber) parliaments—we have joint committees which look at the auditors-generals' reports. In NSW that committee belongs to the lower house. The chair of the committee is a government member—a 'minister-elect', if you like. If the chairmanship is conducted well, then he can be assured that he will get a ministry later on. So the whole relationship between the Public Accounts Committee in NSW and the Public Accounts and Audit Joint Committee in the Commonwealth with the Auditor-General differs. I suppose this became self-evident when, quite early in the piece, the Deputy Chair of the Public Accounts Committee decided to tell me a story. He came from the country, and he decided to speak as if he had a piece of straw in his mouth. He said:

> Y'know Tony, me dad said to me once, 'there's nuthin' that unites political parties more than when someone attacks their benefits', and I said to dad, 'that can't be right, you can't have labor and liberal joined together just because someone attacks their benefits'—and y'know, me dad was right, Tony. Me dad was right.

And that was all about not attacking parliamentary superannuation schemes—which I left until later in my appointment. But we did have a look at parliamentary superannuation schemes because one member, having served six years and six months in parliament, missed out on the superannuation package, and that cost him one million dollars. I thought one million dollars for seven years suggested that there was something wrong with the scheme. I have argued quite strongly, but to no avail, that the parliamentary superannuation schemes in existence in most jurisdictions are archaic and do not match the standards that apply to the rest of the community. You can see from that 'straw in the mouth' story that parliamentarians in NSW were quite happy to join together when they saw an issue important to them—and not necessarily important to the public, or in the public interest—threatened.

There was another issue of concern about the Public Accounts Committee that caused me great problems, and that was the issue of privatisation. The Public Accounts Committee put out a report quite early saying that because the government had no monies available, public infrastructure should be provided by private companies. As the NSW Treasury will tell you quite confidently, that's a flawed analysis. You can't say that the public sector is capital constrained in ways that the private sector is not. The private sector is as much capital constrained—perhaps more—than the public sector. You can't just go along and build public hospitals, public schools and public roads with the expectation that you would receive no revenues or profits from your investments. So what we're saying is that the private sector has the money to build a tolled road, but the public sector does not. This was once true because the Loan Council put caps on the capacity of state governments to borrow funds, up to the mid-1980s. So they came to an agreement that this was their tranche for the year, and they could not borrow any more than that tranche.

This was quite frustrating for the NSW government and led to issues like the Eraring power station, which was owned by the banks. It provided a public service and it was run, maintained and paid for by the public service, but was owned by the banks and the banks provided electricity to customers in Sydney. That was a charade.

Similarly, the Sydney Harbour Tunnel was built from private funds, but the public sector guaranteed those funds and, under a formula, ensured that those funds were topped up to the extent that was necessary—and it was to a very large extent—to pay off the bonds. In other words, the bondholders knew that Macquarie Street was behind the bonds, not the putative dealer in the bonds.

The private sector is capital constrained. But saying that we've run out of money and that the private sector should do the work, caused all sorts of problems for audits of effectiveness when we saw that the private sector was actually more expensive than the public sector in particular areas of infrastructure provision—and the Public Accounts Committee had said that this could not be so. It *is* so, and we've got organisations like the former Industry Commission (now Productivity Commission)

and the Economic Planning and Advisory Council to the Prime Minister pointing out that in some circumstances—such as when the private sector cannot manage the risk as well the public sector—private provision of infrastructure is going to be more expensive to the users than public provision.

It also led to interesting agreements such as that concerning the Port Macquarie Base Hospital, where the government paid for a hospital twice and gave it away once. This occurred because we paid for the hospital—we tendered for its construction and had it built. The management of it was tendered out to a private firm and, as part of the agreement, we agreed to provide it with scheduled Medicare payments for private services. We didn't realise at the time (because we didn't think about this very much) that within the Medicare schedule is an amount of money because of capital. So we were paying Mayne Nickless as though they owned the hospital (when they didn't) for the life of the hospital—which will enable them to recoup all of the investments that they did not make in the hospital. And at the end of the contract we had agreed to give the hospital and the land to Mayne Nickless as well. And so that famous sentence: we paid for it twice, and gave it away once.

Privatisation was not done well, for a series of reasons—in the main because the private sector is significantly more adroit than the public sector in the negotiation of these agreements. Canberrans are currently seeing issues dealing with the Bruce Stadium, and I gather that the Auditor-General here is running into legal difficulties because the private sector participants in that deal wish to make sure their reputations are not sullied.

There was no chance of sullying the reputation of the private sector in NSW. They out-did the government every time. I had nothing but praise for them. And when they saw the drafts of the report, they couldn't conclude that they had been libelled.

There are a couple of other issues that I want to talk to you about concerning auditing and democracy. One of them concerns a limitation in our accountability train that is becoming quite important, at least in NSW, and I suspect it will become important in other jurisdictions. Though I can, I don't particularly want to criticise the way that governments have moved their Senior Executive Service (SES) on to contracts. I could repeat the South Australian Auditor-General's comments, when he said that contracts that allow SES executives to be fired for no reason and with no notice do not always permit the SES to undertake its lawful responsibilities under the Public Service Act. If it did, SES executives would be fired.

Rather than go down that track, let me just say that the kind of SES which started in NSW and is now in nearly all states and the Commonwealth has changed the nature of the public sector and the public service. We now have people in very senior positions in state and Commonwealth public service who are not trained in the public sector. They do not fully appreciate how the structure works, what the norms and rules are or what the law is for operations within the state and within the Commonwealth.

I can give you two rather bitter examples of this in NSW. I was attending an annual general meeting of one of our large, state-owned corporations, established under the Corporations Act. Ministers were having trouble with the state law, because it imposed some requirements on them (concerning Board appointments) that they

would rather not meet. The head of the co-ordinating agency said in public to the meeting: ‘well, let us deem that the law does not apply on this occasion.’ My audit risk escalates straight away when I have heads of agencies talking like that. Happily, one of the ministers there thought that was advice he would rather not have, and they met the conditions of the law.

Subsequently we came across the question of Phillip Smiles (former NSW MP). A situation occurred concerning the former member of parliament who’d been convicted of a heinous offence—since overturned by appeal. Beforehand, the question arose: if he were convicted of this offence, would he be entitled to a parliamentary pension? The government and the parliament obtained three legal opinions on this question, each of which said (because they came from government lawyers) the member would *not* be entitled to a pension if he were convicted on these matters.

The member *was* convicted and he *was* paid a pension, which he commuted into cash. I started to look at this issue and to ask how this could occur. I suppose I started to look at the issue because I’d been told that a senior minister had received one of these legal opinions and had torn it up and thrown it in the bin because it was not the kind of advice that he wanted. So we looked at this matter in some depth and eventually passed it on to the Independent Commission Against Corruption.

However, during the course of this case I spoke to another head of a co-ordinating agency who had received the legal opinion and I asked why he hadn’t done something with it, or why he hadn’t told people what was in the opinion. The head of the department said that it wasn’t his responsibility to pass legal advice on to others. So purportedly the agency that decided to pay the pension had not received legal advice on the matter. It has always been a troubling question why the government and the parliament should seek three legal opinions if they weren’t going to do anything with them—because in the end, nothing was done with them.

Law is being downplayed to a very significant extent in NSW, and I think it is being downplayed to an extent in the Commonwealth arena as well. I can give you many examples—that every year for the last several years the NSW government has spent monies unlawfully, and that over the last several years the Public Accounts Committee has never looked at the issue. On one occasion the unlawful expenditure was over three billion dollars. This was not accidental, in the sense that someone made a mistake. The government had been advised for a number of years that they had been spending, and were continuing to spend, monies unlawfully.

The same offence occurred in Canberra. I remember being called to a Senate Estimates Committee in Canberra to explain why we’d spent eleven thousand dollars more than had been appropriated. That *was* a mistake, but it said something about our systems that allowed that mistake to occur. But when you have a three billion dollar mistake you would think that the NSW parliament might wish to give that some attention. The parliament finds it very difficult to give it attention, because in NSW the parliament sits for about 40 days a year. In the Commonwealth the parliament is scheduled to sit for 72 days this year.

There are other instances about law that suggest that it is an issue that is worth examining. The Commonwealth Attorney-General has described himself as ‘foremost

a politician'. If he is foremost a politician, then his capacity to carry out the responsibilities that he used to have—to help the Commonwealth fulfil its constitutional obligation to uphold the law—becomes reduced. If the Attorney-General of the Commonwealth says that he cannot defend the judiciary because he's a politician, then there are other issues that he cannot do well either, because he is a politician. He cannot look at, for example, the GST advertising that we're seeing now. And he cannot ask himself 'is that lawful?' because, as a politician, that kind of question is not one that he would wish to ask. This puts a very big burden on auditors-general now, because auditors-general are typically not legally trained. But typically, legal issues are now becoming significantly more important, as the public service considers them to be significantly less important.

A lot can and did happen in seven years. We won the Olympic Games (although most of us were praying that Beijing would win), and we had the minister at the time saying that we were going to make a twenty-seven million dollar profit from the Games. The Games, at last count, are going to cost NSW taxpayers about $2.2 billion. We have seen the role of parliament diminished further as governments ignore laws that both houses have passed. We've seen freedom of information become tighter. We've seen commercial-in-confidence issues become more apparent when public servants decline to answer questions asked by senators on the public's behalf.

In many ways, it's a good time for me to have become a journalist—at least I can say what I think.

Question — I'd like to refer to the point you made about NSW parliamentary superannuation. I was absolutely appalled to read that this was sneaked through on Christmas Eve by one of the independents. It seemed obvious that they had all been caucusing away together behind the scenes and that they expected this to go through without any obstacles. I think an alert reporter from the *Sydney Morning Herald* found out about it, and then there was a lot of hypocritical dissembling by some of the politicians denying that they really knew what it was about. I thought it was a very sad comment on the lack of accountability by parliamentarians.

Tony Harris — It's worth explaining that a little more. It was a very technical amendment moved by an independent member of the upper house. When I say 'technical', it was a very difficult amendment to draft and a very difficult amendment to understand. And whenever you see an independent member moving a technical amendment which is unanimously adopted, you have to start worrying. When it occurs at midnight on the last day of a parliamentary sitting for the year before the house is prorogued, then your suspicions should rise a mite more. When it is referred to the lower house within five minutes and is passed without even a vote being counted, then your suspicions can be heightened again. But I wouldn't say that we relied solely on the journalists on that occasion. The Audit Office had an understanding of what was occurring, and was preparing itself to advise the rest of the parliament about it, because in truth most members of the parliament did not know. It was done by a very select group of people. Somehow—and it wasn't through our

office—an intrepid journalist found out and he made the most of it. It didn't help the reputation of parliament very much, unfortunately.

Question — You just informed us about the Macquarie Hospital. I remember that quite a large group of people objected to its privatisation. There was a public meeting and a number of politicians attended and told people that it would have better service, a reduction in the cost of refurbishment, and other things. I am quite shocked by what you have told us today about what actually happened—that the hospital was given away to a private concern to make a profit from sick people. I would like to know, in accordance with the Constitution, what we could do to stop such things? Do you have a right to take the government to the High Court, or any other measures to stop this? We have had enough of politicians telling us all sorts of things, for example in the ACT they destroyed a quite wonderful and structurally sound hospital, only to build a private hospital. I wonder if the land was given away to this organisation, too?

Tony Harris — You'll have to ask John Parkinson the last question. The solution to all of this is for the government to become much freer with information. The High Court has said on more than one occasion that there is a limit to the capacity of the parliament and the government to withhold information from the people and its representatives in the kind of democracy Australia has. In fact that was a unanimous finding of the High Court in a case called, I think, *Longey v the ABC*. That startling change to the law in Australia is represented by one sentence: 'The High Court's unanimous finding that there is a limitation to the power of the government and the Parliament to withhold information from the people.' When I was writing about this stunning change in law in the *Financial Review* early this year, I thought I would ask the Attorney-General of NSW (because his department was involved in the case of refusing information to the upper house) and the Attorney-General of the Commonwealth (because the High Court is a Commonwealth matter) for their views on this stunning change to the law. They had no views. You see, they're politicians, and it's not really helpful for attorneys-general to say that the basis of our Freedom of Information Act, the basis of the public service limitations—the regulations and laws preventing public servants speaking—are affected by this High Court decision.

But that's the solution, because if you have information, and if information is more widely available, then people who are interested and have the time and the skills can actually look at it, and make a case. Whereas at the moment it's the auditors-general, with their limited budgets, who are the only ones who have unlimited access—and even in NSW we don't have unlimited access to all documents. Legal documents and cabinet documents are excluded from our purview.

So that's the arena on which I would be agitating. The High Court has said that, for democracy to work, people must have access to information and that governments cannot have an untrammelled power to withhold it. Let us find out what the new boundaries are within which we can demand information, so that we can exercise our responsibilities under the Constitution, come election time.

Question — Would you like to comment on the contracting ability of the public service, and in particular the quality of specialist advice provided by public servants, whether it's in the areas of health, law or engineering?

Tony Harris — In NSW we have great difficulty with public service contracting, tendering and negotiating these agreements. Firstly, because they're not trained to do so. This is a widespread new phenomenon we are grappling with.

Secondly, we are not rewarded for doing so. In the private sector they will lose their jobs if the contract performs poorly, and they will receive significant benefits if it is profitable. That sharpens your mind. We don't have that pencil-sharpener in the Commonwealth.

Thirdly, we are negotiating from the wrong position. The best deal that I ever saw in NSW was the government's decision not to build a new railway station just south of the Sydney Harbour Bridge. And that was the first time I ever saw a government make an announcement that they were going to do something, and then decide that it was too expensive, and they wouldn't do it. This is what happens to us all the time—we say, 'let's go to Hawaii at Christmas', and come the time and it's too expensive, then we won't go. We actually contemplate, after we've made some in-principle decisions, and can be quite happy to back out. Certainly the private sector is quite happy to back out if it's not profitable. But rarely do you see governments backing out.

So we had Mr Baird—now a member of the House of Representatives, once the Minister for Transport in NSW—say, 'the new Southern Railway between Sydney and the airport would be built without one dollar of public monies'. He was quite right—it was $700 million by the time the deal was done. We did not, in that period of time, think, 'hey, can we afford to spend 700 million dollars on something that we had budgeted not to spend anything on?'

So we have that difficulty, as well as the hiring of advisers. The Roads and Traffic Authority (RTA) hired advisers for the Eastern Distributor (which might be a 400 million dollar deal) and offered $10,000 for advice on the financial aspects. Now $10,000 would not buy you a day's time from a decent financial advisory firm or investment bank. It actually went up to $100,000 as RTA, over time, felt that $10,000 wasn't enough. But still the advice wasn't sufficient to match the complexity of the deal, and so we didn't do very well.

There's no easy solution to this, other than ministers understanding that they should be able to walk away from deals that are too expensive, from an understanding that the public sector isn't really yet geared up for this kind of negotiation.

I'll give you another example. In the Commonwealth we sold the Foreign Affairs building—a purpose-built building because it has in it's basement some of our security apparatus. We sold it—and then we leased it back of course, because it was a purpose-built building for Foreign Affairs. The people who bought it said that this was a no-brainer. What does that mean—a no-brainer? We've got a triple-A government paying more than triple-A rates for a building. We don't have any exposure to this building, the Commonwealth built it, the Commonwealth is occupying it, we don't have any substantial risk about owning it, but it's as if we lent the money to the Commonwealth and we got better than triple-A rates. So they call that a no-brainer.

And we're going to do it again with Defence buildings. We're going to be selling Defence buildings and we're going to be leasing them back, and we're going to be making money out of this. The private sector isn't going to make money, we are. The private sector doesn't exist to make money, apparently. I just don't understand the logic of it—you might as well sell Parliament House and lease it back.

So sometimes our structure's not right and our incentives are not right—there's no easy solution, though it is a problem that's worth recognising.

Question — If you'd made a complaint to the Auditor-General, as a journalist and as a citizen, about illegal or unlawful decisions made by public servants, and if the Auditor-General investigated and found that the complaint was justified and that five million dollars of public money had been unlawfully allowed, but that it wasn't corrupt because this problem was going on in the whole of that department—if you made your report and nothing was done about it in your local legislature and it received half an inch of column space in your local media, what would your reaction be and what would you do next?

Tony Harris — It's probably true that there's a difference in definition between corruption and illegality. Not everything that is illegal is necessarily corrupt. Corruption has this air of self-gain about it, or crass negligence or issues like that. So I probably wouldn't necessarily criticise an auditor-general for coming to a conclusion that it wasn't corrupt. However, if it's unlawful, it's unlawful. And if it is unlawful, then it's a matter that should be reported to parliament—and that's all an auditor-general can do—and then it's up to parliament to determine what they should do.

As a journalist I was questioned about unlawful spending before an upper house committee at the beginning of this year, and they asked: 'are you like a judge—we pass the laws and you just have to judge according to the laws?' And I said, 'yes—you pass the laws and it's not for me to question them, or make value judgements about them. If they're broken in a material way then I have to report them to parliament and it's up to you to determine whether your laws are sensible or not. Mind you, if your laws are not sensible, then there's something wrong with parliament. If you're saying that your own laws are silly, then there's something wrong with you.'

I can't be responsible for the press, either, as an Auditor-General. All I can do is try to put material out, as the law allows, in an understandable way, and if the press don't comprehend this, then try the ABC.

Question — On the supremacy of economics over finance, every report you have produced has said, 'look, this might have appeared financially clever, but it was economically dumb'—particularly in relation to infrastructure, which you've just alerted us to. You have articulately outlined the problem and the conflict, but what I'm curious about is how this has happened. How has finance taken over from economics? Is it a problem in public perception, or in people's understanding, or in our accounting standards? How can we have a Federal Treasurer say, 'hey, we've got our government debt down to seven per cent of GDP', rather than saying 'we have reduced public assets by 200 million dollars'? Different framing, but the same thing. What is the root cause of the problem?

Tony Harris — A lot has to do with presentation. We're having an argument with this government today about what the underlying deficit is, or the underlying surplus. I call it an underlying deficit of about $1.7 billion. So yes it has a lot to do with presentation.

It used to be that if you sold buildings, then that went straight to your bottom line because it reduced your spending. The revenue that you received from the sale of the building reduced your spending. We are trying to mediate that by improving the standards, and certainly the GFS standards now introduced by the Australian Bureau of Statistics give you a much better idea about what is going on.

But there is still this problem of time, and also of classifying things properly. So when, in NSW, we said to a builder that we needed to have a building for lawyers to service the courts, we gave them the block of land and asked them to build us a building which we would then rent from them for the economic life of the building. Then the building will be destroyed as required by the Tax Office, in order for the tax deduction of depreciation to be obtained. When that happens, you start to scratch your head. I would say we owned that building—just as I would say we own the Sydney Harbour Tunnel—and the government will object to that, because if they own the building they also own a liability which they didn't wish to book.

So yes, there is a lot to do with accounting standards and the like, that we have to be quite diligent about and seek to improve. And even when the standards don't allow us to say something is what it is, we can at least describe it fulsomely in the report so that people can make up their own mind.

Question — What is the future for auditors-general? We've had Ches's experiences in Victoria, you've had some interesting experiences yourself from time to time, and then in the late eighties to early nineties there were the experiences of the Commonwealth Australian National Audit Office. What's your view about the future of auditors-general in terms of more independence, or less independence—are they more in the sights of government now?

Tony Harris — That's a good question, and I don't know the answer. I hesitate to say we should go down the South African route and make the Auditor-General a constitutional officer.

Having said that, in NSW—as much as the government humph'ed and haa'ed and showed its displeasure from time to time—they increased the budget and Bob Carr did go public saying that he welcomed the difference between NSW accountability and Victorian accountability under Kennett. In NSW we had an Independent Commission Against Corruption, we have an active Ombudsman, we have an active Auditor-General, and we see that as an important part of the competitive advantage that this state has.

And indeed, I've heard that from the business sector as well. Leightons would not have tendered for the casino licence in Sydney, except that the accountability arrangements in NSW were a lot better than they were in those states where they did tender and lost the race. You can think about that sentence later on. They obviously

thought that they had lost the race unfairly in some states, and of course they won the race in NSW against Packer—which was some race.

So you must take encouragement from the fact that, as much as they mutter, they still fund the office and they still increase it's funding, expand its functions and claim some benefit.

The best way for an auditors-general to survive, it seems to me, is to become relevant to the public, because in the end it is the public interest that they are serving. Although the parliament plays a very important part in that, parliament is also occupied by politics. So if the Auditor-General can ensure that the subjects they examine are meaningful—which probably means they are controversial—then the public will support you. If you avoid controversy, then you avoid the important issues. If you follow and look for the controversial issues and don't wait to be asked, if you write your reports in ways that can be easily disseminated or understood, then the public will support you—and having the public behind you is a hell of a lot better than having most ministers.

Question — You have said that in many cases the law has been broken, and I think you said in one instance it was for three billion dollars. It's obvious that the Act requires you to report to the parliament which passes those laws, but is there any mechanism where the responsible ministers or governments can be hauled before a court for breaking the law?

Tony Harris — You might have seen this happen in Victoria, when the Director of Public Prosecutions wanted to charge the Premier for contempt. And you might remember that the Premier had the law changed, so that it was only the Deputy that could charge ministers for contempt. When you start to see those sorts of responses, you must start to worry about the structure of accountability in the state. And of course we had great reasons to worry.

In NSW, if a minister has spent monies unlawfully and is charged by someone and convicted by court, it's a criminal offence. But I don't expect to see a publicly appointed officer go and charge a minister. We have these laws, but presumably they're not meant to be enforced.

I've actually thought about this a little. Who has the standing to stop governments from unlawful acts? It's not clear. I think the Auditor-General in NSW has the standing to go and get a determination from the Supreme Court, and once having the determination of the government from the Supreme Court, the government would be loath I think to continue that activity.

Although standing has improved significantly following the Batemans Bay Aboriginal case considered in the High Court a year or so ago, it used to be that people who were busybodies couldn't go to court to seek relief against the government. Now the High Court has widened that view, so that if you have an indirect interest in the matter you may go and seek relief. Of course, if you do go, you need your $500,000 as well. So it's quite an interesting issue. I suppose what we should do is try to have an enlivened Opposition, and you do in Canberra. But with only 40 sitting days a year, you do not have an enlivened Opposition in NSW.

Question — You've argued persuasively that the public has the right to know what contractual deals the government is up to. But how would you propose that that information on contracts be made available, and what limitations, if any, should there be on that?

Tony Harris — I don't think there is much in an executed contract that you could describe as requiring protection. Certainly, if it's a large and complex contract, as we see when we're talking about water filtration plants or Eastern Distributors, there would probably be 300 people in Sydney who know the details of those contracts. And if that's a secret, then lots of things are secrets. It cannot be argued successfully that that information ought to be restricted. There may very occasionally be material in a contact which has commercial value (because it hasn't been patented or is subject to copyrights), but once it's executed—except for those rare occasions—the whole thing should be made public.

Now how do you get that done? I'm trying to persuade the press media that we have to start to train public servants in the law, because there would be very few public servants in the Commonwealth that know that the Freedom of Information Act does not prohibit access to Cabinet documents. So if a public servant says: 'No, you can't have look at that because it's a Cabinet document', then that is an invalid reason. So we have to train public servants in what it means.

It wasn't so long ago that estimates of future expenditure or estimates of GDP or inflation growth were not information. If you asked for Treasury's estimates for inflation for the next year, you were told that it didn't have to be provided under FOI, as it was not information. That was true, and not only was it true, it was upheld by the Administrative Appeals Tribunal. So we have taken the issue some way by training and by having the courts properly interpret the law. But more than that, we have to get an occasion where we are refused a document, take it to the High Court and say 'is this one of those powers which you say the government doesn't have?' Because the Auditor-General is not going to do it and I don't think the government of either persuasion is going to do it—we might get an Opposition that promises to do it, but I could tell you about that, too.

The Carr Opposition were very concerned about political advertising and put up a bill to significantly reduce the capacity of political advertising, which the Fahey Government rejected. The Collins Opposition put up the same bill to the Carr Government, and the Carr Government rejected it. Yet when you actually point out these issues to governments, and ask how they can be taken seriously when they behave like that, they don't even get embarrassed.

So, we need to find an appropriate occasion, and test it. The High Court is just looking for a case, but finding out what the case is and who can present it is the problem.

Public Servants and the Public Interest*

Richard Mulgan

The topic I have chosen for today concerns the public service and the values which should guide its professional practice. It is a question of some interest as public servants seek to come to terms with a new employment environment. The public service as a profession has taken a severe buffeting in the last decade and a half. The number of public servants has been severely reduced. Their conditions of employment have been diminished, for instance by the loss of certain appeal rights and, at the senior levels, by the loss of security of tenure. The distinctive values of the public service have been systematically called into question by a managerialist critique which locates best practice in the private sector. Simplistically measured by the standards of private sector management, the public service can easily be made to look grossly inefficient, obsessed with process, and resistant to change. Such criticisms provided the background to reforms of the Public Service Act, with its new emphasis on flexibility of employment and devolution of responsibility. At the same time, cavalier replacement of department heads has indicated open disrespect for the basic principle of public service professionalism; namely that senior public servants are capable of giving loyal and effective service to both sides of politics.

In reaction, many defenders of the traditional public service have hit back. They have cited the constitutional importance of an independent public service, not subject to government control. Governments, they claim, need frank and fearless advisers, not partisan toadies. Governments and politicians come and go but the public service continues as the permanent repository of experience and guardian of the nation's welfare.

* The paper was presented as a lecture in the Department of the Senate Occasion Lecture Series at Parliament House on 11 August 2000.

The debate has been fierce and often uncompromising. As often in such arguments, extreme positions become entrenched and the complexity of the issues becomes obscured. The reformers have often underestimated the distinctiveness of the public sector and have exaggerated its inefficiencies. The traditionalists, in turn, have sometimes tended to overstate the independent authority of an unelected bureaucracy. Such exaggerated defences, while understandable, have the potential to do more harm than good. They damage the case for a professional public service in today's political environment. Advocates of a politically neutral, professional public service run the risk of underselling their product by misrepresenting its virtues.

I wish to explore this point further by examining one set of arguments used in favour of an independent public service, namely those arguments that depend on linking the public service with the pursuit of the public interest. Adherence to the public interest is often taken to be a defining characteristic of a public service. Indeed, it has been recognised as such by the current minister, Dr Kemp, who has referred on more than one occasion to the public service as providing 'public interest' advice. As such, the public service may be contrasted with lobbyists who are peddling a sectional interest, or with policy consultants whose first priority is to make a profit and secure continued employment. It is then an easy, and often tempting, step to say that the public service is the true champion or guardian of the public's interest. Public servants need to stand firm, not only against self-interested pressure groups and consultants, but also against politicians and their advisers who are concerned more with their short-term electoral interests than with the public interest. Commitment to the public interest is thus harnessed as a defence of the public service's independence in the face of other claimants to represent the community.

But how conclusive are such claims? Do public servants really have a right to insist that they are the true champions of the public interest? Should they not yield to the views of others who more directly represent the opinions of members of the public? More fundamentally, does the term 'public interest' have any meaning at all? Is it simply a rhetorical device for cloaking political preferences in high-sounding, moralistic language? To answer these questions, we need to begin with a clearer understanding of what the term 'public interest' entails. So I hope you will forgive a few minutes of conceptual analysis.

First, we may notice that 'the public interest' is one of a number of similar terms all of which are more or less identical in meaning, for instance 'the national advantage', 'the common good', 'the collective benefit'. They combine two terms: one, a noun, signifying positive value, such as 'good', 'interest', 'benefit' or 'advantage'; the other, a qualifying adjective, referring to the community as a whole, such as 'common', 'public', 'national' or 'collective'. Each of these terms is open to a variety of interpretations and reasonable disagreement. At the same time, they do at least set limits to the type of consideration that may be advanced in political debate. In the first place, a term such as 'interest' requires reference to something of positive value, some benefit or good which will accrue to the people in question. We may not all agree on what is to count as valuable. Indeed, a certain degree of disagreement over values is endemic in a pluralist society such as ours. It is this disagreement that helps to make the concept of the public interest inherently contestable. None the less, if we do refer to the 'public *interest*', we must at least be prepared to state our values for consideration. We cannot rely simply on personal preference or whim.

Secondly, the term ‘public’ in the ‘public interest’ also carries certain clear implications. It is an inclusive term requiring reference to all members of a particular community. Such a community is normally defined in political terms by shared citizenship under a common government. The public interest in Australia is the interest of those living in this country. Disputes may sometimes arise over boundaries of the public, particularly where more than one level of government is concerned—the public interest for the Commonwealth government is more extensive than that for the ACT or NSW government. For the most part, however, the extent of the political community and the public is uncontroversial.

Reference to the public interest therefore requires us to consider the interests of all members of the community. Some of these interests we all share in common, for instance law and order, roads, and clean air. Other interests we hold as individuals or members of particular groups. In a modern, pluralist society, most people belong not only to the community as whole but also to a range of smaller groups—local, occupational, religious, gender, ethnic and so on—each with its own identifiable interests. We expect our governments to balance all these interests, common, sectional and individual, when arriving at the public interest.

Some analyses of the public interest restrict its scope to those interests we all share in common. Sectional or personal interests are therefore excluded from the public interest and may even be seen as contrary to it. This narrower view of the public interest is particularly popular among economists (mistakenly influenced by the quite different concept of public goods). For example, in discussion of economic policy, the public interest is sometimes identified with the interests of consumers or taxpayers (assuming that everyone consumes and pays taxes). By contrast, the interests of producers or retailers are described as sectional interests. Assuming that governments should legislate for the public interest, it can be argued that the government should concern itself only with the interests of consumers and taxpayers (in, say, cheap prices and low taxes). Policies that favour sectional interests (such as subsidies and protection) are then to be avoided as contrary to the public interest.

However, the claims of individual and group interests should not be excluded altogether from the public interest. As citizens, we all expect our governments to act in the interests of sectional groups, whether they are women, farmers, Aborigines or small business people. If the public interest is to cover all interests with which governments should be concerned, then it needs to be understood inclusively, to cover all interests held by members of the community, as individuals and as members of sectional groups, as well as those interests held in common with all other members of the political community.

Assessments of the public interest are thus complex and contestable. They require us to take account of all relevant interests. This in turn involves contestable judgments about what is good for a range of separate groups and about how these competing interests are to be weighed against each other. In a democratic society, the assessment of the public interest is an intensely political process, involving debate and negotiation between conflicting standpoints.

Returning to our original question, what part does the public service play in this process of assessing the public interest? A key role for the public service is to help to

sustain an appropriate structure for decision-making, by ensuring that the various voices are heard, that no relevant interests are omitted, and that politically acceptable conclusions are formulated. Public servants should also help to inform the assessment of policy options, by providing a reservoir of reliable information and experience. In these respects, the public service does have an institutional connection with the public interest that helps to distinguish it from other sectional stakeholders. Other interest groups have their own sectional interests to promote. Though they will try to couch their arguments in terms of the public interest, they are always subject to the overriding imperative to pursue the interests of their members. At bottom, the Australian Medical Association is obliged to look after the interests of doctors rather than the public and the role of the National Farmers Federation is to protect farmers rather than consumers. For the public service, on the other hand, representing the public interest is its genuine *raison d'être*. In this respect, Dr Kemp was undoubtedly correct in identifying pursuit of the public interest as a defining characteristic of the public service.

However, before we allow public servants to be consumed with self-importance, we need to enter two significant qualifications. The first is that public servants, in practice, also have their own sectional interests. They, too, are human and share the human propensities for self-interest and self-delusion. Though their official institutional mandate may be to pursue the public interest, they are no less prone than other people to furthering their own material advantage under the guise of serving their clients. They often tend to favour policy options that increase their budgets or their power. Indeed, some influential critics of bureaucracy have analysed all public servants' actions as motivated overwhelmingly by self-interest. Such analyses, no doubt, are simplistic and overstated. Public servants, like anyone else, are capable of self-serving behaviour but, for the most part, their actions are directed towards the stated goals of their organisation, including the pursuit of the public interest. At the same time, their assessments of the public interest should never be taken wholly on trust. Like all such assessments, they should be open to criticism and correction.

This brings us to the second and more important qualification and to the main theme of this lecture—the relation between public servants and elected governments. Though public servants can justly claim a greater affinity with the public interest than can sectional interests or lobby groups, the public service does not have the field to itself. It is not the only institution officially dedicated to the public interest. The task of representing the public and of formulating the public interest is shared with government ministers and even with those despised creatures, ministerial advisers. In other words, pursuit of the public interest is a government function, not just a public service function. Moreover, public servants are part of a democratic system of government and are required to follow the lead given by the elected government of the day. If there is conflict between the elected government's view of the public interest and the public servants', public servants are expected to defer to their ministers.

For the most part, such conflicts do not arise. Elected governments and public servants generally operate within shared assumptions of what the public interest requires. The great bulk of government business, we should remember, is carried on within an agreed non-partisan consensus about the objectives of policy and the procedures for implementing policy. A change of political direction, for instance,

associated with a change of government, affects only a small proportion of government activity. But at those points where elected governments do wish to change direction, then the duty of public servants is clear: they must faithfully and efficiently implement such changes.

It is therefore a mistake to draw a sharp contrast between the public interest and the interests of the government of the day and to imply that public servants pursue the public interest while elected governments pursue their own interests. Such a contrast wrongly overlooks the leading role played by politicians in defining the public interest. It may also carry the mistaken implication that public servants ought to be somehow above politics and divorced from the electoral considerations that drive ministers. That public servants are engaged in politics is not a new thought, though it always bears repeating. As we have seen, the concept of the public interest itself is inherently political, because it requires negotiation between conflicting community values. In so far as public servants are themselves involved in this negotiating process and in the imposition of value choices on society, they too are involved in politics. Ministers, because they have the final word, are usually required to take public responsibility. But this does not affect the point that the public servants who assist them are involved in political choices.

Moreover, public servants are involved in politics not just in this general sense of helping to make value choices. They are also involved in partisan, party politics. Many government decisions are taken with at least one eye on public opinion and in the hope of pleasing the voters. In so far as public servants assist in developing politically popular polices, they too are assisting the government's electoral chances. Again, such partisanship is hard for many public servants to admit. Party politics, they like to think, is for the ministers and their personal advisers but not for the politically neutral or 'apolitical' public servants. After all, public servants serve the interest of the public, not that of the government of the day.

Again, such attempts to disengage from partisan politics are disingenuous. They imply a mistaken view of how the public interest is to be decided in a system of representative government. The desire of politicians to win elections is a fundamental premise of representative democracy. It is, indeed, a noble and praiseworthy desire. Without the electoral motive permeating government activity, there can be no guarantee that governments will attend to the preferences of the public. It follows also that public servants should have no compunction about suggesting and implementing policies that will assist the government's re-election plans. Indeed, such assistance for the government is part of the compact that the public service makes with the government. The only caveats to partisan activity derive from the fact that public servants are required to be impartially partisan and to offer equally devoted service to the re-election plans of whichever party forms the government.

This is the effective meaning of those misleading terms 'apolitical' and 'politically neutral' often used to characterise a professional public service. Public servants are not required to abstain from politics or even from partisan politics, only to serve all sides of politics with equal loyalty and enthusiasm. For this reason, a number of sensible conventions preclude public servants from engaging too closely in the affairs of the governing party in ways that would compromise their capacity to serve the party's opponents at a later date. We also insist that during the period of an election

campaign, the public service remains strictly neutral, pending the outcome of the forthcoming election. But the ineffectiveness of the caretaker period and its air of suspended political reality confirms the party bias of normal government business. The public service always wears the colours of the government of the day. It is the prize won by the elected government which takes over a professional, bureaucratic machine and directs it towards the party's preferred destinations. The attempt to associate the public service with the public interest in contrast to the interests of the government of the day is therefore fundamentally misconceived.

Admittedly, there are some occasions where public servants are expected to stand firm and to oppose instructions, not just from ministers but also from their bureaucratic superiors who may or may not be acting in the name of ministers. When their superiors are acting in an illegal or improper manner, public servants have the right, and also the duty, to resist and to expose such actions within their organisations. These are the rights and duties associated with the 'whistle-blower' and frequently justified in terms of the public interest, as for instance in the common term 'public interest disclosure'.

These whistle-blowing rights apply primarily to matters of legality and due process where ministers or officials contravene stated laws and regulations. Individual public servants who are privy to the actions of their superiors are often in the best position to draw attention to such abuses of power. In this respect, as defenders of constitutional propriety, public servants *can* see themselves as guardians of the public interest. The public has an interest in seeing its constitutional processes safeguarded and public servants are well placed to act on the public's behalf. But these defences of constitutional propriety are closely circumscribed. They should be clearly distinguished from any supposed right to contest the substance of government policy on public interest grounds against the government of the day.

Defence of constitutional propriety in the public interest is not confined to public servants employed in standard government departments. There are other public institutions whose *raison d'être* is much more directly aimed at this objective, for instance parliament itself, the courts and other tribunals, as well as review agencies such as the Audit Office and the Ombudsman. As watchdogs of government in the public interest, these institutions naturally and regularly find themselves in conflict with the executive. By the same token, the public servants employed in these institutions will also have more cause to see themselves as guardians of the public interest.

At the same time, however, under our constitutional system, their guardianship too, like that of departmental public servants, is typically restricted to matters of democratic process rather than the substance of policy. The courts, for instance, when interpreting the public interest, generally defer to the right of elected ministers to determine what the public interest demands in any situation. Auditors-general, when confronting ministers, usually confine themselves to issues of probity and process rather than policy. The Ombudsman has the power of recommendation only, leaving final decision to ministers. Parliament of course, is a forum for challenging the government and its interpretation of the public interest. The Senate has a proud record of impeding the policy initiatives of government. But, its legitimacy as an independent player in public policy derives from its elected representatives. Its public

servants typically confine their protests to defending the integrity of parliamentary procedures.

In general, then, we may conclude that public servants do have a role as guardians of the public interest in protecting constitutional processes. On the substance of government policy, however, departmental public servants have no licence to act as superior arbiters of the public interest against the views of their ministers. Public servants may undoubtedly have superior knowledge and experience, which they place at the disposal of ministers. They have a duty to inform and where necessary warn. But they have no right to impede or challenge a government decision.

I have stressed what may seem a rather obvious point about public servants and the public interest because it relates to a dangerous misstatement of the role and value of a professional public service. As mentioned in the introduction to this lecture, the concept of a professional, politically impartial, public service is under attack. The most senior rank of the Australian Public Service has been partly politicised, a trend that has had a demoralising effect throughout the ranks of the service. The morale of the service has been further weakened by a constant barrage of adverse comparison with the private sector. In response, defenders of the service have tended to stress its constitutional independence, its capacity for frank and fearless advice, and its general distance from the government of the day. An implicit contrast is drawn between politicians and their political advisers, on the one hand, who pursue a partisan, party agenda, and professional public servants, on the other hand, who counter-pose a non-partisan agenda, backed by objective, politically unpalatable argument. The notion of 'an independent public service' offering 'frank and fearless advice' has become the unquestioned mantra of those defending public service professionalism.

However, the association of 'frank and fearless' advice with professional public servants is misplaced, or at least overstated. To begin with, it does a disservice to the quality of advice offered by other advisers who are not part of the professional service. For instance, we would expect the ministers' personal minders, if they are worth their salt, to be equally frank and fearless. They must give advice on what to say, how to look, what to wear, all of which may require considerable frankness and fearlessness! Indeed, it may take more courage to advise a minister to change a hairstyle than to change a policy. The notion that only professional public servants can tell ministers things they may not like to hear is absurd. In fact, in any type of organisation, whether in government or the private sector, frank and fearless advice is part of the service which all capable subordinates owe their superiors. By the same token, the capacity to accept and act on such advice is one of the hallmarks of successful leaders in all walks of life.

Moreover, stressing the importance of frank and fearless advice sells short the qualities of a professional public service in a seriously misleading way. It gives the impression that professional public servants are primarily gainsayers, advisers from whom ministers can expect to hear disagreeable, contrary opinions. It casts the public service in almost an adversarial role to the government, as a form of *quasi*-opposition. Such a characterisation, or rather caricature, plays right into the hands of those who want to politicise the public service. It suggests that the only way for governments to get advisers who will be sympathetic and constructive is to appoint their own people from outside. Public servants, it is implied, can only be relied on to point out obstacles

and generally slow things down. If you want to get things done, bring in your own team.

This is a travesty, and a dangerous one. In fact, professional public servants have an excellent record of adjusting quickly to new governments and new policies. Indeed, radical policy change is more effectively implemented by seasoned and experienced professionals. Public sector management is a specialised business, calling for particular skills and virtues, which are best acquired through on-the-job experience. Moreover, the fact that most ministers come to office with so little management and administrative experience places an additional premium on having an effective management team in place, ready to help turn the minister's general ideas into workable policies. There is an important contrast here with the private sector. When a company changes direction and appoints a new board, the new directors will usually have considerable management experience themselves and will not have the same need to rely on in-house advice. Given that the private sector provides the model for management best practice, ministers and their advisers naturally tend to think that bringing in their own people is the only way to guarantee responsive management. It is this private sector assumption that should be vigorously contested. Defenders of the public service need to assert the capacity of a professional service to deliver efficient and responsive service to the public's elected government.

In this important and pressing task, it is a distraction to keep harping on frank and fearless advice. If we want to stress the qualities that a professional public service can offer, why not emphasise other qualities such as flexible, informed, experienced, politically savvy, honest, hard-working and so on? Frank and fearless is part of the mix but it is not the main element and certainly not the defining element. The great strength of a professional public service is not its capacity to stand up to government but rather its capacity to give effect to government policy.

True, there have been cases of recalcitrant mandarins and we all laugh knowingly at *Yes Minister*. But they were exceptions even then. And they are even less likely now, with the more transparent emphasis on government objectives and the end to permanent tenure. Permanent tenure, it should be noted, is no more essential to the profession of a politically neutral, professional public service than it is to any other profession (including academics). It is mainly a cheap way of recruiting and retaining able people on comparatively low salaries. The key point is that appointment, renewal and dismissal should be on professionally relevant grounds, such as demonstrated competence and merit, including the capacity to adapt to changing political directions. Professional competence and merit, particularly at the most senior levels, certainly includes loyalty to the government of the day and its policies. Lack of such loyalty therefore provides adequate grounds for removal. But loyalty to the previous regime is not evidence of lack of loyalty to a new regime. Quite the contrary.

Whether the Prime Minister or other individual ministers should be the sole judges of loyalty and competence is a vexed question that we have not time to pursue today. My own preference would be for an arms-length process of appointment and dismissal, mediated through a clearly independent public officer, such as the Public Service Commissioner. A non-politicised public service needs to have appointment processes that are independent of government, to avoid perceptions of patronage and political favouritism. But the rationale for such independence is to protect the long-term

impartiality of the public service and its capacity to offer effective loyal service to alternative governments as well as to the public. The rationale is not that public servants can be free to object to government policy.

To return, in conclusion, to our theme of the public interest. Public servants do have a special relationship to the public interest which sets them apart from other sectors in society. The notion of the public interest serves as part of their corporate mission, in the same way as employees in a private firm may be exhorted to pursue the firm's interests. As members of the public, we expect public servants to put our interest ahead of their own when exercising their often considerable powers. But the public interest is a contestable concept which public servants do not have the sole right to determine. Sometimes it may be laid down in legislation, at others it may flow unambiguously from a clear community consensus. On yet other occasions, the elected government will decide on a course that it will be the duty of public servants to follow.

Our system of government gives elected ministers the right to determine the public interest, subject always to parliamentary and electoral accountability. In these cases, public servants are required to accept the government's interpretation of the public interest. Their professional dedication to the public interest does not license them to pose as an independently authoritative source of what the public interest requires, at least on the substance of policy. The public service cannot claim a unique guardianship of the public interest in opposition to the government of the day. The particular value of a professional public service lies in its capacity to serve both the public and the government of the day efficiently and effectively, not in any supposed role as an independent source of authority.

Question — How does the sort of public servant you depicted for us discharge the accountability relationship with the parliament and with being hauled before a Senate estimates committee, and being asked to explain, say—just to choose a totally hypothetical example—their part in fabricating a highly controversial advertising campaign appealing to subliminal racial feelings? How does your type of public servant discharge that part of their function?

Richard Mulgan — That question is not easily answered in general terms. When you used the word 'fabricating' I thought we might be going down a clear line where they'd been asked to do something dishonest, and of course there are clear rules of professional ethics where you would not have to do something that was contrary to any actual law. But dishonesty is something that is in the eye of the beholder and politics is often about putting the evidence in the most favourable light, and not mentioning things that are unfavourable, and my view is that public servants are engaged in that sort of activity. That's their job.

Of course, at the parliamentary committee level there's a rough distinction between policy and administration and its quite proper for public servants to say, 'well, that was a matter of ministerial policy' and by implication say that it wasn't necessarily

their decision but was the decision of their political masters. But they should not do that in any way which suggests disloyalty to the ministers. I think that we should see public servants more in the light of advocates of government policy. After all, we accept this particularly in the legal profession—we expect an excellent QC to be able to master a brief on one side and then be employed by the other side on another day or argue the opposite case. We don't see that that's a compromise of professional integrity. We could do with a little bit of similar thinking in relation to public servants. We know that public servants, particularly at the most senior level, are required to defend their ministers. We know that this may mean that they have to defend things that they disapprove of themselves. We know that at a later date they will have to defend a minister who's doing very different things. But that seems to be part of the job and not necessarily something that should cause any problems.

Question — To expand on my example: say there has been—again, totally hypothetically—a government advertising campaign that has rather nasty undertones, and the parliamentary committee is trying to find out where the rather nasty undertones came from. The public servants are mixed up with minders from ministers' offices in the task of producing this thing. Do the public servants have an obligation to explain exactly where these elements came from, including if they came from the public service itself?

Richard Mulgan — I don't have any problem with that. I'm not really trying to defend public servants as necessarily protectors of government confidentiality, which is one of the instances where these things come out, but there doesn't seem any particular harm at the parliamentary committee level in identifying which office these things came from. I think we should be prepared to accept that.

Question — I recently attended an Institute of Public Administration seminar on outsourcing of corporate activities within departments, which came after the government mandating that outsourcing of corporate services would occur as it delivers better outcomes for the taxpayers. When questioned about whether they undertake research to assess the cost benefits of the outsourcing, the spokesperson for the Office of Asset Sales and Outsourcing said, 'there's no need to, it's government policy.' Obviously this Nuremburg response is not in the interests of the public, as any decision on outsourcing must be based on efficiency, equity and effectiveness. So do you see a public interest role for bureaucrats to question outsourcing activities and even undertake independent research on the cost benefits of individual outsourcing activities to determine if it really is in the best interests of the taxpayer?

Richard Mulgan — The short answer is yes. You asked me if I see a role for public servants—I see a role for governments in doing this sort of research. And I see a role for public servants in carrying out this government research about the effects of contracting out or of any aspects of government policy. Where there can be difficulties, of course, is an area where you have a government that is committed to outsourcing almost regardless of the evidence—again, speaking hypothetically—and then it's a question of whether public servants should be conducting research which might be seen to be going against the instructions of their political masters. And I think that's much more dangerous territory, if they know that's what they're doing.

On the whole, if we want independent research on areas of public policy, which we do, then the proper response seems to be to establish independent research bodies. We can have things like the Productivity Commission or other bodies who have a mandate to conduct research on areas which they consider to be important and where there may be problems that governments should hear about. I'm not sure whether public servants should somehow see themselves in such an independent role in relation to the policy of their own department, which has been put forward for them by their minister. I guess that's where I might differ from the implication of what you're saying.

Question — I think that question raises another problem of the real policy and the publicly available policy. The publicly available policy might be to do something for economic benefit. The real policy might be to do it regardless of the economic benefit. What is the duty of the public servant when asked to state the real policy, for example, in Senate estimates?

Richard Mulgan — My view is that public servants are the servants of the government and I don't see a problem in their defending the government's view.

Question — The government has a real policy and a publicly stated policy. The public servant knows what the real policy is. Questioning in Senate estimates is designed to flush out the real policy. Where does the public servant stand in that situation?

Richard Mulgan — The public servant is in a difficult position. Public servants have ways of indicating what they think without actually saying it—as politicians do, and at which they're adept. And we are using the parliamentary committee system as a follow up on question time. If we can get the minister to answer these questions, well and good; if we can't we'll see if we can get the embarrassing truth out of this public servant. I think public servants have to be careful about embracing a role in which it is seen as their job, in the public interest, to dish the dirt on their political masters. I think that's a mistaken idea, and I think we ought to accept that they are part of the government. Things are more relaxed in the committee system than on the floor of the house, and a certain degree of relaxation is expected even from ministers.

Question — We've obviously tended to see what you've said in terms of the federal level of public servants and ministers and so on. We have replicas of that at state level and at the territory level, although in a more limited structure. Do you see the same principles being recognised at these various levels, and do you see the mechanisms for the sort of things that our chairman was trying to draw out, as working effectively at state level also?

Richard Mulgan — Parliamentary committees, as far as I can tell, have been generally a good thing everywhere. I'm not an expert on what goes on at the state and territory level. My impression is that they're not as active, they don't sit as often, and they don't get as much publicity—though at the ACT level, if what one reads is accurate, they're pretty active.

What is concerning me in this general area is the feeling that relates to the prevalence of the minister's minders—that somehow, where we used to have ministers as public servants, we now have minister's minders as public servants. So there's perhaps an

institutionalising of the idea that the minders have their job and the public servants have a different job, and if we drive too big a wedge into this, my argument would be that we are selling short the role of the professional public servants who are, in a sense, just as capable of doing the minders' jobs as the minders are themselves, in most respects. One shouldn't see that what the minders do is necessarily somehow alien to the job of professional public servants. So if one started from the premise that a minder's job is a public service job and that a public servant can do a minder's job as well as a minder, then I think we might start to reclaim the ground that we are surrendering, and the public service is surrendering, by saying that we can't get into that partisan business—we stand somewhere in the middle between the government and the Opposition. That seems to be the wrong ground to occupy.

Question — The difficulty I see is that the political arm of government—the ministers and minders—often don't want the public to know what they're really up to. The public servants know what they're really up to. Members of parliament are trying to find out what they're really up to, and use public servants as the way to get that information. It seems to me that that situation creates great difficulties.

Richard Mulgan — If the public servant becomes known as the way to get information that the ministers and the minders won't give you, the public servant then becomes distanced from the policy debate within the government, insofar as that debate may contain things which the Opposition may not want to hear—which any good discussion will contain. So it seems that putting the public service in that 'hands-off' relationship with the government may be good in some respects, but it may be dangerous in others.

Question — You said that the public servant is the servant of the government. Isn't it also true that the public servant is supposed to be the servant of the people? There may easily be a distinction between the government's point of view and the people's point of view. It seems to me that there has been a development whereby public servants are now unwilling or unable to speak out and give fearless advice. When I first went to work in the Prime Minister's Department, in the time of Sir Robert Menzies, I said to Menzies 'I'm a socialist, I want you to know that.' Menzies said, 'That's good—I want differing points of view.' I wonder how that scenario would stand up nowadays? It seems that there has been a complete loss of independence. It now seems that a lot of people who have views of their own do not want to give those views, because they know that if they do, and they don't please the minister, they're out. How much has the public service deteriorated since that point of view seems to have come forward?

Richard Mulgan — That's a good question, and there are other people here more qualified than I to answer it. Certainly it's reported that senior public servants are less willing to give certain views—that might be seen as contrary to the minister's—than they once were. There does seem to be reported evidence of increased fearfulness. We don't know how far that's gone. From the ministers' point of view this is often seen as people who are fighting old battles: 'I keep hearing that from that quarter, but this government is going in this direction and I don't want to hear that again.' So the ministers have the perception that this is somehow repeated difficult argument. I think ministers who are worth their salt ought to be able to take contrary advice, now as much as before.

I don't necessarily see that we've had a deterioration in the quality of our ministers. This is a difficult question—I don't necessarily know the answer. What I'm really trying to point out is the hazard of overstating this virtue at a time when governments are saying that they want loyal advisers, sympathetic to their objectives. If we say that the public service is sympathetic to the people and not necessarily to the government, and has a broader view, I think we have to be a bit careful with that, because the politicians do after all represent the public, as they've won the election. A lot of the time it doesn't arise and on some key issues, as I tried to say in my lecture, the public servants do represent the people against the government on procedural matters, such as abuse of power and abuse of constitutional propriety or matters of that sort. I'm really just talking about policy directions and there, obviously, good advisers will point out difficulties and alternatives. I suppose I'm running the argument that Michael Keating and others have raised—that all good advisers have always done that, and all good ministers have always sought that.

Question — I'd like you to elaborate on the dependence of policy on good process. In many policies nowadays, one can observe some ministers who cannot quite see the connections between their portfolio and other portfolios. So regardless of what Cabinet arrangements might be in place, the public servant nowadays has a heavier responsibility to design policies between elections which cope with some circumstances which may not have been apparent when the mandate was given at the previous election. These complexities run across different sectors of policies, different departments, where the public interest has a locus which runs through a number of complex planes. Process becomes very important here. You mentioned legislation, but there would seem to be a pressing need for other forms of process, whereby public servants can divine options for government between elections.

Richard Mulgan — I certainly didn't want to rule out public service initiatives on public policy. Often people in a number of different departments may say: 'well, there's a hiatus here, nobody is thinking about this issue so we'd better get together and think about it.' If that's across departmental lines it may be even more likely that it's not being thought about and there be even more need for it to be thought about. This is standard and perfectly acceptable and, indeed, is to be encouraged. There's no problem with public servants doing things that governments don't know anything about, in the sense that ministers may not know or may not be interested. The only problem that can arise—and, again, we're talking about exceptional cases—is when the government has set its face in one way and the public servants continue to think about an alternative policy, perhaps hoping for a change of government. That is appropriate to the extent that public servants are required to take a long view, and if there's going to be a potential change of government and change of policy direction, they need to start thinking about that. I don't have a problem with that, either. I don't want to overstate the extent to which I think public servants should be, as it were, just mouthpieces of the politicians or think only in the way that politicians think.

Question — What do you see as the role of the academy in protecting the public interest *vis-à-vis* the public service and the government, and can you say more about accountability in your vision of what public servants should be doing?

Richard Mulgan — The role of the universities is obviously to comment on matters that academics think are of public interest. There are parts of the universities, particularly in this town, which are closely interested in matters of public policy. From where we sit, the problem is not with our taking an interest in it, but with actually getting other people to listen to us and not listen to the people who are not in the academy, but are paid much more in private sector accounting firms—which is where the true academy seems to have gone.

That's how we see things to a certain extent, though in other areas academics are involved in public policy debate and are regularly brought in—it differs from sector to sector. Clearly, universities and academics would see themselves as having an important part to play and we would hope that that role was recognised by policy makers—it sometimes is, and sometimes isn't.

On the question of accountability, that's another big issue. We discussed this in relation to parliamentary committees. The duty of the public servant is to assist the public in finding out about things that are going on, so when someone rings up for information, the answer is: 'yes, that should be in the public realm, unless there is a good reason for it not to be.' I am a believer in freedom of information and giving access wherever possible.

Again, we have the question of ministerial responsibility and the extent to which public servants and ministers' departments should avoid embarrassing ministers. That's one of our strong conventions, and goes to the heart of our convention of ministerial responsibility, which sometimes is used to cover things up, without doubt—when public servants have something that they'd like to get out, but they feel bound by the conventions of ministerial responsibility not to let it get out. On the other hand, we have to accept that ministerial responsibility, as it works with us, is a very powerful convention for accountability in that ministers are forced to give information through parliament. If caught lying, the consequences can be quite severe. I don't have any difficulty with saying that a public servant who knows that a minister is actually lying should find some way of letting the public know that this is the case. I don't think you should defend the indefensible, but on the other hand the convention that ministers take responsibility and then clear up the mess, depends on a certain degree of anonymity on the part of the public servant. So there are conflicting pros and cons on that issue, I'm afraid.

Question — Your lecture has given a series of opinions on accountability and ethics. What are the actual formal guidelines relating to this? Are these just in the Public Service Act, or are there any other guidelines in the Constitution or through other formal processes?

Richard Mulgan — Some of it is in the ministerial guidelines and the instructions and recommendations that the Prime Minister and his department issue for ministers and public servants. That's the main source. Some of the general principles of the public service values are in the Public Service Act. But most of these things are not written down, or at least not all written down in the same place.

Ministers in Office: Preparation and Performance*

Ken Coghill

Introduction

In this lecture I wish to review what we expect of governments and ministers, look at their preparation for those roles, describe a recent program to assist a new government, discuss the value of a more systematic approach and briefly foreshadow a research program aimed at better measuring their performance.

The new minister

New ministers are appallingly unprepared for office, doubly so after an election which brings in a new, inexperienced government. One minister, John Button, later wrote on his experiences as a new minister: 'I dithered because … I didn't know much about being a minister … I didn't have much idea what I wanted to do. I had no idea where to begin'.[1]

Another, Don Dunstan, recounts one of his first major tasks being to draft the state Governor's speech officially opening parliament shortly after the election of a new government. He found that some ministerial colleagues had already fallen into unthinkingly accepting drafts with outdated content from the public service.[2] Bill Hayden confounded his public service, when they confronted him with a half metre stack of legislation to master, by telling them that he was already on top of it.[3]

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* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 29 September 2000.

[1] John Button, *As It Happened*, Text Publishing, Melbourne, 1998, p. 246.

[2] Don Dunstan, *Felicia: the Political Memoirs of Don Dunstan*, Macmillan, Melbourne, 1981, p.104.

[3] Bill Hayden, *Hayden*, Angus & Robertson, Sydney, 1996, pp. 181–82.

Barry Cohen tells how, when overwhelmed by his new responsibilities, he met another member of the new government, Michael Duffy. Duffy felt he had three options: slash his wrists, go into the prime minister's office and throw himself on the floor and plead for mercy, or hang on and hope it got better.[4]

The above anecdotes show that new ministers face new challenges for which they are rarely well-equipped.

What do we want from government?

What we want from ministers is inextricably linked to what we want from government. What we want from government is good governance. It has been defined in the Manila Declaration by the 1999 World Conference on Governance as: 'a system that is transparent, accountable, just, fair, democratic, participatory and responsive to people's needs.' Each of these factors—transparency, accountability, justice, fairness, democracy, participation and responsiveness—is important and relevant to how ministers perform.

Fundamental is the idea of responsiveness, which Michael Saward has identified as being at the heart of democratic government.[5] As he explained, we expect government to be responsive to our 'felt needs', not simply looking for our electoral support at periodic elections. We expect each individual minister to demonstrate that responsiveness. Prime ministers and premiers also expect all ministers to be responsive and in so doing, to present a favourable image of the government.

Beyond this superficial requirement though, is the concept that government derives its legitimacy and therefore its authority from people. Accordingly, it has a fiduciary duty to act in accordance with the interests of all the people. It accepts that government exercises a trust in which its members' only proper interests are those in which they act on behalf of the people.[6]

This brings us to the other principles of good governance identified in the Manila Declaration.

Government, and therefore ministers, must also operate justly. Under this principle, they must operate so that there is a proper process, in which the people can be assured that the exercise of power is executed according to known and accepted procedures.

Fairness is similarly fundamental. This principle is a slightly different concept to justice. The people will want to be satisfied that there is fair treatment of each person having responsibility for the exercise of power. For example, each person is treated

[4] Barry Cohen, *The Life of the Party: Political Anecdotes*, Penguin, Ringwood, Vic., 1987, p. 128.

[5] Michael Saward, 'Democracy and Competing Values', *Government and Opposition*, vol. 31, no. 4, 1996, pp. 467–86.

[6] P.D. Finn, 'A Sovereign People', in P.D. Finn (ed.), *Essays on Law and Government: Principles and Values*, The Law Book Company, Sydney, 1995, p. 10.

equally before the law, without discrimination based on political affiliation, ethnicity, gender or any other factor.

Participation is increasingly recognised as desirable in a democratic society, and is conducive to better decisions. The very fact that ministers and officials are aware that the public may participate can be a significant factor in tempering incautious or improper actions. But more importantly, participation facilitates better informed decision-making.

Accountability is fundamental to democratic responsiveness which requires that there is accountability for the exercise of power. In other words, citizens look for mechanisms through which those exercising power can be held to account. Transparency—the open disclosure of and access to information held by an organisation—is the fundamental principle underlying effective accountability. Without relevant information, how can accountability be meaningful?

Having established the principles on which best practice by the executive and individual ministers must rely, how then can they be put into practice?

Ministers

It is worth reflecting in more detail on just what we expect ministers to do in office as members of the political executive. For the purposes of this lecture, no distinction is made between members of Cabinet and other ministers.

In our 'crowned republic', ministers are appointed by the Crown, ostensibly to advise the head of state in relation to the government of the nation, according to the Constitution of the Commonwealth of Australia. In actual fact it is ministers who discharge the nation's executive responsibilities, under the contemporary legislation, interpretations and conventions which surround the Constitution. Although nominally accountable to the head of state, the reality is the reverse. In normal circumstances, the head of state is bound to act in accordance with the advice of the head of government and ministers of the day.

Similarly, in our 'crowned republic', popular sovereignty has largely supplanted the parliamentary sovereignty which is assumed in our constitutional design. Popular sovereignty continues to extend its influence over the operations of the system of government in the Australian Commonwealth and states, the United Kingdom, New Zealand and many other jurisdictions with Westminster-style systems.

Ministers thus have the most profound, ultimate responsibilities for the design, implementation and administration of policies on behalf of the community. Having achieved dominance over the Crown, there is now no higher level of executive responsibility than the ministers.

But what of smaller government, deregulation and all those other fashionable articles of faith which are supposed to reduce the role of government and implicitly lighten the executive responsibility in government? To assume that a democratic government can abrogate its political responsibility to the electorate is a nonsense, as we see repeatedly. To give just two examples: Premier Kennett very quickly realised that a

fire in a gas plant was not merely a matter for the private owner if it threatened supplies to most homes, hospitals and workplaces; and Premier Court is finding that registration of finance brokers brings demands to defend the private interests of their private clients.

The responsibilities of ministers in a privatised, de-regulated environment are more complex and more demanding than in the relatively simple world of prescriptive control and command government. De-regulation in the form of removal of prescriptive control requires the substitution of self-regulation. In a world as complex as ours, self-regulation is not nearly as uncomplicated as the term might suggest.

We have found that those given the chance to self-regulate, and the wider society, benefit from rules providing a regulatory environment within which to self-regulate. Teubner called this 'reflexive regulation'[7]; others have called it the regulation of self-regulation. Establishing the regulatory infrastructure for self-regulation is a far more sophisticated and difficult responsibility than imposing and policing prescriptive controls. It requires understanding that the government is part of a larger complex adaptive system, not the undisputed controller of all that occurs within its jurisdiction. In a democracy, the system of government sets the key rules (regulation) affecting the operations of an entire social system. Evidence suggests that societies which perform best are those that have moderate levels of regulation—neither the rigid central control of the former Soviet Union nor the anarchy of Somalia's totally unregulated community. To do this effectively, ministers must maintain and execute a complex range of relationships with the parliament, business, the not-for-profit sector and other stakeholders. These stakeholders are to be found both within the jurisdiction and in the wider globalised environment.

The complexity of the relationships with which a minister must deal is not merely in the numbers involved. It is in the fuzzy nature of these relationships. They do not operate according to some precise, certain formulas. Each one involves uncertainty, judgements and bargaining, the outcome of which is dependent on a whole raft of variables, some highly unpredictable. Fuzzy logic rather than fixed rules usually determine the outcomes of ministers' actions.

The issues arising in ministers' relationships may themselves be highly unpredictable. Lucky the minister whose responsibilities just sail along smoothly, bereft of the stimulation provided by unexpected storms, shoals and other crises!

However, the individual minister is not alone, a situation which brings its own issues. A minister is sworn in to exercise specified responsibilities, but Cabinet operates as a central forum for coordination and integration. Commonly, junior ministers are part of a portfolio team. A senior minister has overall responsibility in a policy area. It may be a matter of discretion and judgement as to whether some particular decisions are referred to the senior minister or to Cabinet. Similarly with parliamentary secretaries, there are issues of judgement as to what duties they are delegated and what relationships are maintained.

[7] Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law', *Law and Society Review*, vol. 12, no. 2, 1983, pp. 239–85.

The responsibilities of the hapless new minister do not lend themselves to simply walking into the ministerial suite with a policy brief and expecting it to fit like a hand in a glove. The responsibilities which ministers bear require that they be far better equipped.

The discharge of responsibility is only one side of the onerous role of ministers. Accountability for the discharge of that responsibility is the area which causes at least as much, and arguably more, difficulty for ministers. The traditional doctrine of ministerial responsibility suggests that it is a simple matter of being subject to the scrutiny of the parliament. My research and that of others has established that it is much more complex. There is a complex accountability network in operation, in which the parliament rarely succeeds in imposing accountability. It is but one of a network of interactive social institutions that have variable roles in holding the executive and the individual minister to account.

New ministers, even those who have had extensive experience on the Opposition benches, often have difficulty in handling the accountability regime in which they find themselves.

Are ministers readied for executive office, or do they get thrown in at the deep end?

What then is the preparation which new ministers have for office? Button, despite a long career in politics and scrutinising ministers on the other side of politics, felt himself quite unprepared when his opportunity came.[8]

Cameron, referring to the Whitlam ministry, said that '[i]ndividual Ministers, in some instances, had no real conception of what their roles were and became nothing more than mouthpieces for their respective Departments.'[9]

In the UK, *How to Be a Minister*[10] by sometime minister Gerald Kaufman became recommended reading for new ministers of all political complexions, and there was a Civil Service College program undertaken by the Blair front bench prior to taking up its duties.[11] There is now a professional development program for incumbent British ministers.[12]

Generally however, notwithstanding the excellent guidance for ministerial hopefuls provided explicitly in Kaufman's book and more often implicitly in autobiographical works by former ministers (e.g., John Button's *As It Happened*), remarkably little is done to help future leaders of government prepare for office. These selfsame political executives insist that public service executives running their agencies are highly

[8] *As It Happened*, op.cit., p. 246.

[9] Clyde Cameron, *The Cameron Diaries*, Allen & Unwin, Sydney, 1980, p. 19.

[10] Gerald Kaufman, *How to Be a Minister*, Faber & Faber, London, 1997.

[11] Edward Gretton, personal communication, 2000.

[12] United Kingdom, *Programmes for Ministers Summer 2000*, Cabinet Office, London, 2000.

educated and skilled. Few other organisations would tolerate such an absence of professional development for their rising generation of executives, yet we expect ministers to exercise far more discretionary power on behalf of the community than virtually any other class of executive. It is one of the scandals of modern government that ministers come into office with no training in what is involved.

Victoria's surprise

The September 1999 Victorian general election produced an upset result that led to the Australian Labor Party forming government against all expectations. However, new ministers would have been astoundingly unprepared for office no matter who had formed Victoria's government. Had the Liberal Party and National Party Coalition scraped back into office, unexpected defeats would have meant that some new ministers would not even have been parliamentary secretaries, positions which were created by the former Premier, Mr Kennett, as a career path to ministerial office. Several of new Premier Bracks' team had worked as staff to ministers in former governments. Whilst this allowed them to see at close hand how ministers operated, none had actually been ministers.

The preparation of MPs for ministerial office is apparently no better in other Australian parliaments or most other parliamentary democracies. Few other countries do it well either. As Kaufman and Button recount in their books, new ministers simply learn on the job and from the mistakes of others.

How does the new minister know what to expect from the departing minister and later, what to do when he or she hands over the reins as a result of reshuffle, retirement or defeat? New ministers are thrown in at the deep end, and flounder to come to grips with a new role, new relationships and new information.

The luckier ministers will have experienced senior public servants who understand the predicament and do everything they can to support and guide. The less fortunate will have a new head of department—perhaps even with a newly created department—who is struggling with the same situation. In addition, there will be a never ending stream of supplicants coming to plead their special cause, or just to size up the newcomer.

No-one will give new ministers professional development to help them understand their constitutional responsibilities and the real meaning of ministerial responsibility and accountability, either as a group or as individuals. Nor will they hear how to create the close and transparent relationships which exist between a good minister's office and the minister's head of department. Who will tell them about the proper parameters of their respective roles, or current principles of public sector management, and how to behave and organise their conduct so that they do not breach the rules on personal allowances that have tripped up so many Australian ministers in recent years? How will new ministers in Australia know that the outrageous Question Time behaviour of the worst offenders in our parliaments is not something to which to aspire?

Can ministers be prepared for office?

Last minute training and advice before, or when, new ministers take up office is far too late. By then their minds are on other things—the election, attracting support for appointment to Cabinet, and then the utter turmoil which accompanies the myriad of decisions about staffing and organising their office, running a new department and digesting the facts and figures involved in all of these endeavours.

A program to provide professional development was proposed to the Victorian parliament in 1998, but no funding was provided to pilot this program. These ideas had come too late to help Victoria's new ministers.

In the circumstances, before it was certain that the election would lead to a minority government, the Leader of the Parliamentary Labor Party, Mr Steve Bracks, arranged for a short program for his frontbench. In the brief two day interval available before they were sworn in, the full Cabinet (eighteen members) participated in two sessions of four hours each at Parliament House. The format was learning through discussion of presentations, rather than lecturing and hectoring. The program was a truncated version of that which had been proposed to the parliament.

Presentations were made by former Australian Commonwealth government and Victorian state ministers, a former head of the Department of Premier and Cabinet, a senior member of the Parliamentary Press Gallery, and myself. Each brief presentation was followed by intensive round-table discussion of the issues raised.

The program covered a range of the key factors of which a minister has to be aware to properly and effectively exercise his or her responsibilities. After reflecting on the particular characteristics of being in minority government, the program turned to relations with the Governor who represents the Queen as head of state. Ministers are sworn in by the Governor and meet him regularly at meetings of the Executive Council. Australians, with memories of the 1975 constitutional crisis, recognise the crucial importance of the Governor's role and relationship with his government. Ministers must understand this relationship.

Victoria's Westminster-based system was examined from both theoretical and practical perspectives, canvassing the traditional doctrine of ministerial responsibility and contrasting it with the complex accountability network model.[13]

Accountability had become a major issue in Victoria, largely due to accusations that the outgoing Kennett Government had been evading accountability. The independent MPs now holding the balance of power had insisted that accountability be made more effective if they were to support a minority Bracks Government. The disclosure of information held by government, especially in relation to contracts between government and the private sector and the performance of government agencies, were identified as fundamental to accountability. Plans to make Freedom of Information legislation more effective, especially to force the release of contract provisions claimed by government to be commercially confidential, were given high priority.

[13] Ken Coghill, 'Guidance for Ministers', *The Parliamentarian*, April 1999.

The complex accountability network model recognises the fundamental role of the media in the flow of information that is the key to accountability. The program incorporated examination of the role of the media in relation to the government in general and with individual ministers. On this occasion, a former President of the Victorian Parliamentary Press Gallery addressed the group. Discussion gave the new ministers insights into what to expect from the media, how to handle media relations and an understanding of the peculiar factors that could affect reporting in the unusual circumstances then existing.

The program explored the concepts of fiduciary duty and duty of care, ethics applying to ministerial office, the nature and place of codes of conduct, the separation of public duty and private interests, conflicts of interest, and steps needed to avoid both actual and perceived abuse of entitlements. Duty of care emerged as a significant concern due to claims that staff cuts had undermined the capacity of relevant agencies to fulfil their duty of care to certain categories of people subject to statutory protection.

The processes of making legislation are remarkably unfamiliar to many with no direct experience of them. The program allowed the ministers to discuss the processes which need to be followed in government.

There is no established custom in Victoria for the hand-over of ministerial responsibility following a change of government, beyond a common, quaint practice of leaving a note on the ministerial desk, usually amounting to little more than good luck wishes. Private rancour between outgoing and incoming ministers of opposing political parties is unusual, yet there is rarely any attempt to communicate information or advice on matters on which there is common ground.

One of the most delicate issues for any minister is that of staffing the private office and establishing the relationships between the minister, the private office and the agencies for which he or she is responsible. In Australia, these vary from those described by Kaufman for Westminster. For many years, Australian ministers have recruited their own secretarial and advisory staff for their private offices rather than relying on staff provided by the public service. In many cases, appointees have been associated directly or indirectly with the minister's political party.

One of the soundest pieces of advice from a former minister was: 'never appoint someone whom you cannot dismiss', namely, anyone to whom you have political, family or other obligations. The emphasis in the program was on the need to make appointments on merit, thereby avoiding the pitfalls which earlier governments in Australia have encountered by appointing political and other associates to responsibilities which they proved unable to adequately discharge. The incoming Victorian ministers asked their agencies to supply appropriate staff for the various private office positions, for at least an interim period. This had the benefits of immediately providing ministers with staff having sound understandings of the structures, cultures and ongoing policies of the agencies. This also generated enormous goodwill.

Similarly, ministers were encouraged to look beyond the common Australian suspicion that the public service will have become strongly committed to the policies of the outgoing government through appointments to senior positions or simple

enculturation. This suspicion has generally been ill-founded. As Kaufman put it, public servants are more likely to ask: 'Can it be made to work?'[14] Unfounded suspicion has led to thoroughly professional senior officials being displaced by the zeal of incoming ministers determined to put their own stamp on agencies through their own appointees. Whether or not influenced by the program, the Bracks Government made very few new appointments despite some restructuring. Since then, a small number of departmental heads have resigned, but apparently without being pushed.

The nature of the relationships between the minister, staff of the private office, and each agency are clearly crucial. There are appalling tales of private office staff who, in times gone by, have bypassed the agency head to issue directions to subordinate public servants on quite detailed matters. The corrosive effects of undermining the authority of senior managers or keeping agencies in the dark on policy directions was discussed. The benefits of a close, transparent relationship between the minister's private office and the head of the agency, with respect for the proper roles and relationships of each office holder, were emphasised.

As mentioned previously, this program was a very truncated version of the one which had been first discussed in 1998. Its content was keenly discussed and seemed to be appreciated by the new ministry. Assessment of its success is difficult to separate from the multifarious factors affecting the performance of the eighteen ministers, but there is little evidence that the main points have been lost on them.

The experience of this program and the other issues raised in this lecture confirms my view that a more substantial program would benefit good governance in each parliamentary jurisdiction. All MPs who may become government ministers should be given the opportunity of a professional development program. That they are not is scandalous.

Auspice: parliament or party?

A question that arises is whether the program should be offered by the political parties or the parliament. The advocates of party-based programs may argue that party-sponsored programs could give their MPs an edge which they judge to be advantageous in government, that MPs will be inhibited in a mixed party group program, and that there is a risk of party strategy and tactics being revealed to political opponents. But it may be more difficult for a party to deal with the issue of who participates. Do they limit it to shadow ministers if in Opposition or parliamentary secretaries if in government?

Advocates of parliament-based programs may argue that the skills are generic rather than party-specific, that there is a public interest in having a pool of MPs who have studied the attributes of good ministerial performance, and that the funds are more likely to receive a high priority in the parliament than in parties pre-occupied with campaigning.

[14] *How to be a Minister*, op.cit., p. 35.

There is a strong public interest in good governance. Therefore, I believe that it is fit and proper for the parliament to provide the program. I also recognise that the parliament could not select participants in the way that the parties may. Given the unpredictability of politics and the unexpected career openings that it can provide, I advocate that the program should be open to all MPs. If the 'ambition faction' is too large and the program is oversubscribed, the program could be repeated with priority based on years of service, meritorious service or some such acceptable criterion.

For MPs to learn from the program it is crucial that it is treated as a learning experience rather than a lecture series. The program should be spread over many months, beginning soon after each election. It would aim to give would-be ministers a broad and deep understanding of what makes for good governance.

A comprehensive program could include:

- theoretical and constitutional aspects of a minister's role
- ministerial responsibility and accountability
- what to expect, and request, by way of initial briefing
- time management and control over the diary
- the minister's role in Cabinet including when to go to Cabinet, Cabinet submissions, etc.
- the relationship between a minister and each house of parliament, e.g., in relation to legislation, answering questions, motions, petitions etc.
- the relationships between a minister and the public sector including department, statutory authorities, other agencies and contractors to government
- relationships with the former retired/resigned/defeated minister
- selection, appointment and management of ministerial office staff, senior public service and statutory appointees
- relationships with other ministers and their staff, lobby groups, business, unions, etc., relevant to the minister's portfolio and political responsibilities
- handling deputations and individuals making representations
- relationship between the minister's private office and the minister's head of department
- public sector management
- policy making and implementation involving the public service, parliamentary party/coalition, party administrative wing, interest groups, etc.
- ethics, codes of conduct and the separation of public duty and private interests
- avoiding abuse of entitlements, 'jobs for the boys', conflicts of interest, etc.
- relationships with the media
- preparing and testing the grounds for policy change
- intergovernmental relations
- maintaining links and service to the electorate represented by the minister.

I will comment in detail on just a few of these items.

Very few people who have not been ministers really understand the enormous demands on their time. There is incessant pressure from competing sources. Without keeping a tight rein on the diary, the minister finds there is no time left for some of the most important things, starting with family. The absence of good time management puts every other aspect of the discharge of ministerial responsibility in jeopardy. For some it comes easily, but for others there can be some very painful lessons.

Similarly, a basic understanding of how the public service is managed in the era of New Public Management is essential if the minister is to be effective in handling both ongoing policy and new initiatives. This program would equip the prospective minister with principles and practices through which he or she can keep abreast of policy implementation and routine administration.

Intergovernmental relations within the Australian federation rarely affect backbenchers or Opposition MPs, yet involve most ministers in every government. An introduction to the operation of intergovernmental relations is essential for handling them in office.

Finally, the program has been designed to give prospective ministers a better understanding of the relationship between a minister and each house of parliament, than is obvious to most backbenchers and even many shadow ministers. This includes particular reference to the minister's role in relation to preparing legislation and shepherding it through the various stages, providing information in response to questions, debates on legislation and motions, parliamentary committees, and petitions.

This type of program could never cover the exceptional cases of newly elected MPs becoming ministers immediately. Nonetheless, it would be a huge improvement on the current situation where no new ministers undertake professional development.

In Victoria, the major political parties have agreed that a professional development program would add to the quality of governance and should be introduced. The crunch is whether parliaments will see value in appropriating funds to enable MPs who may become ministers later in their careers to develop their professional skills through such programs. It is my contention that in the interests of good governance, they should.

Professional development in office

A professional development program for ministers once in office clearly has merit, as the UK has found. Such a program would give ministers the chance to debate and learn from management and administrative issues encountered in Government. It would necessarily be sponsored by the executive itself.

How is a Minister's performance in office to be measured?

Passing judgement on the performance of governments and ministers through votes cast after up to four years in office is an extremely blunt and imprecise way of measuring their success. Too often, those in safe electorates survive and those in marginal electorates suffer.

Despite all the political point-scoring over ministerial performance, there is surprisingly little debate over how it is to be measured. One such debate occurred in British Columbia in 1996. A Member, G. Campbell, asked the Premier: 'Who is accountable, in terms of the House, for performance, and what performance criteria have been set by the Premier for his ministers and for the other arms of government?' The Premier, Mr Clark, answered:

> The measurement of cabinet ministers' performance is made exclusively by the Premier. The decision the Premier makes with respect to evaluating performance is not an empirical one; it's a subjective one, based on a variety of considerations about how they're handling their portfolio—how they're explaining to the public the positions the government is taking; how they work to reduce costs within government; how they manage within budgetary performance guidelines; how they work as a team in the cabinet; how they interact with the public in the community and with the client groups or interest groups that interface with that ministry. There is no document, no grading system. There are totally subjective criteria the Premier has to exercise from time to time, should he or she be satisfied or unsatisfied with the performance of various ministers.[15]

That answer conceded no basis for judging performance other than the head of government's subjective assessment. Certainly, given that the ministers are recommended for appointment by the prime minister or premier, his or her satisfaction is a threshold requirement, but is it sufficient?

No alternative view was proffered in the British Columbia debate, but if we accept the practical reality of popular sovereignty, are not the citizens entitled to make an informed judgement? If a fundamental role of the parliament is scrutiny of the executive, then should not there be some public criteria against which the parliament assesses the performance of the government and individual ministers? If the parliament is responsible to the people, should not its own performance in scrutinising the executive itself be assessed?

How well does parliament perform its role in the scrutiny of the executive?

Beyond the oft-heard lament about the standards of parliamentary behaviour and the widespread perception that the parliament is ineffective in that it is dominated by the executive, there has been remarkably little systematic evaluation of its performance or the underlying factors at work. Indeed, there appears to have been no research which has made qualitative assessments of these matters. There has been extensive quantitative research, reporting such matters as hours of sittings, numbers of bills, categories of questions and similar information. It is useful information, but it tells us little of how effectively the system is operating.

It is known that respect for politicians has been in decline for some years.[16] In Australia, there are no reported results on the effect of this on the standing of

[15] British Columbia, *Parliamentary Debates*, 13 August 1996.

[16] See the results of the 1997–99 Roy Morgan opinion polls at http:/www.roymorgan.com/polls/.

parliament but there is concern that if the trend continues the legitimacy of the parliament as an institution could be threatened. Threats to the legitimacy of parliament could have grave consequences. It is not known whether any comfort can be drawn from UK evidence that the public does distinguish the performance of MPs and that of the parliament.[17] But Dahl has noted that support for democracy remains high notwithstanding disillusionment with governments.[18]

However, little is known of the basis of the decline in respect for MPs and whether it is deserved. The effect on public perceptions of reporting of Australia's unique, robust form of Question Time is also unknown.

Research project

Methodologically sound research is required to identify factors associated with the decline in the reputation of politicians, the part played by ministerial performance and to provide a better understanding of the factors affecting the public's perception of the parliament.

The recent reforms to the Victorian parliament were designed to improve the conduct of politicians in parliament, create opportunities for citizens' concerns to be aired, improve legislative procedures, enhance the accountability of the executive and government and improve citizens' perceptions of parliamentarians.[19] But has the theory translated into practice and if not, then why not?

A new research program planned to commence in 2001 aims to address those questions. Its innovative, qualitative approach will for the first time analyse citizens' perceptions of the parliamentary and non-parliamentary behaviour of politicians, the performance of ministers and the parliament, and the effect these factors have on good governance.

Conclusion

This brings us back to where I began—with a concern for good governance. Best practice must require that our ministers are as well prepared for office as is possible, and that their performance in office is transparent and accountable to those on whose democratic authority they discharge their heavy professional responsibilities. A professional development program for prospective ministers could only benefit good governance.

[17] P. Norton, personal communication, 2000.

[18] Robert A. Dahl, 'A Democratic Paradox?', *Political Science Quarterly*, vol. 115, no. 1, 2000, pp. 35–40.

[19] Peter Batchelor, *Victorian Parliamentary Debates*, 4 November 1999.

Question — If public servants give ministers incorrect advice, the minister will be sailing along on the wrong advice. There is a tendency in the public service to close ranks. So you can get a junior public servant who makes a decision—on tendering, for example—puts his report through to the section head who just signs it and sends it upstairs to the department head, who then sends it to the minister, and the minister signs it. When you question them, the public servants say, 'well the minister gave it the tick, it must be right.'

Ken Coghill — I think you have raised a very important point, which is similar to one that Don Dunstan makes in his autobiography, where he talks about drafting the speech for the governor shortly after the election at which Labor was elected to government. He comments that literally within weeks of becoming ministers people were behaving exactly as you indicate—they were simply accepting what was coming forward to them. In that particular case it was advice which reflected the culture of the former conservative government, so it was quite different advice from that which an incoming Labor government could be expected to welcome.

I think this is really a key part of what I am proposing. I propose that prospective ministers go through a program in which they understand how such a situation can arise, and what factors can lead to it. The program would also be about how they can manage their ministerial responsibility, their private office, their relationship with their head of department—and, though him, with other sections of their bureaucracy—to avoid that sort of problem. A conscientious and capable minister will be able to establish the systems and relationships to overcome that, but for the inexperienced minister that is a really serious trap.

Question — I have had long experience advising ministers and finding out their peculiarities. I can remember one minister who fought bitterly with his permanent head, who wanted to establish a library. He wouldn't allow that to happen. I had one minister who used to summon me and then go and hide in the toilet, because he was frightened of me. Socrates talked about developing philosopher kings. The Chinese had a system of bringing people on as administrators, and eventually ministers, by examination. I wonder what you would suggest as a means of developing ministers from the beginning, so that they would be of considerable competence. How can you choose ministers from the beginning? How can you bring them up to be capable of performing their functions?

Ken Coghill — We've got to accept the limitation that those who are ministers will necessarily be drawn from the parliamentary parties, and that will necessarily be a pool that is biased against what we may see as the best available talent in the total community. There will also be people who may be very capable of being ministers, who simply do not want to be part of the political process for all sorts of different reasons. They may not like the lifestyle, it may be because of the level of income, or because of the things they would have to give up in order to be ministers. But having accepted that, then I would see it as important that this program commence with a discussion to force them to think through their own values—to think through the philosophical principles underlying what they want to do, what they see as the role of government, what they consequently would see as their relationship with public servants and others. Certainly that's the sort of model that I've been proposing in my discussions in Victoria. Now you can take a horse to water, but you can't of course

force it to drink. There will be some who—for all sorts of reasons—are not going to be very receptive, but I think it is absolutely crucial to expose people to that, to try and encourage a lot more reflective thinking about why they want to be in government, what their party wants to achieve, so that it does turn to the philosophy underlying their role as minister, should they become one.

You make the interesting contrast between the Chinese model and the Socratic model. I believe that we can learn from both of these models, which I think is implicit in what you're saying. The Socratic model tends to be very much rule based, whereas the Confucian model tends to be about virtuous conduct and matters which go along with that. In my mind, neither of them is wholly correct. It's important for anyone becoming a minister to understand not only the importance of proper process and rule of law, but also that there are really important philosophical questions which they ought to be aware of—relationship questions, questions of personal virtue and integrity in behaviour, and those sorts of things which are important foundations of the program I'm talking about.

Question — What you say is very logical, but I'm interested in how you're going to sell the proposition, and what thoughts you've given to that. Obviously, under the legislation, ministers have responsibilities—for example, for their statutory authorities, for IT implications, and how relationships take place between ministers and the public. Are there ways that we can use some of those to sell the program in the interests of ministers? And how do you sell it to parliamentary officers? I'm interested in how you would go about actually making this feasible.

Ken Coghill — The model I've been following in Victoria has been discussed with parliamentary officers, but it's mostly been discussed with the politicians. I think most public servants and parliamentary officers have said that this is a desirable thing which should occur. The difficulty is convincing members of parliament and political leaders in particular, and there are a whole lot of things that come into that. Firstly, the way in which a political party will think about it—some might be concerned that if they have a mixed group with members of different political parties, that might mean that their opponents will somehow get an insight into their thinking through the discussion which occurs. Conversely, they may say, 'if we run this within the party, it may give us a competitive edge when we come to government, so we'd rather confine it to something done within the party, rather than outside.'

The reality is that the political parties are much more focused organisationally on campaigning than they are on governance, and it's going to be fairly hard to persuade the national secretary or state secretary that it's desirable to divert some funds for this purpose. It happens to a limited extent, but it is very limited.

My approach has been to go to each of the Victorian parliamentary parties to find interested members within the party, particularly those who may one day be ministers, and discuss it with them to get their input into the content and structure of the course. But in particular my aim has been to solicit their support as a vehicle to taking it forward to the political party leaders. In terms of getting in-principle support, that has worked to date. The real test now is for the parliament, through the presiding officers, to put a budget proposal to the government and for the government to agree to it. The next thing, of course, is to ensure our prospective participants commit themselves to

the time that would be involved in doing it. It's not much use signing up say twenty people in Victoria and having only five come to one session and ten to another. So a really important part of the program is working through it with participants so that they understand what it's about, they have an involvement in the final design, and a commitment to participating in it.

All of those factors together are going to be important. I'm not suggesting that it's going to be easy to convince political parties in any or every jurisdiction to support the program, nor am I suggesting it's going to be easy to convince every prospective minister that it would be desirable or in their long term interests to participate. I think that the more involvement there can be with the parliamentary parties in soliciting support for it and in prospective participants in the design of the model, the more likely it is that we'll get support for it. At the broader level of course, the more public support there is, and the more advice that might come from senior public servants and ministerial staffers, the more likely it is that any government will see the wisdom of funding such a program.

Question — Do you have an opinion about the relative quality of the American system of selecting secretaries as opposed to the political pool selection that we use in our country?

Ken Coghill — I would have to preface my remark by saying that we're stuck with the system we've got. I think that a parliamentary system produces better outcomes than an executive presidency, and I would also reflect that there have been more than a small number of secretaries of state in America who have come to grief through impropriety or other practices which have lead to their early departure from the president's office or from appointment by the president. I think that any system can be made to work, and to work well. My personal preference is for a parliamentary system because I think that it does lead to better outcomes, and there has been some research work to support that—Lijphart's work, for example.

Question — I can only say that it's marvellous that you're going in the direction you are, but can I counsel that maybe you've got to be realistic about the future. I've thought for a long time that the academics have been either too frightened or too unknowing about what happens in parliament, and they haven't therefore been of any guide. In fact, it's important that the academics expand their knowledge and they can then pass it on. That's what you may be doing, rather than founding a basis on which ministers can be trained. I've been here since 1951, and I have had long-term associations with two ministers, one of whom was Billy Wentworth. Now, when Whitlam got in, he knew what to do, and he did a lot of things in a hurry. His other people were appalling—they shot their mouths off, they carved up their departments in new ways, and put names on branches and sections that suited them. The phone books became impossible to read for a couple of years. But you see, Bill Wentworth and Gough Whitlam both had long term family—informal—knowledge and that's where the education has to start. So the problem is one of education, not job training.

Ken Coghill — Thanks for those comments. I don't think I would advocate confining ministerial office to sons and daughters of previous ministers. There is real opportunity for people to learn in later life. Hopefully one of the advantages I can bring to this advocacy is that I'm able to draw on quite a number of people now who

have completed a political career and gone on to some association with academic institutions.

Question — You mentioned in your address the importance of the relationship between the ministers and the head of state. Do you have any observation about what has happened in Victoria insofar as the premier has determined that the new governor-designate's term will be shorter than the term of the current Victorian parliament? Mr Bracks said that the next premier should have the opportunity to appoint the next governor. That's a very unusual practice. Viceregal representatives almost always have terms that bridge at least two parliaments. My feeling is that the head of state has to be someone who has the respect of the ministry.

Ken Coghill — I don't have any special knowledge of what's happened in Victoria, so my knowledge is no more complete in that area than yours. I think you are absolutely correct that the head of state has to command the respect of the government, no matter what its political complexion is and what his or her own political views might be. The head of state also has to command respect, in the sense of having intellectual capacity and personal integrity, that their views are going to stand up not just as a matter of any public reputation that the individual may have established in some other field in the past. I think that what's absolutely crucial is that the individual incumbent take their responsibilities as head of state seriously, read their papers for the Executive Council meetings, and be prepared to say, 'Well look minister (or premier), have you actually considered this implication of that particular paper which you've put before me?' I do have some limited knowledge that previous governors in Victoria have done that, and Richard McGarvie has written and published a little on it. He has indicated that simply by that cautionary questioning, a governor can have an extremely important and useful role. I would certainly endorse and encourage that.

Question — The political parties themselves should prepare people for parliamentary life within their own systems. It seems to me, from watching it over a long period, that little of this happens, so that when somebody is actually appointed to a particular position, a lot of time is lost making him or her familiar with it. Perhaps if you could get a system so that everybody who was aspiring to be a minister could be educated on the way through, or identified at an earlier stage. That might save the taxpayer some money.

Ken Coghill — I suppose your comment comes at two levels—one is the first election to parliament, which may never lead to a ministerial office. That tends to be a bit ad hoc in Australia. Some of the European political parties do that much more thoroughly and professionally than we tend to do it here. But I would certainly endorse your view that that's something the political parties should do right from the time that the person becomes a candidate. In fact, it might even be useful to do it before some people become candidates so that they may decide that this isn't the life for them after all.

Question — In Australia, and certainly in New South Wales, we have all sorts of laws created by MPs and passed by the upper house, whether state or federal. Under those rules and regulations, you have to be qualified to be a plumber, a brickie, a carpenter, a lawyer or a doctor. But to pass these laws that qualify and really put the stamp and

the screws on people, the politicians don't have to have any qualifications at all. None. I suggest we have two levels of education for politicians. The first one should be obligatory before they can stand for parliament—they should go to a TAFE course and be trained in political science. Then to be a minister they must have a university degree. So you get the two levels of occupation, two levels of salary structure and two levels of responsibility. I think that any party that had the guts, the integrity and the honesty to put this as their platform before an election would romp in. These same MPs—qualified, partially qualified or even unqualified—say that other professions, occupations and trades have to have certain qualifications and experience. But those people who make the decisions don't have to have any qualifications.

Ken Coghill — That really raises a fundamental issue that we have to think about. I understand the reason why you suggest it; the counter-argument of course would be that it's really a judgement that the electorate should make, rather than a political party or the parliament through some self-serving interest as to the type of person that we want to represent us.

Question — Having done my share of preparing briefs for incoming ministers and prime ministers, it would never have occurred to us to have included sections relating to the parliamentary and legislative process, or to personal integrity. Do you have a view on why those subjects are now so important in the preparatory courses you suggest?

Ken Coghill — I really can't think of a reason why they shouldn't have always been important. I think the experience of the last few years—take for example the fairly large number of ministers who departed the first Howard ministry—indicates why it's important to have some understanding of ethics and how you manage your personal affairs and those sorts of things. So far as the legislative process is concerned, it strikes me that that's fundamental to being a member of parliament. If you don't understand that, what are you doing there?

Question — The training of people who aspire to become or have already been chosen to be ministers is very good. Are you preparing guidelines for those who choose them?

Ken Coghill — No, I'm not. But again, we have to accept that their peers are going to make the judgement as to who they believe are the most appropriate people. In the Labor Party that will be a caucus election, in the Coalition that will be a decision by the prime minister balancing a whole lot of factors.

Question — What about shadow ministers?

Ken Coghill — I would see shadow ministers as being among the prime targets for participation in the program such as I have discussed.

Who May Sit? An Examination of the Parliamentary Disqualification Provisions of the Commonwealth Constitution*

John Kalokerinos

THE PLACE OF SECTION 44 IN CONTEMPORARY AUSTRALIAN PARLIAMENTARY DEMOCRACY

The right to choose political representatives is a fundamental right of the citizens of a democratic polity. Section 44[1] of the Commonwealth Constitution sets out the disqualification provisions for persons seeking to sit in the Senate or the House of Representatives in order to ensure that Australia's parliamentarians have an undivided loyalty to Australia and to the Parliament. Using the 1890s Convention Debates, decisions of the Court of Disputed Returns, government reports, and academic commentary, this paper explores the purposes and justification for s 44, and its operation in the contemporary Australian context, to argue that reform is necessary. The paper reviews the latest developments in this dynamic area of the law, examining the most recent litigation, including the *Hill*[2] decision. Particular consideration is given to *Sykes v Cleary*,[3] where the High Court held that three of the candidates for election to the seat of Wills were ineligible, raising the question whether this rate of disqualification is extraordinary or simply demonstrative of the pressing need for reform of s 44.

* This is an edited version of an Honours Thesis submitted for the Research Unit, Faculty of Law, the Australian National University, June 2000.

[1] The full text of ss 44 and 45 is set out in the Appendix below.

[2] *Sue v Hill* (1999) 163 ALR 648.

[3] *Sykes v Cleary* (1992) 176 CLR 77.

I conclude that the existing disqualifications are deficient. Indeed, s 44 was labelled 'vestigial' by Barwick CJ.[4] The provisions are anachronistic and inequitable, and should be deleted, or replaced with legislative provisions which are less rigid, and capable of being updated by the Parliament as and when appropriate. As a general policy, there should be a presumption against limitations on eligibility. Two principles underpin this policy. First, in a democracy, any citizen should be eligible to stand for Parliament. This principle is consistent with representative democracy, a principle inherent in the Constitution.[5] Secondly, there should be very few restraints on elector choice. Further, because of the difficulty of constitutional change in Australia, the disqualifications should not be contained in the Constitution, which entrenches 'archaic language devised in circumstances that prevailed a century ago'.[6] They are more properly dealt with through legislation. In 1981, in arguing the impropriety of constitutional disqualifications, Sawer noted that disqualifications are by their nature technical, and must be flexible to deal with social and economic change and to remain relevant.[7] Legislative protections are more 'flexible and equitable', and can be amended to deal with new dangers as they emerge.[8]

Despite the unsuccessful record of constitutional reform in Australia, such a proposal would have real prospects of success when its bipartisan nature is recognised, and particularly if put as part of a broader program to update the Constitution. Significant constitutional reform is needed to produce a disqualification provision more appropriate to parliamentary democracy in Australia in the twenty-first century.

SECTION 44(I): FOREIGN ALLEGIANCE AND DUAL CITIZENSHIP

Section 44(i) disqualifies any person who is 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power' from being chosen or sitting in Parliament. Section 44(i) contains several deficiencies, in particular the vagueness of its archaic wording, and the uncertainty this engenders in the minds of persons considering running for Parliament. Further, considerable political and practical implications for Australian democracy flow from the operation of s 44(i). The most significant problem is the fact that around five million Australian citizens who

[4] *Re Webster* (1975) 132 CLR 270 at 278.

[5] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 per Stephen J at 56; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 per Brennan J at 46–48, 50; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Mason CJ at 137.

[6] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution*, (Parliamentary Paper Number 85 of 1997), AGPS, Canberra, 1997, p. 34 (henceforth cited as '1997 House of Representatives Committee, *Report*').

[7] Professor Geoffrey Sawer, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, AGPS, Canberra, 1981, p. 4 (henceforth cited as '1981 Senate Committee, *Report*').

[8] 1997 House of Representatives Committee, *Report*, pp. 37, 42.

currently possess the citizenship of a foreign nation,[9] are unable to sit in the Commonwealth Parliament by virtue of s 44(i).

The object of s 44 is to protect Australia's system of parliamentary democracy by disqualifying persons who could be affected by conflicts of loyalty.[10] Section 44(i) was included by the framers of the Constitution to ensure that members of Parliament did not have a divided allegiance and were not subject to improper influence from foreign governments.[11] Similar equivalent provisions may be found in legislation of each of the states.[12] In *Sykes v Cleary*, Brennan J affirmed that the purpose of s 44(i) is 'to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power or adheres to a foreign power', and 'to ensure that foreign powers command no allegiance from or obedience by candidates, senators and members of the House of Representatives.'[13]

Section 44(i) consists of three discrete limbs,[14] each limb disqualifying a distinct category of person. I shall examine each of the limbs in turn.

Acknowledgment of allegiance, obedience, or adherence to a foreign power

The class of persons disqualified under the first limb are those persons who, although lacking foreign citizenship, possess some other allegiance to a foreign nation. The scope of operation of the first limb is uncertain as the High Court has not to date disqualified any person on the ground of 'acknowledgment of allegiance, obedience, or adherence to a foreign power'. However, some guidance may be gleaned from an analysis of its terms and examination of its drafting context.

In their early commentary on the Constitution, Quick and Garran defined the term 'allegiance' in s 44 as the lawful obedience which a subject is bound to render to the

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[9] The estimate that around five million Australians hold dual or multiple citizenship has been provided by the Department of Immigration and Multicultural Affairs to the House of Representatives Standing Committee on Legal and Constitutional Affairs, published in *Inquiry into Section 44(i) and (iv) of the Australian Constitution: Submissions*, vol. 1, S141 and *Transcript of Hearings*, pp. 215–216. This figure includes many people who are eligible to adopt the nationality of their parents, but who may not necessarily be aware of their eligibility: *Transcript*, pp. 216–217.

[10] Kevin Andrews, MP, *Commonwealth Parliamentary Debates* (*CPD*) (H of R), vol. 215, 25 August 1997, p. 6665.

[11] *The Official Record of the Debates of the Australasian Federal Conventions*, Greg Craven (ed.) (*Convention Debates*). Legal Books, Sydney, 1986, vol. III, p. 736 (Glynn, Barton and Sir George Turner at the 1897 Adelaide Convention). See also 1981 Senate Committee, *Report*, p. 10; Associate Professor Gerard Carney, 1997 House of Representatives Committee, *Submissions*, vol. 1, S147; 1997 House of Representatives Committee, *Report*, p. 11.

[12] For discussion and analysis of the state equivalents of s 44(i), see M. Pryles, 'Nationality Qualifications for Members of Parliament' *Monash University Law Review*, vol. 8, 1982, p. 163 and ff.

[13] Sykes v Cleary (1992) 176 CLR 77 at 109 and 113 per Brennan J.

[14] Brennan J has recognised the three-limb division of s 44(i): Sykes v Cleary (1992) 176 CLR 77 at 109.

sovereign.[15] 'Adherence' to a foreign power is a form of treason dating from the Treason Act of Edward III in 1351, and encompasses overt acts done with intent to assist the sovereign's enemies.[16]

The early case of *Crittenden v Anderson* throws some light on its meaning. Crittenden challenged the election of Mr Anderson to the House of Representatives on the ground that he was under 'acknowledgment of allegiance, obedience, or adherence' to the Papal State by virtue of being a member of the Roman Catholic Church. Sitting as the Court of Disputed Returns, Fullagar J observed that if the petition were to succeed, it would mean that s 44(i) would operate to disqualify every professed member of the Roman Catholic Church, thereby denying to millions the fundamental right to stand for Parliament on sectarian grounds. His Honour distinguished between adherence to a religion and allegiance to a foreign state, holding that s 116 of the Constitution (prohibiting the imposition of any religious test for qualification to any Commonwealth office) has the effect of disallowing the imposition of a religious test via s 44(i). His Honour found the petitioner's argument untenable and made an order to permanently stay proceedings on the ground of abuse of process.[17]

Nile v Wood[18] (an action arising out of the 1987 election) was another attempt to rely on s 44(i). Elaine Nile brought a wide-ranging petition objecting to the declaration of Robert Wood of the Nuclear Disarmament Party as a senator for NSW, alleging breaches of paragraphs (i), (ii), and (iii) of s 44.[19] On the ground relating to s 44(i), the petitioner alleged that Wood's actions against the naval vessels of a friendly nation indicated allegiance, obedience or adherence to a foreign power.[20]

Sitting as the Court of Disputed Returns, Brennan, Deane and Toohey JJ held that the petition had set out insufficient facts to establish any acknowledgment of allegiance, obedience or adherence to a foreign power, failing even to identify the relevant foreign power. Speaking *obiter*, their Honours made the following comment about the first limb:

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[15] J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1995, p. 491; S. O'Brien, 'Dual Citizenship, Foreign Allegiance and s 44(i) of the Australian Constitution', Department of the Parliamentary Library, (Background Paper Number 29), 1992, at 1.1.

[16] O'Brien, ibid at 1.1.

[17] Unreported, 23 August 1950, HCA, Fullagar J, noted in 'An Unpublished Judgment on s 116 of the Constitution', *Australian Law Journal*, vol. 51, 1977, pp. 171–172.

[18] *Nile v Wood* (1988) 167 CLR 133.

[19] Although all of Nile's arguments based on s 44 failed, the Court later found that Wood had contravened s 163(b) of the *Commonwealth Electoral Act 1918* (Cth), as he was not an Australian citizen at the time of his nomination, and hence was not qualified to be elected: *Re Wood* (1988) 167 CLR 145.

[20] *Nile v Wood* (1988) 167 CLR 133 at 134, 140.

> It would seem that s 44(i) relates only to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that acknowledgment.[21]

From *Nile*, then, certain requirements are necessary to enliven the first limb of s 44(i). First, a relevant foreign power must be identified. Secondly, there must be a formal or informal acknowledgment of allegiance, obedience, or adherence by the individual in question. Thirdly, the acknowledgment must not have been withdrawn or revoked.

Although the question of the application of the first limb did not arise for consideration before the full bench in *Cleary*,[22] in his dissenting judgment, Deane J nevertheless commented that it 'involves an element of acceptance or at least acquiescence on the part of the relevant person'.[23]

Although subsequent cases have not overturned the *Nile* test, linguistic and conceptual ambiguities make its application uncertain in the contemporary Australian context. What of the many Australians who possess strong links to former homelands or to the homelands of their ancestors? Does s 44(i) apply to Australian citizens who take an active interest in the affairs of foreign nations? In both of these situations the affections—although informal—may be strong, regardless of the possession of foreign citizenship, and may or may not be covered by s 44(i).

The ambiguities surrounding the first limb of s 44(i) have led to differing opinions as to the types of situations and conduct that would fall within it. Lumb and Moens, and Burmester,[24] are of the opinion that the acceptance of a foreign award or honour would be insufficient to establish allegiance to a foreign power.[25] Lumb and Moens assert that acting as honorary consul for a foreign power would also not be a ground for disqualification under s 44(i).[26] Formal acknowledgment of allegiance is probably

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[21] *Nile v Wood* (1988) 167 CLR 133 at 140.

[22] *Sykes v Cleary* (1992) 176 CLR 77. O'Brien notes that at the directions hearing before Dawson J, Sykes argued that as an officer of the Greek Orthodox Church, Kardamitsis owed an allegiance to a foreign power (presumably the Greek Orthodox Patriachate at Constantinople). Confirming Fullagar J's decision in *Crittenden*, Dawson J struck out the petition on the ground that religious adherence, even to a religion with a foreign origin, is not a ground of disqualification under s 44(i); O'Brien, op. cit., at 1.2.4.

[23] *Sykes v Cleary* (1992) 176 CLR 77 at 127.

[24] Mr Henry Burmester, QC, Chief General Counsel, Commonwealth Attorney-General's Department.

[25] R.D. Lumb and G.A. Moens, *The Constitution of the Commonwealth of Australia Annotated*, Butterworths, Sydney, 1995, p. 97; H. Burmester, 1997 House of Representatives Committee, *Transcript*, pp. 70-71

[26] Lumb and Moens, op. cit., p. 97. The Court of Disputed Returns declined to decide on the s 44(i) ground in *Maloney v McEachern* (1904) 1 CLR 77 (which involved the claim that Sir Malcolm McEachern was under 'an acknowledgment of allegiance, obedience or adherence to a foreign power' because he was Honorary Consul for the Empire of Japan): O'Brien, op. cit., at 1.2.1.

established by the acceptance of a foreign passport.[27] Acts contrary to Australia's national security interests, for example providing comfort to, raising funds for, or assisting with the military operations of countries or causes unfriendly to Australia, would be likely to constitute an acknowledgment of adherence, and thus contravene s 44(i). Serving in foreign armed forces has been cited as conduct that would constitute formal allegiance.[28] However, where military service is imposed compulsorily upon individuals, without any formal or informal acknowledgment, I submit that it would not necessarily constitute an acknowledgment of allegiance, but such a situation has yet to arise in court.[29]

Further, s 44(i) provides ineffective protection from contemporary forms of foreign influence. For example, it probably does not shield the Parliament from insidious 'foreign commercial interests', such as donations to political parties from foreign corporations or individuals.[30]

Subject or a citizen of a foreign power

The second limb of s 44(i) imposes an objective test, disqualifying any person who is 'a subject or a citizen of a foreign power'. Regarding the interpretation of 'subject or citizen', Quick and Garran note that 'subject' is the appropriate term when the foreign power is a monarch of feudal origin, whereas 'citizen' applies when the foreign power is a republic.[31] Gleeson CJ, Gummow and Hayne JJ have held that term 'foreign power' involves questions of sovereignty, and is not concerned with questions of whether Australia's relationship with other nations is friendly or otherwise.[32]

The second limb of s 44(i) was first judicially considered in *Sykes v Cleary*, the leading case on the interpretation of paragraphs (i) and (iv) of s 44. *Cleary* arose out of the Wills by-election of April 1992. The eighth-ranking candidate (Ian Sykes) challenged the election of Philip Cleary on the ground that he held an office of profit under the Crown at the time of being chosen, thereby contravening s 44(iv). Sykes also challenged the eligibility of Mr Bill Kardamitsis (the candidate for the Australian Labor Party) and Mr John Delacretaz (the candidate representing the Liberal Party of Australia), the second and third ranking candidates, respectively. Kardamitsis and Delacretaz were dual citizens, of Australia, and of Greece and Switzerland,

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[27] Lumb and Moens, op. cit., p. 97, citing *Joyce v DPP* [1946] AC 347, where the House of Lords held that the holding of a British passport created a duty of allegiance to the sovereign.

[28] H. Burmester, 1997 House of Representatives Committee, *Report*, p. 16; Lumb and Moens, op. cit., p. 97.

[29] The situation has arisen in the past for Greek–Australians who returned to Greece and were called up—to their surprise—for national service; Dr James Jupp, 1997 House of Representatives Committee, *Transcript*, p. 232.

[30] Such as the recent Democratic Party foreign fundraising scandals in the US: C Hughes, 1997 House of Representatives Committee, *Submissions*, vol. 1, p. S94.

[31] Quick and Garran, op. cit., p. 491, noted by Brennan J in *Sykes v Cleary* (1992) 176 CLR 77 at 109.

[32] *Sue v Hill* (1999) 163 ALR 648 at 662.

respectively. As the Court delivered five separate judgments on s 44(i), some detailed consideration of the facts of the case and the reasoning of the Court is warranted.

Bill Kardamitsis was born in Greece in 1952, but had lived in Australia since 1969. He became an Australian citizen in 1975 and in so doing renounced all other allegiances and swore the oath of allegiance to the Queen of Australia. He had made Australia his home, raising his children in Australia, not Greece, and had participated in public life in Australia, serving as a Justice of the Peace and as a councillor on the Coburg City Council. John Delacretaz was born in Switzerland in 1923, but had lived in Australia for over forty years at the time of the by-election. In 1960 he was naturalised as an Australian citizen, renouncing all other allegiances and swearing an oath of allegiance to the Queen.[33]

Because s 163(1)(a) of the *Commonwealth Electoral Act 1918* (Cth) makes Australian citizenship a qualification for election, s 44(i) operates directly upon individuals with dual citizenship. The Court examined the requirements for renunciation of citizenship of each country and found that they differed widely. Under Swiss law, a citizen will be released from citizenship upon his or her demand if the person has no residence in Switzerland and has acquired another citizenship. In contradistinction, under Greek law, citizenship may only be discharged with the approval of the relevant Greek government Minister.[34] Crucially, however, neither candidate applied to discharge their respective citizenship. Thus, both candidates held dual citizenship, a status recognised in Australian common law, and in international law,[35] subject to certain limits. For example, Brennan J hypothesised about the absurdity of recognising foreign citizenship law in a situation where a foreign power was to 'mischievously' confer its citizenship upon members of the Australian Parliament so as to disqualify them all.[36]

The Court noted that under Australian law, the issue of whether a person is a citizen of a foreign state is determined according to the law of the relevant foreign state.[37] The majority took judicial notice of the historical setting of the provision, noting that

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[33] *Sykes v Cleary* (1992) 176 CLR 77 at 103–105.

[34] *Sykes v Cleary* (1992) 176 CLR 77 at 103–104.

[35] *Sykes v Cleary* (1992) 176 CLR 77 at 105–106, citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, *Oppenheimer v Cattermole* (1976) AC 249 at 263–264, 278, and *Liechtenstein v Guatemala* (*the Nottebohm Case*) (1955) ICJ 4 at 20. Dual citizenship is recognised implicitly under s 17 of the *Australian Citizenship Act 1948* (Cth), whereby a person can hold Australian citizenship only where the foreign citizenship was acquired previously: O'Brien, op. cit., at 2.1. Notably, the Citizenship Council, and the ALP have called for reform of the Act to allow acquisition of foreign citizenship after Australian citizenship: Con Sciacca, MP, Shadow Minister for Immigration, 'Labor Gives Green Light to Dual Citizenship' (Media Release), 11 April 2000.

[36] *Sykes v Cleary* (1992) 176 CLR 77 at 113; compare Deane J at 126–127. See also Pryles, op. cit., p. 174.

[37] *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 105–107, Brennan J at 112, Deane J at 127, Dawson J at 131, and Gaudron J at 135, citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, *Oppenheimer v Cattermole* (1976) AC 249, and *Liechtenstein v Guatemala* (*the Nottebohm Case*) (1955) ICJ 4.

s 44(i) is 'in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home'.[38] The majority held that it was not the intention of the founders to disqualify an Australian citizen for election to Parliament because that person continued to possess a foreign citizenship, if that person had taken reasonable steps to renounce that citizenship.[39]

The majority noted that it is a difficult and sometimes lengthy process to renounce the citizenship of some nations. Accordingly, in order to avoid the injustice which could be inflicted upon candidates holding citizenship from a nation with complex or discretionary renunciation procedures, the Court held that renunciation of foreign citizenship is not an absolute requirement to avoid disqualification under s 44(i).[40] The Court held that the appropriate test is that an Australian citizen will be disqualified by s 44(i) if that person has not taken all reasonable steps to renounce that foreign citizenship.[41] This conclusion was at one with Deane J's view that it was not the intent of s 44(i) to disqualify 'any Australian citizen whose origins lay in, or who has had some past association with, some foreign country which asserts an entitlement to refuse to allow or recognise his or her genuine and unconditional renunciation of past allegiance or citizenship'.[42] Hence, the result in *Cleary* balanced the principle of protection of parliamentary sovereignty with the reality that a significant proportion of potential candidates hold dual citizenship.

The Court divided as to what amounts to reasonable steps, holding 5–2 (Deane and Gaudron JJ dissenting), that neither Kardamitsis nor Delacretaz had taken all reasonable steps. Mason CJ, Toohey and McHugh JJ considered that 'reasonable steps' depends upon the situation of the individual, the requirements of the foreign law regarding renunciation, the connection between the individual and the foreign state, and the subjective belief of a naturalised person that by becoming an Australian citizen, that person has effectively renounced any foreign citizenship.[43] Deane J held that the oath of allegiance to the Sovereign, the unreserved renunciation of other allegiances made during their citizenship ceremonies, and their years spent as Australian citizens constituted all that could reasonably be expected of Kardamitsis and Delacretaz. Gaudron J considered that the question whether reasonable steps have

[38] *Sykes v Cleary* (1992) 176 CLR 77 at 107.

[39] *Sykes v Cleary* (1992) 176 CLR 77 at 107. In further support of this interpretation, the majority cited s 42 of the Constitution, which requires a member of Parliament to take an oath or affirmation of allegiance, at 107–108.

[40] *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 107, Brennan J at 113, Deane J at 128, Dawson J at 131–132, and Gaudron J at 139.

[41] *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 107, Brennan J at 114, Deane J at 127–128, Dawson J at 131, and Gaudron J at 139.

[42] *Sykes v Cleary* (1992) 176 CLR 77 at 127.

[43] *Sykes v Cleary* (1992) 176 CLR 77 at 108.

been taken is principally a question for Australian law,[44] and that in the circumstances, the formal renunciation of foreign citizenship and oath of allegiance to the Sovereign, and the fact that the foreign citizenship had not been reasserted, were sufficient to constitute reasonable steps. Both of the dissentients posited the view that an application to a foreign government for release from citizenship—a step required by the majority as a reasonable step—would constitute an acknowledgment of a citizenship already renounced, and would therefore offend the first limb of s 44(i).[45]

Doubts had been expressed for some time about the status of British citizens under the s 44(i) disqualification,[46] and whether Britain constitutes a 'foreign power' for the purposes of s 44(i). These doubts were finally resolved in *Sue v Hill*,[47] which involved a challenge to the eligibility of Heather Hill, a One Nation Party candidate for the Senate in the October 1998 election. Hill won a Senate seat, but was subsequently declared disqualified under s 44(i) by a 4–3 majority of the Court of Disputed Returns.[48]

Hill was born in the UK in 1960 and migrated to Australia with her parents in 1971. She became an Australian citizen in January 1998, but did not renounce her British citizenship until at least one month after her election.[49] Gaudron J noted that the renunciation pledge was no longer contained in the oath of allegiance to Australia at the time that Hill became a citizen.[50]

At the time of the enactment of the Constitution, the UK would not have been considered a 'foreign power'. The majority noted that Australians were British subjects from Federation until the creation of 'Australian citizenship' under the *Australian Citizenship Act 1948* (Cth). However, whether Britain was at this time regarded as a 'foreign power' is doubtful. The precise point at which Australia obtained full legal and political independence from Britain is a question of considerable controversy. The majority found that, following an evolutionary process of independence from the UK, Australia could be said to have reached a distinct

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[44] *Sykes v Cleary* (1992) 176 CLR 77 at 139–140. Kirby J has, in *obiter*, supported Gaudron J's approach: *Sue v Hill* (1999) 163 ALR 648 at 729.

[45] *Sykes v Cleary* (1992) 176 CLR 77 per Deane J at 128–129 and Gaudron J at 140.

[46] *Re Wood* (1988) 167 CLR 145 at 169.

[47] *Sue v Hill* (1999) 163 ALR 648.

[48] McHugh, Kirby and Callinan JJ dissented from the majority on the question of the Court's power to hear the challenge under the *Commonwealth Electoral Act 1918* (Cth), and accordingly found it unnecessary to determine the s 44 issue.

[49] Hill completed a declaration of renunciation of British citizenship in November 1998: *Sue v Hill* (1999) 163 ALR 648 per Gaudron J at 676–677. It is unclear whether Hill's declaration of renunciation had been registered at the time of the Court's decision per Gaudron J at 677.

[50] *Sue v Hill* (1999) 163 ALR 648 per Gaudron J at 677.

turning point and become an independent nation with the passage of the *Australia Act 1986* (Cth) and the parallel legislation in the UK, the *Australia Act 1986* (UK).[51]

Thus the UK is a 'foreign power' for the purposes of s 44(i).[52] Consequently, a dual citizen holding citizenship of the UK and Australia is a subject both of the Queen of the UK, and of the Queen of Australia, and is disqualified under s 44(i).

Two further questions in relation to the second limb of s 44(i) remain unanswered. First, the application of Deane and Gaudron JJ's view in *Cleary* of 'reasonable steps' in relation to individuals who have been naturalised since the removal of the oath of allegiance in 1986.[53] Secondly, s 42 provides that members and senators must take an oath of allegiance to the Queen of the UK.[54] Does this mean, in light of the *Australia Act* and *Hill*, that in complying with s 42, prospective parliamentarians are breaching s 44? These questions have yet to arise before the court.

Entitled to the rights or privileges of a subject or a citizen of a foreign power

The third limb of s 44(i) disqualifies any person who is 'entitled to the rights or privileges of a subject or a citizen of a foreign power'. This limb has received little judicial attention and hence considerable uncertainty exists about its interpretation.

It is unclear whether the provision disqualifies a person who is entitled to all or merely to some of the rights and privileges. Rubinstein has argued that 'rights and privileges' may include the right to vote, the right to hold a passport, social security rights and migration rights.[55] The extent of the uncertainty surrounding the limb is evinced by the controversy that arose in the 1980s when honorary citizenship of Israel was conferred upon Prime Minister Hawke, and it was argued that this entitled him to the rights and privileges of a citizen of Israel, and that he was therefore disqualified.[56] It would be unjust to bar persons in such circumstances from serving in Parliament, but these are situations upon which s 44(i) may operate.

Prima facie, it would appear that the third limb of s 44(i) disqualifies any Australian citizen holding a foreign passport, the right to hold a passport being one of the rights

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[51] *Sue v Hill* (1999) 163 ALR 648 per Gleeson CJ Gummow and Hayne JJ at 665, 675 and Gaudron J at 694–695.

[52] *Sue v Hill* (1999) 163 ALR 648 per Gleeson CJ Gummow and Hayne JJ at 665, 675, and Gaudron J at 695.

[53] The explicit renunciation of foreign allegiance was removed from the oath of allegiance by the *Australian Citizenship Amendment Act 1986* (Cth), and replaced by an oath or affirmation of 'true allegiance': *Sykes v Cleary* (1992) 176 CLR 77 per Gaudron J at 133–134.

[54] On the effect of breach of s 42 see E. Campbell, 'Oaths and Affirmations of Public Office', *Monash University Law Review*, vol. 25, no. 1, pp. 132, 155–6.

[55] 1997 House of Representatives Committee, *Report*, p. 17; Ms Kim Rubinstein, 1997 House of Representatives Committee, *Transcript*, p. 97.

[56] 1997 House of Representatives Committee, *Report*, p. 18.

of citizenship.[57] This aspect of the disqualification alone disqualifies the millions of Australian citizens who hold foreign passports. The situation becomes more problematic when further situations are considered. Take, for example, the situation of a former foreign citizen who is eligible to continue receiving social security benefits in Australia. Such a person would be disqualified, even if that person renounces his or her foreign citizenship.[58] A further problem may lie with cases of nations that offer their former citizens the right to regain their citizenship at some time in the future, notwithstanding that they have renounced it and become citizens of a foreign nation.[59]

Pryles has argued that the third limb applies to persons who presently enjoy the rights or privileges of foreign citizens, rather than persons who merely have a right to acquire citizenship of the foreign state. Thus, under this interpretation, a person born in Australia to parents who are foreign citizens, who has a right to acquire, but is not presently entitled to, the benefits associated with that foreign citizenship, is not disqualified by s 44(i) until he or she actually acquires that citizenship or those benefits.[60] A contrary interpretation would bar the children (and, in some cases, grandchildren) of migrants to Australia from the Commonwealth Parliament.[61]

The need for reform

Clearly then, there are problems both with the interpretation and operation of s 44(i). This section examines some of the broader problems surrounding s 44(i). I submit that the decision of the majority in *Cleary*, that a person who makes no attempt to renounce citizenship of a foreign power evidences a desire to retain citizenship, does not give full weight to the significance of the Australian citizenship ceremony and long-term residency in Australia for the purposes of s 44(i). Deane and Gaudron JJ place great emphasis on unilateral acts of renunciation, such as the swearing of the oath of allegiance, pointing to the express renunciation of foreign citizenship contained in the oath until 1986.[62] They note that an action of this nature, along with a long-term association with Australia, constitutes a 'clear' and 'public' severance of formal ties to any nation other than Australia, and a formal renunciation for the purposes of Australian law.[63] In the future, given that there is no longer a renunciation requirement in the citizenship ceremony, long-term residency in Australia may assume a greater

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[57] *Sue v Hill*, S179/1998, *Transcript of Hearing*, 13 May 1999, per Hayne J at 15.

[58] Such as US emigrants, Mr Bob Charles, MP, 1997 House of Representatives Committee, *Transcript*, p. 78; 1997 House of Representatives Committee, *Report*, pp. 17–18.

[59] Such as the US: Mr Bob Charles, MP, 1997 House of Representatives Committee, *Transcript*, p. 77; Mr Bob Charles, MP, 1997 House of Representatives Committee, *Submissions*, vol. 1, S6.

[60] Pryles, op. cit. pp. 179–80.

[61] From nations (such as Greece, Italy, Israel and Ireland) which recognise *jus sanguinis* (citizenship by ethnic origin), Department of Immigration and Multicultural Affairs; 1997 House of Representatives Committee, *Transcript*, pp. 226, 228–229; Dr James Jupp, 1997 House of Representatives Committee, *Transcript*, p. 233.

[62] *Sykes v Cleary* (1992) 176 CLR 77 per Gaudron J at 133–134.

[63] *Sykes v Cleary* (1992) 176 CLR 77 per Deane J at 128 and Gaudron J at 139.

significance in the future as a reasonable step for the purposes of the second limb of s 44(i).

A related problem is the vagueness and obscurity of the language of s 44(i). In presenting the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on s 44(i) and (iv) to the House, the Committee Chairman noted that the archaic language of the section 'is a serious hindrance to ensuring that it will continue to protect this parliament and hence national sovereignty.'[64] Although there are problems associated with the uncertainty of its interpretation, the fact of its unjust operation is clear. Nonetheless, the very fact that the interpretation of the first and third limbs is unresolved may operate to dissuade many prospective candidates from standing. Moreover, the exact meaning and extent of the 'reasonable steps' required to renounce a foreign citizenship so as to avoid disqualification under the second limb is uncertain, dependant as it is upon the requirements of the foreign nation, and the Court's view of the adequacy of those steps. Until we receive further guidance from the Court on its precise meaning, considerable uncertainty about the interpretation of s 44(i) will persist.[65]

In interpreting s 44(i) Deane J's approach must be regarded as more appropriate from a policy perspective at a time when around five million Australians possess dual citizenship, with the likelihood of future increases. The Joint Committee on Foreign Affairs and Defence has noted that the trend towards large levels of dual citizenship is a consequence of Australia's massive postwar immigration, and the classification of migrant Australians as dual citizens by virtue of the legislation of their former homelands.[66] Added to this is the fact that for several reasons, including the multifarious methods of citizenship acquisition,[67] many Australian-born citizens are unaware of their dual citizenship. The problem is singularly acute for British citizens, since under British law, British citizenship is not surrendered by the acquisition of the citizenship of another nation. As a consequence, virtually all British-born Australians have dual citizenship. Hence, Kirby J has felt compelled to speak of the 'defects' of s 44(i) affecting 'millions' of Australians.[68]

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[64] Kevin Andrews, *CPD* (H of R), vol. 215, 25 August 1997, p. 6665.

[65] In 1999, for example, One Nation Senator Len Harris challenged the right of thirty members and senators to sit in the Commonwealth Parliament on the ground that they were born overseas, *CPD* (Senate), vol. 198, 23 August 1999, pp. 7538–7539; Senator Len Harris, Media Release, 'Harris moves motion to force all Senators to prove eligibility to sit under s 44 of the Constitution', 9 August 1999; A. Fitzgerald, 'Thirty Senators and Members' Seats in Doubt Because Of Their Dual Nationality' *Australian National Review*, vol. 4, August 1999, pp. 7–8.

[66] Joint Committee on Foreign Affairs and Defence, *Dual Nationality: Report from the Joint Committee on Foreign Affairs and Defence*, (Parliamentary Paper Number 255 of 1976), AGPS, Canberra, 1977, p. 2.

[67] Department of Immigration and Multicultural Affairs, 1997 House of Representatives Committee, *Submissions*, vol. 1, S141–142; 1997 House of Representatives Committee, *Report*, pp. 21–22.

[68] *Sue v Hill* (1999) 163 ALR 648 at 729.

The significance of this is that by disqualifying all Australians holding a second citizenship, the right of millions of Australians to stand for, and be elected to the Commonwealth Parliament is forfeited, and the choices for the electorate as to who should represent it are severely curtailed. Gaudron J has noted the significance of the principle that as wide a pool of persons as possible should be eligible to directly participate in government processes, stating in *Cleary*: 'what is at stake is the right to participate in the democratic process as a member of Parliament—a right ordinarily attaching to citizenship.'[69] In reaching his conclusions, Brennan J also expressly endorsed the principle that Australians should not be needlessly deprived of the right to seek election, and, conversely, that the electors should not be deprived of the right to choose from the widest possible pool of candidates.[70] The fundamental right of Australian citizens to stand for Parliament is abrogated by s 44(i).

It should also be noted that s 44(i) puts Australia out of step with international practice. The House of Representatives Standing Committee on Legal and Constitutional Affairs noted that neither Britain nor the US impose any bar on dual citizens sitting in their respective national legislatures.[71] Further, s 44(i) may be in breach of Article 25 of the International Covenant on Civil and Political Rights, which provides that '[e]very citizen shall have the right and the opportunity … to vote and to be elected at periodic elections'.[72]

Deane J considered that s 44(i) contains a mental element, holding that the second limb applies only to cases where the relevant status has been 'sought, accepted, asserted or acquiesced in by the person concerned.'[73] The refusal of the *Cleary* majority to include a mental element in the second limb indicates a doctrinal inconsistency with *Nile*, where the Court implied a mental element into the first limb, holding that the disqualification only applied to a person who has 'formally or informally acknowledged allegiance, obedience or adherence to a foreign power'. A proposal for the reform of s 44(i) follows, but for the purposes of interpreting the existing provision, some mental element similar to that proposed by Deane J should be implied. That mental element may simply be a requirement of an awareness on the part of the individual of his or her foreign citizenship.

Proposals

Because of its inadequacy and problems surrounding its interpretation, s 44(i) fails to achieve its aims. Further, the provision seeks to ensure that the sole loyalty of all members of parliament is to Australia, yet the Constitution imposes no express positive requirement that a person must be an Australian citizen to sit. It is appropriate

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[69] *Sykes v Cleary* (1992) 176 CLR 77 at 138.

[70] *Sykes v Cleary* (1992) 176 CLR 77 at 113.

[71] K. Rubenstein, 1997 House of Representatives Committee, *Report*, p. 37. Article 1, s 2 of the US Constitution imposes a US citizenship requirement for membership of Congress; K. Rubinstein, 1997 House of Representatives Committee, *Submissions*, vol. 2, S186.

[72] ICCPR, article 25(b), 1997 House of Representatives Committee, *Submissions*, vol. 1, S175–S181.

[73] *Sykes v Cleary* (1992) 176 CLR 77 at 127.

to delete the s 44(i) disqualification and to replace it with the requirement of Australian citizenship as a qualification for membership of the Parliament, and a corresponding disqualification for failure to retain Australian citizenship.[74] Such a change would eradicate the ambiguities associated with s 44(i), and has the advantage of imposing a clear and simple test. Section 34 of the Constitution provides that the Parliament may legislate as to the qualifications of members of the House of Representatives. Section 16 provides that the qualifications of a senator shall be the same as those of a member of the House of Representatives. Pursuant to these provisions, the Commonwealth has legislated to provide that Australian citizenship is a qualification for nomination or election to the Commonwealth Parliament.[75] However, it is more appropriate that such a fundamental qualification should be contained in the Constitution. Certainty is an important objective for electoral law. Reform of this nature eliminates the uncertainty presently surrounding the interpretation of s 44(i).

I also propose amendment of the *Commonwealth Electoral Act 1918* (Cth) to require a prospective candidate to declare, at the time of nomination, whether, to his or her knowledge, he or she holds a non-Australian citizenship, and to make a declaration to the Australian Electoral Commission accordingly, without any renunciation requirement.[76] Reform along these lines would substantially uphold the policy behind s 44(i), and would also improve its efficacy.

This proposal eliminates the uncertainties associated with the present law, substantially increases the number of persons from which Australia's future parliamentarians may be drawn, and affords increased choice to the electorate in selecting candidates. The electorate, consistently with representative democracy, may then decide for itself the loyalty of future candidates for the Commonwealth Parliament.

SECTIONS 44(II) AND 44(III): TREASON, CRIMINAL CONVICTION AND BANKRUPTCY

Sections 44(ii) and (iii) deal with treason, criminal conviction, and bankruptcy. In light of the conclusion that I reach—that criminality and bankruptcy are matters which ought to be for the electors to consider—I have grouped together discussion of s 44(ii) and (iii).

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[74] Amendment to this effect has been proposed in other fora: 1981 Senate Committee, *Report*, pp. ix, 14; Constitutional Commission, *The Final Report of the Constitutional Commission 1988*, AGPS, Canberra, 1988, vol. 1, p. 283; Joint Standing Committee on Electoral Matters, *Report of the Inquiry Into All Aspects of the Conduct of the 1996 Federal Election and Matters Related Thereto*, (Parliamentary Paper Number 93 of 1997), AGPS, Canberra, 1997, pp. 73–74; 1997 House of Representatives Committee, *Report*, pp. xiii, 43; Constitution Alteration (Electors' Initiative, Fixed Term Parliaments and Qualifications of Members) Bill 2000.

[75] C*ommonwealth Electoral Act 1918* (Cth), s 163.

[76] Comparable reform was suggested by the Attorney-General's Department, 1997 House of Representatives Committee, *Transcript*, pp. 64, 67; Sir Maurice Byers, 1997 House of Representatives Committee, *Report*, pp. 46–47, and the 1997 Joint Standing Committee on Electoral Matters, op. cit., p. 74.

Section 44(ii): treason

Section 44(ii) disqualifies any person who is 'attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer'. Although the first part of s 44(ii) has yet to be judicially considered, it is likely that it operates to permanently disqualify any person convicted and then 'attainted' of treason. The second part of the s 44(ii) disqualification operates upon any person under sentence or awaiting sentence for an offence which carries a minimum of one year's imprisonment. The Court held in *Nile v Wood* that the disqualification ends once the sentence has been served.

Questions arise, principally, about three aspects of s 44(ii). The first question relates to ambiguities in its meaning: the use of the archaic term 'attainted', rather than the more straightforward contemporary 'convicted', has given rise to disagreement about the scope and meaning of the first limb. The second question relates to the incongruity of the lack of provision for release from the disqualification following a pardon. Thirdly, given the proliferation of sentencing systems and diversity of penalties between jurisdictions for similar offences, is it appropriate to use sentencing as a criterion for disqualification? In light of these problems, the fairness and efficacy of s 44(ii) and its continuing ability to accomplish its objectives must be questioned, and serious consideration must be given to its reform.

The treason limb and the meaning of 'attainted'

Treason has traditionally been regarded as a grave offence, indeed one which the 1981 Senate Committee regarded as 'the most serious offence which a citizen can commit against his fellow countrymen, striking at the very roots of the nation's security.'[77] The framers included the provision in order to permanently disqualify a person guilty of treason from sitting.

Attainder is an obscure concept derived from archaic English law. Under it, civil rights were extinguished 'when judgment of death or outlawry was recorded against a person who had committed treason or felony.' [78] Lane, and other commentators have argued that 'attainder' in the s 44 context would mean 'convicted' in Australia today,[79] and thus a conviction would be required for disqualification under the treason limb of s 44(ii). This uncertainty could thus easily be remedied by adopting the 1981 Senate Committee recommendation that the word 'attainted' be replaced with 'convicted'.[80]

A further uncertainty arises as to the basis in law of the conviction. The Constitutional Commission noted that different treason provisions in Commonwealth and State legislation and at common law make the basis upon which disqualification rests

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[77] 1981 Senate Committee, *Report*, p. 17.

[78] Attainder was abolished in Britain by the *Forfeiture Act 1870;* L. Rutherford & S. Bone (eds), *Osborn's Concise Law Dictionary*, Sweet & Maxwell, London, 1993, p. 36.

[79] P.H. Lane, *Lane's Commentary on the Australian Constitution* (2nd ed.), Law Book Company, Sydney, 1997, p. 106; 1981 Senate Committee, *Report*, pp. 16–17; Lumb and Moens, op. cit., p. 98.

[80] 1981 Senate Committee, *Report*, p. 18.

unclear.[81] To ensure control by the Commonwealth Parliament, any amendment to s 44(ii) should make clear that the conviction must be under Commonwealth law.[82]

Pardon

There are several policy problems associated with the fact that the treason disqualification makes no provision for pardon. A person may be convicted of treason, and over time evidence may emerge, or political circumstances may change, to the extent that actions that once constituted treason may no longer be viewed as such. Yet a pardon would not remove the disqualification. The 1981 Senate Committee recommended that provision be made for lifting the disqualification where a person is subsequently pardoned.[83] I propose that such a reform of s 44(ii) would maintain the policy of the existing law, and would provide for a more equitable disqualification.

Section 44(ii): criminal conviction

The second limb of s 44(ii) disqualifies any person who 'has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer'.[84] Its purpose is to disqualify persons convicted of an offence of a particular degree of seriousness from either standing for or sitting in Parliament during the period of their sentence. As noted by the 1981 Senate Committee, the provision is based on the view that such a person is not a fit and proper person to hold parliamentary office while he or she is under sentence.[85]

Some insight as to its intended operation may be gleaned from the Convention Debates. The delegates considered whether the provision should operate to disqualify persons only while serving or awaiting sentence for an offence punishable by one year's imprisonment or longer, or whether it should operate to permanently disqualify.[86] The delegates voted resoundingly against the insertion of a permanent disqualification on the ground that it would effectively impose an additional penalty on the offender, an 'eternal punishment',[87] which would eliminate any opportunity for full public rehabilitation, regardless of the circumstances in which the offence took place. Particularly notable in this debate was the express recognition by several delegates of the principle that as few impediments as possible should be placed in the

[81] 1988 Constitutional Commission, op. cit., vol. 1, pp. 291–292. For a more certain view, see 1981 Senate Committee, *Report*, pp. 17–18.

[82] *Crimes Act 1914* (Cth), s 24.

[83] 1981 Senate Committee, *Report*, p. 18.

[84] Lane has argued that the disqualification would also be triggered by breaches of relevant common law and territory law: Lane, op. cit., p. 106.

[85] 1981 Senate Committee, *Report*, p. 19.

[86] *Convention Debates*, op. cit., vol. I, pp. 655–659.

[87] ibid, p. 658.

way of the free choice of the electors: 'We may very well trust the electors to do what is right'.[88]

The Court considerably clarified the operation of the second limb of s 44(ii) in *Nile v Wood*. The petitioner asserted that: 'Robert Wood has been convicted of the offence of obstructing shipping, being an offence which carries a term of imprisonment', and that '[h]e was convicted in 1972 of offences in relation to National Service, and served a term of imprisonment'.[89]

In dismissing these arguments, the Court found:

> It is not conviction of an offence *per se* of which s 44(ii) speaks. The disqualification operates on a person who has been convicted of an offence punishable by imprisonment for one year or more *and* is under sentence or subject to be sentenced for that offence.[90]

Further, the Court took judicial notice of the Convention Debates, and held that, as a matter of construction, '[t]he references to conviction and sentence are clearly conjunctive'.[91] Once the sentence has been served, the disqualification is at an end.

Changes in sentencing systems and diversity in penalties make sentencing an inappropriate and irrelevant criterion for parliamentary disqualification.[92] There are inconsistencies in the applicable terms of imprisonment for similar offences, and between the penalties provided for in the multitude of offences created by the Commonwealth, State and Territory jurisdictions. For example, possession of a small amount of cannabis in the ACT is punishable merely by a $100 fine, whilst in NSW the same offence is punishable by two years imprisonment.[93] A person could therefore be disqualified for a conviction in Queanbeyan, but would not be disqualified for conviction for the same activity across the border in Canberra. Also, some relatively insignificant offences are punishable by long periods of imprisonment but may not warrant disqualification from Parliament. For example, the 1981 Senate Committee has noted the inappropriateness of disqualification for breach of s 19(2) of the *Antarctic Treaty (Environment Protection) Act 1980* (Cth), which provides that any person who, whether on foot or by aircraft, disturbs a concentration of birds is liable to a fine of $2000, or imprisonment for 12 months, or both.[94] Conversely, certain serious

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[88] ibid, Dibbs, p. 658 and see also Clark at p. 655.

[89] *Nile v Wood* (1988) 167 CLR 133 at 134.

[90] *Nile v Wood* (1988) 167 CLR 133 at 139.

[91] *Nile v Wood* (1988) 167 CLR 133 at 139.

[92] The inflexibility of constitutional disqualification was recognised at the 1897 Convention: see the *Convention Debates*, op. cit., vol. II, p. 1012 (Glynn).

[93] *Drugs of Dependence Act 1989* (ACT) s 171(1), *Drug Misuse and Trafficking Act 1985* (NSW) ss 23(1), 30.

[94] 1981 Senate Committee, *Report*, p. 20.

offences, particularly in the areas of trade practices and tax, are punishable only by the imposition of a fine, without any provision for imprisonment:[95] such convictions do not attract disqualification.

Further, the disqualification does not take modern developments in sentencing methods into account. Where an order for a suspended sentence or a conditional discharge is made for an offence carrying a penalty of imprisonment for a year, an offender may enter into a recognisance to be of good behaviour for a period extending beyond the sentence. The offender would be liable to sentence at any time during this period and would, therefore, be disqualified throughout this period, falling squarely within the terms of s 44(ii)—'under sentence, or subject to be sentenced': an inappropriate result.[96]

The current disqualification effectively entrenches a criterion based on irrelevant nineteenth century notions of punishment. I propose two possible solutions to the problem, both involving deletion of the existing disqualification. The first would be constitutional amendment to empower the Commonwealth Parliament to determine a legislative disqualification based on criminal conviction, making appropriate provision for disqualification for conviction for serious offences, and for offences punishable by a significant term of imprisonment or a significant fine. The second possible solution would be simply to leave the matter to the judgment of the electors: '[u]ltimately, it must be the electorate which makes decisions about the quality of representation which it demands in the national Parliament.'[97] As Sawer has noted, the position of sitting members sentenced to imprisonment would be covered by ss 20 and 38 of the Constitution, which provide that the place of a member or senator shall become vacant if that person fails to attend for two consecutive months of any session of Parliament.[98] Both of the above courses maintain the policy of the second limb of s 44(ii), ensure greater fairness in the treatment of those seeking election to Parliament, and both take changes in sentencing methods into account.

Section 44(iii): the bankruptcy disqualification

Section 44(iii) disqualifies any person who is 'an undischarged bankrupt or insolvent', and has been held to operate on any person formally declared bankrupt or insolvent, and not discharged from that condition. The provision is meant to address concerns about the protection of the state,[99] and the scope for financial persuasion to influence a bankrupt candidate or parliamentarian. However, in light of changed public attitudes to

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[95] Only pecuniary penalties are imposed for breaches of the *Trade Practices Act 1974* (Cth) (except for non-payment of fines, s 79A).

[96] Australian Constitutional Convention, *Proceedings of the Australian Constitutional Convention: Official Record of Debates and Biographical Notes*, AGPS, Canberra, 1985, p. 228; 1981 Senate Committee, *Report*, pp. 22–23.

[97] 1981 Senate Committee, *Report*, p. 25.

[98] 1981 Senate Committee, *Report*, p. 24.

[99] 1981 Senate Committee, *Report*, p. 35.

debt and bankruptcy, the growth in consumer credit, and the importance of elector choice, I submit that the s 44(iii) disqualification is no longer justified.

Discussion at the Federal Conventions over the progenitors to s 44(iii) was heated, and much light on the reasons for its inclusion may be gleaned from an examination of them. At the time, bankruptcy was generally viewed with considerable moral opprobrium. A comment by Sir John Downer exemplifies this view: 'it will be a bad day for Australia, as it would be for any country, if bankruptcy is considered merely a venial matter, and not one that involves great disgrace'.[100] However, several delegates took the view that the Constitution should not contain a bankruptcy disqualification. Mr Carruthers spoke in impassioned terms: 'Why should men who, through some misfortune, are compelled to take advantage of the insolvency or bankruptcy laws, be kept out of public life until they can get their certificate of discharge?'[101] According to Carruthers, it is testimony to the honesty of public men in Australia that they have been poor men, and in many cases politicians have been financially impoverished because of close attention to public affairs, and corresponding neglect of their personal affairs, 'without any injury to public business'.[102] Carruthers went on to suggest that the provision would be used by creditors as 'a lever of destruction', in order to disqualify candidates or sitting members to whom they were opposed.[103]

In *Nile*, the Court considerably clarified the scope of s 44(iii). Among the petitioner's grounds of challenge was the stark claim: 'Robert Wood is insolvent.'[104] The Court held that s 44(iii) is not enlivened merely by an allegation that a person is unable to pay his or her debts.[105] Using the Convention Debates and turn of the century bankruptcy laws, the Court held that the adjective 'undischarged' qualifies both the word 'bankrupt' and the word 'insolvent': 'insolvent' does not merely describe a person who cannot pay his debts as they fall due. The test is whether a court has declared a person bankrupt or insolvent and that person has not been discharged from that condition.[106]

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[100] *Convention Debates*, op. cit., vol. V, p. 1934.

[101] *Convention Debates*, op. cit., vol. II, p. 1015.

[102] *Convention Debates*, op. cit., vol. V, p. 1933, vol. II, p. 1016. Carruthers went on to refer indirectly to the notable precedent of NSW Premier Sir Henry Parkes who was thrice declared bankrupt, and won his way back into the NSW Parliament each time after resigning: 1981 Senate Committee, *Report*, p. 35.

[103] *Convention Debates*, op. cit., vol. II, p. 1016; vol. V, pp. 1932–1933; Mr Reid concurred, at p. 1935.

[104] *Nile v Wood* (1988) 167 CLR 133 at 134.

[105] *Nile v Wood* (1988) 167 CLR 133 at 140.

[106] *Nile v Wood* (1988) 167 CLR 133 at 139–140; followed by Dawson J in *Sykes v Australian Electoral Commission* (1993) 115 ALR 645 at 650.

Attitudes to bankruptcy have changed enormously since 1901, and it no longer imports moral turpitude.[107] Further, the increased availability of consumer credit has made debt widespread and an ordinary part of life. There has been a significant increase in the level of bankruptcies in Australia,[108] and the harshness of the disqualification is compounded by the fact that many of these bankruptcies occur through misfortune, illness, unemployment, or unstable economic conditions.[109] Changed financial circumstances and community attitudes to debt and to bankruptcy make s 44(iii) difficult to justify today. Accordingly, I propose its deletion.[110] Such reform would remove the temptation for members and candidates to act dishonestly to avoid indebtedness and the perception thereof,[111] and would eliminate any possibility of political uses of the disqualification by prospective creditors.[112] As Carruthers argued over 100 years ago, the electors should have the right to choose to be represented by a person who is compelled by necessity to become bankrupt.[113] Such a person is not necessarily unfit for Parliament, and if that person has acted improperly, the electorate will judge him or her appropriately.

SECTIONS 44(IV) AND 44(V): OFFICES OF PROFIT UNDER THE CROWN, CONTRACTS WITH THE EXECUTIVE, CONFLICTS OF INTEREST AND THE INTERPRETATION OF 'INCAPABLE OF BEING CHOSEN'

Section 44(iv) and (v) seek to address conflicts of interest and undue influence by the executive. I argue that these provisions are outmoded and ineffective, and that once again the evils which they seek to remedy are better dealt with by legislation, rather than through the Constitution.

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[107] The 1981 Senate Committee has outlined some of the extraordinary 17th century punishments for bankruptcy: 1981 Senate Committee, *Report*, p. 34.

[108] The trend is towards an increase in the number of bankruptcies: 4 979 bankruptcies were recorded in Australia in 1979–1980; 8 552 in 1989–1990; 26 376 in 1998–99: Attorney-General's Department, *Annual Report by the Attorney-General on the Operation of the Bankruptcy Act 1966: 1 July 1979–30 June 1980*, AGPS, Canberra, 1980, p. 8; Attorney-General's Department, *Annual Report by the Attorney-General on the Operation of the Bankruptcy Act 1966: 1 July 1989–30 June 1990*, AGPS, Canberra, 1990, p. 30; Inspector-General in Bankruptcy, Insolvency and Trustee Service, *Annual Report on the Operation of the Bankruptcy Act*, 1999: http://law.gov.au/aghome/commaff/itsa/frame_statistics.html.

[109] J. McMillan, G. Evans, H. Storey, *Australia's Constitution: Time For Change?*, The Law Foundation of New South Wales and George Allen & Unwin Australia, Sydney, 1983, p. 271.

[110] Section 45(ii) would also require deletion under this proposal. Similar recommendations were made by the 1981 Senate Committee, and the 1988 Constitutional Commission: 1981 Senate Committee, *Report*, p. 37; 1988 Constitutional Commission, op. cit., vol. 1, pp. 293–294.

[111] 1981 Senate Committee, *Report*, p. 36.

[112] Mr Stephen Mutch, MP, 1997 House of Representatives Committee, *Transcript*, p. 218.

[113] *Convention Debates*, op. cit., vol. V, p. 1933.

Section 44(iv): offices of profit

Section 44(iv) exists to protect the Parliament from the influence of the executive, and to prevent conflicts of loyalty. These principles remain valid today. In *Cleary*, the Court applied a broad interpretation of 'office of profit', but because of the archaic language and concepts used in the provision, many questions persist about its reach and whether it disqualifies employees and members of statutory corporations, local government councillors and employees, assistant ministers and parliamentary secretaries. Further, the provision operates unfairly, as it requires public servants to resign their employment in order to stand for election, affecting perhaps twenty percent of the population. While seeking to maintain the principle upon which s 44(iv) is based, I recommend deletion of s 44(iv) and its replacement with legislation preventing conflicts of loyalty, clarifying the position of public sector employees, and alleviating the unfair operation of s 44(iv).

Section 44(iv) is based on early eighteenth century English law,[114] and gives effect to the principle that the Crown and the Executive should be separate from the legislature. In order to operate independently, the Parliament must be free from executive influence: s 44(iv) bars the use of executive appointments to influence parliamentarians.[115] Apart from preventing conflicts of loyalty, and acting as an 'anti-bribery' provision,[116] s 44(iv) also prohibits 'double-dipping': the receipt of two incomes.[117] It also addresses the incompatibility and physical impossibility of combining parliamentary service and all the associated duties towards Parliament and constituency, with the fulfilment of public service duties.[118]

The interpretation of 'office of profit under the Crown'

Although considerable uncertainty has existed about the coverage of 'office of profit under the Crown',[119] this uncertainty was alleviated, but not wholly eliminated in

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[114] The Act of Settlement, 1701, 12 and 13 Wm III c 2, and the Succession to the Crown Act, 1707, 6 Anne c 41, ss 24 and 25: *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 95.

[115] House of Commons Select Committee on Places or Offices of Profit under the Crown, *Report from the Select Committee on Places or Offices of Profit under the Crown*, House of Commons, 1941, pp. xiii–xiv: *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 95, Deane J at 122; A. R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 260; Campbell Sharman, 1997 House of Representatives Committee, *Submissions*, vol. 1, S80; Geoffrey Lindell, 1997 House of Representatives Committee, *Transcript*, p. 108.

[116] Harry Evans, Clerk of the Senate, 1997 House of Representatives Committee, *Submissions*, vol. 1, S49.

[117] Attorney-General's Department, 1997 House of Representatives Committee, *Submissions*, vol. 1, S167; 1997 House of Representatives Committee, *Report*, p. 55; H. Burmester, 1997 House of Representatives Committee, *Transcript*, p. 65.

[118] *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 96; G Lindell, 1997 House of Representatives Committee, *Transcript*, p. 108.

[119] 1981 Senate Committee, *Report*, Chapter 5.

Cleary, where the Court unanimously held that Cleary (employed as a schoolteacher by the Victorian Government) held an office of profit under the Crown.[120]

The majority held that s 44(iv) disqualifies public servants (as officers of government departments), noting that their exclusion from Parliament reinforces the principle that public servants should not participate in party politics.[121] The majority rejected arguments that s 44(iv) operates to disqualify only senior public servants, stating that such a restricted meaning could not be supported by history, nor by its legislative context: 'the disqualification must be understood as embracing at least those who are permanently employed by government'.[122] The majority provided several policy justifications, including the inability to adequately perform public service duties and parliamentary functions concurrently, and the risk that permanent public servants would not exercise independent judgment in Parliament, but would be constrained by the views of the executive.

Although not the archetypal person at whom the disqualification is aimed, s 44(iv) disqualifies public school teachers, even when on leave without pay. The majority held that taking leave does not alter the character of the office.[123] Deane J concurred: 'the fact that the holder of such an office is temporarily on leave without pay or other emoluments does not deprive the office itself of its character as an office of profit'.[124] Hence, public servants must resign to contest an election.

Problems and issues relating to s 44(iv) and proposals

To date, *Cleary* is the only judicial guidance we have on s 44(iv).[125] Using textual[126] and policy arguments, the majority interpreted the reference to 'office of profit under

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[120] *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 98; Brennan at 108, Deane at 116–119, Dawson at 130–131 and Gaudron JJ at 132. The leading judgment was that of the majority (Mason CJ, Toohey and McHugh JJ) (at 95–102), with whom Brennan (at 108), Dawson (at 130–131) and Gaudron JJ (at 132) agreed.

[121] *Sykes v Cleary* (1992) 176 CLR 77 at 95–96.

[122] *Sykes v Cleary* (1992) 176 CLR 77 at 96.

[123] *Sykes v Cleary* (1992) 176 CLR 77 at 97–98.

[124] *Sykes v Cleary* (1992) 176 CLR 77 at 117, citing *Re The Warrego Election Petition (Bowman v Hood)* (1899) 9 QLJ 272 at 278. See also: K Cole, 'Office of Profit under the Crown and Membership of the Commonwealth Parliament', Department of the Parliamentary Library, (Issues Brief Number 5), 1993, pp. 5–6.

[125] *Free v Kelly* (1996) 185 CLR 296 involved the claim that Jackie Kelly, the Liberal candidate for the seat of Lindsay at the March 1996 election was disqualified by virtue of ss 44(i) and (iv). She held dual citizenship (Australia and New Zealand) and was an officer of the Royal Australian Air Force at the time of her nomination. However, Kelly conceded her disqualification and hence s 44 was not an issue before the court: *Free v Kelly* (1996) 185 CLR 296 at 301. Some commentators have expressed doubts about whether a concession the breadth of Kelly's was entirely necessary: A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 262; and H. Evans (ed.), *Odgers' Australian Senate Practice*, (8th ed.), AGPS, Canberra, 1997, p. 150.

[126] *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 98; Deane J at 118.

the Crown' broadly, holding that it encompasses the Crown in the right of the States. The Court expressly noted the risk of conflict between obligations to their State and duties as a parliamentarian.[127] Although opinions have been proffered on the application of s 44(iv) in various situations, its breadth remains uncertain. It is likely, for example, to apply to ambassadors.[128] Whether s 44(iv) applies to local government councillors and employees has yet to be determined.[129] Does it include employees and members of statutory corporations? What about university staff? The test may simply be to examine whether the position in each particular situation is:

(1) an office
(2) of profit
(3) under the Crown,

but because the Court has not determined the precise meaning and reach of each of these elements, debate continues.[130]

The position of senators-elect is also unclear as no pertinent case has arisen. Following the 1996 election, Jeannie Ferris (a candidate for the Senate) accepted a position as a member of Senator Minchin's staff at a time when the writ for her election had not been returned; she was still technically in the process of being chosen, and was not a senator-elect.[131] Some commentators have argued that s 44(iv) and the principles underlying it apply to senators-elect,[132] and in light of the imprecision of s 44(iv), this is the safe view to adopt.

Section 44(iv) also disqualifies persons holding 'any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth'. The dominant interpretation of this limb—supported by the Convention Debates[133]—is that

[127] *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 98, citing Quick and Garran, op.cit., at 492–493; Deane J concurring at 118–119. Presumably s 44(iv) also extends to territory public servants, although the court made no specific holding to that effect.

[128] Note the Gair affair of 1974; 1981 Senate Committee, *Report*, pp. 40–41 (particularly Sawer's view, at p. 41); 1988 Constitutional Commission, op. cit., vol. 1, p. 299.

[129] Australian Electoral Commission, *Electoral Backgrounder Number 4: Candidate Disqualifications: Section 44 of the Constitution*, AGPS, Canberra, 1998, p. 8; Cole, op. cit., pp. 19–21.

[130] 1981 Senate Committee, *Report*, pp. 51–53; 1997 House of Representatives Committee, *Report*, pp. 64–66; G. Williams, 1997 House of Representatives Committee, *Transcript*, p. 29.

[131] H. Evans, 'Constitution, s 44: Disqualification of Senators: Senator-Elect Jeannie Ferris', advice to Senator Bolkus, tabled, *CPD* (Senate), vol. 178, 29 May 1996, p. 1254.

[132] 'Letter from Attorney-General Senator Durack to Senator Evans regarding employment of Senator-elect as 'Legislative Assistant'', 1981 Senate Committee, *Report*, Appendix 2; H. Evans, advice to Senator Bolkus, op. cit., at 1253–1255; H. Evans, 1997 House of Representatives Committee, *Submissions*, vol. 1, S50; G. Williams, 1997 House of Representatives Committee, *Transcript*, p. 36.

[133] *Convention Debates*, op. cit., vol. I, pp. 660, 898 (Sir Samuel Griffith).

it only applies to pensions payable at the discretion of the executive,[134] but does not disqualify recipients of pensions granted under legislation.[135] Although some doubts exist about this interpretation,[136] I believe the narrower reading is to be preferred as this limb serves no real purpose and is of historical interest only.

The proviso to s 44(iv) exempts from the disqualification Commonwealth ministers, state ministers, officers or members of the Queen's navy or army in receipt of pay, half pay, or a pension, and any person in receipt of pay as an officer or member of the Commonwealth naval or military forces whose services are not wholly employed by the Commonwealth. There is confusion about the extent and operation of the exemptions, and doubt about their continuing relevance.

Although the proviso exempts Commonwealth ministers from disqualification,[137] there is some doubt about the position of quasi-ministerial appointments, such as assistant ministers and parliamentary secretaries.[138] It is arguable whether disqualification for holding such an office accords with the aim of limiting executive influence over the Parliament,[139] in light of the exemption of ministers. Further, Professor Howard has noted that the fact that ministers must dually serve as ministers and as representatives highlights the fact that Australia's entire system of cabinet government is premised upon conflict of interest—a principle directly contradicted by s 44(iv).[140]

State government ministers were exempted to allow the Founders—often state parliamentarians themselves—to stand for the Commonwealth Parliament.[141] Thus, for example, s 44(iv) disqualifies teachers and public servants, but not Bob Carr or Richard Court. Contemporaneous service in the Commonwealth and state or territory parliaments would be impracticable and constitutionally inappropriate in the Federal system today. The Founders envisaged that the exemption of state ministers be only

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[134] Such pensions used to apply for certain military posts, but are now defunct: 1981 Senate Committee, *Report*, pp. 57–58.

[135] Cole, op. cit., p. 17; Attorney-General's Department, 1997 House of Representatives Committee, *Submissions*, vol. 1, S169; Australian Electoral Commission, *Electoral Backgrounder Number 4*, op. cit., p. 8.

[136] A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, pp. 263–264, citing *Laffer v Minister For Justice (WA)* (1924) 35 CLR 325.

[137] *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 98; *Convention Debates*, op. cit., vol. V, p. 1941–1942 (Sir John Forrest, R.E. O'Connor); W. Harrison Moore, *The Constitution of the Commonwealth of Australia*, (2nd ed), Sweet & Maxwell, Melbourne, 1910, p. 128.

[138] For a historical outline of the issue, see L.F. Crisp, *Australian National Government*, Longman Cheshire, Melbourne, 1978, pp. 384–389; 1981 Senate Committee, *Report*, Chapter 6.

[139] House of Commons Select Committee on Places or Offices of Profit under the Crown, op. cit., p. xiv.

[140] C. Howard, *The Constitution, Power and Politics*, Fontana, Melbourne, 1980, p. 86.

[141] It was envisaged to be only a temporary exemption: *Convention Debates*, op. cit., vol. V, pp. 1941–1942, (Sir John Forrest and R.E. O'Connor).

temporary, and as the rationale for its existence no longer exists, it should be removed.[142]

In light of Britain's changed relations with Australia, the exemption for officers and members of the Imperial navy and army is clearly no longer appropriate and should be deleted.[143] The exemption for officers and members of the Commonwealth naval or military forces (including the air force[144]) 'not wholly employed by the Commonwealth' is generally interpreted to mean that reservists are exempted from disqualification.[145] The underlying rationale for the disqualification—to prevent any conflict between responsibilities to the armed forces, and to the Parliament and the electorate[146]—remains valid, but a reformulation would resolve its significant ambiguities.[147]

The problems with s 44(iv) may be grouped into three main categories. First, the uncertainty surrounding its interpretation leads to practical problems for the electoral process.[148] Secondly, the office of profit test and the language used in the proviso are complex and archaic. The test is disconsonant with modern circumstances where government uses private or semi-private bodies (for instance, Qantas) to undertake activities once the province of the Crown. Thirdly, and most significantly, because of the Court's interpretation of 'chosen', the provision operates unfairly, requiring public servants to resign their employment in order to stand for election and to forgo their income for at least the duration of the campaign. The problem is estimated to affect perhaps twenty percent of the population,[149] and is, therefore, a severe restriction and penalty imposed on candidates. Although legislation guarantees reinstatement in the event of failure, the guarantee is not uniform in all jurisdictions,[150] and there may be constitutional problems with such a guarantee.[151]

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[142] A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 268.

[143] Sir Maurice Byers, 1997 House of Representatives Committee, *Submissions*, vol. 1, S64–S65.

[144] G. Williams, 1997 House of Representatives Committee, *Transcript*, pp. 35–36.

[145] H. Burmester, 1997 House of Representatives Committee, *Transcript*, p. 68.

[146] 1981 Senate Committee, *Report*, 1981, p. 56.

[147] Sir Maurice Byers, 1997 House of Representatives Committee, *Submissions*, vol. 1, S65; A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 280.

[148] Senator Minchin, 1997 House of Representatives Committee, *Transcript*, p. 42.

[149] Senator Andrew Murray, 1997 House of Representatives Committee, *Transcript*, p. 16; Deane J put the figure at 'more than 10%' in 1992; *Sykes v Cleary* (1992) 176 CLR 77 at 122.

[150] Australian Electoral Commission, op. cit., pp. 8–11; Attorney-General's Department, 1997 House of Representatives Committee, *Submissions*, vol. 2, S194–S215.

[151] G. Williams, 1997 House of Representatives Committee, *Transcript*, p. 39, citing *Australian Communist Party v Commonwealth* (*The Communist Party Case*) (1951) 83 CLR 1; Attorney-General's Department, 1997 House of Representatives Committee, *Submissions*, vol. 1, S172, vol. 2, S194.

The policies behind s 44(iv) are important and should be maintained, but because of its unnecessarily broad scope and unjust operation regarding public sector employees, the provision requires reform. Some commentators have suggested a 'minimalist' solution of simply removing the words 'being chosen or of' from s 44,[152] but there are problems with this proposal. It does not eliminate the ambiguities in the provision, but simply delays the point at which the problems of interpretation must be resolved, and it allows those disqualified under s 44(ii), (iii) and (v) to be elected to Parliament, and it may lead to abuse through protest candidacies.[153]

Reform comparable to that proposed by the Constitutional Commission should be implemented.[154] That is, s 44(iv) should be deleted and replaced with legislative disqualifications targeting those most at risk of conflicts of loyalty, for example, judicial and legal officers, members of the defence forces, officers of certain public authorities, heads of federal, state, and territory government departments and other senior public servants. Such legislation could make provision for automatic vacation of the office in question at the time of nomination, election, or at the point at which the parliamentary seat is assumed, as appropriate for the particular office. Further, any sitting Commonwealth parliamentarian taking up such a public service position would automatically forfeit his or her seat. This solution eradicates the ambiguities associated with s 44(iv), and affords greater flexibility and equity because the disqualifications can be amended by Parliament to take account of changing circumstances.[155]

The interpretation of 'incapable of being chosen'

Section 44 provides that any person falling within it 'shall be incapable of being chosen or of sitting'. The meaning of 'chosen' was considered in *Cleary*,[156] where argument revolved around whether it includes all the steps necessary for election, or only the election itself, or alternatively, the declaration of the poll. The majority cited precedent,[157] and policy reasons (clearer elector choice and certainty) to hold that 'chosen' refers to 'the process of being chosen, of which nomination is an essential part.'[158] In a vigorous dissent rejecting the broad interpretation, Deane J considered the content and context of s 44 to find that 'chosen' refers to the final stage in the process,

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[152] Liberal Party of Australia, 1997 House of Representatives Committee, *Submissions*, vol. 1, S138–139; Australian Labor Party, 1997 House of Representatives Committee, *Submissions*, vol. 1, S184.

[153] 1997 House of Representatives Committee, *Report*, pp. 75–82; Professor A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 265; G. Williams, 1997 House of Representatives Committee, *Submissions*, vol. 1, S174; Attorney-General's Department, 1997 House of Representatives Committee, *Submissions*, vol. 2, S222.

[154] 1988 Constitutional Commission, op. cit., vol. 1, p. 296.

[155] A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 259.

[156] *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 99–101; Deane J at 119–125.

[157] *Harford v Linskey* [1899] 1 QB 852 per Wright J (Bruce J concurring) at 858.

[158] *Sykes v Cleary* (1992) 176 CLR 77 at 100, Brennan, Dawson and Gaudron JJ agreeing (108, 130,132).

the declaration of the poll.[159] In reaching his narrow interpretation, his Honour found *Harford* to be 'quite unpersuasive', because *inter alia*, the wording and purposes of s 44(iv) and the provision in *Harford* differed significantly.[160] Deane J also distinguished the process of statutory interpretation from constitutional interpretation.[161] Finally, his Honour took practical considerations into account to find that the broad interpretation would 'confine the democratic rights of many citizens' to stand for Parliament.[162]

Cleary was an opportunity for the Court to avoid the harsher effects of s 44. Blackshield has termed as 'unfortunate' the majority's interpretation of 'chosen',[163] and Williams has noted that the policy of s 44(iv) only applies upon election to Parliament, not to the pre-election period.[164] The majority's interpretation of 'chosen'[165] exacerbates the unjust exclusionary effects of s 44 upon the Australian polity, and further justifies constitutional reform.

Section 44(v): contracts with the executive and conflicts of interest

Section 44(v) disqualifies any person who has 'any direct or indirect pecuniary interest in any agreement' with the Public Service of the Commonwealth otherwise than as a member of a company consisting of more than twenty-five persons. The provision is designed to prevent the executive exerting a corrupting influence over parliamentarians and to prevent conflicts of interest.

The purpose of s 44(v) is to protect the Parliament. This purpose is fulfilled in two ways. The first was expressly recognised by Barwick CJ in *Re Webster* as securing 'the freedom and independence of the Parliament from the Crown and its influence'.[166] The second, manifest in the Convention Debates[167] and deducible from the wording of

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[159] *Sykes v Cleary* (1992) 176 CLR 77 at 120–125.

[160] *Sykes v Cleary* (1992) 176 CLR 77 at 124. In addition to Deane J's reasons for rejecting *Harford*, it should also be noted that Wright and Bruce JJ expressly limited their decision in *Harford* to cases of local government elections under the *Municipal Corporations Act 1882* (UK); *Harford v Linskey* [1899] 1 QB 852 at 858.

[161] *Sykes v Cleary* (1992) 176 CLR 77 at 121, 124–125.

[162] *Sykes v Cleary* (1992) 176 CLR 77 at 122–125. A consequence recognised by the majority at 101.

[163] A.R. Blackshield, 1997 House of Representatives Committee, *Transcript of Hearings*, p. 260.

[164] G. Williams, 1997 House of Representatives Committee, *Transcript*, p. 26; *contra* Associate Professor Gerard Carney, 1997 House of Representatives Committee, *Submissions*, vol. 1, S154.

[165] Followed by Brennan CJ in *Free v Kelly* (1996) 185 CLR 296 at 301. See also *Free v Kelly*, S94/1996, Transcript of Proceedings, 2 August 1996, pp. 3–7 (R.E. Williams QC).

[166] Re Webster (1975) 132 CLR 270, at 278, citing 'the precise progenitor' of s 44(v), the House of Commons *Disqualification Act, 1782*, 22 Geo III c 45, s 1. See also Quick and Garran, op. cit., p. 493.

[167] 'The object of the clause is to prevent individuals making a personal profit out of their public positions', *Convention Debates*, op. cit., vol. II, pp. 1023 (Isaac Isaacs).

s 44(v),[168] is to prevent use of the parliamentary office for personal gain, conflicts between public duty and private interest, and the appearance thereof.[169] Barwick CJ's dictum that 'in its construction and application, the purpose it seeks to attain must always be kept in mind',[170] suggests that the recognition of both purposes must affect the interpretation of s 44(v).[171]

Webster's Case

Section 44(v) was considered at length in *Webster* by Barwick CJ sitting alone as the Court of Disputed Returns. In his Honour's view, to fall within s 44(v) there must be an agreement which 'must have a currency for a substantial period of time', and it 'must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs'.[172]

Webster involved Country Party Senator James Joseph Webster, one of nine shareholders in, Managing Director and Secretary of, JJ Webster Pty Ltd. Agreements for the supply of timber from his firm to government departments stretched back to 1964,[173] coincidentally the year he entered the Senate. In a narrow judgment, confined to the facts before him, Barwick CJ held that Webster's dealings did not fall within s 44(v), because, first, they consisted of a series of small, discrete contracts, and second, in his Honour's estimation, the Crown would be incapable of exerting any influence in parliamentary affairs by anything it could do in relation to the agreement.[174] Having decided in Webster's favour, Barwick CJ considered the proviso to s 44(v) relating to membership of a company, holding that mere shareholding in a company does not alone create a pecuniary interest in any agreement the company may have with the Public Service. Although Barwick CJ found that 'other circumstances' may possibly combine with a shareholding to create a pecuniary interest, such circumstances were held not to exist in *Webster*.[175]

Barwick CJ exonerated Senator Webster through an adroit use of technical principles of contract, and a narrow interpretation of the Constitution. Accordingly, the decision

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[168] 'Pecuniary interest': a term used to regulate conflicts of interest and duty: 1981 Senate Committee, *Report*, p. 77.

[169] Although rejected by Barwick CJ in *Webster* (at 278–279), Hanks has argued that this second purpose may be deduced from the 1890s Convention Debates, and from the drafting history of s 44(v); P.J. Hanks, 'Parliamentarians and the Electorate', in G. Evans, *Labor and the Constitution: 1972–1975*, Heinemann, Melbourne, 1977, pp. 196–197. See further, J.D. Hammond, 'Pecuniary Interest of Parliamentarians: a Comment on the Webster Case', *Monash Law Review* vol. 3, 1976, p. 91.

[170] *Re Webster* (1975) 132 CLR 270 per Barwick CJ at 278.

[171] G. Evans, *Labor and the Constitution: 1972–1975*, Heinemann, Melbourne, 1977, p. 197.

[172] *Re Webster* (1975) 132 CLR 270 at 280.

[173] *Re Webster* (1975) 132 CLR 270 at 271.

[174] *Re Webster* (1975) 132 CLR 270 at 280–286.

[175] *Re Webster* (1975) 132 CLR 270 at 287.

has been subjected to significant and valid criticism.[176] Hammond has argued that in choosing to exclude the conflict of interest purpose, Barwick CJ's view of the objects and operation of s 44(v) is flawed.[177] Hanks argues that the wording of the provision and its drafting history suggest that s 44(v) was intended to go behind the corporate veil and catch corporate contracting.[178] In light of a fuller consideration of the Convention Debates,[179] Barwick CJ's conception of the purpose and scope of s 44(v) is unduly restrictive, and that it effectively denudes the words 'direct and indirect pecuniary interest', and the proviso of any meaning.

Contemporary operation, problems, and proposals

Although s 44(v) has been deprived of most of its efficacy by *Webster*, the 1981 Senate Committee has noted that a range of ordinary transactions (such as government insurance and loans, and acquisition of government property) could still potentially fall afoul of s 44(v).[180] More significantly, conflict between public duties and indirect pecuniary interests is not addressed under the current interpretation of the provision: an acute problem given the quantity of business carried on through corporate structures.

The deficiencies of s 44(v) were highlighted recently by allegations raised in Parliament that Mr Warren Entsch MP,[181] a shareholder, director and company secretary of Cape York Concrete Pty Limited, was disqualified by virtue of s 44(v) because of contracts for the supply of concrete—totalling $175,500—concluded between the company and the Department of Defence in 1999.[182] Although vindicated by the Acting Solicitor-General citing *Webster*,[183] legal opinions about Entsch's position differed. A contrary opinion suggested that should s 44(v) arise for reconsideration by the court, Barwick CJ's exposition would be rejected in favour of a

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[176] *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament*, AGPS, Canberra, 1975; *Public Duty and Private Interest: Report of the Committee of Inquiry*, AGPS, Canberra, 1979; P.J. Hanks, 'Parliamentarians and the Electorate', in G. Evans, *Labor and the Constitution: 1972–1975*, Heinemann, Melbourne, 1977; G. Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution', *Australian Law Journal* vol. 49, 1975, p. 464; Hammond, op. cit., p. 91.

[177] Hammond, op. cit., p. 99.

[178] G. Evans, *Labor and the Constitution*, op. cit., pp. 197–198.

[179] The full Court has subsequently held that the Convention Debates are admissible: *Cole v Whitfield* (1988) 165 CLR 360 at 385.

[180] 1981 Senate Committee, *Report*, p. 79.

[181] Member for Leichhardt, Parliamentary Secretary to the Minister for Industry, Science and Resources.

[182] *CPD* (H of R), vol. 226, 9 June 1999, pp. 6479, 6481.

[183] *CPD* (H of R), vol. 226, 9 June 1999, p. 6480; H. Burmester, *Section 44(v) of the Constitution—Possible Disqualification of a Member* (Legal Opinion), 9 June 1999.

broader interpretation.[184] Such an interpretation would entail a liberal construction of 'agreement' (encompassing short-term contracts), giving efficacy to 'direct or indirect pecuniary interest', and a recognition that the provision captures shareholder interests.[185] In light of the Court's recent broader interpretation of paragraphs (i) and (iv) of s 44 in *Cleary* and *Hill*, and the admissibility of the Convention Debates, it is probable that the Court would recognise the conflict of interest aim, and apply a more purposive, less technical, construction of s 44(v).

Parliamentary disqualifications should provide for regulation of executive influence and conflicts of interest. Nonetheless, as part of any wholesale proposal to reform s 44, I suggest the deletion of s 44(v) (and s 45(iii))[186] and its replacement with a provision empowering the Parliament to legislate with respect to the direct or indirect pecuniary interests of parliamentarians. The 1981 Senate Committee[187] and the Constitutional Commission[188] recommended similar changes, and as uncertainty has grown in the intervening years, the impetus for reform is now even more stark. This proposal affords flexible and relevant rules, recognising the changes over the last century in types of pecuniary interest. Clear legislative provisions will improve the efficacy of the disqualification and will avoid the problems of interpretation that have plagued s 44(v).

THE WAY FORWARD

Section 44 goes to the heart of Australian representative democracy. Increased litigation in the past decade has highlighted its inherent problems, necessitating its re-examination. It has justifiably been termed 'an obscure and antiquated area' of the law.[189] The need to have simple and unambiguous disqualification provisions is a central concern of electoral law,[190] yet largely as a result of its nineteenth century origins, a degree of uncertainty surrounds the interpretation of s 44. In light of the unfair discrimination perpetuated by s 44 against dual citizens and public servants, the provision constitutes a blot on contemporary Australian law. Some commentators have noted that it is objectionable on civil rights grounds. As demonstrated above, serious constraints on eligibility have a deleterious effect on the choice afforded to the electors

[184] S. Gageler, *In the Matter of the Honourable Warren George Entsch MP and Section 44(v) of the Constitution* (Legal Opinion), 10 June 1999.

[185] Gageler, ibid, pp. 12–13.

[186] Section 45(iii) deals with related issues and was extensively considered by the 1981 Senate Committee: 1981 Senate Committee, *Report*, pp. 80–90.

[187] 1981 Senate Committee, *Report*, pp. xi, 86.

[188] 1988 Constitutional Commission, vol. 1, p. 302.

[189] C. Howard, *Australian Federal Constitutional Law*, (3rd ed.), Law Book Company, Sydney, 1985, p. 74.

[190] Sir Maurice Byers has stated that 'Certainty in the conduct of the affairs of the Parliament is essential to the well-being of the nation': 1997 House of Representatives Committee, *Submissions*, vol. 1, S62.

and thus potentially on the quality of Australia's parliamentarians. The extent of these constraints brings s 44 into conflict with the principle of representative democracy.

As a solution to the problems of s 44, I have proposed wholesale revision of the disqualification provisions, using legislative, as opposed to constitutional, disqualifications. The proposed reform gives effect to two main principles: first, that some disqualifications are necessary to protect the Parliament, and second, that as few citizens as possible should be ineligible for Parliament, in order to afford maximum elector choice. Naturally, such amendments would require approval at a referendum. It is hoped that the injustices and the unsatisfactory nature of the current system would be recognised by the Australian people.

Disqualification

44. Any person who:

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

(ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or

(iii) is an undischarged bankrupt or insolvent; or

(iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

(v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Minister for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Vacancy on happening of disqualification

45. If a senator or member of the House of Representatives:

(i) becomes subject to any of the disabilities mentioned in the last preceding section; or

(ii) takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors; or

(iii) directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State;

his place shall thereupon become vacant.