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Photograph: Elizabeth Kwan

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## **Edward Braddon: Indian Civil Servant, Tasmanian Premier and Federalist\***

*Scott Bennett*

It has always seemed to me that the writers of the American Constitution are remembered and honoured to a much greater extent than we honour their Australian counterparts.

There are of course some Canberra suburbs and a few House of Representatives electorates that bear the names of our constitutional founders, but most of them are largely forgotten. The Senate is to be commended for including in its occasional lecture series some of the people involved in our Federation story, as in the last three years we have had Stuart McIntyre on Alfred Deakin and Ninian Stephen on John Quick, and last year we had Leslie Zines talking about Robert Garran. As someone who has written on Australian Federation, I was delighted to be able to attend those three lectures, and today I am pleased to be able to add to what is obviously going to become an annual event: the Senate's yearly acknowledgement of our Federation story.

In this lecture on Sir Edward Braddon I will be trying to do four things. I will give you a glimpse of his life before he came to Australia (and it was an extensive career); give a brief description of his political career in Tasmania; place him in the Federation

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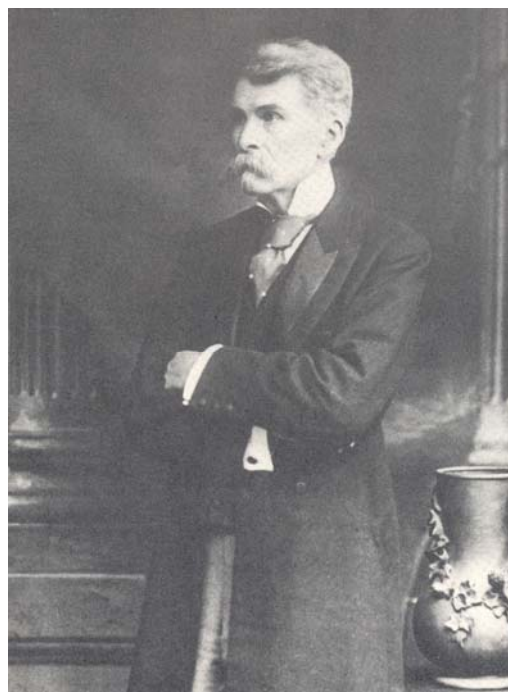
\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 8 December 2006.

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story, which of course will be the main task of the lecture; and throughout, hopefully, I will give you some sense of what Braddon was like as an individual.

This is a photograph given to me 30 years ago by a very elderly member of Braddon's English family. The date is uncertain, but Braddon's appearance matches the description of him given by Alfred Deakin at the time of the 1897–98 Convention:

An iron-grey lock fell artistically forward on his forehead, bright grey eyes gleamed from under rather bushy eyebrows, a straight nose leading to a heavy moustache and a Vandyke beard. If his locks had been longer his whole appearance would have admirably suited a Cavalier costume.<sup>1</sup>



This is a man who came to Australia in middle age to live on the North-West Coast of Tasmania, but this was after 30 years spent in India, where the story begins.

Edward Nicholas Coventry Braddon was born in Cornwall in 1829. Eighteen years later he travelled to India to work in a Calcutta merchant firm that was run by a cousin. He tells us that he found the work hard to bear; imprisoned, as he put it, behind a counting desk. To his great relief, in the early 1850s Braddon was able to flee the city when he was offered the job of managing a number of indigo factories near Krishnagar. He did this for about five years, and his life was rather more exciting than this might suggest. In July 1855 he was involved in skirmishes which were the result of the uprising of the Santal people in the Bhagulpur district of West Bengal. Two years later, during the Indian Mutiny, he saw armed service in Purnea after enlisting in a volunteer force led by George Yule, later Sir George Yule, President of the Indian National Congress.

Braddon described these martial occasions as 'a splendid substitute for the tiger-shooting which came not to my hand.'<sup>2</sup> This rather flippant comment is a reminder that hunting, often called 'shikar', was an important part of his and many other Anglo-Indian lives in the nineteenth century. In fact the title of his Indian memoirs, published in 1895, was *Thirty Years of Shikar*. Although he tells us quite a bit about his work, a great deal of the book is devoted to stories of him hunting tigers, snipe and many other animals.

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<sup>1</sup> Alfred Deakin, *The Federal Story. The Inner History of the Federal Cause 1880–1900*. Edited by J.A. La Nauze. Melbourne, Melbourne University Press, 1963, pp. 72–3.

<sup>2</sup> Scott Bennett, 'Braddon in India', *Tasmanian Historical Research Association Papers and Proceedings*, vol. 26, no. 3, September 1979, p. 71.

After the Mutiny, Braddon's life changed remarkably. The Santal insurrection had played a part in the creation in 1857 of a new province, the Santal Parganas. George Yule was appointed to head the administration, and it seems that he was responsible for Braddon's joining the Indian Civil Service as Assistant Commissioner in the division of Deoghar.

For a man such as Braddon, work as an Indian district officer was ideal. If one was a district officer at that time, much of the work was spent in the field. About six months of the year, in fact, were spent travelling around his district, and it was activity he relished. It was also a job that required a high degree of administrative skill, which he soon displayed, but most importantly, as he tells us in his memoirs, to a large degree he was on his own, relatively free from oversight and interference from his superiors. This gave him the opportunity to develop his own ideas on governmental matters and to put many of them into practice.

Braddon's work in the Santal Parganas was highly enough regarded to see him promoted five years later to the position of Superintendent Excise and Stamps in the recently-annexed province of Oudh. Today that is part of the state of Uttar Pradesh. He held the position in Oudh for 14 years. During that time Braddon gained further administrative skills and experience, for he was also appointed Superintendent of Trade Statistics and Inspector-General of Registration. He also served a period as personal assistant to the Financial Commissioner and conducted an inquiry into salt taxation. All of which gave valuable administrative skills for the Tasmanian life that was to follow. As in the Santal Parganas, his work in Oudh saw him spending a great deal of time in the field. He later estimated that he covered about 3000 miles (4800 km) a year on tour.

Braddon's memoirs show clearly how much he enjoyed the work, the hunting, and the social life of a moderately important civil servant. From all accounts his superiors were pleased with his work. Despite this, an amalgamation of various provinces in 1877 saw his position abolished, and to his annoyance he was forced into a premature retirement the age of 47. His Indian career was over. Incidentally, as well as the hunting book referred to earlier, Braddon also found time to write *Life in India*, published in 1872, during his years in Oudh. Both of his books are very readable. Perhaps he took after his sister, Mary Elizabeth Braddon, who was one of the most popular English novelists of the second half of the nineteenth century.

At the end of their Indian years, most Anglo-Indians returned home to Britain, where, it has been said, they lived out their lives in relative obscurity in places like Bournemouth or Brighton. Braddon was different, for he had no desire to retire, and he and his second wife, Alice, chose to move to a new home in the Australian colonies. Why did they come south? It seems that an important factor was the work of Colonel Andrew Crawford. During the 1870s and 1880s a number of Anglo-Indians settled in the Tasmanian North-West—not only the Braddons. They did so largely as a consequence of publicity of this area sent back to India by Colonel Crawford. Crawford was himself a former resident of India, an army officer who had settled on the Tasmanian North-West Coast. His efforts at extolling Tasmanian virtues caused a great deal of interest in the Anglo-Indian community, and it seems likely that Braddon was influenced by this. So when the Braddons left India in March 1878 they set off for Tasmania, rather than heading home to Britain.

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In Tasmania the couple soon purchased a small, rather run-down property at Leith, on the coastal road between Devonport and Ulverstone. Tasmania's North-West was largely unpopulated at this time and it has been said that the coastal community was greatly enriched by the arrival of Anglo-Indians families—people who brought invaluable skills and money to the colony. The local society 'was greatly enriched by these people who had more leisure and taste and money than most to devote to community affairs.'<sup>3</sup> Anglo-Indians left their mark on Tasmania in many ways. For example, three of them entered the Tasmanian Parliament: Andrew Crawford, Edward Braddon and Arthur Young, all before 1900. It is no wonder that people like Braddon were encouraged to stand for the Tasmanian Parliament, because they brought a great deal of experience to the colony.

Braddon's writings tell us that he and Alice played their part in the local community. Braddon was often seen on the roads around Leith, riding his white horse, in his 'blue velvet riding coat, a white waistcoat, and light corduroy trousers, [and with] a large carnation hanging from his button-hole'.<sup>4</sup> I remind you we are talking about rural Tasmania here, so he must have seemed quite an exotic flower! Incidentally, within a year of his arrival, Braddon had a series of 30 letters published in the Indian newspaper, the *Statesman and Friend of India*. These were letters in which he talked at some length about two things: his experience of settling into Tasmanian life, and his view of Tasmania and its possible future. The letters give a valuable insight into life on the North-West Coast at this time.<sup>5</sup>

In 1879 Braddon won the House of Assembly seat of West Devon. He won it by just 22 votes, a close-run thing, and his narrowest-ever victory. He had begun what John La Nauze, the Federation historian, later described as 'an elegant retirement in the game of colonial politics'.<sup>6</sup> But it was an active 'retirement'. By 1886 Braddon was Leader of the Opposition, and he served as Minister for Lands and Works in the Fysh Government during 1887 and 1888. What seemed to be the crowning achievement to his Australian career was his period in London as Tasmanian Agent-General between 1888 and 1893. When he left the Agent-General position he was 64, and it was expected that he would settle into retirement in Leith. Instead, as soon as he set foot back on the North-West Coast, he was persuaded to contest West Devon again. He was re-elected promptly. In less than a year he was Leader of the Opposition, and barely a year after that, after the Dobson Government suddenly collapsed in April 1894, Braddon became Premier. He held this position until 1899, despite the fact that his government had not been expected to last long. When it finally lost office in December of that year, it was the longest-serving Tasmanian government to that time.

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<sup>3</sup> G.T. Stilwell, 'Andrew Crawford', *Australian Dictionary of Biography*, vol. 3, Melbourne, Melbourne University Press, 1969, p. 491.

<sup>4</sup> John Reynolds, 'Premiers and Political Leaders', in F.C. Green (ed.), *A Century of Responsible Government 1856–1956*. Hobart, n.d. [1956?], p. 195.

<sup>5</sup> See Edward Braddon, *A Home in the Colonies: Edward Braddon's Letters to India from North-West Tasmania, 1878*. Edited by Scott Bennett. Hobart, Tasmanian Historical Research Association, 1980.

<sup>6</sup> J.A. La Nauze, *The Making of the Australian Constitution*. Melbourne, Melbourne University Press, 1972, p. 103.



Several things stand out in the Braddon Government story. After the severe depression of the early 1890s, it helped restore Tasmania's finances. This was partly due to the severe reduction of the number of Tasmanian public servants. 'Braddon's Axe', as it was referred to, was swung, removing from the public service a great many officers. The Government also encouraged the expansion of industry, and many public works were constructed. It enticed Tattersalls Lotteries from Melbourne to Hobart. Of great later significance, proportional representation was introduced to the House of Assembly elections, the first time it was used in Australia. The Tasmanian historian, John Reynolds, has spoken of the Braddon Government as being 'a terror to the Hobart clique' who had long sought to dominate the colony.<sup>7</sup>

A socialist journal, *The Clipper*, described Braddon in verse:

Keen eyed, quick witted, a man who knows  
The way to wheedle friends and vanquish foes.<sup>8</sup>

As Premier, Edward Braddon certainly left his mark, but of course there was more to come, particularly in the area of Australian Federation, and that is where we go for the rest of today's lecture.

The following illustration is one of the number of simple cartoons of the 1897–8 Federation Convention members published in the journal *Quiz*.<sup>9</sup> The drawing of Braddon fits another contemporary description of him:

Almost as thin as [Fredrick] Holder [of South Australia], slight, erect, stiff, with the walk of a horseman and the carriage of a soldier, he had the manner of a diplomat and the face of a mousquetaire.<sup>10</sup>



Like many other Tasmanian politicians, Edward Braddon had long supported the union of the six Australian colonies. For over five years he had been a member of the Federal Council of Australasia, serving as president in 1895, and he also hosted the 1895 Premier's Conference, at which the push towards Federation was officially revived. Nothing came of the constitution drafted at the Convention of 1891, and it was only in the mid-1890s that the move to Federation was reborn, and the 1895 Premiers' Conference was an important part of that development. Braddon was not only a keen federationist, he was also a keen supporter of imperial federation—the federation of all British colonies under British rule. The ideal of imperial federation had a number of adherents in Australia and elsewhere throughout the British Empire

<sup>7</sup> Reynolds, op. cit., p. 195.

<sup>8</sup> *The Clipper*, 30 September 1899.

<sup>9</sup> *Quiz*, 8 April 1897.

<sup>10</sup> Deakin, op. cit., p. 72.

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during the late nineteenth century. It is hard to imagine now that the ideal saw colonies like New Zealand, Australia and Canada coming together in an imperial structure, with Britain at its heart. Braddon saw the union of the Australian colonies as the first step along that path, and in 1888 he had helped establish the Tasmanian branch of the Imperial Federation League.

Most of what follows deals with Braddon's activities at Federation Convention of 1897–8 and thereafter. It was this Convention, held successively in Adelaide, Sydney and Melbourne, which produced most of the final Australian Constitution. Five colonies attended, Queensland being the exception. Braddon was one of ten Tasmanians elected to represent his colony at the Convention's deliberations.

As the five premiers who attended were to be ex-officio members of all committees at the Convention, it was likely that Braddon would play an important part, and this proved to be the case. By contrast, the remainder of the Tasmanian delegates made little mark. In fact, one measure of Braddon's relative importance in the Tasmanian contingent is that he spoke for well over one-third of the time taken up by the Tasmanian delegates. Despite this, Braddon was distinctive among politicians of the time—his speeches were usually short! In fact on one occasion at the Melbourne session he actually apologised that he might not have spoken long enough on a particular issue,<sup>11</sup> but I don't think any of his fellow delegates, used to the lengthy orations of people like Alfred Deakin or George Reid, were bothered by this. In fact, he was occasionally praised for his conciseness.

However, it would have been clear to those listening to Braddon's contribution at the Convention's opening that his views, however briefly expressed, reflected the main attitudes to Federation held in the smallest colony.<sup>12</sup> For example, he expressed his belief that the two great advantages of Federation, at least for Tasmania, would be a federated defence arrangement, together with the abolition of customs duties in trade between the Australian colonies. Tasmanians had long resented the fact that they had not been able to get into the Victorian market, which was strongly protectionist. Support for a federated defence and support to the abolition of customs duties were views very widely held across Bass Strait.

However, Braddon also believed that the abolition of internal customs duties was actually dangerous for the smaller colonies and he was adamant that the financial health of these colonies had to be protected in the new constitution. We shall return to this issue.

On another matter (of relevance to our location today on the Senate side of Parliament House) was that Braddon was very much in favour of a strong upper house. He stated consistently that the upper house should be strong and should have a very considerable power to block and amend legislation. As a consequence of that he was one of the delegates who supported the insertion into the Constitution of what eventually became section 24, the nexus clause, where it says that the House of Representatives shall be as nearly as practicable twice the size of the Senate. In

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<sup>11</sup> Australasian Federal Convention, Melbourne session, 11 March 1898, p. 2321. The Debates of the Australasian Federal Conventions of the 1890s are online at [www.aph.gov.au/senate/pubs/index.htm](http://www.aph.gov.au/senate/pubs/index.htm).

<sup>12</sup> Australasian Federal Convention, Adelaide session, 24 March 1897, pp. 63–9.

addition, he was one of those delegates who believed that the upper house should be called the 'States' House', for he thought that name would get the message home as to what the role of the upper house should be.

Unlike some in eastern Australia, Braddon also believed in the importance of Western Australia coming into the Australian Federation. He said it was important that the Convention delegates make every effort to ensure the participation of that far distant colony. The reason for that seems to have been that he believed that the smaller colonies had a common cause to protect themselves against New South Wales and Victoria, and Western Australia would be an important part of that likely struggle.

On more general issues, where there was not necessarily a small state view, Braddon supported responsible government, as distinct from the US model. His former Attorney-General, Andrew Inglis Clark, himself an important federationist, was very keen on the American model, but Braddon was one who supported responsible government, where the government of the day remains so while it controls the lower house.

Braddon also believed the Senate should be an elected body—unlike some of his colleagues. The 1891 draft Constitution had not made the Senate an elected body, but this was not surprising. At that time the upper houses of the UK, New Zealand and the USA were not elected, and many Australians believed that the same should apply to any new national upper house. Braddon also believed that amendment of the Constitution should be difficult, and he believed that courts should decide disputed elections, taking such electoral matters out of the hands of the politicians. He believed in a uniform franchise across the country, with no favouring of property. At this time Tasmania still did not have full adult suffrage despite his government's attempt to introduce it, and Braddon was very keen that this should not be the case for Australia as a whole.

Braddon spoke strongly of his belief that the place of public servants should be protected in the new constitutional arrangements. He was one of the few delegates in fact to show any interest in the future administrative arrangements. He also believed that the people should be part of the constitution-writing process by being asked to vote on the Constitution Bill once it was written. He was also in favour of the retention of Privy Council appeals, claiming it would be a 'lamentable mistake' were the Convention to weaken 'one of the strongest links that connect us with the British nation'.<sup>13</sup> This last point is a reminder that like most other delegates, Braddon saw Australia as part of something larger—the British Empire. He was, after all, an imperial federalist.

Braddon shared with some other Convention delegates the belief that the Commonwealth government would not be large, for it would have relatively few responsibilities. It might have the defence of the country to worry about, and it might need to mint a few coins or a few stamps, but he thought not much more than that would need to be done by the national administration. Braddon believed it was better not to load the Commonwealth Parliament with tasks like conciliation and arbitration, which were best done at the state level. He claimed that giving the conciliation and

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<sup>13</sup> Australasian Federal Convention, Melbourne session, 11 March 1898, p. 2322.

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arbitration power to the Commonwealth Parliament would be to increase, rather than diminish, the difficulties of industrial disputes. It would possibly interfere with what he called ‘trades unionism’, and it would certainly interfere with employers and employees. All of which meant that something like conciliation and arbitration should remain very much the province of the states, rather than the national government.<sup>14</sup>

Above all else, and like the other nine Tasmanians, Braddon was a small states defender, concerned that a balance should be kept between the need to establish a democratic nation, and at the same time ensuring that the less-populated states were not swamped. As he put it to his fellow delegates:

If I ask for consideration for the smaller States, it is for the one great reason that I want the people in the smaller States to come in [to the new Australian nation].<sup>15</sup>

There is no doubt that from the perspective of the smaller colonies, there was a need to remain alert, for some of the large colony delegates did not hold the minnows in high regard. Sir Joseph Abbott of New South Wales, for instance, on one occasion denied that the defence issue had any relevance of Tasmania, asserting, ‘a fleet would pass it by without knowing it was there.’<sup>16</sup>

In regard to the ‘small state’ issue Braddon, like many others at the Convention, found New South Wales Premier George Reid difficult to deal with. On a number of occasions Reid attacked the small colonies, expressing his resentment that:

... those who represent a minority of the taxpayers gain their way and mould this instrument, which was designed to express the national will ...<sup>17</sup>

By ‘National’, of course, Reid meant New South Wales. Braddon responded with an attack upon Reid’s ‘ludicrous’ and ‘inexcusable’ charges against Tasmania.<sup>18</sup> Alfred Deakin later wrote of Braddon bringing to the Convention ‘an element of manners’,<sup>19</sup> but on one occasion even the normally diplomatic Tasmanian let fly against large-colony arrogance, asserting angrily that: ‘Size is not everything. A bladder may be large, but there is little in it.’<sup>20</sup>

Despite the provocation from delegates like Reid, it is clear that Braddon’s dry wit helped keep Convention relationships reasonably amicable. His running gag throughout the Convention was of having Hobart designated as the new national capital. At one stage in Melbourne, the Convention considered amendments suggested by the colonial parliaments, including the New South Wales Legislative Council’s

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<sup>14</sup> Australasian Federal Convention, Adelaide session, 17 April 1897, pp. 791–2.

<sup>15</sup> Australasian Federal Convention, Adelaide session, 24 March 1897, p. 66.

<sup>16</sup> Australasian Federal Convention, Adelaide session, 13 April 1897, p. 495.

<sup>17</sup> Australasian Federal Convention, Melbourne session, 9 March 1898, p. 2138.

<sup>18</sup> Australasian Federal Convention, Melbourne session, 9 March 1898, p. 2155.

<sup>19</sup> Deakin, *op. cit.*, p. 73.

<sup>20</sup> Australasian Federal Convention, Melbourne session, 1 March 1898, p. 1713.

claim that the Constitution should designate Sydney as the capital city, a proposal with which William Lyne of New South Wales agreed. Josiah Symon of South Australia countered with the suggestion of Mount Gambier, while Dr Cockburn of the same colony suggested Adelaide. ‘Nonsense’, said Braddon, ‘Nature has fixed upon Hobart as the capital. Everything points to it or some other place in Tasmania as the capital.’ Sir John Forrest of Western Australia was horrified: ‘But you would need a bridge [to get] across [to it]’, he objected. ‘All that would be done by the Commonwealth’, replied Braddon, showing a clear understanding of Tasmania’s future relationship with the national government. ‘Would Launceston do as well?’ asked another mainlander. ‘I will not say anything against Launceston’, said a Premier well-alert to Tasmanian regional rivalries.

To conclude this piece of by-play, Braddon assured honourable members, with tongue in cheek, that after Hobart *was* selected as the capital city, when members and senators travelled south to take up their parliamentary seats they would ‘be making *no* sacrifice of health *or* personal comfort.’<sup>21</sup>

Such an ability to defuse tense situations no doubt helps explain John Downer’s view of Braddon, expressed in a letter to Samuel Griffith of Queensland. Braddon was, said the South Australian, ‘a very charming and interesting man to have at the Convention’.<sup>22</sup> Alfred Deakin described the Tasmanian as an ‘accomplished strategist’ and furthermore, an ‘admirable negotiator’.<sup>23</sup> All of which suggests that Braddon probably played an important part in helping the Convention do its work reasonably smoothly, particularly when its members were away from the Convention floor. At the same time, a reading of the Convention debates shows quite clearly that Braddon never lost sight of who had sent him to the Convention. As the Constitution-writing progressed, the Tasmanian Premier remained ever-alert on the need to defend the place of the smaller colonies. If there is any criticism to be made of him, it would be that he could have spent more time on the big-picture issues than he actually did. In his determination to protect the place of the smaller states, he tended to let others focus on the bigger questions.

In fact it was a result of his determination to look after Tasmania’s best interests that he gained his greatest notoriety—at least on the mainland. The view at home was rather different. Thirty years ago I was talking to an elderly man on the North-West Coast of Tasmania. He was a man who had known Braddon, and as we discussed his career, he suddenly said: ‘You realise of course Braddon was responsible for the “Braddon Blot”?’ For him the memory remained strong, and something for which Braddon deserved praise. Of what was he talking?

As I have said, supporters of Federation were adamant that Australia be rid of the tariffs that separated the six colonies. The major problem here, though, was the great dependence of the colonies on all the tariffs they collected. They were in fact far more important than income taxation at that time: Western Australia gained 91 per cent of its finances from tariffs, Tasmania gained 76 per cent, and even the supposedly free-

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<sup>21</sup> Australian Federation Convention, Melbourne session, 8 February, 1898, p. 702.

<sup>22</sup> Downer to Griffith, 29 April 1898, Griffith Papers, ADD 452, Dixson Library, State Library of New South Wales, Sydney.

<sup>23</sup> Deakin, *op. cit.*, p. 73.

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trade colony of New South Wales gained about 60 per cent of its money from tariffs. The obvious and crucial question for Convention delegates was what would happen to the states' finances in the new federal nation when internal free trade had been put into place.

A lot of time was spent at the 1891 and the 1897–8 Conventions grappling with this issue, and Braddon was one of the number of small colony delegates who believed that a foolproof way of protecting the finances of the smaller states should be inserted into the Constitution. In due course, Chapter IV of the Constitution was written to achieve this:

- Section 87 said that not more than one quarter of the money raised in customs and excise duties could be used for Commonwealth purposes. The remainder was to be paid to the States, or applied to the payment of interest on State debts if these should be taken over by the Commonwealth.
- Section 93 guaranteed payments to the States for 5 years after a uniform tariff was established.
- Section 94 said that the payment of all surplus Commonwealth revenue was to be given to the States.
- Section 95 allowed Western Australia to remove its tariffs over a five-year period.
- Section 96 gave the Commonwealth the power to make grants to any State for at least 10 years.

Let us go back to the first of these provisions. Something like Section 87 had been suggested in different forms by various delegates throughout the Convention's three sessions, but nothing had come of it. As the last days of the third session drew near, Tasmanian delegates started to worry that nothing would be done. On the fourth-last day of the Convention, Braddon brought forward the first draft of what eventually became Section 87, and after some discussion it was passed. That section quickly became known at the time as 'the Braddon clause'. It was carried by a vote of 21 to 18, though New South Wales delegates voted 8 to 1 against it. The Convention came to a close soon after.

Although illness had limited Braddon's activity at the second session of the Convention in Sydney, his overall contribution had been important. Deakin believed his efforts to have been significant, placing him in what he described as the 'second rank' of delegates, in a list that included Bernhard Wise, Henry Bournes Higgins and John Downer.

Braddon's final address at the Federal Convention was characteristically brief, but gracious. He noted that delegates were all necessarily influenced by the interests of their colonies, but believed this was 'as natural as it was excusable'. The smaller States had been defeated on the question of the Senate's power in relation to money bills, but he assured his listeners that they accepted their defeat 'with gracefulness'. And if the smaller states occasionally lost a battle, 'well, it has been said somewhere that "Failure is God's road to success".' Braddon expressed his belief that Tasmanians

would support the Commonwealth Bill, and he was sure that he and his colleagues could get their fellow Tasmanians to vote to accept the Bill. He ended his time at the Convention with a flourish:

... to my mind it is a Bill which appeals thoroughly to the people, the great masses of the people, for whom we have prepared it ... the people will dominate—dominate as they should do, reasonably and in a wholesome way—and nothing will be possible to be done except with the assent of the people.<sup>24</sup>

Braddon's Federation work did not stop here, for he was soon involved in the two referenda campaigns of 1898 and 1899. Voters were given the opportunity to approve or reject the draft constitution before it was sent to London for parliamentary approval. In Tasmania the referenda campaigns were organised by two Federation leagues—one in the north, and the other in the south of the colony. According to one observer, Tasmanian political leaders such as Braddon, Sir Philip Fysh, Neil Lewis and Henry Dobson, all premiers in their time, were happy to 'offer themselves as privates in the ranks of the little Federal Army', being prepared to speak anywhere around the island, wherever or whenever the leagues asked them to. One historian has described Braddon as being in his element, speaking 'from balconies, buggies and on street corners with an enthusiasm unusual in a seasoned public man'.<sup>25</sup>

As part of his campaign efforts, in May 1898 Braddon issued a manifesto to electors in which he spelled out the reasons for voting 'yes' in the forthcoming referendum:

- it would enable 'this small colony' to be 'a sharer in all the advantages that will flow to every province'
- voters were being asked 'to give up provincialism for a broader national life'
- all people would benefit from free markets
- there would be a demand for labour due to an increase in industrial activity
- there would be 'security against hostile aggression'
- if Tasmania stayed out, it would suffer as 'a small fragment of that outside world' that would be blocked by Commonwealth customs barriers
- in particular, the New South Wales market would be barred to Tasmanian products
- in conclusion, Braddon noted with great pleasure that 'the Senate [would] exist for the representation and protection of state rights and state interests', and that, he asserted, 'as much as anything, commends the Constitution to me'.<sup>26</sup>

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<sup>24</sup> Australian Federation Convention, Melbourne session, 17 March 1898, pp. 2479–80.

<sup>25</sup> Reynolds, *op. cit.*, p. 200.

<sup>26</sup> *Examiner* (Launceston), 28 May 1898.

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A contemporary letter to the Launceston *Examiner* gives a flavour of Braddon's efforts. It shows one voter's feeling of confidence in what the Premier had to say:

On Monday evening last I had the pleasure of being present to hear the Hons. Sir E. Braddon and Mr N. Cameron ... Sir Edward, although not at his best, acquitted himself very satisfactorily and carried the very large audience present with him, and I may say that many who had been wavering before, on hearing his views on Federation have now made up their minds to support it. They feel convinced that the Hon. Premier, at his advanced age [of 69], would not advocate the cause if he had the slightest idea it would be a bad bargain for us ... .<sup>27</sup>

These words are a reminder of latter-day South Australian Premier John Bannon's comment that the presence of a stable group of five premiers in office at the time, was important to the advent of Federation, because he believed those five men created trust and co-operation in their own communities.<sup>28</sup>

Two months after the Convention, referenda were held in four of the colonies—Western Australia and Queensland did not move on the matter at this stage. The Commonwealth Bill was accepted by wide margins in Victoria, South Australia and Tasmania. In New South Wales the Bill required not only a 'yes' majority, but at least 80 000 votes in favour. There was much opposition to the Bill in New South Wales; Premier Reid wanted to get the message across that his colony would like to come in to the new nation, but it was not going to do so without some concessions.

Many aspects of the Commonwealth Bill were criticised. There was fierce opposition in relation to the powers of the Senate, which was attacked as an undemocratic body. The prospect of an increase in customs duties also upset people, as New South Wales had long prided itself on its free trade policies. But in particular, the finance clauses in Chapter IV were resented, with most vitriol reserved for what the *Daily Telegraph* had described as a 'blot' on the Constitution, namely the 'Braddon Clause'. This, naturally enough, was soon referred to as the 'Braddon Blot'. 'The Braddon Blot', thundered Labor politician Billy Hughes, was 'abhorrent to the free trader and detestable to the protectionist'.<sup>29</sup> On polling day the Bill failed in New South Wales, for although there was a majority in favour, the affirmative vote of over 71 000 was short of the required figure of 80 000. Federationists like Braddon were devastated, for the other colonies would not proceed without the 'Mother Colony'.

The photograph below shows five of the premiers in 1899. In the back row we have Edward Braddon, with John Forrest from Western Australia. Front left is George Turner of Victoria, Charles Kingston from South Australia is in the centre and George Reid is on the right. It is a photograph taken in Melbourne in early 1899 when the Premiers met to discuss the draft constitution. The Premiers had realised that it was

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<sup>27</sup> 'Federation', letter to the *Examiner* (Launceston), 24 May 1898.

<sup>28</sup> John Bannon, 'South Australia', in Helen Irving (ed.), *The Centenary Companion to Australian Federation*. Melbourne, Cambridge University Press, 1999, p. 156.

<sup>29</sup> L.F. Fitzhardinge, *That Fiery Particle, 1862–1914: A Political Biography, William Morris Hughes, vol 1*. Sydney, Angus and Robertson, 1964, p. 92.



important for them to move the Federation process along, but was also important that they be seen to be listening to New South Wales' concerns. So they met in Melbourne to see if they could push matters to a resolution. This was the so-called 'secret' Premiers' Conference, which was not open to press and public.



The Five Premiers. Courtesy of the National Library of Australia

George Reid was happy that the meeting was taking place, because he used this as the opportunity to delete the 'Braddon Blot'. In fact, the Blot was retained, because as the Premiers debated the issue, Reid came to realise that all suggested alternatives to the Blot were actually worse than the Blot itself. However, as a compromise, the premiers agreed that Section 87 would operate for ten years, and thereafter until the Parliament otherwise provided. With that Reid had to be satisfied. Referenda were scheduled for later in 1899—Queensland now taking part—though Western Australia still held off giving its voters the chance to have their say.

Braddon was now certain of the acceptance of the Commonwealth Bill, despite having to deal with an attack upon it by the Tasmanian Statistician, Robert Mackenzie Johnston. Presciently, Johnston believed that the finance clauses would not work as hoped, and that the Commonwealth would soon become financially dominant. In response, Braddon and the other Tasmanian federationists were careful not to criticise the highly regarded statistician, but chose simply to assert their faith in the fairness of any future Commonwealth Parliament in its negotiations with the states. In fact, Johnston's fears may well have been irrelevant to the result. In 1898 Tasmania had voted 81.3 per cent in favour of the Bill; in 1899 support jumped to 94.4 per cent, the highest affirmative vote among the colonies. The outcome suggests that there had never been any real doubt that Tasmania would support the Constitution Bill. All colonies eventually voted in favour, of course, and came together on the first of January 1901.

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Edward Braddon had been an important participant in this seminal occasion in Australia's modern history. A footnote to our story is that he still did not retire, but contested the first election for the House of Representatives. The Tasmanian arrangements were that the state voted as a whole, and with a personal vote of 26.2 per cent, the veteran topped the poll. The 71 year-old was, in effect, the first Tasmanian elected to the House. He remains the oldest from any state to be elected to our national Parliament. He was re-elected in 1903, but seven weeks after that he was dead.

In conclusion, I quote a New South Wales Federation Convention delegate, Joseph Carruthers. Writing 20 years after the events described here, Carruthers obviously regarded Braddon very highly, describing the Tasmanian politician as having

[C]ommanded respect for his views at all times by his quiet and respectful, though determined manner of presenting them to his colleagues.<sup>30</sup>

On 12 May 1951 at Commonwealth Jubilee celebration ceremony in the Devonport Town Hall, Edward Braddon was the Tasmanian honoured for his participation in the achievement of Australian Federation.



**Question** — May I ask why you chose Braddon above all others?

**Scott Bennett** — That's a question that a number of Tasmanians could well ask. When in 1951 Braddon was honoured in the way that I have just described, it caused some unhappiness in Tasmania, because many people believe that Andrew Inglis Clark, who had been at the 1891 Convention, and whose work is seen very clearly in section 51 of the final Constitution, should have been the man so honoured. Why Braddon? Well I think Bannan's point that the premiers were key players in this is an interesting one, and so Braddon was the one I chose, rather than Clark. Braddon is less well-known than Clark, and he is someone whose career I have long followed.

**Question** — Since the time of Braddon we've had Commonwealth-state financial relations and Premiers' Conferences, and the states conceded their income-tax power. Since then we've had the GST and the way that that revenue is distributed in exchange for the states ceding more of their taxation powers. In a way you could look at Braddon and say that perhaps he was being parochial, or he was thinking of the short term. But perhaps in another way he was putting his finger on an inherent

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<sup>30</sup> *A Lifetime in Conservative Politics. Political Memoirs of Sir Joseph Carruthers.* Edited by Michael Hogan. Sydney, UNSW Press, 2005, p. 141.

tension that was always going to remain within the federation and is still something we have to grapple with today.

**Scott Bennett** — I've just been writing a paper for the Parliamentary Library on the state of our federal system. When I was looking back at those early years it was so clear to me, having Braddon in my head as well, that within a couple of years of Federation, within a couple of years of 1 January 1901, Deakin was talking about the states being bound to the chariot wheels of the Commonwealth, and he meant in financial terms. The historian John Craig has said that in fact even before the end of the first year of the new Commonwealth, there was disillusionment in Tasmania at least, if not the other states, because it was quite clear that the Commonwealth would become dominant, particularly in financial terms. I think when we look at the history of Commonwealth-state relations since 1901, it's quite clear that for all that work done, it *was* for nought, because hardly anything in Chapter IV worked as it was designed to do, and the Commonwealth within a very short time was in fact financially dominant—and has become more and more so.



## **Australian Parliaments and the Protection of Human Rights\***

*Simon Evans and Carolyn Evans*

This lecture draws on a research project, funded by the Australian Research Council, that we have been jointly engaged in since early 2004.<sup>1</sup> This is a work in progress and some of our conclusions are tentative. One aspect of the work is a series of interviews with parliamentarians, legislative drafters, committee staff and advisers to identify aspects of the existing processes that are not apparent from the public record. These interviews are ongoing and we would very much welcome the opportunity to talk with anyone who is able to contribute to this process. We anticipate publishing the further results of the project during 2007.

### **1.1 Two Problem Cases**

Our topic today is Australian parliaments and the protection of human rights. We want to start by giving two examples of legislation passed by Australian state parliaments in the last two years that illustrate some of the limits of the parliamentary contribution to the protection of human rights.

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 8 December 2006.

<sup>1</sup> This research was supported by the Australian Research Council through a Discovery Project on Australian Parliaments and Human Rights (DP0450991).

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*Serious Sex Offenders Monitoring (Amendment) Act 2006 (Vic)*

The *Serious Sex Offenders Monitoring (Amendment) Act 2006* (debated and passed by the Victorian Parliament in October 2006) amends legislation which was passed by the Victorian Parliament in 2005, to establish ‘a scheme for the extended post-sentence supervision of high-risk child-sex offenders in the community.’<sup>2</sup> The 2005 legislation empowers courts to make extended supervision orders, enabling strict monitoring of the location and behaviour of sex-offenders by the Secretary of the Department of Justice and the adult parole board for a period of up to 15 years after they have completed their sentence. Among its powers under the Act, the parole board can direct where a convicted offender is to reside.<sup>3</sup>

The 2006 amending legislation was prompted by the Supreme Court’s decision that it was unlawful for the adult parole board to direct Robin Fletcher (a convicted paedophile) to live within the grounds of the Ararat prison after he had completed his sentence. The purpose of the amendment was to ‘clarify that the adult parole board may impose residence requirements under an extended supervision order to direct an offender to reside at a place that is located within the perimeter of a prison, whether inside or outside the prison wall, but does not form part of the prison.’<sup>4</sup>

The amendment was ‘pushed through’ both houses of Parliament in a single day in the last sitting week before the 2006 election.<sup>5</sup> The bill was characterised as an expression of the Parliament’s true intentions in drafting the 2005 legislation: ‘it restores the situation the government and all of the community wants to see exist.’<sup>6</sup> During the course of the debate, the bill was not opposed by any speaker in either house, although some members argued for more drastic measures.<sup>7</sup> The arguments presented in favour of the bill focused on the high rate of recidivism among sexual offenders,<sup>8</sup> the need to protect the community,<sup>9</sup> and, somewhat surprisingly, the rehabilitation of offenders.<sup>10</sup>

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<sup>2</sup> *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3465 (Tim Holding, Minister for Corrections).

<sup>3</sup> Section 16(3)(A).

<sup>4</sup> *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3465 (Tim Holding, Minister for Corrections).

<sup>5</sup> *Victorian Parliamentary Debates*, Legislative Council, 3 October 2006, 3801 (Peter Hall).

<sup>6</sup> *Victorian Parliamentary Debates*, Legislative Council, 3 October 2006, 3801 (Chris Strong).

<sup>7</sup> See e.g. *Victorian Parliamentary Debates*, Legislative Council, 3 October 2006, 3805 (Dianne Hadden): ‘This is another knee-jerk, half-baked bill, and it does not go all the way to protecting the community, which is the primary purpose of the Serious Sex Offenders Monitoring Act.’

<sup>8</sup> ‘The changes in this bill are a reaffirmation of the Bracks government’s commitment to ensuring the highest levels of safety for Victorians while minimising the risk of recidivism by serious sex offenders.’ *Victorian Parliamentary Debates*, Legislative Council, 3 October 2006, 3803 (Jenny Mikakos); ‘I understand there is a high rate of recidivism amongst paedophiles. That is probably one of the more revolting offences that one can think of and is the reason we are moved to pass this sort of draconian legislation.’ *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3594 (Andrew McIntosh).

<sup>9</sup> ‘... if the only practical solution to protect the community was to keep an offender in the precincts of a jail, then so be it, that should be the position.’ *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3594 (Andrew McIntosh).

<sup>10</sup> ‘These purposes are to protect the community and promote the offender’s rehabilitation, care and treatment.’ *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3465 (Tim Holding, Minister for Corrections); ‘It will ensure that offenders who are subject to extended supervision orders can be properly rehabilitated and receive the treatment and supervision they

Some speakers referred to the rights of children and victims of sexual assault. The only substantial mention of the rights of the offender was offered by the Shadow Attorney-General, Mr McIntosh, who expressed concerns about the retrospective effect of the law, particularly in reversing the court's decision on the legality of the order made in relation to Mr Fletcher.<sup>11</sup> Notwithstanding his concerns, Mr McIntosh concluded that the amendment was necessary 'to effect what the community expected was going to be the case.'<sup>12</sup> The Minister for Corrections attempted to sidestep the retrospectivity issue by reference to the fact that the amendment was merely an expression of the law that Parliament had originally intended to enact—though that law could itself be seen as authorising a retrospective increase of the sentence imposed by a court.<sup>13</sup>

The Act may well be an appropriate response to a real risk. But what is striking is how it was debated in Parliament with scant attention to human rights issues. International human rights treaties recognise a right not to have a heavier penalty imposed than applied at the time that the offence was committed.<sup>14</sup> That right is also recognised in the Victorian Charter of Human Rights and Responsibilities which comes into force on 1 January 2007.<sup>15</sup> Only one member mentioned this issue, asserting that in the circumstances of Mr Fletcher, the extended supervision order did not constitute an additional penalty.<sup>16</sup> The human rights of offenders, particularly notorious offenders, will always struggle for traction in political debate—particularly in the run-up to an election. But a commitment to human rights requires attention to the human rights of all—*especially* the unpopular and the marginalised. Explaining how and why this Bill was a justified limitation of human rights is as important in demonstrating a commitment to human rights as enacting a human rights Charter.

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require to allow them someday to re-enter society.' *Victorian Parliamentary Debates*, Legislative Council, 3 October 2006, 3803 (Jenny Mikakos).

<sup>11</sup> *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3595 (Andrew McIntosh):

Have no doubt what we are doing here. If a person has been to court, no matter if it happens to be someone as reprehensible as Mr Fletcher, that person has been to court and has had his rights declared, just as it is the right of any citizen to go to court to have those rights vindicated or declared by the court.

Notwithstanding that right being declared, we are introducing a piece of legislation that will deliberately quash those rights that have been declared by a court. It is a significant step and should not go without some sort of comment today.

<sup>12</sup> *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3595 (Andrew McIntosh).

<sup>13</sup> *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3596 (Tim Holding, Minister for Corrections):

In a sense the legislation does not so much deprive someone of a previously existing right, although it deprives them of a right as declared by the Supreme Court, as assert the legal situation that the government thought existed anyway—that is, the right of the adult parole board to validly enact that as a condition of an extended supervision order. That is the reason why we have made this retrospective.

<sup>14</sup> ICCPR Article 15; ECHR Article 7.

<sup>15</sup> Section 27(2).

<sup>16</sup> *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3595 (Jude Perera).

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*Law Enforcement Legislation Amendment (Public Safety) Act 2005 (NSW)*

*The Law Enforcement Legislation Amendment (Public Safety) Act 2005 (NSW)* was debated and passed by the NSW Parliament as a response to the violence of the Cronulla riots.<sup>17</sup> It was said to be necessary to increase police powers to enable them to ‘prevent or defuse a large-scale public disorder’.<sup>18</sup> The bill contained provisions that gave the police powers to institute roadblocks and lockdowns.<sup>19</sup> It also authorised police officers to impose emergency closures of licensed premises,<sup>20</sup> established emergency alcohol-free zones,<sup>21</sup> increased the maximum penalties for the offences of assault,<sup>22</sup> riot<sup>23</sup> and affray<sup>24</sup> and created presumptions against bail for a number of public disorder offences.<sup>25</sup>

There was virtually no opposition to the passage of this legislation, particularly in the Legislative Assembly. Indeed, the majority of opposition MPs seemed to think that the bill did not go far enough.<sup>26</sup> The measures recommended by the opposition included: boosting police numbers to deal with ethnic crimes,<sup>27</sup> requiring everyone in a special zone to produce their identity upon demand by the police, the introduction of standard non-parole periods for riot and affray and laws targeting gang leaders.<sup>28</sup>

Some dissent was voiced by minority parties in the Legislative Council. The Greens voiced concerns regarding both the speed at which the bill was being passed and its extension of police powers: ‘The bill is an ill-conceived and knee-jerk response. It is more about public relations than reality.’<sup>29</sup> The Democrats also questioned the necessity of the bill.<sup>30</sup>

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<sup>17</sup> See, e.g., *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20632–3 (Barry Collier); 20621 (Morris Iemma); 20628 (Frank Sartor); 20622 (Morris Iemma); and 20626 (Carl Scully); *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20582 (John Della Bosca).

<sup>18</sup> *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20621 (Morris Iemma). See also *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20582–3 (John Della Bosca); 20584 (Duncan Gay); 20589 (Fred Nile); *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20626 (Carl Scully); 20621–2 (Morris Iemma); 20625 (Carl Scully).

<sup>19</sup> Law Enforcement Legislation Amendment (Public Safety) Bill 2005 (NSW) sch 1, ss 87I–87L.

<sup>20</sup> *Ibid.* sch 1, s 87B(1).

<sup>21</sup> *Ibid.* sch 1, s 87C(1).

<sup>22</sup> *Ibid.* sch 2, s 59A.

<sup>23</sup> *Ibid.* sch 2, s 93B.

<sup>24</sup> *Ibid.* sch 2, s 93C.

<sup>25</sup> sch 3, s 8D.

<sup>26</sup> *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20623 (Peter Debnam); 20630 (Andrew Stoner).

<sup>27</sup> *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20623–4 (Peter Debnam).

<sup>28</sup> *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20626–7 (Andrew Tink).

<sup>29</sup> *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20586 (Lee Rhiannon).

<sup>30</sup> *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20591 (Dr Arthur Chesterfield-Evans).



There was very little discussion of the rights impact of this bill. Although the police minister, Carl Scully, did acknowledge potential civil liberties concerns in general terms, he argued that the bill struck the appropriate balance between civil liberties and the protection of the community. He referred to oversight by the Ombudsman, the bill's sunset provision and the limitation on the number of police that can exercise these powers, as elements of this balance.<sup>31</sup> Democrats member, Dr Arthur Chesterfield-Evans noted the potential of the enhanced police powers to violate civil liberties, however, he did not discuss the rights impact of these provisions in any detail.<sup>32</sup> Greens member, Ian Cohen, was the only member to identify specific human rights that would be (or might be) infringed by the bill.<sup>33</sup>

As with the Victorian Act, this Act may well be an appropriate response to a real problem. But again, the attention given to human rights issues does not appear to be proportionate in its specificity and depth to the seriousness of those issues.

## **1.2 Australian Parliaments and the Protection of Human Rights**

Is that something we should expect? Why should proportionate attention to human rights be something that we expect of Australian Parliaments?

### *Human Rights Matter to Australians*

Human rights are a standard that ordinary Australians believe to be relevant in judging Australian society and its constitutional arrangements.

In one study carried out by Mike Salvaris, respondents were asked to rate the importance of various indicators of what makes a good society. The indicators ranked most highly were the observance of high standards in public life, equal and fair treatment under law and that 'basic human rights of all citizens [are] strongly protected.'<sup>34</sup> When asked what were the most important things that should be in the *Australian Constitution*, the most highly ranked answer was that the *Constitution* should 'define and guarantee the basic human rights of all Australian citizens.'<sup>35</sup> They also thought that the *Constitution* should protect right to public health and education and the right to an electoral system in which votes are weighted equally.

A survey conducted by Brian Galligan and Ian McAllister in 1991 (some years ago now) also found strong popular support for an Australian bill of rights entrenched in the *Constitution*. This support was associated with a significant degree of popular

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<sup>31</sup> *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20626 (Carl Scully).

<sup>32</sup> *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20593 (Dr Arthur Chesterfield-Evans).

<sup>33</sup> *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20602 (Ian Cohen).

<sup>34</sup> Mike Salvaris, 'Community and Social Indicators: How Citizens Can Measure Progress' (2000) Institute for Social Research, 32, 36  
<[http://web.archive.org/web/20040306083953/http://www.sisr.net/programcsp/published/com\\_socind.PDF](http://web.archive.org/web/20040306083953/http://www.sisr.net/programcsp/published/com_socind.PDF)> at 4 July 2005 (copy on file with authors).

<sup>35</sup> Mike Salvaris, 'Making Our Own Paths to the Future: Strategies for Citizenship, Democracy and Progress in WA' (Paper presented at WA 2029 Conference, Perth, November 2004).

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concern that rights are not well protected in Australia.<sup>36</sup> This survey also found a sharp divergence between the popular views and those held by legal and political elites. Fifty-four per cent of Australians felt that their rights *were not* well protected against unfair government action whereas significant proportions of lawyers and legislators felt that rights *were* well protected (65 and 79 per cent respectively).<sup>37</sup> A majority of legislators also believed that parliament, rather than the courts, should retain responsibility for rights protection.<sup>38</sup>

A recent survey conducted by Amnesty International revealed that Australians greatly value human rights but have a poor understanding of the extent to which their rights are protected under Australian law. Ninety-five per cent of those surveyed stated they considered rights to be important or very important.<sup>39</sup> (61 per cent mistakenly believed Australia has a Bill or Charter of Rights.)

### *Parliaments Are Important to the Overall Protection of Human Rights*

How then should Australian institutions give effect to this desire to protect human rights?

- We already have a rich suite of institutions and mechanisms for protecting human rights. These include:
- Independent and impartial courts that uphold the rule of law
- Anti-discrimination legislation enforced by equal opportunity commissions and tribunals at national, state and territory levels
- Freedom of information legislation that ensures that citizens and others have access to information about government conduct that breaches human rights
- Ombudsmen
- A free press and active civil society.

None of these mechanisms is perfect; all can be improved. But today our focus is on Australian Parliaments.

Legislatures perform several distinct functions:

- They are representative bodies providing a mechanism by which citizens participate in public affairs and government
- They are forums in which governments can be held accountable for their conduct
- They debate, amend and enact legislative proposals that become laws.

In discharging each of these functions they can affect the enjoyment of human rights. Our particular focus is on this last, law-making, function. This is because of its significant and direct effect on human rights. The laws that Australian Parliaments enact are regularly enforced and its human rights impact is felt by citizens and others.

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<sup>36</sup> Brian Galligan and Ian McAllister, 'Citizen and Elite Attitudes Towards an Australian Bill of Rights' in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights*. Leichhardt, NSW, Federation Press, 1997, pp. 144–145.

<sup>37</sup> *Ibid.* p. 147.

<sup>38</sup> *Ibid.* pp. 145–7.

<sup>39</sup> Roy Morgan Research, 'Anti-Terrorism Legislation Community Survey' (Paper prepared for Amnesty International, Queensland, 10 August 2006), p. 5.

Moreover, unlike other institutions, legislatures are able to be proactive in seeking to protect rights rather than having to wait for a violation of rights to take place. The best rights-protection *prevents* abuses of rights rather than redresses, annuls or punishes violations.

Parliaments also have a wider range of options open to them in pursuing the protection of rights than do courts. While a court or tribunal may find that workplace discrimination on the basis of sex is unlawful, it cannot set up an investigation into systemic causes of discrimination against women, nor fund non-discrimination education programmes for employers, nor create advertising campaigns to encourage girls to enter non-traditional employment for women, nor provide for better child-care facilities.

There is another reason to focus on legislatures when considering human rights.<sup>40</sup> Human rights are inherently controversial. Everyone has a stake in that controversy and an equal right to participate in it. Human rights should therefore be the subject of democratic deliberation in legislatures rather than legal-technocratic assessment by courts. Take freedom of speech for example. Almost all Australians would agree that freedom of speech is a good thing and a basic right in a democratic country. Almost all would agree that parliaments should not unreasonably limit freedom of speech. And yet there is intense disagreement about how that principle should be applied. One recent example is legislation prohibiting religious vilification.<sup>41</sup> Proponents of such legislation, including the Victorian government, regard it as entirely consistent with freedom of speech – a limitation of the right that is justified by the need to protect freedom of religion and the right of victims of vilification to participate on equal terms in society. Opponents, including many religious groups, are equally strongly of the view that the legislation is harmful and unjustified.

Some of these disagreements reflect factual disagreements: for example, about the *effects* of vilification. Others reflect disagreements about *values*: how important religious freedom is, for example. And these disagreements extend right across the domain of human rights, even in relation to rights that some people regard as absolute and that are identified as such in international law—some people argue that torture is never justified and is always a breach of human rights; others argue that it can sometimes be justified.

It is quite possible that in each case there is no fact of the matter, no single right answer, or at least no right answer that we can identify unequivocally. Disagreement is an inevitable part of life and politics; consensus is rare. It is best that disagreements be resolved by institutions that represent (however imperfectly) the people rather than by non-representative institutions (such as courts) when we have no reason to believe that those institutions would be any better at identifying the right answer to these disagreements.

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<sup>40</sup> These arguments are developed, for example, in Jeremy Waldron, 'A rights-based critique of constitutional rights' (1993) 13 *Oxford Journal of Legal Studies* 18.

<sup>41</sup> For an analysis of how such legislation was debated in an Australian parliament, see Simon Evans and Carolyn Evans, 'Parliamentary Deliberation about Religious Vilification Legislation' in Katherine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (forthcoming 2007).

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### 1.3 How the Legislative Process Considers the Human Rights Implications of Legislative Proposals

It is therefore important to know how parliaments consider human rights issues and how often parliaments enact laws that affect human rights. Is the parliamentary treatment of the two acts that we described at the beginning of this lecture typical?

#### *Pre-Legislative Scrutiny*

First we need to take a step back and look at how legislation comes to the parliament.<sup>42</sup> Most often, of course, policy is developed in government departments, put in legislative form by the Office of Parliamentary Counsel and its analogues, approved by cabinet at the policy and/or legislation stage, and then introduced into the parliament by the government.

At present in Australia, there are very few mechanisms that enable systematic consideration of human rights issues during the policy development and approval process. Only in a handful of jurisdictions is there any legislative requirement that officials or ministers consider rights issues at the policy formation or approval stages, at least in relation to primary legislation.<sup>43</sup>

For example, at commonwealth level, cabinet approval *is* required for any significant policy proposal that is politically sensitive or involves significant expenditure or revenue changes.<sup>44</sup> But policy proposals that have a human rights impact are *not* singled out for detailed Cabinet consideration. Outside the ACT, and from 1 January 2007 Victoria, and to some limited extent Queensland there is no human rights parallel to the Regulatory Impact Statement process required for laws affecting competition and business.

At Commonwealth level again, there are limited requirements for consultation within government (not publicly), on rights issues at the legislative drafting stage; but not at the earlier policy formation stage when it would be more useful.<sup>45</sup> For example, the *Commonwealth Legislation Handbook* requires that the Attorney-General's Department 'be consulted on proposed provisions that may be inconsistent with, or contrary to, an international instrument relating to human rights' and notes

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<sup>42</sup> For more detail, see Simon Evans, 'Improving human rights analysis in the legislative and policy processes' (2005) [2006] 29 *Melbourne University Law Review* 665.

<sup>43</sup> In relation to secondary legislation, drafters in some states are required to take rights issues into account: see, e.g., *Subordinate Legislation Act 1994* (Vic) ss 21(1)(f)–(g). Cf *Legislative Instruments Act 2003* (Cth) ss 16–17.

<sup>44</sup> Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook* (1999, updated as of May 2000) [4.5].

<sup>45</sup> The government rejected Democrat amendments to the Legislative Instruments Bill 2003 (Cth) that would have required rule-makers to undertake appropriate consultations with experts and affected persons when proposed delegated legislation would affect human rights, civil liberties, the environment and other interests of the community: *Commonwealth Parliamentary Debates*, House of Representatives, 3 December 2003, 23 647–9 (Philip Ruddock, Attorney-General). *The Legislative Instruments Act 2003* (Cth) as enacted does not require consultation but only recommends it; second, it only does so when delegated legislation would affect business or restrict competition: see *Legislative Instruments Act 2003* (Cth) ss 17–19.

specifically the *International Covenant on Civil and Political Rights* (ICCPR)<sup>46</sup> and the ‘instruments dealing with discrimination on the ground of sex, race or national or ethnic origin’ as set out in the Schedules to domestic legislation.<sup>47</sup> But as is clear from this description, the requirement is limited in scope and does not erect a formal human rights hurdle that all legislative proposals must clear.

Ministers can ask HREOC to examine bills to ascertain whether they would be inconsistent with human rights but this intervention is ad hoc and requires the initiative of government. (HREOC can, of course within the limits of its resources, make submissions to government and parliament about bills.)

In short, as a New South Wales Parliamentary Committee observed, ‘Legislation is prepared within bureaucracies without any measurement against human rights standards.’<sup>48</sup>

### *Legislative Scrutiny*

When bills reach the Parliament there is some human rights scrutiny but it is ad hoc and unsystematic and as a result is highly variable in its scope and intensity.

As part of our project, research fellow Leanne McKay analysed the human rights profile of the bills introduced into several Australian parliaments over a three year period (2001–2003). Here we sketch some results of our initial analysis of the data for the Commonwealth Parliament (figure 1).

First, it is important to note that the overwhelming majority of the bills introduced in each of these years did not limit rights contained in the ICCPR and did not set out to protect rights contained in the ICCPR (We did not attempt to judge whether the limits were justified—just whether the rights were engaged or protected). Around 10 to 15 per cent of bills in any year burdened ICCPR rights; about the same number protected ICCPR rights. Some bills of course limited some rights and protected others (e.g. the Racial and Religious Hatred Bill 2003 and the Sexuality Anti-Vilification Bill 2003).

Figure 1

	bills considered	Burden human rights		Protect human rights		Burden and protect human rights	
		considered	enacted	considered	enacted	considered	enacted
2001 <sup>49</sup>	179	15	10	13	2	9	7
2002	259	24	19	17	13	6	6
2003	184	24	15	14	2	8	3

<sup>46</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

<sup>47</sup> Department of the Prime Minister and Cabinet, above note 44, [6.34].

<sup>48</sup> Standing Committee on Law and Justice, Legislative Council, Parliament of New South Wales, *A NSW Bill of Rights*. 2001, p. 115.

<sup>49</sup> The figures in this table are indicative—we have yet to review the data and finalise the figures.

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What one would hope for is that:

1. legislators accept that human rights constrain legitimate political action
2. legislators consider a broad range of rights implications of legislative proposals—not just a narrow set of human rights
3. legislators consider the rights implications of the specific provisions of legislative proposals—not just the rights implications of the broad legislative policy
4. legislators consider the evidence that is relevant to deciding whether limitations on rights are justified and in short give attention to human rights issues that is proportionate to the gravity of those issues. It would be a mistake to expect this of any one aspect of the parliamentary process. But it seems a reasonable thing to expect of the process as a whole.

Our study has revealed that human rights issues are considered to some extent by Explanatory Memoranda, Scrutiny Committee Reports and parliamentary debate in one-half to two-thirds of the cases in which legislative proposals burden ICCPR rights:

Figure 2

	<b>Bills that burden human rights—issue noted in:</b>			
	Explanatory memorandum	Scrutiny committee report	Minister's response to scrutiny report	Parliamentary debate
2001 (24)	14	16	0	10
2002 (30)	20	19	3	17
2003 (32)	15	17	1	23

### *Parliamentary Committees*

The Senate Scrutiny of Bills Committee is the prototype for several Australian state parliamentary committees that consider some rights implications of legislative proposals. It considers (among other things) whether bills trespass unduly on personal rights and liberties. It comments on one-half to two-thirds of the ICCPR issues raised by legislative proposals. It, and to an even greater extent its counterpart delegated legislation committee, are sometimes able to secure amendments to legislation to better secure protection of some rights and liberties.<sup>50</sup> But its approach is narrowly focussed on civil liberties issues and its coverage is far from complete. Consider two examples from 2003.

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<sup>50</sup> As a Senate *Procedural Information Bulletin* recently noted: ‘The contribution of committees to amending bills is not always acknowledged, particularly when amendments are made in the House of Representatives, and is not always obvious. Often amendments arise from committee reports without the precise wording recommended by the committees being adopted.’ (No. 206 for the Sitting Period 9–19 October 2006, 20 October 2006.)

The Protection of Australian Flags (Desecration of the Flag) Bill 2003 was introduced by Mrs Draper as a private member's bill. The Scrutiny of Bills Committee summarized the effects of this bill: 'The bill applies criminal sanctions against a person who desecrates or otherwise dishonours or, without legal authority, burns, mutilates or otherwise destroys the Australian National Flag or an Australian Ensign.' The bill clearly engages the right to freedom of expression and there is room to debate whether it is a justified limit on that right. Similar debates have taken place in other countries, including the USA and New Zealand. But the Scrutiny of Bills committee expressly declined to comment on the bill.<sup>51</sup>

Now, there might have been good reasons for not reporting on this bill. The Committee has limited resources, both time and human capital. It might make a strategic decision not to report at length on a private member's bill that has limited chances of obtaining time for debate and more limited chances of being passed. Nonetheless, it is striking that there isn't even a one sentence report of the kind commonly made, drawing the restriction on freedom of expression to the attention of the Senate for its consideration.

Another striking example is the ASIO Legislation Amendment Bill 2003 which (among other things) required persons in relation to whom a questioning warrant under s 34D of the *Australian Security Intelligence Organisation Act 1979* (Cth) was issued to surrender their passport and prohibited them from leaving Australia.<sup>52</sup> This engages the right to freedom of movement under international human rights law. The Scrutiny of Bills Committee commented on a strict liability provision in the Bill but did not mention the freedom of movement issue.<sup>53</sup> Government and Opposition speakers addressed a discrimination issue (potentially longer questioning periods when an interpreter was used)<sup>54</sup> but only a Greens member noted the freedom of movement issue, relying on published comments by an international law academic.<sup>55</sup> The Committee's analysis of civil liberties and parliamentary and judicial control of administration is a strength; but it leaves significant gaps in coverage of even civil and political rights, let alone economic, social and cultural human rights.

Sometimes rights issues are engaged at multiple stages in the parliamentary process. The Australian Protective Service Amendment Bill 2003 burdens several ICCPR rights (including arts 17, 9(1), 10(1) and 21) in the course conferring additional powers on protective service officers (to request personal identification details and information; to stop, detain and search certain persons for security purposes, and to seize things found during such a search). The Explanatory Memorandum argued that the burdens were justified as striking the appropriate balance between security and

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<sup>51</sup> *Alert Digest* Number 10 of 2003.

<sup>52</sup> ASIO Legislation Amendment Bill 2003 (Cth) s 34JD(1).

<sup>53</sup> *Alert Digest* No. 16 of 2003.

<sup>54</sup> *Commonwealth Parliamentary Debates*, House of Representatives, 2 December 2003, 23484 (Philip Ruddock); 23464–6 (Robert McClelland).

<sup>55</sup> *Commonwealth Parliamentary Debates*, House of Representatives, 2 December 2003, 23470–1 (Michael Organ), referring to the statements made by Associate Professor Donald Rothwell in Cynthia Banham, 'ASIO grillings will breach civil rights, warns expert', *Sydney Morning Herald* 27 November 2003.

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rights and freedoms. The Scrutiny Committee's *Alert Digest* noted issues about the search and seizure provisions and asked the Minister whether the its guidelines had been taken into account. The Minister responded that those guidelines had been taken into account. The Committee later reported on amendments made in the House of Representatives that removed limitations on the APS powers and narrowed the grounds on which a person could assert that they had a reasonable excuse for failing to provide information to an APS Officer. The Senate Legal and Constitutional Legislation Committee considered the extent of the powers conferred by the bill fairly closely and concluded that they were justified. The Parliamentary Library's *Bills Digest* noted the lack of limits on length of detention for purposes of a search and the absence of a limit on detention times. There was substantial discussion of rights implications of the bill in the course of parliamentary debate.

The progress of the bills discussed here present useful illustrations of the strengths and weaknesses of parliamentary human rights scrutiny. Parliament has a rich set of existing processes for considering human rights issues—committees, correspondence with Ministers, parliamentary deliberation and so on. However, as we have already noted, each of these processes has shortcomings.

Although the scrutiny committees, can act expeditiously, even in response to amendments, to provide an initial assessment of some rights-impacts of bills, their approach is relatively narrowly self-defined and relatively low-key. They focus on a particular set of civil liberty issues, especially those in which they have developed their own standards (including search and seizure). They rarely express a concluded view on bills—instead referring matters to their parliament or chamber for consideration and not expressing a clear position as to whether a bill trespasses unduly on rights and freedoms. It seems that this limited approach, both to scope and recommendations, is necessary to preserve the committees' capacity to reach agreement on bills and to report in a timely fashion. Moreover, the impact of scrutiny—though often asserted—can be hard to identify. Recall the Victorian bill that we outlined at the outset of this lecture, the Victorian Serious Offenders Monitoring Bill. It was the subject of an excellent report by the existing parliamentary scrutiny committee in that jurisdiction<sup>56</sup> that identified the serious human rights issues with the bill. The Victorian report was a remarkable achievement given the limited time available—the Committee managed to complete it and have it tabled in time for debate in the Legislative Council. However, it was not mentioned in debate, even by the members of the Committee (The NSW Committee was not able to report until after the Bill was passed).

The Legal and Constitutional Legislation Committee's approach to bills appears to be influenced by the number and tenor of the submissions it receives. Human rights oriented submissions inflect the reports it makes. But even when the Committee receives numerous substantial submissions examining human rights issues, which it

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<sup>56</sup> See Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest* No. 1 of 2006 [29] and Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* No. 12 of 2006, Wednesday, 4 October 2006. Full disclosure: I made a brief submission to the Victorian Committee but the Committee's report is far more wide-ranging than that submission.



faithfully recounts in its report, the Committee rarely expresses its own reasoning and conclusions *in the language of human rights*.<sup>57</sup>

In short, just as human rights issues are considered in a largely unsystematic fashion at early stages of the policy process in most Australian jurisdictions, presenting the risk that decisions about how to pursue policy objectives are taken without adequate analysis of their human rights implications, parliamentary analysis is also largely unsystematic, with sporadic and limited contributions by scrutiny committees and specialised committees like the Senate Legal and Constitutional Committee.

#### **1.4 Reform**

Fortunately, there is a great deal that can be done to improve the capacity of Australian parliaments to protect human rights. Today we highlight five initiatives that have already been taken in the UK and the ACT and that will commence in Victoria from 1 January 2007. Parliaments can:

- agree and articulate a set of rights
- identify a clear and robust role for scrutiny committees
- provide adequate resources for scrutiny committees
- require government to prepare pre-legislative human rights impact analysis
- require ministers to provide reasoned statements about the human rights impact of legislation.

These initiatives retain the Australian parliamentary tradition and ensure that rights issues are first addressed by democratic institutions. They should be adopted by all Australian parliaments.

##### *Agree and Articulate a Set of Rights*

The first, and perhaps most important step, is for the Parliament to agree on a set of human rights against which it wishes to assess legislation. This need not involve enacting a Human Rights Act or Charter of Human Rights and Responsibilities. The Parliament, its houses jointly or separately or even a single committee could agree on such a list. The Senate Regulations and Ordinances Committee and Scrutiny of Bills Committee have gone a small way towards this position. They already flesh out their generic mandate to consider whether delegated legislation and bills ‘trespass unduly on personal rights and liberties’ by publishing lists of issues that they focus on in applying that mandate. They could go further and shift away from a relatively narrow ‘civil liberties’ conception of rights and liberties.<sup>58</sup> In principle, they could decide to base their scrutiny on the rights contained in the ICCPR, the ICESCR, the CERD and so on, or any subset of these. The advantage of doing so would be threefold.

First, such a list of rights would allow for *systematic* analysis of rights issues. The current approach, although immensely valuable on its own terms, is rather unfocussed and ad hoc.

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<sup>57</sup> The Senate Legal and Constitutional Legislation Committee’s 2005 report on the *Provisions of the Anti-Terrorism Bill (No. 2)*, November 2005 provides a useful illustration.

<sup>58</sup> See Carolyn Evans and Simon Evans, ‘Scrutiny committees and parliamentary conceptions of human rights’ [2006] *Public Law* 785.

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Secondly, it would allow for a *broader-ranging* analysis of rights issues. The current approach, which emphasises civil liberties and parliamentary control of administration, focuses on a very narrow range of human rights issues.

Thirdly, it would give the committees an *external reference point* in the international and overseas comparative jurisprudence on the treaties and national rights instruments based on those treaties.

#### *Resources for Scrutiny Committees*

If scrutiny committees are to take on a human rights scrutiny role that is broader than their current role, they will need more resources, including appropriate (internal or external) expert advisers.

Our interviews with scrutiny committee members reveal that the resource that they find hardest to secure already is time. Effective scrutiny requires time for analysis and deliberation. It also requires that the results of scrutiny be available to the Parliament for the substantive debate on the bill. Particularly in state parliaments, legislation is introduced into the Parliament and comes on for debate after a short adjournment with only the most limited opportunity for the Committee's secretariat and advisers to analyse the bill, for the Committee to deliberate and finalise its report.<sup>59</sup>

#### *Identify a Clear and Robust Role for Scrutiny Committees*

It would be important for scrutiny committees to retain their focus on informing parliament about rights issues. One of the risks of committee scrutiny under human rights acts (and even under non-statutory lists of rights) is that the process becomes over-legalised, such that the committee in effect gives its prediction of what the courts would do if they had the power to consider whether legislation breaches human rights. Parliament should be informed about how courts might react. But Parliament should retain an autonomous role to make its own assessment about the scope of human rights and what limitations on human rights are justified. Although some legislation breaches human rights clearly and beyond any dispute, and other legislation does not, most legislation that engages human rights raises contestable human rights issues on which minds may legitimately differ. For the reasons we gave earlier, Parliament should have at least a coordinate role in resolving these issues.

The example of the UK Parliament's Joint Committee on Human Rights (JCHR), about which we will say more later, shows that it is possible for a scrutiny committee operating within a human rights framework to be more robust in its comments on Bills than the current Australian scrutiny committee practice. At least until recently—and it should be acknowledged that there have been changes recently—the JCHR was able to operate in a largely non-partisan fashion, presenting unanimous reports on legislation *even where it went beyond commenting on the likely response of the Strasbourg court to bills*. Its recent report on the Armed Services Bill opens:

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<sup>59</sup> Some committees have been hamstrung by restrictions on meeting during sitting hours and restrictions on reporting after a bill has been enacted. For the most part, these restrictions have been lifted.

For a major Government Bill with a number of provisions which engage human rights, in relation to some of which there is relevant and recent Strasbourg case-law, we find it unacceptable that we are once again in the position of having to criticise the wholly inadequate consideration of human rights matters contained in a set of Explanatory Notes. We have no doubt that the human rights compatibility of the Bill's provisions has been under extended and detailed consideration within the Government, and the unwillingness of the Government to provide any explanation of this consideration in support of its statement of compatibility makes our task of scrutinising the legislation on behalf of both Houses of Parliament considerably more protracted. This weakens the ability of Parliament to call the Executive to account in a timely way during the passage of the Bill.

Its comments on the Asylum and Immigration (Treatment of Claimants, etc.) Bill identified clauses that it regarded as being unjustified limitations on human rights and clauses that it was not persuaded constituted justified limitations on human rights.<sup>60</sup> These positive statements about human rights compatibility run the risk of replacing coordinate human rights scrutiny with legal crystal ball gazing but they have the considerable merit of identifying a clear framework for the Parliament as a whole to consider legislation: does the bill limit human rights in a manner that is justified as an effective and proportionate means of achieving the bill's substantive objectives?

#### *Pre-legislative Human Rights Impact Analysis*

The executive government should integrate analysis of the human rights impact of proposals into its policy and legislative development framework in the same way that it (attempts) to integrate analysis of economic and competition impacts of proposals. This could have two positive effects. Government proposals would be developed within a human rights framework, rather than shoe-horned or spun into compliance when the proposal comes to Parliament. And the Parliament would have the benefit of a considered (albeit government-centered) analysis of the human rights impact of proposals to inform its deliberations.

These processes are most developed in the Australian Capital Territory Act (although the Queensland processes under the *Legislative Standards Act 1992* (Qld) are worth noting) but as with parliamentary scrutiny it is important to ensure that the analysis goes beyond vetting by legal officers and also incorporates serious attention to the policy dimension and the possibility of the non-judicial branches of government disagreeing with judicial interpretations of rights.

#### *Require Ministers to Provide Reasoned Statements about the Human Rights Impact of Legislation*

Ministers should be required to take responsibility for the human rights impact of their legislative proposals by making a reasoned statement as to why their legislation is consistent with human rights or why any inconsistency is justified. Ministers are already required to give some such statements in the UK, New Zealand and the ACT;

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<sup>60</sup> In its *Fifth Report* of Session 2003–04.

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from 1 January 2007 Victorian Ministers must provide *reasoned* statements.<sup>61</sup> These statements are a basic element of ministerial responsibility in a human rights framework.

### **Case Study: The UK JCHR on Anti-Terrorism Legislation**

Most of these institutional reforms have already been adopted and tested in the UK under the *Human Rights Act 1998* (UK).

As in most Western countries, a great deal of anti-terrorism legislation has been enacted in the UK since 11 September 2001, starting with the Anti-Terrorism, Crime and Security Bill 2001 which was introduced on 12 November 2001. Four days later, the Joint Committee on Human Rights presented its first report on the bill. It commented that fulfilling its mandate required that it give priority to the protection of human rights in circumstances where they are most likely to come under pressure from (state and public) demands to address security concerns.<sup>62</sup> The JCHR found that ‘the balance between freedom and security in the Bill ... [had] not always been struck in the right place’ despite the government’s best attempts.<sup>63</sup> It recommended against using the threat of terrorism to increase the powers of the state in a manner that compromised the rights and liberties of individuals.<sup>64</sup>

It presented a second report on the bill on 5 December 2001 while it was being considered by the House of Lords. It again commended the willingness of the government to engage in a dialogue regarding the human rights implications of the bill but expressed concern about the speed at which the legislation was being passed.<sup>65</sup> It concluded that the bill was likely to have a significant impact on rights and although it praised the improvements that had been made (or promised) to safeguard human rights, it argued that several provisions in the bill had not been adequately justified,<sup>66</sup> including derogation from art 5 of the ECHR;<sup>67</sup> possibility of indefinite detention incompatible with art 5(4) of the ECHR;<sup>68</sup> disclosure of information between agencies in possible violation of art 8 of ECHR.<sup>69</sup> The bill was eventually enacted, but with significant amendments including the introduction of a sunset clause over the provisions concerned with indefinite detention,<sup>70</sup> the creation of a committee of Privy Councillors to review the legislation two years it was enacted<sup>71</sup> and a narrower definition of what constitutes a terrorist suspect.<sup>72</sup>

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<sup>61</sup> *Human Rights Act 1998* (UK) s 19; *Bill of Rights Act 1990* (NZ) 2 7; *Human Rights Act 2004* (ACT) s 37; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28.

<sup>62</sup> JCHR, Second Report of the 2001–02 Session, *Anti-Terrorism, Crime and Security Bill*, HL37/HC372, [2].

<sup>63</sup> *Ibid.* [78] (emphasis removed).

<sup>64</sup> *Ibid.* [5], [76].

<sup>65</sup> JCHR, Fifth Report of the 2001–02 Session, *Anti-Terrorism, Crime and Security Bill*, HL51/HC420, [2].

<sup>66</sup> *Ibid.* [32].

<sup>67</sup> *Ibid.* [4]–[6].

<sup>68</sup> *Ibid.* [15].

<sup>69</sup> *Ibid.* [24].

<sup>70</sup> *Anti Terrorism, Crime and Security Act 2001* (UK) s 29(1).

<sup>71</sup> *Ibid.* s 122.

<sup>72</sup> *Ibid.* s 21.

In 2004, the JCHR reported on the large body of anti-terrorism legislation which had been enacted by then. It noted that long term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights and recommended that, if the threat from international terrorism was to continue for the foreseeable future, an alternative way must be found to deal with that threat.<sup>73</sup> It argued that the public and parliamentary debate about terrorism should take place within a human rights framework and that human rights law provides the framework within which the balance between the right to security and right to liberty must be struck. In particular, it invited government to consider ways it could increase the independent democratic scrutiny of its claims about the level of the threat from international terrorism so as to enable Parliament to reach a better-informed assessment of whether the measures were strictly required by the exigencies of the situation. Finally, it noted its concern about provisions of the 2001 Act that targeted only non-nationals and the disproportionate impact of the use of Terrorism Act powers on the Muslim community.

These concerns were brought home by the decision of the House of Lords in the *Belmarsh Prisoners* case.<sup>74</sup> This landmark case was brought by nine non-nationals who had been indefinitely detained under section 23 of the *Anti Terrorism, Crime and Security Act 2001* (UK) for being suspected terrorists. The non-nationals argued that the indefinite detention permitted by section 23 of the Act represented an impermissible derogation from article 5 of the European convention on Human rights (ECHR) and a contravention of the non-derogable, non-discrimination principle in article 14 of the ECHR. The House of Lords concluded that the derogation from the ECHR was not shown to be justified and that the provisions authorising their detention discriminated against non-UK nationals in a way that was not compatible with the ECHR.<sup>75</sup>

The government's response again demonstrated the capacity of the JCHR to make a difference to parliamentary consideration of human rights. In January 2005, Baroness Scotland of Asthal, the Minister of State, Home Affairs made a statement about the government's intentions.<sup>76</sup> The government proposed to replace the powers in Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* with a new scheme of orders applicable to all suspected terrorists, irrespective of whether they are British or foreign nationals. The bill would be designed to meet the Law Lords' criticism that the previous legislation was both disproportionate and discriminatory. In outlining the

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<sup>73</sup> Eighteenth Report of the 2003-04 Session, *Review of Counter-terrorism Powers*, HL 158/HC 713.

<sup>74</sup> *A(FC) and others v Secretary of State for the Home Department* [2005] 2 AC 68. See the symposium edition *Modern Law Review* vol. 68, no. 4, 2005: p. 654, 'A v Secretary of State for Home Department: Introduction'; p. 658, Tom R. Hickman, 'Between human rights and the rule of law: indefinite detention and derogation model of constitutionalism'; p. 668, Stephen Tierney, 'Determining the state of exception: what role for parliament and the courts?'; p. 673, David Dyzenhaus, 'An unfortunate outburst of Anglo-Saxon parochialism'; p. 676, Janet L. Hiebert, 'Parliamentary review of terrorism measures'.

<sup>75</sup> *A(FC) and others v Secretary of State for the Home Department* [2005] 2 AC 68 [43], [68] (Lord Bingham).

<sup>76</sup> *United Kingdom Parliamentary Debates*, House of Lords, 26 January 2005, col. 1267-1271.

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government's proposal, Baroness Scotland of Asthal paid respect to the work the JCHR had done on reviewing the provisions in Part 4.<sup>77</sup>

The Prevention of Terrorism Bill 2005 was introduced on 22 February 2005. The orders under which the Belmarsh Detainees were held would expire on 14 March 2005 so there was some urgency in passing the bill.<sup>78</sup> Once again the JCHR reported very quickly on an extremely complex piece of legislation. Its first report was tabled on 25 February 2005. It observed that in light of the tight time frame the report was intended to 'provide a first indication for Members of human rights issues arising at the earliest opportunity.'<sup>79</sup> It welcomed some of the initiatives in the bill but remained concerned about the human rights implications of some of the measures: the necessity for 'derogating control orders'; the lack of prior judicial involvement in orders depriving individuals of liberty; the use of a special advocate procedure in deprivation of liberty cases; the limited judicial control of non derogating control orders; and the open ended discretion to impose obligations on persons subject to control orders.<sup>80</sup> The JCHR indicated that it envisaged that 'more detailed scrutiny of the Bill's provisions [would] follow in a further report, to be published in time to inform debate before the Bill ha[d] completed its passage through Parliament.'<sup>81</sup>

This initial report clearly informed debate in the Lords. Several members referred to the comments of the Committee.<sup>82</sup> The government tabled amendments addressing some of the JCHR's concerns on 2 March 2005. Again, the JCHR reported in a matter of days, on 4 March 2005.<sup>83</sup> And once again the JCHR commented on '[t]he rapid progress of the Bill through Parliament' which 'has made it impossible for us to scrutinise the Bill comprehensively for human rights compatibility in time to inform debate in Parliament.'<sup>84</sup> The Lords applied some 42 amendments to the bill to give effect to the JCHR's recommendations, including a provision that the judiciary, not the Secretary of State, possess the power to make control orders, a provision raising the standard of proof required to obtain a control order to the civil standard of proof and the inclusion of a sunset clause. The Commons rejected the majority of these amendments, made significant modifications to those they did accept and insisted on other amendments; the Lords did likewise. Eventually the Bill was passed on 10 March 2005 after the House of Commons agreed to a 12 month sunset clause.<sup>85</sup>

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<sup>77</sup> Ibid.

<sup>78</sup> Janet L. Hiebert, 'Parliamentary review of terrorism measures' (2005) 68(4) *Modern Law Review* 676, 678.

<sup>79</sup> JCHR, *Ninth Report of Session 2004–05, Prevention of Terrorism Bill: Preliminary Report*, HL 61/HC 389, 3.

<sup>80</sup> Ibid. pp. 3–7.

<sup>81</sup> Ibid. p. 3.

<sup>82</sup> See, e.g. *United Kingdom Parliamentary Debates*, House of Lords, 1 March 2005: col 131 (Lord Thomas of Gresford); col 134 (The Lord Bishop of Worcester); col 143, 146, 454 (Lord Plant of Highfield); col 158 (Baroness Falkner of Margravine); col 184 (Lord Clinton-Davis).

<sup>83</sup> JCHR, *Tenth Report of the 2004–05 Session, Prevention of Terrorism Bill: Preliminary Report*, HL68/HC334.

<sup>84</sup> Ibid. p. 3.

<sup>85</sup> *Prevention of Terrorism Act 2005* (UK) s 13.

## Conclusions

Clearly the UK Human Rights Act process is no panacea and its Australian analogues will be no different. Governments will still insist that their legislation is urgent and that scrutiny must be truncated to ensure passage of the legislation. It will still be difficult to gain traction for the human rights of the most disadvantaged and reviled. Human rights analysis will demand time of members who are already hard-pressed to meet their existing legislative, committee, party and constituency responsibilities. It will also demand resources for expert advisers and committee staff. And a government with the numbers can push through legislation or threaten, as the UK government did, to repeal parts of the Human Rights Act.<sup>86</sup>

As the UK case study shows, a parliament human rights process structured around a human rights act *can* provide a framework of analysis that is developed and applied consistently over a number of years and provide a moral and political reference point to argue for human rights respecting legislation. But more is required. A human rights act does not of itself create a culture of human rights—an attitude among legislators, commentators and citizens that the range of legitimate political action is constrained by human rights. This is obviously true in overseas jurisdictions that have had human rights legislation or constitutional provisions for many years. It is no less true in Australian jurisdictions that have adopted human rights acts. Recall the example that we gave at the outset—the Victorian *Serious Sex Offenders Monitoring (Amendment) Act 2006*. Of course it was debated in October 2006 before the Victorian Charter was to come formally into effect on 1 January 2007. But there was precious little evidence of culture of human rights, or even an atmosphere conducive to the development of a culture of human rights, in that debate.

The struggle to achieve human rights is not won with the passage of a human rights act. Ultimately the success a human rights act depends on parliamentarians and governments taking rights seriously as a constraint on government action; on governments providing the resources that are necessary for timely and effective scrutiny; and on parliaments resisting the instinct to defer to the courts as the sole authoritative interpreters of human rights. In other words, the success of these Act depends on their human rights values becoming part of political culture. Legislators are politicians and respond to the issues that their constituents regard as important. While human rights are not a widespread concern of constituents, human rights impact statements, scrutiny committee reports and Ministerial statements of compatibility are ‘just another [set of] inputs to juggle’. The challenge of human rights will remain a challenge for all of us.



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<sup>86</sup> Prime Minister’s News Conference, 5 August 2005, <http://www.pm.gov.uk/output/Page8041.asp>; BBC News, ‘Blair “to amend human rights law”’, 16 May 2006, [http://news.bbc.co.uk/2/hi/uk\\_news/4770231.stm](http://news.bbc.co.uk/2/hi/uk_news/4770231.stm).

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**Question** — One of the previous speakers, Greg Craven, spoke on the constitutional arrangements in terms of states' rights. The very next day after he talked about states' rights, John Stanhope put up on his website legislation that in my view was very challenging to human rights, that the government had been trying to hide and that they were going to put off for a number of weeks.

The question I have is: human rights are often most trampled upon when the society is at its most hysterical. Think about your example of sexual molestation. None of us are going to stand here and defend sexual molesters of children. But molesters do have rights. When we have a sense of hysteria about security, wherever it comes from, we are at our most unwilling to defend people's human rights. I am thankful that your proposal doesn't go to a bill of rights because I'm not sure that is all that helpful, but how do we set up protections for human rights so that they are more publicly there when we as a society are at our most hysterical?

**Simon Evans** — Two issues come out of your comment about the terrorism legislation which John Stanhope published on the website. The first is, the kind of co-operative legislation that is proposed by usually the commonwealth government seeking the assistance of state parliaments in enacting complementary laws to have a national scheme presents some of the most difficult challenges for Australian parliamentary processes generally and relation to human rights in particular. Very often the results of those negotiations between government are presented to the state parliaments on a take it or leave it basis: here is the legislative text to sign up to and enact it as quickly as possible, because the deal's already been done. State parliament is cut out of the loop.

The terrorism example is instructive because John Stanhope didn't play ball and publish the legislation on the website at the draft stage. That may or may not be a good thing, because sometimes policy development does have to happen behind closed doors. Sometimes it's impossible to develop sensible policy in the public eye because of the very hysteria you talked about in the second part of your question. In this instance what he was able to do was publish legislation and then solicit advice on the human rights implication of that legislation, which was also published on the website. So there was advice from Hilary Charlesworth and Steven Gagler and others published on the website measuring the legislation against the Constitution and against the ACT Human Rights Act and against our international treaty obligations. So what that Human Rights Act framework did was give a basis for scrutiny that was very useful in negotiating a better result for that legislative package.

On what to do about legislation in times of hysteria—I don't know that there are a lot of guarantees that you can put in place, regardless of what institutions you erect. It will be staffed by human beings who are responsive to the reality of the situation that they face, but also responsive to psychological pressures. The United States has had a Bill of Rights that has been held up by some as a paragon of human rights protection for two centuries now, and yet the record of the United States Supreme Court in times of war and terror has been mixed in the extent to which human rights are protected. Parliamentarians are even more sensitive to public pressures or public hysteria, as you put it.



My answer to what you do is two-fold. One, you don't rely on any single institution to protect human rights at the best of times and especially at the worst of times. You want multiple sites for deliberation about human rights, and about all issues. Two, you don't rely just on governmental institutions. One of the strengths of our society as a free western liberal society is that it has an active civil society. There are a lot of people in this audience today who care about human rights and have no government affiliation. They are citizens who care about human rights—citizens who come together in Amnesty International and human rights organisations, lawyers groups for human rights, non-lawyers groups for human rights, and that activity of the civil society that puts submissions into parliamentary committees and whose inputs are reflected in the consideration of those committees are an important part of maintaining human rights, even at the worst of times.

**Question** — Before the speaker began, the chairman drew us to this reality: don't expect too much from any government.

**Simon Evans** — The point you make about not trusting government to protect human rights is absolutely right. In part, governments do act to threaten human rights and human rights laws and institutions are an important part about limiting overreaching by government. But government is also vital to protecting human rights. Our human rights would not be effectively protected if government did not set up the Australian Electoral Commission, if it did not pass an effective electoral law. If we did not have laws protecting free speech, social welfare law, health insurance law and so on, laws protecting the right to property, our human rights would not be adequately protected either. So I think the contribution of government appears on both sides of the ledger in protecting human rights. We need to bear that in mind.

**Question** — It wasn't quite clear to me what you meant by human rights in that your first example was failure to respect the rule of law, which is certainly something that bothers me very much in Australia, but doesn't seem to me to be quite the same as human rights. I can only go to the preamble of the American Constitution: we hold certain things to be inalienable. The implications there are that these things have to be respected whether or not the majority of people, indeed any people, recognise it.

You seem to be a little dismissive of the role of the courts and law. It seems to me that while it's imperfect, something like an American bill of rights and the role of the court is necessary if you see human rights as being something fundamental, which is regarded as existing in a person whether or not the government or society exists. Sure the US record has been mixed, but they have after all thrown out the Guantanamo Bay commissions as being unconstitutional under the American act, something which would not I think have happened here in any circumstance. So my question is: why do you not feel that something like an American bill of rights would be a step forward in protecting human rights?

**Simon Evans** — I'm sorry if I appeared dismissive of courts. I think that courts can play an important role in protecting human rights, in building a culture of human rights, but the mistake would be to see them as the sole, exclusive, or even primary agency for protecting human rights. There were two reasons for this. The first is that the courts are reactive rather than proactive, and the second is that human rights are controversial and judges have no particular expertise in the moral questions that

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human rights raise. They do have some advantages. They can respond to particular situations. They can respond to situations that legislatures have overlooked. They can act against temporary hysterical majorities in some situations, but we shouldn't place all of our eggs in the one basket. As I said in response to an earlier question, I think the best protection of human rights comes from a development of the existing Australian approach, which is to have a number of different sites for protecting human rights, which may include the courts but shouldn't be limited to the courts, which may include the parliament, but shouldn't be limited to the parliament.

**Question** — I'd like to raise a couple of concrete cases to show you just how limited human rights can sometimes be in this country. I'll mention the case of Mr Scott Parkin. Mr Parkin was descended upon by five federal police in Melbourne and he was thrown into what amounted to a prison. Now the first thing that you, I, or anyone else in this room would say is: 'Well, what have I done?' The police said: 'We're not going to tell you what you're in here for.' Now that seems to me to be a pretty fundamental breach of human rights. Mr Scott Parkin had come to this country on a lecture tour. At the end of five days, the federal police escorted him onto a plane. The federal police stood on the plane and took him to Los Angeles airport. At the end of the flight they said 'Scott, here is a bill for \$11 700. Don't come back to Australia for three years. If you do, you pay the bill for \$11 700, the cost of your incarceration and the cost of your airfare.'

Another case regarded a gentleman who worked in the then Department of Trade here in the mid 1970s. He applied for a job. The department said he couldn't have the job and he asked why, and they said he was a security risk. He asked in what way. They said, well, we're not going to tell you. So he took the Australian Security Intelligence Organisation to court and it came out in the process that he was a member of the Communist Party of Australia, perfectly legal, and he was selling a newspaper called the *Tribune* on the streets of Canberra.

On the question of freedom of speech, I mention the case of a Mr Lance Sharkey. Mr Sharkey was thrown into prison for three years for making a seditious utterance. I am wondering if you can tell us what you understand by sedition and also can you tell us something more about this anti-terrorism legislation, because as I understand it, you can be thrown into prison for two weeks and then possibly longer without communication with lawyers or anything.

**Simon Evans** — I can't in the time available say anything more about the terrorism legislation and it's not my specific focus today. I wouldn't want to pretend that Australia's human rights record is perfect—I don't think that of any country is. There are some aspects in which it is far from good, and what I was arguing for today was changes in the processes of protecting human rights in Australia that might assist in ensuring that legislation does not authorise some of the situations that you described in your question.

**Question** — We have difficulties trying to integrate the stuff of human rights into our culture, although I think the vast majority of Australians support a wide bill of rights. We always seem to be put down by people who say this is not right, and we can't have this, and we are in danger, but I think that is the minority. Can you tell us something about the Canadian Charter of Rights that seems to have gone so well with

the people over there and they seem to have taken to it like ducks to water. I wonder whether we can learn something from them to start preparing the ground here.

**Simon Evans** — I should say that I'm ambivalent about human rights acts. I think there are reasons to be concerned about them, particularly if they lead to domination of governments, and the policy agenda by courts have very deleterious effects. I think that's why I've been focussing on the parliamentary aspect rather than on bills of rights per se. The Canadian example is an interesting one because although in many ways the Charter has shaped Canadian political consciousness for the last quarter century. It is also deeply controversial precisely because of the influence the Supreme Court has had on shaping the political agenda, and that politics has been sidelined to a large extent in quite a number of policy areas. American legal philosopher Jeremy Waldron (who is a New Zealander by birth) describes the American Supreme Court as 'nine black-robed celebrities' who have no reason to particularly care what they say about human rights except that they are celebrities in black robes. The Canadian Supreme Court wear red robes, but the story is much the same. The Charter has done good stuff, but it's also had a deleterious effect on political culture and the range of things that governments can do. So I wouldn't leap with great enthusiasm to the Canadian model as one for Australia.



## **Reforming the British House of Lords How a Little Reform Can Go a Long Way\***

*Meg Russell*

I want to talk to you today about one of the classic—if not *the* classic—second chambers of the world, and the changes that it has recently undergone. My biggest current research project (and obviously not the one that brings me to Australia) is looking at the change the British government made to the House of Lords in 1999, and the effect that has had on the operation of the British parliament and on British politics in general.<sup>1</sup> My contention, which is becoming less contentious all the time as other people conclude the same, is that an allegedly small reform has had very significant effects, and may even come to be looked back on as a turning point in British politics. This tells us something interesting not only about Britain, but also about parliaments, bicameralism and parliamentary reform in general.

I will structure what I'm going to say to you in five parts:

- First, I'll give you a bit of background about the House of Lords: who sat there before reform, what the reform did, and who sits there now.

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<sup>1</sup> This research was funded by the Economic and Social Research Council (ESRC) under grant RES-000-23-0597. I am grateful for their support.

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- Second, I'll suggest some reasons why the chamber might have greater confidence as a result of its reform.
  - Third, I'll provide some evidence that it does indeed have greater confidence, and that this is translating into greater *de facto* power.
  - Next I'll quickly mention what implications these developments have for the prospects of future reform in the UK.
  - But what I really want to concentrate on is the bigger conclusions: what the developments tell us about parliamentary reform, about the changing shape of British politics and about bicameralism in general.

## Background

The House of Lords, as I'm sure most of you know, has always been, and still remains, an unelected institution. It is one of the oldest parliamentary chambers in existence, having developed from the council which was called together to advise the monarch as early as the thirteenth century, and save for a brief period of abolition between 1649 and 1660 following the English civil war, it has been continuously in existence, and its composition and powers have evolved in gradual steps.

Since its foundation at the start of the twentieth century the Labour Party had been committed to Lords reform. The chamber was seen as one of privilege and unaccountable power, comprising as it did mostly of hereditary peers—members of the nobility who had inherited their titles from their fathers. However, reform in the twentieth century was piecemeal and often frustrated. In 1911 the left wing Liberal government reformed the Lords' powers—removing the chamber's veto and reducing this to a power of delay. But a promised further reform to create 'a Second Chamber constituted on a popular instead of hereditary basis' was never brought into effect.<sup>2</sup> In 1949 the post-war Labour government reduced the chamber's delaying power further from roughly two years to one, but did nothing about its composition. In 1958 a Conservative government introduced life peerages, allowing members to be appointed for life without passing the titles to their offspring. This reform—which also brought women into the chamber for the first time—was influential, and most new members appointed after this date were appointed as life peers.

When Labour came to power in 1997 the House of Lords included 759 hereditary peers and 477 life peers. In addition 26 Bishops and Archbishops of the Church of England sit in the House, and a number of senior judges who are appointed to form the UK's highest court of appeal (I don't intend to dwell on these last two types of members as their numbers are small and the position of the so-called 'Law Lords' is about to change due to the creation of a new Supreme Court). Labour remained committed to reform of the Lords, as well as to a raft of other constitutional legislation, including devolution in Scotland and Wales and a Human Rights Act. Its election manifesto promised that it would remove the hereditary peers as a first step to creating a 'more democratic and representative' second chamber. A bill was published in 1999 to implement the first stage of reform, and a Royal Commission was established to consider the options for the second stage.

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<sup>2</sup> Words taken from the preamble of the 1911 Parliament Act.

The bill passed, without as much difficulty as many had expected, later in 1999. One reason for its ease of passage was that a compromise had been struck, whereby 92 hereditary peers (10 per cent of the total plus some office holders) would remain until the next stage of reform.<sup>3</sup> The Conservative Party in particular claimed that Labour had no intention of moving to the second stage and that it simply sought political advantage through reform. Of the hereditary peers that took a whip, 301 were Conservatives and only 19 were Labour. Many others were independents, but suspected by Labour of Conservative leanings.<sup>4</sup> The political imbalance amongst the hereditary peers was always quite openly and understandably a motivation for Labour to reform the House. By retaining 92 of these members the Conservatives hoped perhaps to embarrass Labour into a next stage of reform, but also to retain some of their own most active members.

So when parliament resumed in November 1999, 655 hereditary peers had been expelled. As a result the House of Lords was much smaller, and much more politically balanced, than it had been before. Of the 666 members who remained, the great majority were life peers, plus the 92 hereditaries and small number of Law Lords and Bishops. The House was still wholly unelected, and could certainly be considered only partially reformed. Indeed most debate about the Lords in Britain since then has focussed on its continued unreformed state. Labour remains in power but (as the Conservatives predicted) no further reform has been forthcoming. Many are therefore still waiting for the ‘more democratic and representative’ chamber that was promised in 1997.

I first started writing about the Lords in order to inform debates about reform, but as more and more time has passed and this still hasn’t materialised, I have grown increasingly interested instead in the effects of the reform that’s already happened. As I said, the chamber appears more confident and assertive, and as a result seems to be gaining strength. I’ll first say why this might be the case, and second what the evidence is.

### **Reasons for greater confidence**

I suggest that there are four reasons why the House of Lords, for all its strangeness, may feel—and indeed may be justified to feel—more confident than previously to intervene in policy debates and to challenge the executive.

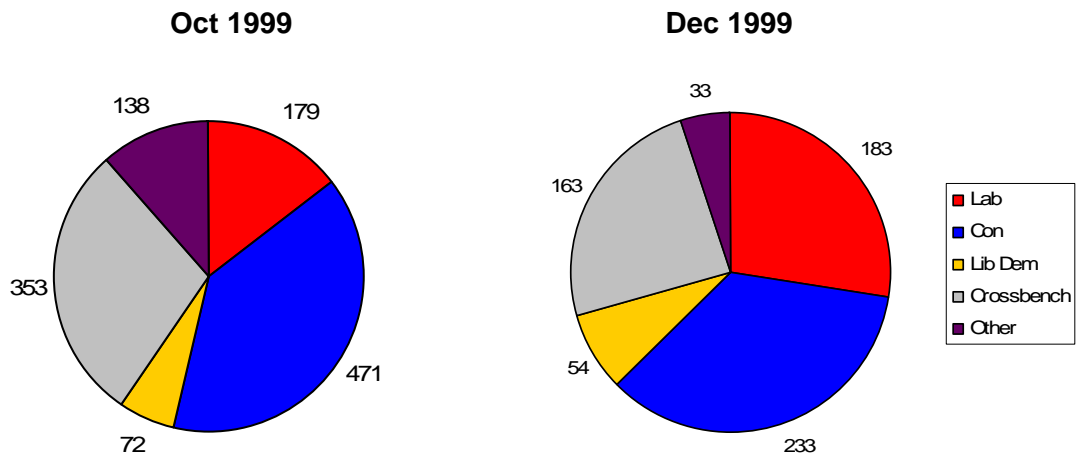
The first and most obvious is that heredity is no longer the main route into the chamber. This was a clearly anachronistic practice in a modern democracy, and did little to gain the House of Lords respect. Although a number of hereditary peers remain, they are a small fraction of the previous total, and furthermore were chosen (in elections by their peers) largely on their record in the House. Most are active parliamentarians and many are individually well-respected. In any case, whatever your views on these members, they’re now a small minority, and all of the others in the house were chosen on their merits.

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<sup>3</sup> See D. Shell, ‘Labour and the House of Lords: a case study in constitutional reform’, *Parliamentary Affairs* vol. 52, no. 4, 2000, pp. 429–441.

<sup>4</sup> These figures exclude the 119 hereditary members who had either not taken the oath or were on leave of absence. Of the remainder, 217 sat on the crossbenches and 22 as Liberal Democrats.

Figure 1: Party balance in House of Lords before and after reform



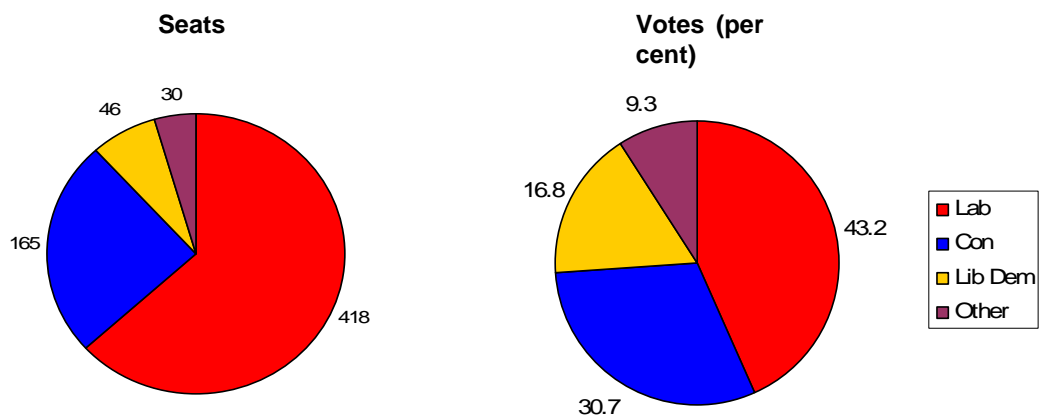
Second, and at least as important, the party balance in the chamber has fundamentally changed. While previously it was permanently dominated by the Conservatives, it is now a chamber of no overall party control. In the past Conservative governments were almost assured of getting their legislation, since *in extremis* they could call in their so-called ‘backwoodsmen’—those Conservative hereditaries who normally never appeared. When Labour was in government, in contrast, they had to rely on the restraint of the Conservatives not to defeat their legislation. Peers therefore learned to act with great caution and not use most of the power they had. In particular conventions grew up that government manifesto measures should not be blocked.

Figure 1 shows the big difference in the chamber’s balance immediately before and after reform. Now the two main parties are fairly equally matched in terms of numbers, both holding around 200 seats, with the balance of power held by the third party—the Liberal Democrats—and a large group of independent ‘Crossbenchers’. This situation broadly remains, although in 2005 the Labour Party went on to become marginally the largest party in the chamber for the first time.

The new House of Lords is clearly more representative than its predecessor. But in terms of party balance it can also be argued to be more representative than the House of Commons. Our single member constituency system for the lower house, like yours, tends to produce inflated majorities for the governing party and under-represent minor parties in particular. In the 1997 and 2001 parliaments the situation was quite extreme. At the 1997 election Labour won 63 per cent of seats on 43 per cent of the vote. These figures are shown in Figure 2. Comparing vote shares with seats in the two chambers, the Lords appears to be more reflective of public opinion at the election even at a glance—with the large number of independent members perhaps matching the 30 per cent of people who didn’t vote at all. Applying the measures political scientists use to gauge proportionality confirms that the distribution of seats in the Lords is far more proportionate than that in the Commons.



Figure 2: Party balance in House of Commons seats and votes, 1997



In part for these reasons, the Lords seems to enjoy greater public support than previously, and elite attitudes to the chamber have also changed, particularly on the Labour side. During the reform debates, Labour’s leader in the House of Lords stated that removal of the hereditary peers would make the chamber ‘more legitimate’.<sup>5</sup> A survey we conducted amongst MPs in 2004 found that 75 per cent of Labour MPs and 54 per cent of Liberal Democrats believed that the chamber was more legitimate as a result of its reform.<sup>6</sup> Furthermore a majority of MPs—including a majority of Labour MPs—believed that the Lords was justified in blocking unpopular government policies. These views were echoed in surveys we conducted of public opinion. These found that two-thirds of voters believed the Lords was justified in blocking an unpopular bill—even if it had appeared in the government’s manifesto.<sup>7</sup>

The final reason that the Lords may feel more justified in flexing its political muscles is the lack of further reform since 1999. In the early months of the government, and even the early years, ministers could complain that an unelected chamber had no mandate to meddle in their legislation, and that the chamber instead should be reformed. However, the longer this reform is delayed, the less such arguments sound convincing. If the government really wanted to democratise the Lords it has now had almost ten years to do so. It can be argued that ministers are the last who can complain that the chamber is unelected—if they want it to change then they should introduce a bill to reform it. If this included provision for elected members it would probably have popular support.

These are not my arguments alone. All these justifications for greater assertiveness on the part of the Lords are regularly made in the corridors at Westminster, not least by the peers themselves. The longer time goes on the more they are also entering into the discourse of journalists, other commentators and the general public. These are the

<sup>5</sup> Baroness Jay, *House of Lords Hansard*, 14 October 1998, col. 925.

<sup>6</sup> For full results see M. Russell and M. Sciara, ‘Legitimacy and Bicameral Strength: A Case Study of the House of Lords’, Paper to 2006 Conference of the Political Studies Association specialist group on Parliaments and Legislatures, University of Sheffield. Available at: <http://www.ucl.ac.uk/constitution-unit/research/Parliament/house-of-lords.html>.

<sup>7</sup> *Ibid.* This survey was carried out only three weeks after the 2005 general election.

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things that could make the peers feel more confident—but are they? What is the evidence of this greater confidence?

### **Evidence of greater confidence**

There is mounting evidence, I suggest, both in what the peers say and what they do. The greater assertiveness of the Lords has also been recognised by government, which has sought to act in response.

The first evidence comes from the views of peers themselves. In a parallel survey to that conducted amongst MPs we asked peers whether they believed that reform had made the chamber more legitimate. In total 78 per cent of members of the House of Lords believed that it had. This figure is somewhat suppressed by views of the Conservatives—who had originally opposed reform and are reluctant to now acknowledge that any good came of it. Amongst Labour peers, 88 per cent believed the chamber was more legitimate.<sup>8</sup> Furthermore, peers were strongly supportive of the chamber's right to block government legislation. Over 90 per cent of them believed the chamber was justified to vote against unpopular government measures, even if they appeared in a manifesto bill. This included over 80 per cent of Labour peers.<sup>9</sup> There seems no doubt, therefore, that peers *feel* confident in their rights to influence government legislation. Unfortunately we don't know how they felt before reform, as no such surveys had been conducted. But their belief that legitimacy has grown shows that reform has had an important impact.

This is clear from the public statements of members as well as in their privately confessed views. There are many instances that could be cited from Lords debate. The Liberal Democrats—the third party who now effectively hold the balance of power in most votes in the chamber—have been particularly strident in their views. They have long supported proportional representation for the House of Commons, as they are consistently under-represented there (despite now holding over 60 seats). Liberal Democrat leaders questioned the validity of the 2005 general election, when Labour won a majority of seats on only 35 per cent of the vote. They have repeatedly renounced the convention whereby government manifesto bills are allowed a relatively free passage through the House of Lords, describing this as the product of the bygone age when the chamber was Conservative-dominated and largely made up of hereditary peers.<sup>10</sup> Despite the chamber's unelected basis they therefore see it as justified to use their position there to stand in the way of government legislation, especially if they have public opinion on their side.

What the peers think is perhaps less important, of course, than what they actually do. How is the greater confidence of the chamber played out in terms of peers' behaviour and impact on the policy process?

It's always very difficult to assess the impact of a parliamentary chamber. Quantitative measures tell at best only half the story, and much of the influence goes

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> See for example the speech by then party leader Charles Kennedy at *House of Commons Debates*, 17 May 2005, cols 50–51.

on in parliamentary corridors and ministerial offices out of public view. But there are some measures we can look at with respect to the House of Lords which are instructive.

There have always been large numbers of amendments made to government bills in the chamber, which can run into thousands per year. But most of these are government amendments, which may result from poorly drafted legislation, or respond to points made when the bill was in the House of Commons, as well as to debates in the House of Lords. Numbers of amendments alone therefore do not tell us very much.

The most obvious measure is the number of defeats the government suffers in the House of Lords, when amendments are passed which are clearly against the government's wishes. In recent years there have been large numbers of such defeats, and this figure appears to be rising. In the session that ended in early November this year, there were 62 government defeats. In the previous long post-election session in 2001–02 there were 56, and in the 1997–98 session there were 39. In total there have been over 350 government defeats in the chamber since it was reformed in 1999.

Figure 3: Government defeats in the House of Lords, 1975–2006

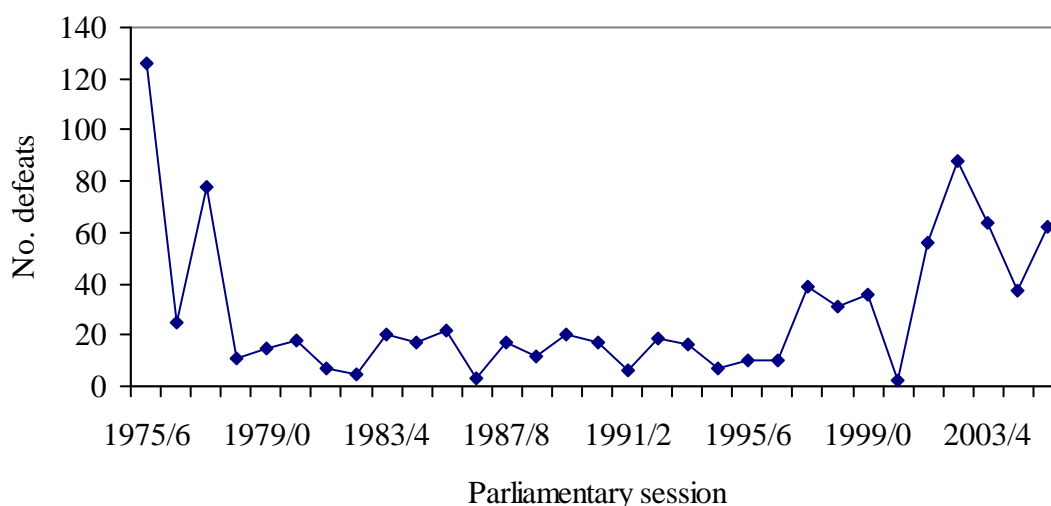


Figure 3 shows the number of defeats in the chamber in each session since 1975. You can see a rise after 1997, and particularly after 1999. However, this could be interpreted, as it is by some Labour ministers, as simply demonstrating that the House of Lords is more hostile to Labour governments. As you can see, the level of defeats was consistently low during the Conservative years 1979–97—averaging 13 per year—but was exceptionally high during the 1974–79 Labour government, reaching a peak of 126 in its second parliamentary session alone. But although the Lords undoubtedly made life more difficult for Labour governments in the past, I think that we are now seeing a different pattern. If the Conservatives were in government, Labour and the Liberal Democrats would almost certainly combine to defeat them in the Lords, so we would not see a return to the formerly quiet times. However, this cannot be definitively shown until we have a Conservative government.

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The number of defeats the government suffers therefore gives some indication of greater assertiveness on the part of the Lords, but is not on its own conclusive proof that the chamber has changed. Another measure that may provide greater evidence is the extent to which the House of Lords is prepared to insist on its amendments. The chamber doesn't have an absolute veto, and amendments may be overturned once a bill returns to the House of Commons. In this case the bill shuttles back and forth between the chambers until they either agree, or the bill is dropped, or occasionally the government uses its power to bring the bill back in the following session and pass it without the support of the House of Lords.<sup>11</sup>

It's quite striking that during the 1974–79 Labour government, which included that session with the largest number of government defeats, there were only four bills on which the House of Lords insisted on its amendments. In two cases it insisted once, and then backed down. In one case it insisted twice, and in the last case it insisted three times—meaning that the bill shuttled back and forth three times before the matter was resolved. This was an increase on the record under the previous Labour government, when over the whole period 1964–70, the Lords had only insisted once on an amendment.<sup>12</sup> But it was nothing to the chamber's behaviour in the first full parliament after its reform in 1999. In the 2001–05 parliament there were insurances on 17 bills. In most cases there was just one insistence before either the Lords backed down or some kind of compromise was reached. In three cases there were two rounds of insistence. But on two bills the chamber insisted on its amendments no fewer than four times, and the same thing has already happened again since 2005, on the government's proposal to introduce identity cards. This seems a sure sign that the Lords are prepared to throw away the caution that guided them in the past, and stick to their ground when they believe that the government is wrong. They may give in, ultimately, but in the meantime the government faces delay and public exposure on the issues which cause the Lords concern.

These are, as I already suggested, imperfect measures. Counting defeats, or counting insurances by the second chamber does not capture the extent to which the government alters its policy in response to the pressure from the House of Lords. There is no need for the chamber to insist if the government accepts its amendments following a defeat. Our analysis suggests that the government goes at least some way to meet the Lords' concerns in 60 per cent of cases.<sup>13</sup> There is no need for the Lords to defeat the government in the first place if it is prepared to accept the points raised by peers at earlier stages. A great deal of this goes on and it is very difficult to measure. There is no need for peers to propose amendments at all, if the government seeks to pre-empt their views by putting legislation before the house which is likely to be acceptable. One interesting development in recent years is the extent to which the government is prepared to consult with the Liberal Democrats—who as I say now

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<sup>11</sup> The Parliament Acts, allowing a bill to pass with the support of the Commons alone, have actually only run their full course on four occasions since 1949.

<sup>12</sup> Janet Morgan, *The House of Lords and the Labour Government 1964–70*, Oxford, England, Clarendon Press, 1975.

<sup>13</sup> For a preliminary analysis see M. Russell and M. Sciara, 'Why does the Government get Defeated in the House of Lords?', Paper presented to the Political Studies Association Conference, University of Reading, 2006. Available at: <http://www.ucl.ac.uk/constitution-unit/research/parliament/house-of-lords.html>

hold the balance of power in the House of Lords—over key policy proposals. For example when planning its anti-terrorism legislation in 2005 the Liberal Democrats were invited to the negotiating table on the same basis as the Conservatives—a clear recognition of the fact that assent by one or other party is generally required to get a bill through the Lords. In the end, incidentally, it was the Conservatives that were persuaded to support the government on this occasion whilst the Liberal Democrats remained opposed.<sup>14</sup>

Another interesting shift that we have seen recently is a new kind of joint working between members of the Commons and the Lords. On one occasion earlier this year—on a bill seeking to outlaw religious hatred—the Lords made significant amendments, which the government sought to overturn when the bill returned to the House of Commons. But there was much public concern about the bill, and rather than back the government the Commons chose to back the Lords amendments, and the government found itself defeated, as numerous Labour MPs rebelled. On other occasions rebellions during the Commons stages have sent a warning, which has been picked up in the Lords and the legislation changed, with the government choosing to concede rather than face a further Commons rebellion. Several times now Labour dissidents have publicly called upon the Lords to block or amend bills, and clearly much clandestine lobbying also goes on behind the scenes. As a result it seems to be not only the Lords that is strengthening, and certainly not the Lords versus the Commons, but parliament as a whole with respect to the executive.

All of these things seem to provide pretty clear indications that the House of Lords is both feeling more confident, and acting more assertively, following its reform. If one further piece of evidence is needed it can be found in the response of the government. Having started in 1997 by stating that the chamber's powers were broadly correct, and need not be reformed, many on the government side have moved from supporting a change in the Lords' composition to a reduction in its powers. This was suggested in Labour's 2005 election manifesto. Earlier this year, at the government's instigation, a parliamentary joint committee was established to consider the conventions governing the relationship between the two houses. This reflected growing concerns that the current conventions are breaking down, and is an indication of how the traditional restraint exercised by the House of Lords is seen to be declining, in respect both of primary and secondary legislation. This is what the committee was asked to look at but, after having taken much interesting evidence, it offered the government little comfort when it reported early last month. It suggested that it would be difficult to codify the current conventions, and that these would be bound to change in any case if the composition of the chamber were further reformed.<sup>15</sup>

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<sup>14</sup> See M. Russell and M. Sciara, 'The House of Lords in 2005: A More Representative and Assertive Chamber?' in M. Rush and P. Giddings (eds), *The Palgrave Review of British Politics*, 2005. Basingstoke, England, Palgrave, 2006. This chapter is also published as a briefing by the Constitution Unit: see website address at note 13.

<sup>15</sup> See Joint Committee on Conventions, *Conventions of the UK Parliament, Report of Session 2005–06*, HL 265, November 2006.

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## Prospects for future reform

This leads me to briefly reflect on what these developments suggest for future reform of the House of Lords, before turning to some more general conclusions.

As I said at the start, the government initially promised a two-stage reform, and the norm in the UK is to see House of Lords reform as unfinished business. So much is its current state considered merely temporary, that few bother to look at how the Lords is actually operating. However, we in Britain have a long history of temporary solutions that somehow stick. The reforms in 1911, 1949 and 1958 were all considered short-term fixes, to be followed by longer-term solutions when the players could reach agreement and parliamentary time could be found. There is every indication that the 1999 reform will prove to be the same.

There are many in the Labour Party who remain committed to Lords reform. However, they remain committed to it for very different reasons. One group wants to deliver on the promise to introduce a ‘more democratic and representative’ house, and to introduce elections. Quite another group wants to reduce the chamber’s powers to make it easier for governments to get their legislation. To some extent this diversity of view with respect to how many checks a second chamber should put on government has always existed in the Labour Party.<sup>16</sup> And to some extent it exists in the Conservative Party too. But more than ever it is now appreciated that the objectives of democratising the Lords and weakening it are fundamentally incompatible. If one seemingly minor compositional change—the long overdue removal of the hereditary peers—results in a chamber which is this much more assertive, there are major concerns in some quarters about the power that would be unleashed by creating an elected chamber. The government is internally divided, and it has been unable to come up with a set of proposals that can secure sufficient support. In 2003 the House of Commons voted on a variety of options for the composition of a second chamber and all of them—ranging from all-elected to all-appointed and five options in between—were rejected by the house. Since 1997 we have had a Royal Commission, two joint committee reports, and we are rumoured to be about to get our fourth government white paper on Lords reform. But I suspect this will go the same way as all the other proposals. In fact the rumours are that the government wants to square the circle by proposing a half elected half appointed chamber—which rather than being welcomed as a compromise is simply likely to be rejected by all sides.

So the Lords composition remains controversial. But the other option that some in the government have floated—a short bill simply to reduce the chamber’s powers—also appears to be politically impossible. Whilst the Lords has the support of the public for its policy interventions this would be a very risky and controversial step, and it would be strongly resisted by the Lords itself. The best chance the government has of reducing the chamber’s formal powers is to package these with compositional changes that will be popular, which means election, which means greater *de facto* powers.

Probably the likeliest reform is a further minor one, to tidy up the appointments process, reducing the patronage of the prime minister and giving more power to the

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<sup>16</sup> See P. Dorey, ‘1949, 1969, 1999: The Labour Party and House of Lords reform’, *Parliamentary Affairs*, vol. 59, no. 4, 2006, pp. 599–620.

independent commission which was established in 2000 to oversee appointments. There is growing pressure for this given recent controversies about seats for party donors. However, even this step is seen by some as dangerous as it will further increase the legitimacy of the chamber, and once again its strength. In short the House of Lords has got stronger, but there doesn't seem to be anything now that the government can do to stop it.

## **Conclusions**

I'm happy to answer questions on reform, but I'd now like to move to my main conclusions, of which I think there are three.

The first is, as the title of this talk suggested, that a little reform can go a long way. Despite the seemingly minor—many would say inadequate—nature of the change to the House of Lords in 1999, power relations have shifted significantly as a result. Reform can have unintended consequences, and those consequences can be bigger than you might expect. We do have prior experience of this in Britain—to some extent the same could be said of the 1958 reform which introduced life peers. This was seen as a short-term fix, but lasted 40 years and in many ways reinvigorated the House, certainly saving it from terminal decline.<sup>17</sup> But it's particularly ironic that in this case the government sought to strengthen its position by removing a large number of opposition members from the chamber, and in fact seems to have weakened its own position. Here there are clearly parallels with the introduction of PR for the Australian Senate. I have seen this described as a measure introduced for the government's short-term gain, but it clearly had wide repercussions which saw power shift from government, and also changed both the procedures and the culture of the chamber.

The second big conclusion is about the shape of British politics. We clearly offer the definitive Westminster system, with a strong executive sustained by a single-party majority in the House of Commons, and able between elections to legislate relatively freely—simply facing the wrath of the electors next time round if the wrong decisions are taken. If this ever was true, it may well have been ended by this seemingly minor reform to the Lords. As a result the government is having to negotiate its programme to a far larger degree, and the third party—and independents—have gained an influence in British politics unprecedented in the twentieth century given the size of the government's Commons majority. Because of the unelected basis of the Lords, and its lesser powers compared to the Commons, it does remain clearly the junior partner. The shift in party power relations is not as stark as it would be if we moved, as many have proposed, to a system of proportional representation for the Commons. Indeed what we are left with is something like what you have experienced in recent decades—a compromise between majoritarian and consensus politics. And we are now likely to remain there. Having achieved the current party balance in the House of Lords there is now an expectation that no party will seek to hold a majority there. This applies in the current appointed house, and it is also a feature of all serious proposals for an elected chamber. As a result small parties and independents look set to grow in influence, making policy making more pluralistic than it has ever been in modern Britain. In addition the balance of power seems to have tilted sharply from executive to parliament, with the House of Commons even working in partnership with the

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<sup>17</sup> For a discussion see Janet Morgan, *op. cit.*

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rejuvenated House of Lords. Our one small change has potential to reshape both the party system and the role of parliament in British politics.

The final lesson is one for bicameral studies in general, and runs counter to expectations. It is generally noted that elected chambers are likely to be more powerful than appointed chambers, as appointed chambers will suffer from legitimacy problems. The most complete schema for analysing bicameral strength has been put forward by Arend Lijphart, who notes that '[s]econd chambers that are not directly elected lack the democratic legitimacy, and hence the real political influence, that popular election confers.'<sup>18</sup> This may be true all else being equal. But all else rarely is equal, and there are other factors, I conclude, which may be more important. Lijphart's classification of bicameral strength is based on two factors: the extent to which the powers of the two chambers are symmetrical, and the extent to which their composition has a different representational basis—such as representation of states versus citizens in federal systems. On both these axes the House of Lords is really unchanged by its recent reform—its powers are unaltered, its members continue to represent nobody in a formal sense, and as it is unelected its legitimacy continues to be open to question. Using the same classification system the Australian Senate should also be unchanged by the advent of government control in 2005—the chamber's constitutional powers remain, as does its system of state representation—which provides a competing democratic legitimacy. In other words your system of bicameralism is strong, and remains equally strong despite recent change, while ours is weak, and remains equally weak. But experience suggests that it's more complicated than that.

Both examples indicate the importance of the party balance in a second chamber. This in itself is hardly a new finding, although Lijphart doesn't count it explicitly in his schema. But the story of the House of Lords suggests that party balance, and other factors boosting the perceived legitimacy of a chamber, may actually be more important than whether it is elected and enjoys democratic legitimacy in the traditional sense. In our system the funny old House of Lords with its retired experts and numerous members not taking a party whip has a new appeal as people grow cynical about politicians and political parties. Its relative proportionality has a clear appeal too, given that no government has won a majority of the popular vote since 1931. This is particularly true when, inevitably after almost ten years, disenchantment with the government has become widespread. Despite the chamber's continued unelected basis, there are therefore important factors which boost its legitimacy in a way that provides it with significant *de facto* power. The issues of second chamber power, composition and legitimacy are intricately entwined: power flows in part from legitimacy as Lijphart says, but legitimacy may come from places other than those you would immediately think.

It seems strange to say that British politics may be invigorated by an unelected chamber which still contains 92 hereditary peers. As I say, debate in Britain is largely still focussed on the reform of the Lords that hasn't happened, rather than reform which has. But if, as I suspect, no further reform happens for some time, we may look

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<sup>18</sup> A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven, CT, Yale University Press, 1999, p. 206.



back in years to come and see that a small and unappreciated reform has changed British politics in very significant ways.



**Question** — I'm curious about some factual things. Firstly these hereditary peers who have been expelled—I take that they still carry their titles do they? Secondly, the ones who remain, have there been any transfers by the death of one of the remaining ones and does the son become a member of the House of Lords, or does it die?

**Meg Russell** — The hereditaries that are expelled, yes, they retain their title. So we now have Lords in parliament as well as Lords out of parliament. The ones who remain, there's a very curious system. Part of the compromise package that enabled the 92 to remain provided for them to be replaced upon death. The way that the 92 were chose, as I said, was an election by their peers. The whole body of hereditary peers elected one tenth roughly of their total to remain the house, and it was done mostly by party groups. So the Conservatives elected the Conservatives who remained and so on.

What they wrote into the Bill was a system of by-elections (so-called). If a hereditary peer who holds a seat in the Lords dies, the hereditary peers who remain elect a successor and the successor has to be drawn from the current body of hereditary peers outside the House. So he could be an expelled hereditary peer or the son of a hereditary peer who has died, not necessarily the one who departed the House. It is a very bizarre system and I think people in government are really regretful that they agreed to that element of the compromise. They agreed to it because people, I think, genuinely thought that the next stage of reform was coming, the by-election system would never be used, but we've now had about six or seven of these.

**Question** — Does that mean that some peers holding their titles were in the House of Lords then went out of the House of Lords and will never come back in again?

**Meg Russell** — Yes. Some have come back. I think one son of a peer who left and then died has come in. I think it's likely that at some time there will be a private members bill or something to end the by-elections. If we ended the by-elections, it would take quite some time for them all to die off; the youngest hereditary peer is younger than me. Eventually they would go by natural wastage. At the moment the 92 are constantly topped up.

**Question** — I wonder if the lesson from what you say is that, if any fundamental reform of parliament is to take place, it has to take place immediately a government comes into office and before disillusionment or cynicism sets in.

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**Meg Russell** — I think that's quite right and I think it's the case with all of the constitutional reform that we had. It's interesting that in the first two parliaments after Labour came to power in 1997, we had a huge raft of constitutional legislation, not all of which I mentioned. One of the reasons for that was that the Labour Party had committed itself to not expanding welfare programs. It had committed itself to sticking to conservative spending targets and therefore there wasn't that much on the social welfare front that it could do. So it put all its constitutional reform very quickly, which was all very radical. I think if it had waited a bit longer, if it had had other things to do in its first and second term, some of these things might never have happened.

What we are waiting for now is two things. One is a change of government (though I believe that the Conservative leader has suggested in private that House of Lords reform is really not a big priority for him). Some of the Labour peers are coming to realise that they can team up with the Liberal Democrats and defeat the Conservatives when the Conservatives come to power, and that might actually be quite fun. It's at that point that people will really appreciate that the House of Lords has changed—when it becomes an instrument for a coalition of the left to defeat a Conservative government. But people are quite slow to realise this and I think that includes the Conservative leader. The Conservatives still have this idea that the House of Lords is their friend, and so I think Lords reform by an incoming Conservative government is quite unlikely. The other thing we are waiting for is Tony Blair's retirement, and there are all sorts of rumours about what Gordon Brown who is expected to succeed him wants to do. But Tony Blair was very keen on Lords reform before he was prime minister. Gordon Brown has had very little legislation because he's Treasury Minister. Those ministers who have had a lot of legislation are very wary of anything that strengthens the Lord's powers.

**Question** — I got an overwhelming impression that there is a lot of ferment going on from your statements. You mentioned the Scots, the Welsh, you mentioned small parties, and Independents.

**Meg Russell** — There are all sorts of interesting debates in Britain about England at the moment about parliament and the position of Scottish, Welsh and English MPs in parliament, because now we have devolution in Scotland and Wales and no devolution in England. There is quite a lot of controversy about Scottish MPs voting at Westminster on matters which apply only to England, because of course we don't have a federal arrangement. The largest part of our union state, England, which represents 80 per cent of the population, has no devolution at all. So we have a great imbalance.

**Question** — Has unicameralism ever been given a serious run at all? You've also partly answered a question which I was going to ask—the 1911 Parliament Act. To what extent has consideration been given to removing the restrictions and becoming more powerful, as distinct from the way you were characterising it. A consequence of an appointed house is that there is a quality of people and a variety of people in a

chamber that you don't get from an elected house and I in fact had the privilege of sitting through the first debate on embryo research in the House of Lords and the quality of debate was superb. I'm wondering how much that gets attention.

**Meg Russell** — You are inviting me to write another speech with all those questions. Unicameralism was originally the Labor Party's position on its foundation, but curiously when the party found itself in government, it never was that inclined to put this into effect. The time when it might have done so was in the 1940s when it had won a landslide after the Second World War, but it wanted to put through so much legislation in that period that Labor ministers came to appreciate that the House of Lords could be turned into a legislation factory and they could introduce bills into two houses at once. They could put the uncontroversial things in there and the peers would all work on the detail. Actually abolition never seriously came onto the agenda even in that period. The Labour Party last had a commitment to abolish the House of Lords in its 1983 election manifesto, which was highly controversial. That was a manifesto which the left of the Party managed to seize control over and wasn't really representative of the post-war Labour Party.

Unicameralism was one of the positions that the House of Commons voted on in 2003. It was presented with seven options for reform and a group of Labour back-benchers put down a unicameralist amendment, but that was quite heavily defeated alongside all the rest. So it's not a real option. Just as I think increasing the Lord's powers are not a real option. There was general consensus until very recently that the way the Lords' powers have settled after the 1911 and 1949 Parliament Act was about right. A year's delay—it's a slightly messy system, it's not really a year's delay, it's untidy, but this was broadly about right, and it's actually only the Labour Party or certain elements of the Labour Party ministers who have wanted to unpick that and suggest that the powers might be capped.

You are quite right about the issues of quality and expertise and variety and independence of mind as well, and maturity, and all the rest of it that goes along with the appointed House. In a sense I think I didn't play that up very much, but that is one of the things which contributes to this sense of its new legitimacy that the existence of those factors was perhaps rather masked by the overwhelming preponderance of hereditary peers. Now that those peers have been taken away, they reveal the life peers and we're now in this period when people, as I said, are feeling rather cynical about political parties. They don't like all the yahoo politics of the House of Commons and they quite like the idea of these rather other-worldly, mature expert people who come along and chip in as you say, on some very delicate debates in ways which are widely respected.



**Piranhas in the Parliament  
Politicians, the Press ... and Who's Really  
Devouring Whom?\***

*Karen Middleton*

I have never been to South America and I haven't seen a piranha ... as it were ... in the flesh.

A friend of mine, here in Canberra, does, however, have a stuffed one on top of her toilet. It's about the size of your clenched fist—a taxidermy masterpiece with the most horrendously enormous teeth—and it sort of smiles at you like it might launch itself at your jugular as soon as you've turned your back and dropped your knickers.

The experience must be even more disconcerting for those whose ablutions require them to look it in the eye. It is one scary fish.

Portraying journalists as piranhas is, I admit, a bit of a cliché. But the fishbowl analogy seemed too hard to go past when the good people of the Senate asked me to offer some thoughts on the strange parliamentary co-existence of the polities with the Press.

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 16 February 2007.

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I will, of course, be conceding that one of these two species is voracious, flesh-eating and insatiable—yes, that’s us—and the other, traditionally (to pursue the analogy) its prey. But I’ll also point out that in this particular fish tank, the hunted have developed ways to dramatically minimise the risk of being eaten.

It’s a bigger tank than it used to be and they have more room to hide but that’s not all that’s behind it.

By hand-feeding, over-feeding and selective starvation rations, they’ve managed to tame our aggressive instincts, limit our breeding grounds and significantly reduce our habitat. Without some effort to fight back, our traditional role may become endangered, if not extinct.

### **The fish with the bad press**

As I said, the piranha tag isn’t new. It’s a favourite descriptor of those who don’t like us all that much.

Having led with my chin on the title of this lecture, I went searching for some background on piranhas using that trusty tool so beloved of a journalist with a long speech to write and a looming deadline—Google. I found a blogger who goes by the name of Joey Skaggs<sup>1</sup> and who’s published some very amusing guidelines for baiting, catching and ‘cooking’ journalists. He compares us to sharks, barracuda and, yes, piranhas.

‘They are extremely territorial and defensive,’ he advises, ‘and will repeatedly attack, either singly or in large groups. You can usually find them behind hidden agendas.’ He outlines a series of recommended hooks and lures—sex, controversy, incompetence, power, revenge, little guy against the system, anything with an animal or a child. He also lists useful tools for reeling in a journalist—conviction and purpose, irony, humour, wit, confidentiality, deception.

‘Be patient,’ he urges the would-be angler; ‘Once the hook is set, they usually jump in the boat. And believe it or not, many others simply follow suit. Often feeding frenzies occur and you might even catch more than you can handle.’ He suggests that, once caught though, journalists puff up. And should be iced quickly.

It seems real piranhas are actually ... apparently ... a popular food fish. (Who knew?) Even more fascinating, a piranha caught on a hook and line may be attacked by the others. Turning on your own kind. Imagine that.

And while it’s commonly known that piranhas are found in the Amazonian, Guianas and Paraguayan river systems, I was delighted, a bit appalled and really not all that surprised to discover they have also been found swimming in the Potomac River in Washington DC. Apparently they don’t do so well there in the winter.<sup>2</sup>

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<sup>1</sup> ‘A Well Cooked Journalist’, Joey Skaggs, June 21, 2003. [www.joeyskaggs.com](http://www.joeyskaggs.com)

<sup>2</sup> ‘In river of many aliens, snakehead looms as threat’, *Washington Post*, May 29, 2005.

Anyway, who would've thought there'd be such a cheap link from piranhas to politics, just waiting for me to shamelessly exploit it?

In this national capital and this particular fish tank, some argue that parliamentarians and the media should be separated, at least by glass, to avoid one being eaten alive by the other.

I guess that's understandable.

We in the media can be vicious. When we smell blood, we circle and we strike. Sometimes the more merciless among us enjoy taking a single, debilitating bite to leave the victim swimming in circles, missing a fin. Other times, in a feeding frenzy, there can be little more than a carcass left.

We're not all piranhas of course. Some of us are Parrotfish. Blowfish. Goldfish. Silverfish.

But as far as reputation goes, we all tend to be caught in the same net. After all, it only takes the suggestion of sharp fins or gigantic teeth to make people want to get out of the water.

### **Predator and Prey**

In politics, the feeding goes in both directions. Journalists pursue politicians. And politicians pursue coverage. And when they don't like the coverage, they pursue journalists.

At a church service earlier in the year to mark the opening of Parliament for a new year, Anglican Bishop Tom Frame was clear about who he believed was the predator and who was the prey.<sup>3</sup> His remarks were *to* the politicians and *about* those of us who deal most publicly with them.

'Very few care or have any regard for your feelings of those of your families, who are often deeply wounded by the arrows that are hurled at you,' the Bishop said. 'So please don't say "oh, it comes with the job" as though by saying that, it absolves the people, it absolves the *Press*, from such appalling behaviour. We can do better. We ought to do better. You deserve better', he told them.

But there was a second message too:

'There are some things that we cannot demand from others,' the Bishop said; 'Respect readily comes to mind. It's not gained through persuasion, intimidation or coercion. Respect can only be earned.'

He was right, on both fronts.

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<sup>3</sup> Sermon, church service marking the opening of Parliament. Anglican Bishop Tom Frame. St Andrew's Presbyterian Church. Canberra, February 6, 2007.

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Some of us in the media can be terribly cruel, occasionally oblivious to the hurt we cause in pursuit of a good story or just a good line. That is as true in political journalism as any other kind and probably more so. But at least as often, in this part of the pond, we can find ourselves in receipt of some heavy-handed persuasion, intimidation and—if not quite coercion—then trickery at least.

Bishop Frame didn't seek to excuse either set of behaviour. And I certainly don't suggest that being on the receiving end of one justifies resorting to the other.

### **Who's devouring whom?**

But between the Press and politicians—and on politicians I'll speak mostly here of governments because governments have the most political power—it would be wrong to suggest only *one* is doing the devouring.

Despite how we're sometimes portrayed, journalists don't spend their days looking for new ways to destroy the careers of the nation's elected representatives. We are frequently, perhaps even mostly, legitimately pursuing stories that are in the public interest, though sometimes there are differences of opinion on how 'public interest' should be defined.

These stories can occasionally cause considerable discomfort to those who feature in them. We can find that we thwart political ambition, stymie a promotion, or obstruct someone on a path of least resistance. And then we meet considerable resistance in return.

As tools to be used against pesky journalists, persuasion, intimidation and trickery have been around for years. Many of my colleagues recount colourful tales of abusive phone calls, withdrawn access, threats of future non-cooperation and punishment for perceived bad behaviour. They mostly laugh about it later. Mostly.

When former Labor minister Ros Kelly's resignation was rumoured, her colleague Graham Richardson tried to shut down the speculation, launching one of those routine, all-out assaults on those who reported it, ridiculing them for writing rubbish worthy of nothing but fish-wrapping. Of course shortly thereafter, Kelly did resign and then, suddenly, so did Richardson. As a parting gift, a couple of journalists gave Richardson a dead fish wrapped in copies of their newspaper. He bellowed with laughter and called it the 'perfect Mafia present'.

Politicians also regularly use the media to get at each *other*. One senator, now retired, used to enjoy leaking provocative anonymous quotes to newspapers, deliberately using *another* colleague's recognisable turn of phrase.

And two members of the current Opposition front bench, watching a colleague doing a terribly serious Lateline interview on the ABC, spotted the telltale outline of his ever-present mobile phone in his top pocket. They fell about laughing in an office downstairs, watching him fumbling onscreen as they rang it. Twice.

But the relationships are not always quite so jolly.



In 1990–91, the leadership rivalry between Bob Hawke and Paul Keating split the Press Gallery, as each man enlisted commentators and columnists to his cause.

On the night Hawke finally lost to his rival, he threw open the doors of the Cabinet room and put on a huge party. But any journalist he saw as having sided with Keating was barred. There were stand-up rows at the door and almost fistcuffs as Hawke's defenders squared off against those they blamed for his defeat. Some of us weren't tarred with either the Hawke *or* Keating brush—probably because we were too young and irrelevant—and we wandered right through the Cabinet suite, drinks in hand, looking in every cupboard drawer and swinging on every chair. ASIO must've been in there for weeks afterwards.

There *are* occasionally moments of strange solidarity, like September 11 2001, when John Howard and the travelling media were all caught up in the terrorist attacks in Washington. On the lawns of the ambassador's residence the following day, as he prepared to fly out of the country in specially-opened airspace on the Vice President's plane, Howard asked that the cameras be turned off and then apologised for leaving us all behind. We told him we had work to do.

So there is a sort of mutual understanding that develops if you hang around here too long. Elsewhere, I think they call it 'Stockholm Syndrome'. But often in the relationship, it's us using them and them using us with the blowtorches applied in both directions.

When Paul Keating was Prime Minister, he famously went after the *West Australian* newspaper because of a highly critical story it published about him. The revenge and ostracisation went on for years.

There are rare occasions, of course, when the politician *is* on solid ground.

Some 20 or so years ago, when I was working at the *Canberra Times* a national debate was raging about tax and, specifically, the then Treasurer Keating's personal arrangements. Some newspaper executive in his wisdom had decided it would be fun to publish photographs of Keating's residences in both Sydney and Canberra, complete with their full street addresses.

I got to the office very early that morning and the only other person on the editorial floor was colleague Graham Downie, affectionately known as the God reporter. It was so early, neither of us had even read the paper yet, though Graham had a better excuse than me because Graham is blind.

He also has a very black sense of humour and had, back then, a very small windowless office in the same wing as the editorial executives. So when the editor's phone rang, he got there first. He was slightly puzzled when a torrent of abuse spewed into his ear and he politely asked who was calling.

It was Paul (expletive deleted) Keating, who explained in straightforward terms that he was really quite upset about the houses and the addresses and who did we think we were etc. All, as you can imagine, punctuated in a most animated four-letter fashion.

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Still trying to decipher it all, Graham said ‘I’m sorry but I don’t know what you’re talking about.’ Keating went into an apoplectic rage that someone who worked for a newspaper had not even seen its front page: ‘What *are* you... *BLIND?*’

I still remember the smile that came across Graham’s face. ‘Actually,’ he said, (and he really enjoyed the pause) ‘I am.’

The *Treasurer* only paused for a moment and then the abuse resumed.

### **Tending the tank and taming the wildlife**

Perhaps it’s an even greater sense of past media persecution that’s inspired the leader of the current Government to bite back on a much greater scale and harness the volatile power of the circling media.

Over the past 11 years, the Prime Minister has learned to control media coverage like none before him have. He knows how to minimise the risk of the uncontrollable feeding frenzy. He knows when we’re hungry—in these days of the 24 hour news cycle, that’s all the time—and either feeds us, starves us into submission or just slowly raises the water temperature till we start to roll over.

I would suggest that history will record the ‘control of the bowl’, if I may continue to torture the analogy, as absolutely central to John Howard’s success.

This Government’s media management strategy has flourished through a combination of restriction and distraction.

Restriction is hardly new. The previous Government certainly engaged in it too, though not as effectively as its successor. Under Labor, the application of the Freedom of Information Act became increasingly subjective, with journalists’ requests routinely finding their way onto ministers’ desks for political scrutiny before approval. Or denial.

The monitoring and, by extension, control of information was alive and well then too, in the guise of a unit we used to call aNiMaLS. ‘aNiMaLS’ was officially called the National Media Liaison Service, which laboured under an awkward acronym until it was rescued by a few cheeky vowels.

It was squeezed into an L-shaped set of offices just downstairs from here ... around the corner from the Prime Minister’s suite. Its rather un-subtle location on one of the building’s main thoroughfares was offset by frosted windows and a lack of obvious signage, giving it the slightly mysterious air of a spy agency hard at work.

aNiMaLS’ ‘liaising’ involved monitoring media all over Australia and disseminating useful snippets to embarrass or nobble the Opposition. If an Opposition figure made a hash of something, somewhere, they had it covered. If a partial transcript from Radio Gunnedah appeared on your desk, you knew it was aNiMaLS—and your taxes—at work.

The Coalition—much monitored and, by 1996, very cranky—abolished aNiMaLS upon winning office.

In its place has grown a much MORE sophisticated network without the snazzy acronym. It's a sort of media-monitoring-cum-spin set-up. The monitoring is once again paid from the public purse and you can bet the bill is off the charts compared with those old days. But it's now accepted as a necessary expense in these days of 24-hour news.

In terms of outward information flow, it's the Prime Minister's press office that's ultimately in charge. Announcements are centrally coordinated to ensure no conflicting messages or wasted media opportunities. Ministers are assigned to appear on Sunday morning talk shows to reinforce a theme ... and ordered to cancel if plans change.

On the wider media stage, it's the ministerial committee on government communications—comprised ... not surprisingly ... of Government MPs—which has the oversight role, vetting and approving all Government advertising and national media campaigns.

Access to people and events is increasingly restricted, often attributed to 'security' but sometimes looking suspiciously like convenience or playing favourites. Despite the lip-service paid to press freedom, information control is pretty tight.

Some journalists and organisations are deemed useful and given extra assistance while others are designated as either being of no benefit, because of low circulation or ratings, or just being 'trouble'. That's a practice that's gone on for decades but it has been greatly refined under the current regime.

There's restriction on our questioning these days too. When heads of government visit from abroad, the Prime Minister insists on taking only two questions from each country's media—a trick he picked up in Washington.

And we are increasingly in the age of the 'video news release'—the advent of which causes heated discussion along the Press Gallery corridor. Where the Prime Minister is concerned, these emerge in response to a particular event—the death of Slim Dusty, a sporting hero's retirement, a triumph on Oscar night.

Sometimes the comment is on request from television bureaux, sometimes it's on offer.

The Prime Minister's office will agree to do a pooled 'interview', usually with a single television journalist—sometimes also one from radio—but restricted to the specified subject. Occasionally there's only a camera present and very occasionally the press secretary even conducts the 'interview'. The broadcast material is then distributed to all television and radio networks and the transcript to all print media and wire services.

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It means we get a ‘grab’, as we call it, on one particular issue which we otherwise wouldn’t have. But it also means the Prime Minister avoids talking about anything else, that particular day.

His office argues he often doesn’t have time to do an ‘all-in’ news conference all the time—and to be fair, he does do them regularly—canvassing all the day’s issues with all the media together. And, they say, at least this way we get something.

It’s not an entirely unreasonable point. But neither is the suggestion that this way, he gets to ‘cherry pick’ the issues he wants to confront and sidestep others on difficult days.

So should we run these comments or not? It’s a dilemma. And we usually do.

### **Putting the lid on**

The policies of restriction also affect who we’re allowed to speak to—or rather who’s allowed to speak to us.

Since it won office, the Government has shut off or curtailed many traditional information sources for journalists. The large-scale background briefings on weekly coalition party meetings have been restructured. The affable, sometimes overly helpful backbench briefers have been replaced by savvier senior MPs whose own ‘brief’ is to only offer a selective picture of what went on. The Opposition has adopted the same approach. The spin can make you dizzy.

And the Government has been particularly tough with public servants. Few are even allowed to speak to journalists anymore and those the Government suspects of doing so without authorisation are pursued, even prosecuted.

So, too, are the journalists to whom they speak—witness the case of my two colleagues Michael Harvey and Gerard McManus from News Ltd’s *Herald Sun*.<sup>4</sup> They wrote a story on the Government’s relationship with war veterans and how despite its publicly sympathetic attitude, it was rejecting their request for financial assistance and then trying to spin what *was* on offer as generous.

McManus and Harvey have now been charged with contempt of court for refusing to reveal their sources. They have pleaded guilty. It’s not clear if they’ll be jailed, although the judge did indicate some hostility when he remarked recently that the journalists seemed to wear their refusal to obey the demand to disclose as a ‘badge of honour’. I’m not sure how much protection a badge of honour would offer inside. But I strongly support the non-disclosure.

Some may think it’s fair enough to jail journalists for refusing to spill. But what gets me in the gills is that senior members of government routinely offer journalists strategic ‘leaks’, sometimes as a kite-flying exercise to test the response to a proposed

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<sup>4</sup> Gerard McManus & Michael Harvey, ‘Cabinet’s \$500m rebuff revealed.’ *Herald Sun*, February 20, 2004.

piece of policy, sometimes for other reasons. They do so in the full knowledge that the journalists, in upholding the vital confidentiality clause in our code of ethics, will not expose them as the source. So it's a bit breathtaking when someone *else* tells us something—something the Government doesn't want published—and we are hauled before a court for refusing to divulge *them* as the source, in order for them to be prosecuted.

I concede that this 'by agreement' arrangement in source protection can itself be a source of frustration for—and criticism by—those *consuming* the news because vital pieces of context will be missing—like who provided the information and why. But without the protection of sources under the code of ethics, you'd know a lot less about the workings of government, even than you do now. So it's a trade-off.

These days, it's a lot harder to find sources without a party-political agenda who *are* willing to talk. Whereas we used to seek information from specialist bureaucrats on the execution of a particular facet of policy, we are now routinely directed to the 'minister's office'. That's because there is nothing, now, that isn't political. Everything done by government, is done with the politics in mind.

So restriction also comes in the shape of spin. Just like the role of political journalism is, increasingly, to interpret events, it's important to see how the Government—and, slowly, the Opposition—is setting the context for their announcements for maximum PR impact.

Take the Government's ten million dollar water plan. A bit of grilling through the Senate estimates committee process has established that it didn't go to Cabinet for approval before Mr Howard unveiled it with fanfare in his pre-Australia Day speech. What that tells you is that somebody decided that the *timing* of the announcement—and its potential political impact—was more important than bedding down the details through the usual processes.

And it's not just *when* but *how* things are announced that's significant.

In her recent dissection of the Press Gallery,<sup>5</sup> Queensland academic Helen Ester writes about Mr Howard having chosen to announce his decision to go to war in Iraq at a news conference, rather than on the floor of Parliament as would once have been the case. She quotes my colleague Rob Chalmers, who produces the *Inside Canberra* newsletter and is now the longest-serving Press Gallery member with 50 years' service under his belt. Rob sums up the Government's PR priorities when he describes Parliament House as increasingly like Mr Howard's 'taxpayer-funded television studio'. Actually 'radio studio' might have been even more accurate.

More than any other political leader, John Howard has harnessed the power of talkback radio as a means of communicating over the heads of the local piranhas and straight into a much bigger and, as he sees it, less filtered pond. He has a weekly

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<sup>5</sup> Helen Ester, 'The Media', in Clive Hamilton and Sarah Maddison (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate*. Crow's Nest, NSW, Allen & Unwin, 2007.

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commitment to each of the main big-city morning radio shows and allowing a TV camera to witness his responses, and then issuing a transcript, ensures other media also regurgitate what he has to say. It has worked extremely well for him and is now so entrenched it's a practice which may well continue beyond this government.

### **Dangling the bait**

But along with all this restriction comes the artful practice of distraction. We fall for it every time. While limiting the flow of *some* information, the Government is a veritable font on other things, ensuring we always have something to write and broadcast—recognising the eternal appetite of the very hungry fish. It's forever announcing things, or re-announcing, or re-packaging them.

Keeping us occupied is a key objective. The busier we are tearing something apart, the less likely we are to start doing laps, looking for something else to munch.

So why do we put up with this?

Well, the trouble is, a lot of what the Government is 'announcing' *is* actually news. It has become very good at *manufacturing* news, at stashing things away in the bottom drawer to be unveiled with a grand 'ta-DA' on a day when a good, solid distraction is required.

The choice for us is either go with the big, obvious story—the ten billion dollar water plan or the discussion paper on values in education—or ignore it (*and every other* news outlet) and go trawling for something they *don't* want us to know about.

It's very hard to choose to ignore actual events—even if they are sometimes confected—in favour of chasing shadows, though the most important stories are often hiding in the weed.

I think we should all probably spend a little more time in the weed and less time gulping on the surface. But that takes a lot of effort. It takes time management—always a personal challenge for me. It takes determination not to be distracted by the electronic snowstorm of emailed press releases and the insistent parade of ministers and shadow ministers wanting to spruik their wares. And it takes resources—the backing of publishers and broadcasters willing to invest the time and space in having us look for the *real* news instead of being dependent creatures who need feeding daily and are told what we should eat.

Like pet piranhas who've actually forgotten how to bite.

In conclusion, I think there *is* more good about us all living here together than bad. But vigilance is required on *our* part—the part of those of us in the media—to ensure we're still doing what we're here for and not just acting as the bullhorns of government and opposition.

My research into real piranhas tells me they *can*, in fact, survive as pets. But they actually do need a varied diet. And though they seem to have an endless appetite, overfeeding—like underfeeding—will kill them.

(After this, I may go hungry for some time.)

Thank you.



**Question** — How many journalists are there in the Press Gallery?

**Karen Middleton** — At my last count of the contact list for the Press Gallery there were 260 people working up there. I haven't dissected that to work out how many are reporters or writers. There are also editors, camera crews, photographers, administrative staff, because we have full television studio facilities and newspaper bureaus upstairs, wire services. So 260 were there at last count, and incidentally the Prime Minister's press office compiled the list for us. Isn't that nice of them. Actually I am grateful for that because I couldn't do it in a million years.

**Question** — How many in the Prime Minister's press office?

**Karen Middleton** — In the press office he has three media advisors and then he has four or five assistant media advisors who do transcription and some of the administrative work and some of the junior media work.

**Question** — How different do you think the situation would be if the press gallery wasn't co-located in Parliament House?

**Karen Middleton** — It's always an interesting question. It would slow everything down, which is why I think it probably will never happen because the news cycle is so fast these days with communications the way they are that physically being located elsewhere wouldn't just mean that we couldn't harass politicians as easily, it would also mean they couldn't harass us as easily, and they couldn't whistle up a press conference at five minutes notice.

The way we work now is there is a bell in the Press Gallery and if someone is calling a press conference either here or even interstate at very short notice, because they know we are all co-located together here, they will ring the bell. Then it's like Pavlov's dog—everyone salivates and comes running and finds out what's going on. So these things can happen at very short notice and on weeks like Budget week, the bell is just going all the time and on Budget night we actually set up cameras in the Press Gallery at the press boxes and we just wheel people through because it's just so much easier.

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It would be physically much more difficult to process the volume of information that we do if we weren't here and I think for the other side as well. Some people might think it would be a good thing to not have us here, and there are arguments in both directions. It might be a good thing to slow things down and we might be a little more discerning about we cover in that case. You could argue it both ways I guess.

**Question** — As you move around and talk to journalists from other countries, how do you compare your lot with theirs?

**Karen Middleton** — It's interesting actually, we don't often get enormous amounts of time to talk because we're racing around following our bloke and they are racing around following their bloke or woman, so we don't get a lot of time. Sometimes there's a few minutes standing waiting for a press conference.

On the trip we did with the Prime Minister to the United States, Canada and Ireland last year, a number of us found it interesting, when we were in Ottawa, the way their Press Gallery was set up. We have an administrative committee here, of which I'm the chair, so I'm the president and we're all elected and it's a voluntary arrangement and it's very haphazard and it really deals mostly with real estate issues: sort of body corporate liaison with the Parliament because we pay rent for our space here. But it's very ad hoc, and that does have its disadvantages because it's hard to act collectively if and when we need to. We don't act collectively on matters of policing each other's work or anything like that, but it's sometimes useful to act collectively in dealing with the Parliament on administrative matters, on matters of access, when we can and can't have cameras in the building, that sort of thing. The Canadian Press Gallery has a full-time paid director who co-ordinates that, and I've often thought that would be a great thing and may even pursue it, but how we would pay for that? It needs to be funded and we don't have any money and we never have any money. It's a bit different in that respect, they are set up in different ways, and you do observe different levels of control.

I made a reference to Washington, where the Press Gallery is very tightly controlled, and there's been a lot of public debate about some of the implications of that in relation to the Iraq war. I think there's a different culture in the States that perhaps doesn't exist here, where they are perhaps historically and culturally a little more accepting of authority because the presidency has this particular status there. In fact I remember once years ago there was a press conference here, for George Bush senior, and Keating was Prime Minister then. We were seated with the Australian media on one half of the room and the American media were on the other. When Bush and Keating walked into the room, all the Americans stood up. We didn't. So I think there are some cultural differences that will permeate the media anyway and we perhaps have a well known and documented suspicion of authority in this country that goes back a long way and it's played out in media as well.



**Question** — I work for the ABC and it seems to me to be questionable where we are headed with freedom of speech in this country.

**Karen Middleton** — I think I mentioned that there is a lot of lip service paid to freedom of speech, but sometimes actions speak louder than words. It's not just this government. Once people get into office, they want to protect what they have and nobody likes you saying something that embarrasses them or that they don't want other people to know about. There is a natural reaction to that, but I think it has been on the increase in recent years, that there is this effort to try and stop the diversity of news and information. Sometimes that's a media ownership issue too. We've seen media ownership laws changed, and a reduction in the number of owners. I don't think there are as many conspiracies about owners dictating what goes in a newspaper or on air as people suggest, but my personal view is that it can't be good for the diversity of news and information if you have fewer owners and fewer journalists covering an issue and work being syndicated everywhere. So yes, it's an issue I think.

**Question** — You spoke earlier about journalists working collectively on real estate issues. To what extent do journalists work collectively in deciding what is going to be the issue of the day and how to detect a particular event? Do journalists work individually or collectively on these sorts of things?

**Karen Middleton** — Actually there is a lot less caucusing than people think. If you open a newspaper or a series of newspapers (and in this town you can get something like seven on your front lawn in the morning) you will see a similarity in the subjects covered and sometimes you'll see the same quotes used from one person to another. That is not so much because we stand around deciding what's the news of the day, it's because we are attuned to particular issues, following them closely, so we all recognise a development in an issue when we see it. You can argue about the way we're trained to do that and whether or not it's healthy, but I think it isn't as confected and organised as you might think. We really don't have time to stand around swapping stories with each other and working out what everyone thinks is the lead, because we're just too busy. We'll talk to each other on the way back from a press conference and swap commentary for as long as it takes to get from the Prime Minister's courtyard to the office, but there isn't as much standing around and organising as people think. It is more independent than that.

Of course you need to remember that while we do put the wagons in a circle a bit when people attack the Press Gallery, we're all highly competitive individual journalists, whose organisations are fighting each other for readers and viewers. So it's a strange atmosphere up there, where we have a bit of solidarity because we all work here and a lot of people like to criticise us for working here, but there's also huge competition and you want to beat someone else to whatever story there is. People sometimes forget about the competitive side of journalism, and sometimes governments and oppositions play to that. They will dangle things to somebody in order to get a frenzy going in some direction—we are reasonably competitive.

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**Question** — You were talking about the pressure of the 24-hour news cycle. One thing I've noticed even in the few years that I've been working in the building, is the internet and online content. I was wondering how the change in the medium has affected your work in the media.

**Karen Middleton** — Yes, it is affecting the way we work. Because of the immediacy of online journalism, there is pressure to get things out fast. Some of the early practitioners of blogging and online journalism tend to put speed ahead of accuracy and fact sometimes, and that puts pressure on everybody because in journalism we are supposed to check and make sure that something is accurate. The time pressure can sometimes be the thing that thwarts you doing that properly, and sometimes I've found that online publications have been less good at accuracy. Certainly there was a criticism of Crikey when it first was set up, that they used to just publish all sorts of things; gossip, rumour, and they fell victim to people's manipulation too. People were sending them emails purporting to be from someone in high office, which was mocked up. So there are all kinds of traps when you're dealing online and when you want to get things out quickly, and I think we all have to be careful of that. The pressure of the 24-hour news cycle means that there is more urgency about everything. It's not just the online factor; it's 24 hour television, and having journalists reporting directly from overseas, with soldiers in the Middle East for example. The pressure to get everything out the minute that it happens means you are reporting one side of a conflict and not the other, and it can be a problem.

**Question** — Time and again in interviews we see politicians of all political persuasions being asked a question and then deliberately not answering it. They are trying to get their own message across. How well do you think as a profession in general you go at getting them to answer the question?

**Karen Middleton** — We have competing interests. If I'm interviewing a politician and they have a message they want to get out, they will be very focused because they will have done media training and some other person in my position will have taught them how to do this. They will repeat their message. Whatever question you ask them, they will say: 'Yes, well, that's a very interesting question and that brings me to this point, which is blah', and that's how they should do it as a good politician who has a message to get out. It is frustrating for us. We have to find creative ways to pursue both issues and to hope that we can extract the information that we want.

It is difficult because in broadcast journalism, we have time pressure. If there is a live interview, it may only go for a minute and a half. You may have a politician in for a minute and a half or on the 7.30 Report, it might be five minutes or longer, 10 minutes sometimes, but you're conscious that you don't want to lose your audience by just haranguing and haranguing and you have to make a judgement about when to harangue and pursue and point out that a question hasn't been answered and when to move on and that's a very difficult thing to do. For someone with a job like Kerry O'Brien's it's very, very difficult to manage—to adequately inform and entertain as well, because you need to hold the audience's attention and cover important issues, as well as make a judgement on the run about how far to pursue something and when to

let it go and move onto something else. Whichever path you choose, there will be somebody who will say you did the wrong thing. It's incredibly frustrating. It is up to us to learn how to ask questions properly and pursue that and to be listening to the answers.

It is also very hard in a live interview. You're thinking: 'Where am I going next?' because the last thing you want to happen is for your mind to go blank. If you tune out what they are saying and look for where you are going next, you might miss something. It's a balancing act and the more experienced among us do it very well.

**Question** — Has the rise of the sort of opposition we have currently provided more embarrassment for the government through the media?

**Karen Middleton** — You mean since Kevin Rudd took over? Is it us doing it or is it Kevin Rudd doing it or is it Labor under Kevin Rudd doing it or is the Government being nervous because Kevin Rudd's there or because we're focussing on Kevin Rudd? I guess what I'm trying to say is it is a perfect storm in a sense. There are a whole lot of things that contribute. This is why some of us hang around in politics so long—it's quite fascinating, because it's never as straight-forward as you might think. It's psychology as well, so yes, there is more focus on the Opposition, and critical focus maybe on the Government because there's an Opposition that appears to be resonating more with the public. It's a sort of chicken and egg thing—where does it start? Is it starting with you and the opinion polls or is it starting with us paying more attention to them? I don't know, but most commentators that I've heard in the past week are saying they feel that the Government is under more pressure than it used to be because the Opposition seems to have renewed confidence for whatever reason. New leaders always get a lot of attention in the short term anyway in the media, and we talk about honeymoons, and there was a question about when the honeymoon ends. I think a lot of things contribute and I'm not saying the press is not part of it. Our attention can help to boost one side and lower another, not deliberately, but just by the fact that we focus on them.

**Question** — Do you believe there's a difference between the major parties and how they use the media and has it changed much in the last 11 years since Howard became leader?

**Karen Middleton** — Yes, well I guess that's the point I was making. It has changed a lot, partly because the media and the news cycle have changed. As I said we have CNN now, we have broadcasting all the time and newspapers aren't just once a day anymore. I don't know if you've noticed this, but the daily newspapers now are updating their news stories online and their journalists are under some pressure to file for the net before they file for the paper. The whole culture of news and information transmission has changed with the internet and the immediacy and tech positions and all that. So the culture has changed as a result, and you get people who are better than others at learning how to work that, and that's the point I'm making about John

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Howard. He is exceptionally good at it—he is very, very good at it, and he has the resources of government to assist him.

You can be good at it, but if you haven't got the tools to work with, it's harder. Oppositions don't have the tools, they don't have the funding, they don't have the bureaucratic structure to help them. There has been criticism of whether the Government has appropriately or inappropriately used taxpayer's money to fund advertising campaigns and there is a fine line. It's a debate that will go on because some of those advertising campaigns are legitimate exposure of Government policy and things that people need to know about. Some of them look awfully like political advertising. The Government have the infrastructure and the support, and that helps when you've got a clever person who knows how to deal with it and you can get streets ahead. I think Kevin Rudd's pretty clever at it too, actually, and that's starting to emerge now that he's leader. He is learning about those things very quickly and we're starting to see a different sort of a contest because he's playing guerrilla warfare in the media too, which is interesting but exhausting. I think neither of them sleep—it's ridiculous.

## **The Independence of Electoral Administration\***

*Colin A. Hughes*

As a topic for serious study, electoral administration has been a late starter. Classic political philosophers like Rousseau and John Stuart Mill wrote about electoral systems and the theories of representation they embodied, and so did historians of Greece, Rome, the Papacy, the Holy Roman Empire, the United Kingdom and the United States *et cetera*. But such writers almost always ignored the low-level mechanics of who did exactly what when elections were taking place, the one virtuous exception being Jeremy Bentham.

As an undergraduate fossicking in the second hand bookshops which once stood where the Bank and the Fund now rule the world, I acquired two volumes entitled *How the World Votes*.<sup>1</sup> Their author was a Yale professor, Charles Seymour, with his research assistant shown as co-author. Seymour is still well known today for his account, written a few years earlier, of the development of the English electoral

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 23 March 2007.

<sup>1</sup> C. Seymour and D.P. Frairy, *How the World Votes*. 2 v. Springfield MA, C.A. Nichols Co., 1918.

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system after the Great Reform Act.<sup>2</sup> To start this lecture I want to ask why the ‘How’ in the later title was ignored for so long.<sup>3</sup>

It will help if we look at the sub-titles of those books for a moment. In 1915 Seymour added ‘The development & operation of the parliamentary franchise 1832–1885,’ and in 1918 ‘The story of democratic developments in elections.’ By 1918 democracy was seen as a good thing, though not necessarily always suitable for export and adoption. Look at what was being said about Iraq in the Covenant of the League of Nations (Art. 22) and the text for the subsequent mandate. What ‘developing democracy’ traditionally meant in the context of elections was extension of the franchise to, eventually, all adults. Since the end of World War II that meaning has expanded, as we will see.

When Seymour reached ‘Elections in the British Colonies,’ those colonies which were about to become Dominions, his praise was fulsome: ‘[T]hese self-governing commonwealths represent in many ways the furthest development of the democratic idea that the world has seen.’<sup>4</sup> In particular, they had curbed plutocracy and reformed the hereditary upper house. The methods of roll-keeping in Canada and Australia were described briefly, and he noted that ‘Australia has ... gone far in developing the technical details of holding elections.’

Unlike the mother country where untrained officials produced often unsatisfactory rolls, and ‘electoral duties were regarded as of comparative unimportance and shifted on to the backs of already overloaded officials, Australia has a wealth of electoral officials who have nothing else to do but to see that the mechanism of elections runs smoothly.’<sup>5</sup> The significance of that development has been discussed elsewhere.<sup>6</sup> In practice the ‘wealth of officials’ meant a full-time junior official who did the routine work and a more senior officer with other, non-electoral duties as well, located in every electoral district (the Commonwealth Constitution called them ‘divisions’, plus very small establishments at state and federal level supervising them. The whole organisation was known as the Electoral Office, and formed part of a large ministerial department for budgetary and personnel administration purposes.

Writing a few years later than Seymour, Lord Bryce, having defined democracy as meaning ‘nothing more nor less than the rule of the whole people expressing their sovereign will by their votes,’ was equally approving of Australia:

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<sup>2</sup> C. Seymour, *Electoral Reform in England and Wales*. New Haven, Yale University Press, 1915; reprinted Hamden CN, Archon Books, 1970.

<sup>3</sup> Note the same point has been made about electoral commissions: R.A. Pastor, ‘A Brief History of Electoral Commissions,’ in A. Schedler et al. (eds) *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder CO, Lynne Reiner, 1999, p. 76.

<sup>4</sup> *How the World Votes*, op. cit., p. 181.

<sup>5</sup> *How the World Votes*, op. cit., p. 193.

<sup>6</sup> C.A. Hughes, ‘The bureaucratic model: Australia,’ *Journal of Behavioural and Social Sciences* vol. 37, 1992, pp. 6–23.

It is the newest of all the democracies. It is that which has travelled farthest and fastest along the road which leads to the unlimited rule of the multitude.<sup>7</sup>

That was certainly true. Adult male suffrage, abolition of plural voting and property franchise, suffrage for women were far and fast indeed. Bryce also mentioned several local innovations that extended the franchise, but went on to say that '[t]he counting of votes appears to be everywhere honestly conducted, and one hears no complaints of bribery,' whilst noting limitations had been imposed on campaign expenditure and the likelihood that elections were getting more expensive.<sup>8</sup>

What Bryce did not write about, nor did anyone until Robert Parker<sup>9</sup> 40 years later, was the Australian tendency to turn adjudication of some important decisions over to independent bodies. It is important for today's topic and again it is a matter written about previously.<sup>10</sup> When developing electoral administration, the Australian colonies had originally followed British foot-steps fairly closely, but as the post-Bentham era of reforms unfolded sometimes the Australians were a few paces ahead, sometimes the British.

The franchise began as a property right, and as such was suitable for adjudication in the ordinary courts of law. But when the numbers of electors grew and their qualifications had been reduced and simplified, it proved easier to turn disputes over to a specialized court that came into existence *ad hoc* when rolls were being compiled to hear *inter partes* disputes about eligibility. The new federal government immediately created Special Courts of Revision (*Commonwealth Electoral Act 1902*, s.38) comprising the electoral official charged with keeping the roll in his division and either a magistrate or a couple justices of the peace. The matter remained with those special courts briefly, then the magistrate or justices of the peace were dropped. That left enrolment disputes to the official responsible for roll maintenance in that division, subject to appeal up the bureaucratic hierarchy.

Disputes about membership of the House of Commons—membership of the House of Lords raised very different questions—could concern either eligibility to be elected or the conduct of the poll. In either case it was considered the responsibility of that chamber which would appoint a select committee to investigate. Eventually responsibility passed to a special court consisting of a superior judge, and the Australian colonies followed.

Another electoral problem took the same course away from the legislative branch. By 1902 when the Commonwealth first legislated, the time was already ripe for what Seymour would soon describe: routine electoral matters were turned over to public servants, a process which was encouraged by the demands made by a continuous roll. New Zealand and New South Wales had already innovated in a closely-related area by

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<sup>7</sup> J. Bryce, *Modern Democracies*. vol. 1. London, Macmillan, 1927, p.viii; vol. 2, p. 181.

<sup>8</sup> *Ibid.* pp. 200–201.

<sup>9</sup> R.S. Parker, 'Power in Australia,' *Australian and New Zealand Journal of Sociology* no. 1, 1965, pp. 88–89.

<sup>10</sup> C.A. Hughes, 'Government Action and the Judicial Model,' in A.E. Tay and E. Kamenka (eds), *Law-making in Australia*. Melbourne, Edward Arnold, 1980, pp. 268–70.

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turning the drawing of division boundaries to an official, subsequently three officials. However that legislation set criteria to be applied by the official(s) and each chamber retained the right to reject the officials' proposals and require them to try again. There still remains some uncertainty whether the provisions of the Commonwealth Electoral Act (CEA) monopolise the electoral sphere, or whether other legislation dealing with review of administrative decisions can offer an alternative remedy,<sup>11</sup> but that lively hare will not be pursued now.

Corrupt acts affecting the electoral process went to the ordinary courts. 'Electoral offenses' they were called generally but in the CEA they were divided into three categories: those committed by electoral officials and called 'breach or neglect of official duty', those committed by political activists and called 'illegal practices' which included bribery and undue influence, and those likely to be committed by ordinary citizens which were also called 'electoral offences.' Offences were prohibited and penalized '[t]o secure the due execution of this Act and the purity of elections' with savage penalties: imprisonment with maximum terms of two years, one year or six months depending on the offence, or fines of £200 or £50 maximum. The only cut-price offence was defacing or removing official notices at £2 maximum, still a tidy sum for those days (CEA 1902, ss.173–91). Breach or neglect of official duty was near the top of the range with a maximum of one year or a £200 fine which is not surprising for an era where public service ethics rested on a penalty-based disciplinary system.

'Independence' from interference by another in a sphere of government activity usually has a close connection to the status and reputation of the person or persons undertaking that activity. By 1902 judges had more than two centuries of independence under their belts; public servants nearly half a century. Both the politically active and the mass public would have had fairly clear and firmly-held beliefs about the integrity and independence of judges and public servants, reinforced as they were by the severe sanctions of loss of a relatively good and certainly secure job and possible criminal prosecution.

It remained possible for a *deus ex machina* to be invoked if and when it was thought necessary, which was rare. A select committee reviewed the first election conducted by federal officials in 1903, and was generally satisfied with arrangements. A royal commission sat in 1913 when some things were thought to have gone wrong at that election. It ended the last vestige of the 'overload' Seymour wrote about by making the senior official in each division's two-person office a full-time electoral official. One might say that Australia's 'characteristic talent' for bureaucracy<sup>12</sup> had triumphed once more because it appeared to work well. In a wider context the point has been made:

Paradoxically ... electoral governance attracts serious attention not when it produces good elections but when it occasionally produces bad

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<sup>11</sup> A. O'Neil, 'Justiciability: the Role of Courts in Reviewing Electoral Administration,' in G. Orr et al. (eds), *Realising Democracy: Electoral Law in Australia*. Sydney, Federation Press, 2003, pp. 193–204.

<sup>12</sup> A.F. Davies, *Australian Democracy*. Melbourne, Longmans, 1958, p. 3.



ones. It is this paradox that has obscured the empirical relevance and analytical significance of electoral governance.<sup>13</sup>

The Australian system of electoral administration was paralleled in each state for their own elections, save they did not have officials permanently stationed in each of their electoral districts but recruited other officials *ad hoc* when an election came on. It became a familiar and trusted part of the Australian political landscape and as a consequence nobody wrote about it. Regular tinkering with, and occasional substantial changes to, the electoral system meant that Parliament often had an opportunity to say something about the administrative implications of those matters, and in particular Members would avail themselves of the opportunity to mention local grievances like the availability of polling places, but these rarely had a sustained partisan flavour.

Significant for future talk and writing about Australian electoral administration, though not at that time, was the struggle in the 1940s and early 1950s for control of the international trade union movement waged by the American Federation of Labor and the International Congress of Free Trade Unions as part of the Cold War.<sup>14</sup> It led to the Electoral Office being given responsibilities for the conduct of trade union elections as well as parliamentary elections, and the former proved to be much more prone to disputes and consequent litigation in the courts than the latter ever were.

Not until the early 1970s and the coming to office of the Whitlam Government was serious and sustained consideration given to major changes to the electoral system and, associated with it, to the ability of what had become something of an in-bred bureaucratic backwater to cope with major additions to its responsibilities and with the consequences of changes in Australian society and party politics.<sup>15</sup> Thanks to the responsible minister, Fred Daly, a modest increase in the staffing of the divisional offices was achieved and roll-maintenance computerised, but that did little more than recognise the massive growth in enrolments and the number of enrolment transactions every year. The Electoral Office was made a statutory authority, and thus slightly more at arm's length from its ministerial department, and its senior officials were made statutory officers and so removable only by Parliament, but these changes only gave legal form to existing practice. The Hawke Government came to office in 1983 with what was potentially a substantial program for change inherited from the Whitlam period, but chose to work through a Joint Select Committee on Electoral Reform (JSCER) in the first instance.

I will mention only changes which resulted from that process that are germane to this lecture's subject, the independence of electoral administration. For the benefit of anyone present familiar with a paper on that subject published a few years ago,<sup>16</sup> I will

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<sup>13</sup> S. Mozaffar and A. Schedler, 'The comparative study of electoral governance—introduction,' *International Political Science Review* vol. 23, no. 1, 2002 (Special Number on Electoral Governance and Democratization), p. 6.

<sup>14</sup> S. Short, *Laurie Short: a Political Life*. Sydney, Allen & Unwin, 1992, pp. 195–97.

<sup>15</sup> G. Whitlam, *The Whitlam Government 1972–1975*. Melbourne, Penguin, 1985, pp. 653–87; C. Hughes, 'Electoral Affairs,' in H. Emy et al. (eds), *Whitlam Re-Visited: Policy Development, Policies and Outcomes*. Sydney, Pluto Press, 1993, pp. 229–53.

<sup>16</sup> C.A. Hughes, 'The Independence of the Electoral Commissions: the Legislative Framework and the Bureaucratic Reality,' in G. Orr et al. (eds), *op. cit.*, pp. 205–15.

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try to avoid repeating what was said then. Both the major parties, Labor and Liberal, recommended creation of an independent electoral commission, and the JSCER saw ‘great merit in the existence of an Australian Electoral Commission (the AEC) with a statutory basis and which is seen to operate independent of political influence’ and recommended accordingly.<sup>17</sup> The JSCER proposed that the AEC carry on all the current functions of the Electoral Office, and in particular a statutory basis should be given to what had already started on a limited and intermittent basis, ‘research, information and education programs.’<sup>18</sup>

But the JSCER also proposed involving the AEC in what would have to be relatively novel responsibilities. In 1902 a relatively recent British precedent had been copied and limits set for campaign expenditure (CEA 1902, ss.160–72), but the provisions had been largely ignored in practice. Eventually they were repealed by the Fraser Government when the possibility that they might be applied arose. The JSCER considered two ‘closely related’ issues, the first being introduction of partial public funding of election expenditure, and the second the re-imposition of an obligation to disclose expenditure, now coupled with imposition of a new and additional obligation to disclose the source(s) of donations.

Whilst a great many of the JSCER’s recommendations were supported by both major parties, the area of these two issues was charged with partisan feeling, attributable presumably to the widely-held belief that the Liberal Party benefited more substantially from the current, un-regulated situation that did the Labor Party. With the support of minor party members in the Senate the Hawke Government was able to legislate along the lines laid down by the JSCER. In the more than 20 years since then there has been, I think, widespread acceptance that there should be public funding and that there should be some degree of disclosure, but considerable partisan feeling hangs over the details of both.

Another new field of activity would be the registration of political parties, introduced to support several changes being made. One change was the addition of the party identification of candidates on ballot-papers; a second was collective lodging of nomination papers of a party’s candidates, and a third the payment of public funding and the lodging of disclosure returns. Those changes largely reflected the changing nature of campaigning and electoral contests with increased emphasis on party leaders rather than individual candidates, the centralized control over campaign messages allowed by IT developments, and the steeply rising cost of campaigning. The new function appeared to fit comfortably into existing routine: for the most part it required routine clerical work within fairly clear statutory provisions. Ready access to an administrative tribunal and then the courts if an imaginative new party tested the *status quo* took away any politically sensitive disputes. However a case that happened to arise under similar legislation in a state jurisdiction recently showed the potential for trouble that can lurk in apparently quiet corners. It involved money and therefore imported the criminal law of fraud into the dispute and that in turn led to a well known political identity being locked up for a time. On the other hand, when a party opposing the passage of a constitutional amendment referendum differed from the

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<sup>17</sup> Joint Select Committee on Electoral Reform, *First Report*. Canberra, AGPS, 1983, pp. 38–40.

<sup>18</sup> *Ibid.* p. 40.

AEC on the meaning of a statutory restriction on advertising, the matter was speedily and finally resolved by the former applying to the High Court. It all depends.

Finally the JSCER proposed enhancing the AEC's independence, compared to the Electoral Office's, by abandoning the power of each chamber to fail to pass or to reject a redistribution scheme for a particular state and require the redistribution commissioners to try again (CEA 1902, ss.21–22). Lest this be thought a minor matter, for the last instances are now 30 years in the past, there were 17 instances of rejection and 14 instances of a scheme lapsing before the parliamentary veto power was removed. There had been speculation whether the possibility of rejection might inhibit the independence of the redistribution commissioners.<sup>19</sup> The majority of the JSCER, wisely, chose to rely instead on appearances and 'believed that, to reinforce to the maximum possible extent the independence of the commission and to ensure as much as possible the removal of its conclusions from the political sphere, the conclusion of the Electoral Commission with respect to redistributions should be final'<sup>20</sup> and that was what the legislation provided. In a dissenting report, Senator John Carrick, the senior Liberal member of the JSCER, suggested that at the final stage of the redistribution the proposals should be placed before Parliament, which might make comments or recommendations. The redistribution commissioners should consider these and then make their decisions, which would be final.

That has been a short history of how we, that is Australia, got to where we are today and it is time to start looking around and asking questions. This is undoubtedly a popular topic:

From Afghanistan to Burundi to Liberia to Palestine, today's headlines are full of situations in which electoral processes go forward in the face of tremendous challenges for conflict management. The reason is clear: in today's world, no government can claim to rule legitimately without some degree of deference to the will of the people ...<sup>21</sup>

To begin at the beginning, the first critical decision has to be the choice of an electoral system, how to convert votes into seats. For some time Australia has used bicameralism to have two-bob each way, and whilst there are proposals abroad for tinkering with each system, their only impact on electoral administration is the increased burden complexity of the voting process places on an administrative authority that is expected to explain the variations to the electorate.

Next is the question of how electoral systems affect party systems, which at present is the extent to which proportional representation increases the number of minor and mini parties on offer.

Finally, and back to our subject, there will be fundamental considerations of electoral administration:

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<sup>19</sup> C.A. Hughes and D. Aitkin, 'The federal redistribution of 1968: a case study in Australian political conflict,' *Journal of Commonwealth Political Studies* vol. 8, no. 1, 1970, pp. 21–22.

<sup>20</sup> JSCER, *op. cit.*, p. 88.

<sup>21</sup> J. Large and T.D. Sisk, *Democracy, Conflict and Human Security: Pursuing Peace in the 21st Century*. Stockholm, International IDEA, 2006, p. 85.

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Research has shown that the structure, balance, composition and professionalism of the electoral management body (e.g. an electoral commission) is a key component in successful electorate processes that generate legitimate, accepted outcomes.<sup>22</sup>

But it is a great truth that has been recognised only recently:

The organisation of elections was traditionally a specialist backwater of the administrations of established democracies, often located within the government or local government service. Individual committed officials worked in their electoral service for many years often in isolation and with their role unrecognized.<sup>23</sup>

Does the international scene have anything to do with us? Australia hasn't had a civil war like Afghanistan and the others. Elections in such countries have generated a literature of their own<sup>24</sup> and organizations have sprung into existence to assist, some based on a single national benefactor and others truly international in their composition and funding. Australian electoral administration is good enough to export to the less fortunate, and the AEC and its officials have been vigorously engaged in that activity since 1983 as its Annual Reports document and a comment by the Prime Minister about Iraq puts beyond question. Do we really need to worry about the maintenance of what is a long-accepted administrative structure or the avoidance of politico-administrative ills we have never experienced? My answer is that it would be useful to have a look at some recent events, first in fellow members of the Commonwealth of Nations with which we are rarely compared, then in a country with which we like to think we have a number of similarities, and finally in one about which we don't think we have much in common.

Nigeria has an electoral commission that is supposed to be independent. It also has an anti-corruption watchdog commission, like some of our states. With elections pending, the Economic and Financial Crimes Commission recently wrote to political parties, of which Nigeria has a good number, listing 130 candidates who are about to be charged with corruption, including one of the most serious candidates for the federal presidency. The Nigerian electoral commission has since said they will not be allowed to stand.<sup>25</sup> At the beginning of the year the army of Bangladesh called on the country's president to declare an emergency to prevent the impending general election being held. Bangladesh is a polity where excessive bitter rivalry between two major parties and their veteran respective leaders permeates political life. Each party distrusts the other being in office during an election, and so a practice developed that a caretaker government would be installed whilst the election was on. One had just been appointed when it was tipped out by the army. When the new, temporary one was installed it appointed a new electoral commission. However, the author of the article relied on here speculates that the army will not allow an election to be held for

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<sup>22</sup> Ibid. p. 99.

<sup>23</sup> *Ten Years of Supporting Democracy Worldwide*. Stockholm, International IDEA, 2005, p. 106.

<sup>24</sup> E.g. K. Kumar (ed.), *Postconflict Elections: Democratization and International Assistance*. Boulder CO, Lynne Rienner, 1998.

<sup>25</sup> 'A blacklist to bolster democracy', *The Economist* 17–23 February 2007, p. 49.

at least a year, in part to allow correction of a national roll thought to contain 12.2 million 'dubious names', an estimate attributed to the National Democratic Institute which says the roll will take 'several months' to correct, and the issue of 'fraud-proof identity cards' would take a year.<sup>26</sup>

In the United States the Federal Electoral Commission was established only after the Watergate scandal.<sup>27</sup> It is concerned only with regulating campaign finance in presidential elections, and is an example of a bipartisan commission, rather than a non-partisan commission. Consequently its members may have active party links, as do a great many elected or appointed electoral officials. Everything else involving federal elections is the responsibility of the 50 states and 4600 local authorities, though there are federal constitutional provisions and federal legislation covering some aspects. The federal legislation may be very specific; e.g. requiring access to polling places for the disabled (1984), ensuring that the military and other citizens overseas can still vote (1986), and that voter registration is possible at motor vehicle registries (1993); or it can be very broad in its effect—battling discriminatory voting practices (1965) and requiring state wide rolls and provisional ballots and making money available to improve electoral administration (2002). Brian Costar and I,<sup>28</sup> and a great many Americans too,<sup>29</sup> have been very critical of the conduct of recent American elections on more grounds than can be dealt with now.

Finally there is the recent experience of Mexico, where democracy suffered from the long dominance of one major party. Their Federal Election Committee (FEC) was established in 1946 and has been characterised as 'highly controversial ... run directly by the interior secretary as a dependence of the executive branch ... notorious for directing elections towards outcomes dictated by the president.'<sup>30</sup> In 1989 a Federal Electoral Tribunal was created in which decisions of the FEC might be challenged, and in 1990 the Federal Electoral Institute was added. Gradually its powers and its jurisdiction were extended and its reputation for integrity enhanced. In 1996 it was transferred from the executive branch to come under the authority of the Supreme Court, and given control over the selection of its chief executive officer. By 2006 it had engendered sufficient confidence in its independence and integrity to weather an extremely close presidential election followed by a short period of peaceful mass protest against the outcome it had declared.

The conclusion to be drawn from these cases, and there could have been many more, is that there is nothing magical about an electoral commission. It can be set up with

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<sup>26</sup> 'Everybody but the politicians is happy', *The Economist*, 10–16 February 2007, pp. 27–28.

<sup>27</sup> *Congressional Campaign Finances: History, Facts, and Controversies*. Washington, Congressional Quarterly, 1992, pp. 44–50.

<sup>28</sup> C.A. Hughes and B. Costar, *Limiting Democracy: the Erosion of Electoral Rights in Australia*. Sydney, University of New South Wales Press, 2006, pp. 7–10.

<sup>29</sup> For example S. Overton, *Stealing Democracy: the New Politics of Voter Suppression*. New York, W.W. Norton, 2006; House Judiciary Democratic Staff, *Preserving Democracy: What Went Wrong in Ohio*. Washington, US House of Representatives, 2005; The Commission on Federal Election Reform, *Building Confidence in U.S. Elections*. Washington, Center for Democracy and Election Management, American University, 2005.

<sup>30</sup> T.A. Eisenstadt, 'Off the Streets and into the Courtrooms: Resolving Post-electoral Conflicts in Mexico', in A. Schedler et al. (eds), *op. cit.*, p. 88.

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inadequate responsibilities and powers, and be recognised as inconsequential. The principles on which its members are selected are important, as are the circumstances in which they can be removed, individually or collectively. A commission can be caught up in political conflict and become the pawn of more powerful forces. Or it can establish itself as a respected independent force able to resolve political conflict. The rest of this lecture will address a series of questions about how this is most likely to be achieved.

The first question is whether a statutory foundation is sufficient, or should the electoral commission be entrenched in the constitution. There are three pretty obvious truths to start with. Thirty years have passed since the Australian electorate got up enough speed to carry a constitutional referendum, and we have only to consider the level of affirmative voting in 1988 on parliamentary terms and fair elections. Next, amendments may not get things quite right first time. The 1977 amendment on Senate vacancies failed to catch the first case that arose after it had been adopted. Finally, the fact that the Commonwealth Constitution says something should exist is no guarantee it will exist. What could be said to a Martian visitor to Canberra who asked to be taken to the Inter-State Commission? Perhaps tell him it was intended to regulate river transport and he will understand. Given the likelihood that a federal government will not control the Senate, legislation ought to be sufficient. If I caught the magic flounder and it offered me one amendment in return for its freedom, I would rather try to guarantee a right to vote.

It should be remembered that there are well known points at which the Constitution pinches electoral administration, for example introducing a fixed term would assist administration but runs up against the Governor-General's power to dissolve in s.28. There is current an interesting point following the statutory change passed in 2006 to close the rolls on the day that the writ for an election issues. It brings into play s.12 which allocates the power to issue writs for Senate elections in the state governors, and their power to do this has traditionally been regulated by state legislation.<sup>31</sup> Current provisions either give the local Governor-in-Council discretion, or for Victoria adopt the 1983 amendments to the CEA—as that state did generally with its electoral legislation—and specify the close of rolls being seven days after the date of the writ (s.4(1)). The federal government apparently relies on s.109 to claim that such a provision is inconsistent with a Commonwealth law and to that extent invalid, and it may well be that Commonwealth law determines what can be put on the writ. But whether the Commonwealth can compel a state governor to issue a Senate writ may be a different matter, and one can only say 'watch this space'.

The second question is how specific, or broad, should electoral legislation be; in other words how much discretion should an electoral commission have when conducting an election. Over the years the CEA has grown in length, and the regulations made under it have shrunk, and that is a good thing. There will always be matters where a wide discretion is required. If you are going to enforce compulsory voting, as the Act requires, then something like s.245(4) is necessary:

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<sup>31</sup> *Senators' Elections Act 1903* [NSW], *Senate Elections Act 1960* [Qld], *Election of Senators Act 1903* [SA], *Senate Elections Act 1935* [Tas], *Senate Elections Act 1958* [Vic], *Election of Senators Act 1903* [WA].

The DRO is not required to send a penalty notice if he or she is satisfied that the elector: (d) had a valid and sufficient reason for failing to vote.

Parliamentarians should not have to spend their time considering what should, or should not, be included in a list of reasons that would qualify as valid and sufficient. Possibly some of them have not seen enough of the world to even imagine some of the reasons that are put forward.

On the other hand, discretion demands careful consideration. Take s.268(3):

A ballot-paper shall not be informal for any reason other than the reasons specified in this section, but shall be given effect to according to the voter's intention so far as that intention is clear.

A rhyming couplet was easily remembered: 'When in doubt/throw it out,' but it hardly complies with the intention of the legislation to preserve the voter's right to have their vote counted if that is possible. On a related point, casual observers of the political scene are at risk of mistaking where responsibility lies and whither criticism should be directed. To take a current issue, the ability of candidates who qualify for public funding to show a profit on the operation, the one news story might refer to 'federal electoral law' or 'the rules' or 'the AEC rules' which allow this. It is unlikely to say there once was a statutory provision preventing such an abuse, but it was deleted by agreement of the major parties once they found it an inconvenient distraction from the main game of spending as much as they could as quickly as they could.

The third question is whether there should be some protective machinery involving the legislature to act as a counter-balance to the executive's natural and pervasive influence. Some countries bring their courts into play for this purpose, but because of the view that Australian (and US) courts have taken of dangers to the separation of powers doctrine we can more usefully concentrate on the legislature. The news that the JSCER was going to morph into a permanent feature of the electoral landscape was good news, and some years of living with the Joint Standing Committee on Electoral Matters (the JSCEM) did not undermine my belief in parliamentary committees.

However, it is possible that the relative stability of governments since 1983, a period of almost a quarter century in which two governments each lasted more than a decade and won five and up to the present four general elections respectively, induced a feeling among new members of the committee and others that elections weren't working properly 'to throw the rascals out' and something was wrong somewhere. Two other phenomena of the period, a propensity to strengthen a few components of the government machine at the expense of the rest, and an intensification of partisanship in public life and attack campaigning on the American model in electoral competition, contributed to this feeling. But having said that, it is certainly the case that the evidence engendered by the JSCEM's inquiries and its subsequent reports constitute a unique body of material on electoral administration in detail.

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The fourth question is whether the leadership of an electoral commission can be protected from partisan influence, and if so how. The South Australian branch of the Labor Party had suggested to the JSCER that the first chief executive officer should be chosen ‘on the recommendations of an independent select committee’ and thereafter by the AEC itself, but the JSCER preferred the more usual Governor-General-in-Council appointment. This followed interviews conducted by a committee of relevant permanent heads. Although the defeat of the Whitlam government in 1975 effectively brought an end to administrative reform in the Electoral Office, it coincided with the retirement of the long-serving Frank Ley and led to the appointment for the first time in living memory of an outsider, coming from the Prime Minister’s Department, to the most senior office. Since then no insider has been appointed.

What is probably more important as a guarantee of independence is that no incumbent has been re-appointed when their first statutory term ended. If a convention has developed, and one must always be reluctant to say that, it is a useful one. This is not a matter of removing self-interest as a consideration when unpleasant decisions have to be made, but of preventing any appearance that self-interest might have operated. Curiously the point at which the discretion of the Governor-General-in-Council is partly fettered concerns the chairman, one of the two-part time commissioners, who has to be selected from a panel of three ‘eligible Judges’ supplied by the Chief Judge (CEA 1918, s.6(4)), a formula which, I suspect, was designed to maintain a proper arm’s length between the judiciary and a politically sensitive appointment. For the other part-time member, another convention again appears to have started that the appointee will always be the Commonwealth Statistician; again it is a wise step.

It will always be possible for a government so inclined, and provided it controls both houses of the Parliament, to nibble away a bit of independence by so legislating rather than picking the right person. Thus the Act previously said:

The office of a Divisional Returning Officer shall, unless the Commission otherwise directs, be located with the Division. (CEA 1918, s.38)

The location of divisional offices was the subject of tension between the AEC and some Members and within the Commission between Central Office and divisional staff, primarily because the section’s clear implication of each division having its own, small office and existing staff’s satisfaction with that arrangement ran counter to the cost and other benefits of consolidating several offices into one in metropolitan and large provincial city areas.<sup>32</sup> Eventually, by the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2005 the provision became:

The office of a Divisional Returning Officer must be located within the Division, unless the Minister has given written authority for the office not to be so located.

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<sup>32</sup> JSCER, *‘Is this where I pay the electricity bill?’ Inquiry into the Report on the Efficiency Scrutiny into Regionalisation within the Australian Electoral Commission*. Canberra, AGPS, 1988.



And, it was added, such a written authority was not a legislative instrument, the significance of which I need hardly explain to this audience. This may be a one-off bit of business pressed by a few back-benchers, or even former back-benchers, or it may be a tentative toe in the water with a view to bringing back the Minister in other places. In the United States, for example, the location of and allocation of resources to polling places have been highly controversial matters at recent elections.

Fifth and finally, are some electoral administration functions more dangerous to exercise, i.e. likely to lead to an attack on independence, than others? Or, coming at it from a different angle, has the expansion of responsibilities since 1983 put the AEC more frequently into the political firing line than the old Electoral Office ever was? One has only to mention removal of the parliamentary veto of redistributions, entanglement in parties' internal affairs, enforcing disclosure, contributing to electoral education, and various international contacts—the likelihood that effective controls in Australia will only drive the offending operation overseas, the possibility of web and blogging defamation, money and messages sent from outside the jurisdiction, the swarm of front and fellow-travelling organizations that may surround a contemporary political party, even terrorism and the measures taken to fight it, to appreciate how far the political environment that surrounds electoral administration has changed and the extent to which the newer responsibilities have thrust the AEC into it. Understanding its past may help to protect its future.



**Question** — You mentioned the joint select committees and the first joint committee in 1904, and the royal commission a decade later and how committees re-started in the 1980s. What is their history between those dates? Were there periods where there was a lot of parliamentary committee analysis of the previous election? Did they stop in the long period of Menzies' government, for example?

**Colin Hughes** — I'm disadvantaged in answering that question at the moment because, for a quite different purpose, I've been reading a lot of old *Hansards*, basically pre-1948, and I have been surprised at how many references you pick up by looking at 'home affairs' and then the sub-reference 'Electoral'. There was a lot going on, sniping about little things, and indeed in a paper that I hope may one day soon appear on the Democratic Audit site, you will get my gleanings from that exercise. People were using occasions, even grievance debates, to raise electoral matters. Therefore that experience clouds my judgment.

I would have said the premise that the Joint Standing Committee on Electoral Matters has taken electoral matters off to an appropriate forum is right, but I don't know enough about how questions have changed over the years. How far, for example, the independent question is like the Tasmanian Tiger, to be treasured if you think you've seen one; and how far what we're really looking at is the control of Question Time by ministerial officers and the like. There is little concern about the minutiae of electoral matters in ministerial office, most of the ministers having safe seats, which is why

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they are ministers. It's a good question. I'm not sure if I went away for a week with a full set of *Hansard* I'd really be able to come up with a watertight answer, but I think certainly the Joint Standing Committee has had a beneficial effect in educating a great many people on the subject and I think a fair few Members too. I think the fairly outrageous critical things are no longer said by Members of Parliament but said by people outside Parliament, but whether they have been put up to doing that by Members of Parliament is a different question again.

**Question** — I want to ask you a question which really extends a comment you made, but in doing that can I just have a few moments to explain the background that I come from? You were saying in going through your list of questions at the end that one of them was about the possibility for the legislature to act as a counter-balance to executive power. My question is: given that there has not been much controversy about electoral administration in Australia, in the light of something like the Uhrig Report in the Commonwealth on statutory authorities generally, where the report is obviously designed to drag them back into the area of ministerial influence, to curtail autonomy, is there a feeling within the electoral administration that it is now necessary to get the legislature set up to act as a counterbalance? I was at a conference of the International Institute of Administrative Sciences in Mexico about nine months ago, and you mentioned Mexico and the case of the Mexican Electoral Institute. The interest was very much in what you might call integrity agencies: in audit offices, ombudsmen, anticorruption commissions, bodies like that, as well as electoral bodies. And their establishment as a special category of statutory bodies (where governments like to have them, so they can curtail their funding so that they are more like window-dressing than effective instruments). Electoral bodies were mentioned, and in the discussions that took place it seemed to me that in South Africa, in Mexico itself, in the United Kingdom and in Victoria now in Australia, there is a movement towards a special category of officers of parliament. I don't mean clerks of houses, but I mean people heading statutory bodies with a degree of independence from the executive government who are in danger of losing that independence so need special parliamentary protections. It seems to me that New Zealand a few years ago took a great initiative in formalising this notion of officers of parliament, but strikingly and compared with the others I've mentioned, didn't mention the electoral administration—the others did.

My question really is, is there much sense within the Australian electoral administration of the need to push for stronger parliamentary protection?

**Colin Hughes** — I wouldn't presume to answer the last part of the question because I haven't been part of the AEC for a very long time.

I think the general point that you make about lack of interest in shifts between the executive and quite possibly both other branches of government is like the old frog-boiling metaphor—the frog is only gradually becoming unhappy about this. To personalise the response, I had the misfortune not to have lived under responsible government until I was 20 years old, and this has left me with a permanent prejudice against the executive branch; and to that extent, on seeing a legislative committee set up to deal with electoral administration in 1984, I threw my hat in the air and cried hurrah.

You mentioned South Africa and England and I think it can be said that both were very conscious of the Australian commission model when they moved along those lines. There is a lot of serious talk around the world about this sort of problem, but it's very difficult to seize a constitutional tradition and a constitutional regime. For example, in Latin American countries they reversed this drastically. In the United States, of course, there was a long tradition of the independent regulatory agencies. This meant that when they turned to electoral administration, to set up a federal body, they had an opportunity to do something worthwhile, instead of which they created a Federal Electoral Commission that has one function, and said it should be composed half of Republicans and half of Democrats. They ended up in the court to determine whether it would be proper, considering separation of power violations, and that it had to come out of the executive. Obviously consultation would be possible, but there was no way that you could have the executive and the Senate and maybe the courts getting together to produce a body that was, if not independent, at least coming from all three branches of government.

The Mexicans started up with a body that wasn't worth powder and trot, and by a series of acts of will turned it into a very respectable institution, which appears to have stood on the edge of the civil war and faced down the mob and Mexico is back and running normally. So there are wins.

**Question** — I think you mentioned in the introduction your role in the Bjelke-Petersen gerrymander. I actually grew up under the Playford gerrymander and shortly after I moved to Canberra, a great time ago now, that was actually reformed by Dunstan and Steele Hall. Gradually, over the years, there has been a lot of reform in most of the state electoral systems, but we still have a situation in some state upper houses, I think in Western Australia, where there's a slightly undesirable situation. Would you comment on the state situation and particularly on upper houses?

**Colin Hughes** — I think there are two problems with state upper houses (well three if you count not having one like Queensland). You can say it's going to be about proportional representation and then have so few members elected per district that in fact what you're doing is ensuring a reasonably fair go between the two major parties and leaving everybody else, you hope, on the outer. That system can turn around and bite you as happened with the Victorians who ended up resuscitating the DLP, that we all thought had passed from the scene. So there's the problem of getting PR right. The other problem is the ratio of seats to electors.

Some sort of deal was done in Western Australia—I don't know anything about the circumstances—that at least the lower house would be more or less one vote, one value, and the upper house would still have a heavy rural weightage. You have one elected from single member constituencies and preferential voting, and one elected from multimember constituencies with proportional representation; you have one that is malapportioned, and one that isn't malapportioned. If you think malapportionment is a bad thing, then there's a problem. I don't really know enough about sentiments in

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Western Australia to know whether this is a problem bubbling away beneath the surface that will soon break through.

If you look at the history of drastic electoral changes anywhere, either you have to have a disaster, or a long shot of averting a disaster by doing something now to cause people to change the rules. One of the difficulties of electoral reform is that you have to go to a body of people and say: 'The means by which you got here is flawed and ought to be changed,' and this is pushing up a fairly steep hill, but there are occasions when it happens. The Senate going over to proportional representation in 1948–49 was undoubtedly the Labor Party seeing dark clouds gathering on the horizon and buying a bit more time in the Senate to make Menzies' life miserable for a year or two. Things would never have happened in Queensland if a body set up ostensibly in the first instance to address problems in the police force had not said that one of the problems in the police force is because the electoral system is so crook and therefore an independent body was given an opportunity of doing something about it.

Talking about Queensland, and the abolition of the gerrymander, when the zonal system was abolished, the Electoral and Administrative Review Committee (EARC), of which I was a member, retained a novel form of weightage for a small number of seats, and there was some grizzling from the purists in the Labor Party about this. Since then there have been a number of elections, and at one election I noticed that somebody in the Country Party said that there shouldn't be big districts. I think a dispute that had been going on since the nineteenth century was resolved by a good principle and a bit of compromise, saying that there are times when you have to modify principle to accommodate local situations.

To let you into the proceedings of EARC, the five of us sat there with a referdex and worked out how long it would take, if you were the member for Gregory, to visit all towns over 500 population in your constituency—drove through at the speed limit and just shouted 'Hi I'm your member' as you passed through. If you drove all night you could do it in two days. That didn't really seem representation.

So a formula was suggested to us which seemed admirable; we adopted it and it has now been adopted in Western Australia, and I think that's how you do get changes from time to time. It may well be that there are other machinery things; for example going back to how to choose the members of a body that is very sensitive, like the Australian Electoral Commission. Should a word be had with the Leader of the Opposition before the names go forward to the Governor-General-in-Council? There are good ideas that will be decided against not on principle, but because Bloggs tried it ten years ago and it turned into an utter dog's breakfast of squabbling and abuse. So until the generation that remembers that has passed from the scene, you won't be able to get that fine principle up on its legs again. That's how the system works unfortunately.

**Question** — You've suggested that the convention that has emerged that Australian Electoral Commissioners only serve one term is a good thing. I was wondering if there aren't some advantages in such offices being filled through some kind of bipartisan process as you've just eluded to, and that they be filled for life as the Chief Electoral Officer in Canada is, and have that kind of accumulating authority and standing and so on which life appointments give. I think positions such as Clerk of the Senate are another example where appointment for life may be a good idea.

**Colin Hughes** — I think it would be hard to sell. I think in fact a single term has some advantages that aren't tied necessarily to the question of independence. I was appointed for a seven year term and five years and a couple of months into it, the Commonwealth announced that whatever the statutory provision was, hereafter their statutory appointments would be for only five year terms. It got me to thinking about the matter and it did seem to me, not in terms of independence but in terms of doing the job, that after about five years if you haven't got something done and you've tried to raise it again, people will say 'Oh he's not going on about that again is he?' Five years was really about the time to either keep the thing on the rails if it was satisfactorily on the rails or shake it up and clear out and see whether it worked under anybody else. The danger with the life appointment is that people start watching you too closely for little foibles: 'Did you notice that he did something this morning that he doesn't ordinarily do, the old boy's losing it.'

I can remember seeing one of the last two life professors at Oxford (Gilbert Murray was one, but I never saw him). R.W. Lee, who used to lecture in Roman-Dutch law, used to come down to the Inns of Court once a week to lecture to half a dozen Ceylonese students as they were in those days. Seeing this 90-year-old figure tottering along the back of the law courts made me think probably retirement age is a good for professors, judges and a lot of other people. I don't think a life term necessarily is the best way of getting at things. I think if I had a choice, I'd certainly go for seeing if there is some conceivable way of involving the Opposition in saying: 'Is this person acceptable to you?' and seeing if the flood of vile abuse that they produced contained any germ of truth that it might be worth your while to know about.

**Question** — When we think about the history of Australian politics, we see that some elections are decided in a land-slide and some are decided by the tally of a handful of marginal seats, and we may have a government coming into office that has indeed been elected by perhaps the sum of three or four marginal seats, maybe less than 500 votes in an extreme example. I'm interested in the increasingly apathetic state of Australian society about political affairs. I am interested in the impact of the large number of informal votes, which can be sometimes between 5 and 6 per cent of the total number of votes cast. I'm wondering what your thoughts are on how we can minimize the impact of glitches in marginal seats or in times of tight elections where the true word of the people may not come into force due to opportunities for marginal electorates to be targeted.

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**Colin Hughes** — There are a number of problems in the questions you raise. One of the consequences of having single member seats is that you get odd mixes because the population isn't spread evenly over the districts. You don't have 17 bank managers, 23 doctors, 45 wharfies allocated to each constituency. This also varies quite considerably by area. I noticed in the papers in the last day or so somebody speculating about the forthcoming federal election, and making the point that there is a lot more potential for trouble for the government in Queensland and in Western Australia than in the three other mainland states. That has always been the case and it's to do with the geography of Sydney, Melbourne and Adelaide as against the geography of Perth and Brisbane. Perth and Brisbane are all mixed up with lumps of wharfies here right next to lumps of bank managers there, whereas in Adelaide, slightly less than used to be the case, and Melbourne and Sydney, there are lines that you can draw on the map and there may be a marginal seat at Parramatta that's been sitting on the fault line, and that's why marginals matter.

The second point about marginals is there are very few divisions that are habitual offenders. This year's marginal seat is unlikely to be next year's. About the only seat that's worth treating as a habitual offender is Eden-Monaro, and that's presumably why Mr Nairn's been made minister, and he ought to be more sensitised than most to these problems. It is very hard to manage things to capitalise on marginal seats because you can't pick the horse to nobble.

Where it can matter is when you look at aggregates and that's why it's more likely to matter for the Senate. Manipulating informal voting for the Senate is worth having a couple of bob on because a vote wasted in Bradfield is as effective as a vote wasted in Parramatta or whichever marginal seat, or Fowler, which is a safe Labor seat. Therefore if you manipulate the system of voting for the Senate, there could be a bit of pay dirt at the end of it. It doesn't mean you'll wipe out the opposition, but that sixth seat might just fall across the line. Doing it for the House of Representatives would be buying a lottery ticket and hoping your number comes up. This is why in 1983 above-the-line voting was introduced by a Labor government, because they were taking a shellacking in Senate informal voting. You had only to look at the informal vote for the Senate by division, to see that there were very few Liberal votes being lost in Bradfield and a terrible lot of Labor votes being lost in Fowler. Therefore whilst most of the arguments going on at the moment are valid reasons being put forward for changing the ticket voting system, there are some people with an axe to grind about the ticket voting system who might be thinking of the long term benefit that would be received by pushing the Senate informal vote back to where it was 20 years ago, which is throwing out one in ten, or likely to be more nowadays.

As for people being fed up with the political system and therefore not paying attention to politics, or worse, not turning up to vote if voting was no longer compulsory, I think this is a very considerable problem. It's a world-wide problem. I used to think that teaching civics in the schools and bodies like the Electoral Commission doing worthwhile things would help. That faith has been sadly damaged by reading what other similar countries have tried to do and how intractable the problem really is for a whole variety of socio-economic, educational, media-competition reasons. I think

therefore that keeping compulsory voting is by far the safest course that we have open to us. If we abolished it, the people who started voting 30 years ago and are pretty well habituated would continue voting, and the people who are say under 25 would take the first opportunity they got and stay away, or most of them would. That debate about compulsion I think needs to be watched, and whether that might be opened up again in the near future.

**Question** — I'm actually from Eden Monaro standing as an Independent, and I have approached Professor Sawyer about electoral probity, and things such as the raising of print allowances. The Special Minister appears to stumble over his feet where he shouldn't in terms of administrative errors in polling community organisations, and also tacking a little bit of polling information for the electorate on the end of the print budget. I'm quite concerned about the diluting of the democratic processes through using raised print allowances and raising the ceiling on disclosures, and the fact that our year 11 and 12 students don't get that electoral education anymore, so there's disenfranchisement of the potential youth voters. I wonder if you have any comments how we can shore up the Electoral Act to make sure that we are protecting democratic rights for all Australians.

**Colin Hughes** — The Electoral Act is a bit like a Tax Act, you can suppose at any given moment that a lot of experienced, shrewd people are out there tapping anything that they can find. Marshall Mannheim, the great Finnish leader, said that the Russians are window rattlers. They constantly walk around and they rattle every window they see and if it's open they go in. The Electoral Act is a bit like that, there are people rattling the windows all the time.

I think the incumbency advantage, to put a general label on some of the things that you were on about, is causing a lot of concern at the present time. For the narrower subject matter that I was concerned with, the first question I suppose is whether this should be a responsibility of the Electoral Commission or Commissioner or whether a separate statutory officer, for example on government advertising, ought to be set up to say that you can't do that, and then either issue an injunction or go to the Court for an injunction to get a breach.

That was the experience of course with the referendum held in 1988. The Labor government, which was producing the favourable case, had an interest in the constitutional changes that they wished to achieve and they were putting out (I think the Attorney General, Lionel Bowen was the name that appeared as authorising them) words that went something like: 'The founding fathers said you, the people, should be able to change the Constitution and this is what we want to do.' The Liberals understandably took exception to the second half of that and objected to its association with the first half. We at the Electoral Commission looked at the Act and held it up to the light and wet our fingers and touched it, and we didn't think that it was in breach of the prohibition in the Referendum Act against spending government money on promoting one side or the other. It was stating a historical fact: the founding fathers had intended that the people should be able to change the

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Constitution from time to time. Peter Reith, who was the Shadow Minister responsible for electoral matters, took a different view. He said to us that we ought to stop it. We said we don't think so, but if you want to stop it, you are perfectly entitled to go to the Court. He went to the Court and returned with a piece of paper signed by one High Court judge saying he was right, and the matter was disposed off in a short period of time.

Now there may be problems that can't be resolved as satisfactorily as that. What you need when you're really at the coal face, if the story has to be killed instantly before it gets out, is somebody who is dedicated to raising such questions, authorised to go to the Court and get something out of the Court. To give you an example: when I was practicing as a lawyer, I ended up suing a newspaper in the magistrates court because that was the only place that I could get a judgement in the time to deny that my candidate, as the newspaper had alleged, had said that there were only three ladies in the constituency, and named them. By getting the maximum 25 quid out of the magistrate's court, we could at least say, 'You see they are liars.'

It's a very tight timeframe when you're in the last four weeks or so of an election. You have to have access to the courts. It may be an isolated independent who wants justice against the major parties, and who is dedicated to going to the court.

The AEC has a number of statutory provisions which I haven't talked about entitling it to raise defects in the conduct of a poll. They are the best placed people to know whether there has been a defect in the conduct of the poll because they will hear about it immediately, and they ought to be obliged to take it before the court and say maybe someone shouldn't have been elected. But there are other matters that aren't a matter of turfing someone out and either having another election, which is what the court ordinarily orders now, or declaring someone else elected. In the last couple of days of furious campaigning, it may be a question of getting the record straightened, and saying no, this is what the truth of the matter is, here is a learned judge who has just said that. Judges have been independent since fairly soon after the Restoration and people tend to believe what judges say. Not perhaps as much as they would have a few years ago.



## **Trends in the Australian Party System\***

*Paul Reynolds*

### **Introduction**

Political parties have for so long been an integral part of modern liberal democracies that one is apt to take them, if not for granted, then as a given in the landscape of politics. The party system in Australia, in embryonic form, predates Federation, although its rapid rise after 1901 is both a cause and a consequence of the federal process. It is one of the supreme ironies of federation in Australia that the Constitution was written by men who constituted the final generation of non-party politicians. In other words, the late 1890s was the last time possible for the Constitution to have been written *sans* parties. That having been said, the document proved to have been so flexibly drafted that lack of formal and constitutional recognition neither inhibited the rise by the parties to dominate the polity, nor did its operations and application by the High Court prevent their on-going activity, much less threaten their legitimacy as cognate players in the political process.

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## The formation and role of political parties

The number and reach of political parties in Australia over the past 120 years has been remarkable. We tend to think of the three permanent ‘Majors’—ALP, Liberal and Nationals—plus a couple of add-on ‘Minors’ as the sum total as these represent the permanent players. However, at the state and local levels parties have a rich history of formation, operation, decline and fall, or, maybe, morphing into another stage of political evolution. Two observations then seem warranted.

First, parties are formed when a section of society feels that *it has a claim on the political and decision making processes of the state which is not being addressed by current persons or organisations*. The ‘Majors’ of course represent this proposition as text book cases, especially the ALP mobilising working class consciousness<sup>1</sup> and the Nationals giving political expression to ‘countrymindedness’.<sup>2</sup> (Aitkin, 1977,1982). On the other hand the Liberals/Nationalists/UAP were parliamentary organised parties without any durable mass base. While the latter was incorporated by Robert Menzies in 1944, the modern day Liberal Party bares many of the hallmarks of an organisation constructed from the top down. Nevertheless, in class terms, it makes sense to view the Liberals as a case of middle class mobilisation, or at least the middle class as it was comprised in the first half of the twentieth century.

Second, in the 1960s, when I was an undergraduate, and the political science discipline was being established in this part of the world, we were taught that the difference between political parties and pressure groups was that the latter, whether instrumental or promotional, did not seek office, preselect candidates or become involved in the electoral processes; or if they did, only as a tactic to further their aims. As well they were sectoral with limited policy horizons. The former, however, sought office, had a broad whole-of-government approach to policy and were in the business of holding and wielding power rather than merely influencing its disposition in a limited direction.

From the perspective of 40 years or so such a taxonomy seems overly rigid, seeking hard and fast boundaries where none truly exist. The line between the two types of organisations has become extremely blurred, especially in respect to minor parties. These latter have no realistic expectations of gaining power, seldom have a ‘big picture’ policy agenda and, even if they do, this is not what they are recognised for. Should they be successful in gaining Upper House representation, they are apt to behave as pressure groups depending on who holds power in these chambers. Conversely, major, permanent and institutionalised lobby groups certainly will interact with the governmental processes in the guise of, as modern parlance has it, ‘stakeholders’ but this, while vital, will be only one set of their multitude of agendas and activities. The interplay of such forces, moreover, is maximised in a city such as Canberra, a dedicated federal capital whose chief (sole?) task is national governance.

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<sup>1</sup> D.W. Rawson ‘The Life Span of Labor Parties,’ *Political Studies* vol. XVII, no. 3, 1969.

<sup>2</sup> D. Aitkin, *Stability and Change in Australian Politics*. Canberra, ANU Press, 1977; and *Stability and Change in Australian Politics*, 2nd ed. Canberra, ANU Press, 1982.

### **Functions performed by the party system**

The most important explanation for the durability of the parties is that, simultaneously, they perform a variety of functions, doing so economically, skilfully and purposefully. For convenience I have listed six, although not in any order of importance:

- (1) Policy formation and articulation;
- (2) Recruitment of political activists;
- (3) Training for leadership through internal party mechanisms and parliamentary service;
- (4) Operating as electoral machines;
- (5) Providing for, and facilitating, the circulation of political elites via the transfer of power;
- (6) Demarcating differing ideological positions within the polity.

If this were an undergraduate lecture I would now discuss each point in some detail to give a sense of the complexity of the process. However, in this instance I want to observe that each of these roles has, over time, experienced profound change and metamorphosis. For example, parties do not now rely only on their internal processes to devise and propound policy, rather they draw policy inputs from an array of sources and process these according to the party's practises and lore. Recruitment of activists has become a specialised activity as, after the 1960s the old mass memberships gave way to cadres, many recruited as university students and drawn from the sandpit of university union politics. Leaders are no longer folk heroes like John Curtin or patricians like Robert Menzies, but are apt to be made and unmade by opinion poll results and feedback from news media commentaries, including the incessant and mindless clamour of talk back radio and its 'shock jocks'. As Emeritus Professor Joan Rydon was wont to observe, every year, somewhere in Australia, people are voting. This means that the parties are constantly on 'election alert' with all that this implies in funding, planning and resources. The leaders of the 'Majors' never survive election defeat, while even victory may not necessarily result in continuation in office (e.g. cases as disparate as Thatcher, Hawke and Bjelke-Petersen). The circulation of elites is a constant, either through election results or, more rarely, on the floor of the House. That said, even the most casual perusal of the history of state and federal elections show that they mostly serve to confirm governments in office and only occasionally (federally four times since 1969) change governments.

Not only then is the party system durable, it is so because it is sustained by even more durable patterns of partisanship. The role of ideology in the Australian party system has always been contentious, but one can discern a sub stratum of ideas (to put it no stronger) in the formation of both Labor and the Liberals. While it may be true that pragmatism will always win out, the corollary question must be, 'Pragmatism for what?', an indication that ideology can rescue the party system from sterile short term activity.

### **Whither the party system?**

In light of the durability of the party system over the past century and more, it seems altogether unreasonable to question its future as a *system* if only because its existence

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and continuity is testimony to its ability to adapt to social and economic change which has, in turn, shifted the balance of political forces within the parameters of the 'Majors' and their politics. This notwithstanding it is useful to delve below the surface of apparent functionality in the hope of discerning trends which may well exert significant influence on future directions within the overall system.

First, it is as well to recall that the basis for the Australian party system is the state branch. Indeed it was not until the 1960s that the 'Majors' established federal secretariats and not until the 1970s that the state branches surrendered to their federal counterparts the running of national election campaigns. Despite these developments the state branches enjoy considerable autonomy and power over their own affairs. They preselect and deselect candidates; they train generations of politicians at federal, state and local government levels; they operate as significant fundraisers, especially if in Government; they send delegates to national conferences and executives and manifest themselves as their parties' sinews of war.

While, in theory, the Liberal federal executive can intervene in the affairs of a state branch, this is comparatively recent development and has never occurred. I am not aware of any such power in the National Party and, even in the case of Labor which possesses this power, it was exercised three times between 1970 and 1981 and never thereafter. The occasions when the ALP federal executive did so act depended crucially on the factional balance then obtaining on the executive.

Further to this general point, the state of the parties federally, and hence the party system, depends on how the parties are travelling at the sub-national level. The current situation where all states and territories are controlled by the ALP, which has been out of power federally since 1996, is almost unprecedented. (There was a brief period in the late 1960s when Labor was out of power in all jurisdictions). This then gives rise to two further considerations. The first is that, as federations go, Australia is not all that pluralistic, certainly insofar as race, language, religion and regional diversities are concerned. However, precisely because of this it can be argued that our interstate differences are more subtle and nuanced with each party branch taking on its own characteristics and folkways appropriate to that state's political culture. While it would require thorough in depth investigation and research to explore the detailed working out of these processes, it means, at the very least, that a good deal of state/territory diversity lurks under the generic party labels.

The second consideration is that the state branches hold the key to their party's on-going credibility and durability. To take the case of the Nationals, in their first and founding state, WA, they no longer exist, at least for federal purposes. Notwithstanding their ambitious name they exist, as a force at all, only because they have a political presence in NSW, Queensland and, to a much lesser extent, in Victoria. A further case concerns the Liberals in Queensland. They ceased to be a credible force in state politics in 1983 (save for a brief and impermanent revival, 1995–98). They have only sustained themselves as the federal Liberal's northern post box because, in South East Queensland one voter in five chooses to vote Labor (i.e. Beattie) at state level and Liberal federally.<sup>3</sup> Should this pattern not survive 2007, the

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<sup>3</sup> D. Cheverton, 'Gemini Voters, A case study of voting at federal and state elections in Queensland 1992–2004', unpublished MS held by author [2005].

Liberals in Queensland, at both levels, will be in grave danger of decline into total irrelevancy.

My second wider point concerns the circulation of leaders and elites. While it is self-evidently true that Australia is a stable democracy and that legitimacy of governments or leaders is not an issue (1975 being the inevitable exception), it is somewhat sobering to recall that, of federal leaders and prime ministers, since 1945, only Menzies retired at his own time and of his own choice. All others were defeated electorally or cut down in their party room, or both. This observation then leads to a further consideration on leadership itself. The experience of the federal Liberals with the leadership issue from 1983 to 1996, and that of the ALP since 1996 shows how hard it can be for parties out of office to bring their leadership cycle into conjunction with public expectations when these latter are established by the government of the day by deploying its considerable resources. This then is all the more problematical because of the evolution of the prime minister's position into a presidential style of office with all the accompanying concentration of power, effort, resources and attention. But the paradox remains, while the trappings of office bespeak permanency, the position of any incumbent is, at best, transitory. With no hereditary monarch as head of government (rather than head of state), and without a president elected at large, limited to a number of specific terms, the bestowal and withdrawal of leadership will remain with the parliamentary parties where, in the absence of a separation of powers between the executive and legislature, it will ever reside.

My third and final point concerns the interplay between the major and minor parties. There were no minor parties when, in 1948, proportional representation (PR) was introduced for Senate elections. However, with the advent of the Democratic Labor Party in 1955, two electoral trends were established. The first was that a minor party with a disciplined support base could exert a totally disproportionate influence on electoral outcomes through the direction of its preferences. In the DLP's case it actually saved Coalition Governments in 1961 and 1969. The second was that PR created an opportunity for parliamentary representation via the Senate and this, in turn, meant the chance to hold the balance of power. Both trends survived the demise of the DLP in 1974, the difference being that there have been several claimants for the balance of power in more recent times including an individual in former Senator Harradine. While the current minor parties are not as bloody-minded over preferences as was the DLP, the major parties have to build their minor counterparts into their electoral tactics in ways unknown in a first-past-the-post system. The widespread negative reaction, expressed in 2004 when then Coalition took control of the Senate suggested that, over the previous quarter of a century it had become a popular belief that Government *should not* control the Senate. It will be interesting to see if and how far, such sentiment translates this election year.

### **Conclusion**

The party system in Australia has developed its own dynamic, has socialised successive generations into support for its protagonists and has, for many, become co-terminus with the whole political system. The party system itself has profited from

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two institutional changes: namely compulsory voting which frees the parties from the tedium and expense of having to ‘get out the vote’ and, for the public, has become a civic virtue; while the other development, public funding, guarantees to all who qualify, a financial base, thereby giving the ‘Minors’ more room to operate than they could otherwise expect.

The warning then, insofar as there is one, is that the federal parties are only as strong as their state bases. The first half of the last century was characterised by instability in both the Labor Party and urban non-Labor. The ALP split three times between 1916 and 1955, while the latter had to be re-invented four times between 1910 and 1944. By contrast the second half of the twentieth century was marked by major party stability and minor party amoeba-like formation and re-formation. One distinctiveness that the Australian party system has compared to its NZ, UK and Canadian counterparts is the formation and survival of the Nationals. While the ‘Majors’ can be expected to go through their electoral cycles as mirror images of each other, an indication of the on-going health of the party system can be discerned from the size, vitality and success of the ‘Minors’ which, collectively, measure the contentment, or otherwise, of the electorate with the party system.



**Question** — Professor you finished up talking about the ongoing health of the party system, yet I think it’s well accepted that party membership is in decline. You talked originally about the 1960s or earlier when party membership was quite substantial. Today it is quite small. What do you think the implications of that are for the party system and for the health of the democratic system?

**Paul Reynolds** — That’s a good question and it’s something students quite frequently raise as well. Until about the 1960s and 70s, we were a society where people joined and belonged to organisations, churches, trade unions, political parties, boy scouts, hundreds of those sort of community organisations—now all that has disappeared. In fact Professor Hughes, who was your lecturer last month, once observed to me when he was the Electoral Commissioner, that he could chart the decline of organised religion in Australia. I said: ‘What, from the Australian Electoral Commission?’ He said ‘Yes Paul, there are no Sunday school halls left that we can use for polling booths. We have to use primary schools now.’ In the decline of public membership of voluntary groups it would be quite amazing if political parties were exempt from this.

Anecdotally, about 20 years ago, if students wanted to become active in the political processes, they went and joined pressure groups, such as Amnesty International. What I’ve noticed now is that the political activists I teach now are going back to the political parties because they see the parties as career paths. So what the parties have lost in terms of foot soldiers, they have gained in officers. Whether you call that a quality shift or not, I don’t know, but the mass-based party is a thing of the past, as is the mass based almost anything, fill in the blank. But so long as the parties are recruiting activists, training them as the key political players and collectively I use the

term political elites, then the party system will survive, but not in the sense of the old mass-based party where everybody turned up on a windy Monday night once a month to fight about who owned the Gestetner or who's going to sell the chook raffle tickets—that's gone.

It may be that the parties will suffer in another sense in that they won't have people available to hand out the how to vote cards, but my suspicion is that in quite a number of instances they are already paying people to do that. They are not depending on local branch members because they haven't got any, so they can give it to students or schoolboys or something like that to do that job.

Of course compulsory voting really means that the parties don't have to have mass memberships. In Britain or New Zealand where voting is voluntary, a hell of a lot of the foot soldier work of the branch members is to make sure that potential supporters of your party are on the electoral roll, and then on election day go and get them and physically take them to the polling booths. Now compulsory voting, which started in Queensland in 1914 and was adopted by the Commonwealth in 1924, has never been seriously questioned except occasionally by a few right wing Liberals and the parties want it and people think it's a civic duty. But my American students who are here on study abroad schemes are horrified that we compel people to vote.

**Question** — I heard on public radio recently that the description of the two American parties was that they were empty shells to be filled by the interests of lobby groups. In Australia, partly because of the mass base disappearing, do you think that's an adequate description of where we are now or where we're likely to go? Will the political parties in the absence of a hard left or right just become empty shells fillable by pressure groups or lobby groups?

**Paul Reynolds** — The short answer is no, it won't, because the party system in the two countries are not strictly comparable. The parties in America are not mass-based but a collection of pluralist interests. So the Democratic Party, for Hispanics, blacks, feminists, gays, blue collar workers and so on, is an umbrella parties. Our parties are much more exclusivist than that—they're not umbrella parties. Consequently in Australia the party discipline is much tighter and that means amongst other things that the parties are not susceptible to being captured by lobby groups and pressure groups and other stake-holders. These people can try to get their ideas and agendas on the party's policy priority list, but the party retains control over its policy agenda and no political leadership in any political party would surrender that. Also, because the parties in Australia are more ideologically defined than they are in America, certain lobbyists will gravitate to one party and not to another, which means that the two major parties each have their own client groups and the interplay between the party and its client group will be an ever-changing relationship according to the exigencies of the time and of the processes that are around at the time of the rise and decay of issues.

It would be foolish to rule it out forever, but I think the structure of the party system and the interplay between the client groups and the parties in Australia would preclude us becoming Americanised to that extent.

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**Question** — I'd like to invite your comments on two theories which we commonly hear these days. Firstly the theory that voters like to balance one party at the federal level with the opposite party at state level; and secondly the theory that ideology has disappeared from politics at state level at least and that voters simply choose which is the best party for service delivery.

**Paul Reynolds** — Daniel Cheverton, whose work I've quoted, at least suggests that at least that is happening in Queensland. On the other hand Queensland is a peculiar state in that split ticket voting, which is what the Americans call the phenomenon you've described, was always a viable option for non-Labor voters, because what they tended to do when they had the opportunity was to vote Liberal federally and National at state level because you were assured victory in both if you wanted to keep Labor out. What we now have since 1989 in Queensland with the post-Fitzgerald era, is that people have crossed party lines and they're doing a balancing act. It's a minor phenomenon in the sense that Cheverton suggested only one voter in five in south east Queensland was doing this. Commentators have picked this up in certain areas of Sydney as well. I'm not aware that there is much evidence for it anywhere else, so I think the theory needs more investigation and there may be something in it, but we just don't have the data yet to run with it. It would be a good PhD thesis, think about it.

In relation to your second question, I would doubt that political parties at the state level really did much to peddle ideology, except in very situationally specific instances, and here I return to my state of Queensland. The Labor Party was at its most radical in Queensland in the 1920s when it had a majority of four, and it amalgamated the Brisbane City Council, put in a state government insurance office, abolished the Legislative Council, abolished hanging, and ran butcher shops. This was a kind of utopian socialism if you like. If Joh Bjelke-Petersen could have spelt ideology I would have passed him and awarded him an honorary doctorate, but I don't think that ideology has ever figured much. Maybe in New South Wales from time to time, but populism has always had more currency as a political style at state level than ideology, and sure, you can morph populism into ideology but it's a pretty poor fit and I would suggest it's a style rather than an ideology.

But certainly the latter part of the point is well taken: the states are now seen as service delivery vehicles and there is an interesting instance of this. Largely that realisation has dawned on state populations with the advent of the GST, and one of my close friends, Dr David Hamill, who was Treasurer of Queensland from 1998 to 2001, produced a PhD thesis in record time (2½ years part time, which of course had the rest of our PhD students grinding their teeth in fury). David, when he retired from politics took all his papers from the Treasury Office home in Ipswich and then wrote a PhD. David was able to demonstrate very clearly that while the states have more money, they have far less control over it. So the GST has certainly been money bags for the states, but the money comes very tightly controlled from Canberra. So the states, yes, offer service delivery particularly in times of drought, water shortage, all that kind of stuff; that's the cutting edge of the service delivery. And you'll get more votes for promising a decent road than you will from propounding the necessity to have state-run butcher shops.



**Question** — I'd like to ask you a question about the difference between political parties. In the family where I grew up, politics were always well and truly over to the left, and my father always said to me: 'I want you to remember that the letters ALP stand for Alternative Liberal Party.' The point that he made was that there was no real fundamental differences between these two parties and that people were deluding themselves if they thought that there were. It was 50 years ago that my father mentioned that, and I'm wondering whether you see any fundamental differences. When you look at the statements of people like Mr Rudd, one of the very first statements he made was: "'believe in the market economy.' The word socialism, for example, is not mentioned. It's essentially two parties who argue about the management of the economy for those who own and control it—those who own businesses and especially those who own big businesses. I'd like to hear what your views are on whether you think that there are irreconcilable and deep differences between these two parties.

**Paul Reynolds** — It is a question that is frequently raised and it deserves a serious answer. I would start the answer by saying that there never were deep and irreconcilable differences of an ideological kind between the political parties from the 1890s onwards. There were always alternative ways of doing things. You have to remember that the first half of the twentieth century was essentially the struggle to develop and put in place the welfare state and there was only one party that was going to do that and that was the Labor Party. So the Labor Party got its distinctiveness for the first 50 years of its life because it had a fundamental goal and that was establishment of comprehensive welfare. This was what Rawson and others have meant by working class mobilisation.

Now what happened all over the western world after World War II was that the welfare state was established by left of centre parties, partly as a result of the hideous effects of the Great Depression. Conservative parties hopped on the band wagon in the 1950s and they were able to present themselves in Australia and the United Kingdom and America, New Zealand and Europe, as the true managers of the welfare state. They weren't going to dismantle the welfare state but they were going to run it according to business principles. And for about a generation Labor lost its way. It had done what it set out to do, now what was it going to do? You had books in the United Kingdom, for example *The Future of Socialism* by C.A.R. Crosland and *Must Labour Lose?* by Mark Abrams—these were periods of self doubt and some very profound self questioning on the left as to what to do now. So socialism in Australia only ever meant the establishment of the welfare state. Senator Hard-Left could bang on about Marxism, and for a time the Communists got a bit of airplay in the 30s and 40s, but the Labor Party wiped them out as any organised force in Australian politics.

So what we have now is another period of consensus. Globalisation, rationalisation of markets, market forces, free trade, this sort of stuff. After one hundred years, free trade is back as the orthodox belief-system of economists. So naturally enough the parties are going to pursue where there is least consensus. So of course the argument is going to be about who runs the show best, and the corollary of that is who profits the most. If you look for example at Howard's legislation on industrial relations, you can say that this is the most ideological right-wing government we've ever had in Australia, which is probably true. But Howard sells the industrial relations package as being beneficial to the vast majority of workers and that is where the debate is joined.

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And it was ever thus in Australia; the debate is always joined on the outcomes, on the output, not on the input or the rationale. It's who gets what, when, why and how, as Robert Dahl famously articulated it in the 1950s.

You've got a situation therefore where the observable phenomenon is what governments produce and what governments do, and that's where the political argument is.

**Question** — Professor I believe that in Australia politics is different from in the United States and the United Kingdom because you get more dissent within the parliamentary system. With our tight way of control the parties, if you vote against the Labor Party you're out; the Liberal Party gives you a conscience vote if John Howard will allow you to have it. How will we go in the twenty-first century with such tight control? Are we going to lose some aspects of democracy?

**Paul Reynolds** — No, I don't think so, but I think again it comes down to the contextualisation of the question. Remember that the United Kingdom is not a federation. So it only has one parliament and that parliament has 650 members. With the best iron-clad discipline in the world, you're going to be herding cats with 650 people. Also in the United Kingdom, because the House of Commons is so large, more members will be no more than back benchers. Only a very tiny percentage of members will end up as ministers or anywhere on the political radar. And the House of Lords, because it contains the Lords Spiritual and Temporal, is only a delaying device, and they are trying to get rid of it. As the *Economist* said about the latest tranche of reforms to the House of Lords: 'Welcome to the eighteenth century.' That's one reason why party discipline in Britain seems not as tight as in Australia. It's a function of size.

Now in the United States, as I've already mentioned in response to an earlier question, the parties are coalitions of interests. So therefore the party discipline is much weaker and cross-party voting is something which is a way of life and is built into the political processes. It's always expected that there will be conservative Democrats and liberal Republicans and occasionally depending on the circumstances they will cross the floor.

In Australia, by contrast, we have small parliaments. The biggest house of parliament is the House of Representatives, with 150 members and you can go right down to the Tasmanian House of Assembly where there are about 27 members. Now in those circumstances it's much easier to control the behaviour of the politicians in parliament; and remember that the politicians are not controlled externally, they make their own rules in their caucuses and party rooms. That's where the dissent is ironed out and that's what you don't hear about because Chatham House rules are firmly enforced in caucus discussions. So the product therefore is solidarity and unity and presenting a united front to the public. This of course is facilitated very largely because 80 per cent of all parliamentary business is non-controversial. Governments only are governments of innovation generally speaking in their first term—thereafter they are governments of administration. This is what makes the Howard Government so different, because it has been innovative all the way through.

I might suggest here that political parties are captives of their own myths. The Labor Party myth is that Whitlam failed because he tried to do too much too quickly, so Labor governments ever after have been quite cautious. The Liberal Party's myth is that Fraser waited eight years to remake Australia in the conservative mould. So the tightness of the discipline can be seen as stifling democracy, but I prefer the analogy that it is like having two footy teams. They can only compete successfully if they're united and purposeful and aiming to win. As Jim Killen used to put it: 'Not all the best players are on the one team.' But I always like Paul Keating's reply to that: 'Our bastards are better than their good guys.'

**Question** — You have done the impossible. When you gave your description, I said: 'There is no future for the voters in this country. We'll have to wait for the Chinese to take us over and show how it can be done.'

**Paul Reynolds** — I can give you just a quick humorous analogy. I won't name the gentleman, although he is now dead, but it was said of a former Governor of Queensland, that if the Chinese landed today, he'd have plastic surgery tomorrow.

**Question** — Do you have any views on the funding for elections and the fact that the federal government give so much money per vote?

**Paul Reynolds** — Yes, that was an innovation that brought in with the last tranche of electoral reforms in 1984, and it was designed to do two things. One was to give the parties a public funding base where they would be accountable. They don't just get the dough for the votes, they've got to furnish all kinds of returns to the Electoral Commission and they're accountable. The second one was to obviate the danger a previous questioner referred to of having the parties captive of lobby groups. If the parties depend on the big end of town; corporate donations, trade unions, whatever, then they are in danger of being in thrall to those groups, either on specific or general grounds.

The other unintended consequence was, as I said, to give the minor parties a more secure financial base than they would otherwise have. Now those are the practicalities of it—that was the sort of pragmatic rationale for it. You can argue the morality of it until the cows come home. To use the example of my American study abroad students again: they think it's appalling that the state should give money to political parties. Some people would say that it's appalling that American politics is run by tobacco companies and the anti-abortion lobby. So you pay your money and you take your choice—the pun is intended. If you're going to have public funding, it is what it says: *public funding*. It is publicly accountable, the parties are accountable for the funding that they get. If you don't have public funding, and you say that this is an illegitimate thing for the taxpayer to be footing the bill, political parties can go and beat the bushes and get the money wherever they like, and no-one will never know what strings were attached to the money. Of course it's not an either/or situation, because the political parties do go out and solicit donations to top up the public funding, but with public funding they have to declare to the Electoral Commission who gave them money, and how much was given, and that's on the public record.

So the reforms of 1984 were intended to balance two sets of interests: to secure the parties on a financial basis without sleazy deals and also to give the minors a bit of

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airplay. The fact that it isn't an issue in politics now and wasn't particularly controversial 20 years ago either, means that most people accept the rationale for public funding, provided the safeguards are in place.

## **National Parliament, National Symbols: From British to Australian Identity\***

*Elizabeth Kwan*

### **Introduction**

The Australian national flag has become the most familiar of our national symbols. Less familiar is the Commonwealth Coat of Arms. Parliament House in Canberra, completed in 1988, displays both the flag high above the building, day and night, and the coat of arms above its front entrance.



Image 1: Parliament House, Canberra, showing the Australian Coat of Arms and flag

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 4 May 2007. Those interested in the detail documenting the paper will find it in Elizabeth Kwan, *Flag and Nation: Australians and Their National Flags since 1901*. Sydney, UNSW Press, 2006.

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The bold central display at Parliament House provides a sharp contrast to the *two* sets of flags and arms—British and Australian—on Australia’s provisional parliament house completed in 1927, now known as Old Parliament House. The Union Jack and Australian blue ensign flew above the roof of that building, not every day but on special flag days. That dual display of flags has now gone. But the coats of arms, now painted (but not accurately) can still be seen above the rounded feature windows either side of the front entrance: the British arms on the left with English, Scottish and Irish symbols; and the Australian arms on the right with the symbols of the six federating states (image 2). The door knobs at the front entrance also display the British and Australian arms.



Image 2: British arms (left) and Australian arms (right), front entrance, Old Parliament House

### ***Transition in the national flag***

Official Australian national symbols began to emerge soon after federation in 1901, with the two shipping flags, the seal and the coat of arms, which were gradually adopted and adapted. But when did an Australian flag, the Australian nation’s chief symbol, replace the British flag as the national flag? Newsreel images of flags on Parliament House provide the answer. In June 1951, when Australians were celebrating the jubilee of federation, the Union Jack still took precedence as the national flag. In the jubilee celebrations shown in image 3, the Union Jack has the position of honour as the national flag at the viewers’ left, emphasising Australia’s British nationality.<sup>4</sup> Not until February 1954 did that change. During her visit in 1954 the Queen gave assent to the Flags Act, and image 4 shows the Australian flag in the position of honour over the Union Jack for the first time, when the Queen arrived at provisional Parliament House, Canberra. It took three more decades before Australians accepted that transition. But by then a Morgan poll showed that a growing percentage of them were questioning the place of the Union Jack on the Australian flag. By 1998 a small majority wanted a new flag.

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<sup>4</sup> It is flag protocol that the flag on the viewers’ left when facing a building is in the position of honour.



Image 3: Jubilee celebrations of federation in June 1951, showing the Union Jack taking precedence over the Australian blue ensign on provisional Parliament House



Image 4: The Australian national flag took precedence over the Union Jack for the first time on the Provisional Parliament House in February 1954

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## *Two questions*

These facts about the national flag puzzle most Australians aware of them. The transition in national flag we made—and are still making—is not well known or understood. Nor are the roles played in that transition by people, pressure groups, political parties, parliaments and governments. They prompt two questions. Why did Australians take more than fifty years after federation to replace Britain’s Union Jack with an Australian flag, and still decades more to accept that change? Why is so little known about that history?

## **From Union Jack to Australian National Flag**

### *Choosing a flag design*

#### *The unofficial federation flag*

At its inauguration in January 1901, the Australian Commonwealth did not have an Australian national flag, though many Australians thought that the federation flag would become one. This popular flag, a British white ensign with a blue cross bearing white stars, was once used as an unofficial shipping flag along the east Australian coast from the early 1830s. During the 1898 federation campaign the Australasian Federation League of New South Wales promoted it as the flag for the new Commonwealth with the motto ‘One people, one destiny, one flag’. In 1901 it featured on invitation cards for the celebrations of January and May.



Image 5: Invitation to the Inauguration of the Australian Commonwealth, 1901, showing the federation flag

The flag’s St George cross with stars, similar to the symbol on the New South Wales blue ensign, was quite different from that on another flag prominent in the federation



campaign: the Southern Cross constellation on Victoria's red ensign. Its antecedent was the flag of the Australasian League of 1851, used in campaigning against the transportation of British convicts to Australia and New Zealand.

*A design for two shipping ensigns*

In 1900 a newspaper and a journal, both of Melbourne, first raised the issue of shipping flags for the new Commonwealth: blue for naval and official ships; red for commercial ships. The second competition was still underway when Australians celebrated the opening of the first Federal Parliament on 9 May 1901. One Australian had already complained to the Prime Minister, Edmund Barton that 'every city, village, house, school and steamer is anxious to proclaim the Union of Australia, but not one can do so through the non-existence of our Flag.' The flag that dominated the celebrations was the national flag, the Union Jack, introduced into state schools to mark the opening of the federal parliament.

Barton's government, which had received a request from the British government for a flag design but was unable to agree on one, had launched its own competition for two shipping flags in April. The judges, seafaring men aware that the British Admiralty required British blue and red ensigns, with the national flag, the Union Jack in the place of honour, and the addition of a colonial symbol, took less than a week in September to select a design from some 30 000 entries. Essentially they chose the design of the Victorian red ensign with the addition of a large star—the Commonwealth Star—beneath the Union Jack, its six points symbolising the federating colonies

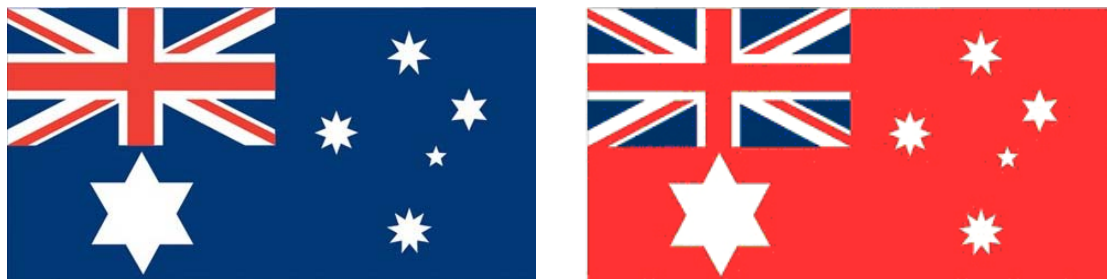


Image 6: These were the two shipping ensigns chosen by naval and marine judges in 1901. Modified and approved by the British Admiralty, they were gazetted in 1903.

*Criticism and uncertainty*

Significant critics of the design, both in Barton's Liberal Protectionist government and in New South Wales, thought the design was too Victorian. They wanted the federation flag: the St George cross with stars. Barton, who had persuaded the Australasian Federation League to adopt and promote that flag for the new Commonwealth, eventually decided to send that design, as well as the one selected by the judges, to the imperial authorities. Predictably, the Admiralty chose the design for the two ensigns. With minor modification, they appeared in the *Commonwealth of Australia Gazette* in 1903 as the Commonwealth Ensign (blue) and the Commonwealth Merchant Flag (red).

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Later governments of Labor's Chris Watson in 1904 and Andrew Fisher in 1910 were also unhappy with the design, wanting something 'more distinctive', more 'indicative of Australian unity'. Barton's government did not seem interested in using the blue ensign, grudgingly agreeing to fly it only on naval ships not forts. Richard Crouch, the youngest member of the House of Representatives, a lawyer from Victoria, continued to be the flag's advocate, persuading the House of Representatives in 1904 to pass a motion insisting that the blue ensign 'should be flown upon all forts, vessels, saluting places and public buildings of the Commonwealth upon all occasions when flags are used.' Watson's government agreed to fly the blue ensign on special flag days, such as the monarch's birthday, on Commonwealth buildings in Melbourne and Sydney, and on post offices, but not if it meant additional expense—a provision which undermined the decision.

#### *Gradual adoption of the blue ensign by the Commonwealth government*

But gradually governments began using the blue ensign: on forts in 1908 and as a saluting flag at reviews and ceremonial parades in 1911. Both Liberal and Labor governments under Alfred Deakin and Fisher used the blue ensign to mark their moves for greater Australian control over defence, especially the development of an Australian army and navy. Both hoped that Australian warships would fly an Australian, rather than British white ensign at the stern, a view Britain rejected. Australian governments also found that the Union Jack was still required at reviews where vice-regal representatives were present. Both blue ensign and Union Jack had to be used. Authorities took some time to adjust to the blue ensign being used. Australian patriots were annoyed in 1913 to see that the blue ensign was not used at the review in Fremantle of the men of the *Melbourne*, the first cruiser for the Royal Australian Navy to arrive from Britain. The government had to remind officers of the 1911 order.

As to the Commonwealth merchant flag or Australian red ensign, difficulties with proposed navigation legislation meant that commercial ships in Australia registered as British ships under Britain's *Merchant Shipping Act 1894* were not yet required to fly it.

#### *The impact of war*

##### *Popularising the ensigns*

Australia entered the war with three flags representing its dual nationality: the Union Jack as national flag and its two Australian ensigns. All three featured in recruiting drives for the Australian Imperial Force (the AIF). But the Union Jack was clearly regarded as the most important: 'the' flag, the artist James Northfield called it in his poster for the Victorian State Recruiting Committee.



Image 7: The Union Jack as the national flag, and the red and blue Australian ensigns were used on recruiting posters during World War I

From Gilgandra in New South Wales a group of recruits, the ‘Cooees’ marched to Sydney late in 1915 carrying the Australian red ensign and the Union Jack. From Delegate in the south, the men from Snowy River carried an Australian red ensign, stitched by their women onto a larger British red ensign, in a recruiting march to a depot in Goulburn in January 1916.



Image 8: The Australian red ensign, seen here in a recruiting banner at Queanbeyan in 1916, was more common than the blue one

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On troopships some took a red ensign with them, others the Union Jack. Australian ensigns, some presented by women's groups from home, identified Australian casualty clearing stations and general hospitals at the front. In battle, there were occasional accounts of Australian ensigns marking objectives reached: either a tiny paper flag stuck in a tin of bully beef received in a parcel from home; or a blue ensign sent by the commander of the AIF as an incentive to the men taking a town.

On the home front the achievements of the Australians at war inspired a greater awareness of the Australian nation and a pride in its ensigns. As Charles Bean, the official historian, put it in a book for young Australians in 1918, those achievements 'made our people a famous people ... so famous that every Australian is proud for the world to know that he is Australian.' In New South Wales state schools were now free to fly an Australian flag instead of the Union Jack, as had long been the case in Victoria.

### *Reinforcing the Union Jack*

Although Australia's role in the war popularised Australian ensigns, war and post-war conditions also circumscribed their use. The Union Jack retained its pre-eminence as the national flag on memorials, honour boards and fundraising badges, as well as in state schools.



Image 9: World War 1 badges

In South Australia from 1916 state schools were not allowed to fly an Australian ensign instead of the Union Jack, reflecting the suppression of its large German-speaking minority and the closure of their Lutheran schools. Their children, insisted John Verran, Labor MP, must be 'taught by those who are British, and taught what it is to be British'. Under Labor, 'I love my country' became 'I love my country, the British Empire', in the words accompanying the salute of the Union Jack.

Throughout Australia the conscription campaigns of 1916 and 1917 made loyalty to Britain a key issue. The slogan 'Australia first and the Empire second' used by its most outspoken advocate, Irish-born Dr Daniel Mannix, Catholic Archbishop of Melbourne, in opposing conscription, exacerbated religious and ethnic division,

especially with the failure of the second referendum. In 1920, when Mannix used Australian flags instead of the Union Jack in an extraordinary St Patrick's Day procession in Melbourne, Protestant loyalists professed outrage. Forbidden to use Irish republican flags in the midst of the bitter Anglo-Irish war, and refusing to use the Union Jack, Mannix found Australian flags usefully ambiguous. They made the procession appear both loyal and disloyal at the same time: loyal, because organisers could answer critics by pointing to the Union Jack on the Australian flags; disloyal, because there was no separate Union Jack.

In such a context, Victoria's Director of Education refused to adopt a suggestion that schools should use an Australian flag to mark Anzac Day, the 'nation's birthday': 'Teachers are at liberty to use either the Union Jack or the Australian Flag', he responded, 'but to prescribe the exclusive use of the latter might prove a welcome reinforcement to the propaganda of disloyalists.'

Labor's split over the issue of conscription and the re-alignment of political parties saw Labor become more strongly Irish-Catholic in orientation and the Nationalists more militantly English-Protestant. In New South Wales, Labor's links to not only Irish republicanism but also another anti-British movement, international communism, made Labor's promotion of an Australian ensign rather than the Union Jack suspect in the eyes of the wider community. Nationalists prided themselves on representing that community, in contrast to what they portrayed as Labor's sectional and disloyal interests. In the volatile politics of the post-war period Nationalists made much of the Union Jack in appealing to voters, especially returned soldiers. In this they had the support of the Returned Sailors' and Soldiers' Imperial League of Australia (the RSL) and other conservative groups like the King and Empire Alliance. An Australian ensign, unless accompanied by the national flag, the Union Jack, was seen as a disloyal symbol.

### ***Was the blue ensign the national flag?***

#### *Questions of precedence and protocol*

The Nationalists' requirement that the Union Jack should always accompany an Australian ensign saw the issue of precedence played out very publicly on the flagpoles of Sydney's Town Hall in 1921. Should the Union Jack have precedence? Much political point-scoring prompted a barrage of questions to the Department of the Prime Minister. There was a related question: was the blue ensign on shore for Commonwealth government buildings only? In essence both questions were really about which flag was the national flag: the Union Jack or the Australian blue ensign?

During the interwar period, these questions were a constant source of frustration for public servants in the Department of the Prime Minister, with little involvement of their political masters. But by 1924 there was agreement that the Union Jack should take precedence as the national flag. The blue ensign was for Commonwealth government buildings, but could be used on state government buildings if the state ensign was not available. There were no restrictions on the red ensign or the Union Jack: these were the flags state schools, private organisations and individuals could fly.

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It was not surprising, then, that British flags took precedence over Australian ones on Parliament House, Canberra at its opening by the Duke of York in May 1927. What was surprising were the red rather than blue ensigns decorating the building, if we are to believe the commissioned painting of the event.(see Image 10, below) Surely the Commonwealth's most important public building would be decked out in blue ensigns—the Commonwealth government's flag. The artist, Septimus Power, known for his ability to 'create a feeling of movement and drama', may have painted the ensigns red for dramatic effect—to highlight the St George crosses in the Union Jacks, and the carpet leading from the Duke's carriage to the main entrance. Or was it to underline the red ensign as the Australian flag people could use?



Image 10: Harold Septimus Power, *'The Arrival of Their Royal Highnesses the Duke and Duchess of York at the Opening of Federal Parliament House Building, Canberra, 9 May 1927'* (1928)

### *Victoria forces the Commonwealth's hand*

Late in 1940 the Victorian government challenged the assumption that the blue ensign was for governments and not people by passing legislation allowing state schools to buy that ensign. Albert Dunstan, the shrewd Country Party radical who governed Victoria with Labor's support, had finally tired of waiting nearly two years for the prime minister to respond to his request to end restrictions on the blue ensign or release a statement allowing schools and the general public to use that flag.

His legislation had the desired effect, prompting one Sydney newspaper to declare that 'the red Australian flag, most often flown is not the real Australian flag'. Robert Menzies, leader of the United Australia Party government authorised a statement in March 1941 permitting Australians to use either ensign on shore. Ben Chifley's Labor government issued a similar statement in 1947. But widespread press disinterest meant that questions from the public continued.

### *Changing the national flag*

#### *An Australian flag for every school*

In December 1950 the Menzies government decided that the blue ensign should be proclaimed the national flag, enabling organisers of the jubilee celebrations to present it to every school. Legislation followed in 1953, with Queen Elizabeth II giving her assent while in Canberra in February 1954. The Australian flag now took precedence over the Union Jack.

#### *Accepting the change*

Australians took some decades to understand and accept the change that had taken place. South Australia's Director of Education suspected that the Commonwealth government intended its gift of 1951 to replace the Union Jack in state schools' national salute. South Australia chose to continue with the Union Jack, even after 1954. Only in 1956 could school principals there choose to use the Australian national flag instead of the Union Jack. Even in the 1970s many Australians persisted in regarding the Union Jack as the national flag, which explains Arthur Smout's campaign from 1968 to 1982 to urge Australians to give the Australian flag precedence.

#### *Promoting the Australian flag*

Menzies promoted the Australian national flag by having it flown every day above the entrance to Parliament House from 1964, and from government buildings on working days. The National Capital Development Commission, created by the Menzies government in 1958, erected two huge flagpoles for Australian flags on Capital Hill and City Hill.

The federal government's practice of giving flags to schools widened to include youth groups and by the 1970s national sporting bodies. By 1980 the Australian flag had been placed in the House of Representatives and become part of the logos of the two major parties. The flag was central to the brief prepared for entrants in the Parliament House design competition of 1979, and to the winning design. Its flagpole dwarfed the previous one on Capital Hill and even more so the short central flagpole on Parliament House below it. The image became an Australian icon.

Even so, Malcolm Fraser's Coalition government, when establishing the long-awaited Australian shipping register in 1980, could not persuade Australia's merchant marine to adopt the Australian national flag instead of the Australian red ensign, affectionately known as the red duster.

#### *Questioning the design*

Just as most Australians had come to accept the Australian blue ensign as their national flag, a growing percentage of them felt that it was not really Australian, dominated as it was by the flag of another country. It was essentially a British ensign. Indeed Australia still had two British ensigns, as it had in 1903 when the Union Jack was the national flag. Morgan Polls showed the percentage of Australians wanting a new flag increasing from 27 in 1979 to 42 in 1992, to a majority of 52 in 1998.

The emergence of two lobby groups, Ausflag in 1981, determined to find a more appropriate design for an Australian flag, and its counterpart in 1983, the Australian

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National Flag Association, equally determined to prevent change to the flag, began an increasingly serious contest for the hearts and minds of Australians. Almost as serious was a similar contest between Labor Party governments under Bob Hawke and Paul Keating and the Liberal-National Party Opposition. By the mid-1990s the Australian flag, or the Union Jack on it, was disappearing from the logos of national organisations, such as the National Australia Day Council, Ansett Australia, and the Australian Labor Party.

#### *Discouraging change*

Since 1996, the Coalition government under John Howard has discouraged discussion about change to the flag by establishing Australian National Flag Day in 1996, legislating in 1998 to make change more difficult for governments, reproducing the Australian National Flag Association's promotional video on the flag and putting it into all primary schools in 2002—at a time when the Australian community was so divided over the flag; providing a subsidy to all schools for erecting a flagpole in 2003, and requiring all schools receiving federal funds to fly the Australian flag in 2004.

### **Two Questions**

*Why did the transition from Union Jack to Australian national flag take more than fifty years?*

#### *Governments' reluctance*

For several decades from 1901 Australian governments struggled to understand the symbolism involved in the Commonwealth being a self-governing not an independent state within the British Empire. Barton's government, which favoured the federation flag over the competition design, seemed to ignore the fact that the British Admiralty required two shipping ensigns, the red and the blue ensigns, not the federation flag as the national flag. Once the ensigns were gazetted, the government naturally hesitated to use the blue ensign on forts as if it were the national flag. It clearly wasn't, as the Defence Department insisted. It was an ensign of the national flag, the Union Jack.

The war brought to the fore this issue of whether the blue ensign was the national flag. People and governments—state and local—wanted to use Australian ensigns for patriotic purposes on land. But which should they use? Neither the Prime Minister's Department, bombarded with questions from the public and responsible for advice on the issue, nor the more conservative Defence Department, seen to be the source of expertise, was sure. The Nationalist government was unwilling to sort out the issue. The press was disinterested. Public uncertainty dragged on into the 1930s.





Image 11: Children of Brighton-rd State School, Melbourne, salute the Union Jack in 1938

Albert Dunstan, the Victorian Country Party premier who in 1940 allowed state schools to buy blue ensigns from flag suppliers, was unusual in his grasp of the issue and his determination to solve it. For patriotic purposes, he argued, the blue, not the red, ensign should be used by governments *and* people. But Menzies, more cautious despite receiving advice which confirmed Dunstan's opinion, chose instead to announce in 1941 the end of restrictions on the flag's use. He feared that declaring the blue ensign to be the national flag would raise awkward questions about the Union Jack in the midst of war.

Such considerations continued to matter. Labor prime ministers were usually even more cautious, wary of the anti-British tag so easily pinned on them by non-Labor. Chifley issued a similar statement to Menzies in 1947, but went further in referring to the blue ensign as '*the* national emblem' rather than as '*a* national emblem'. Two years later he established an interdepartmental committee to consider a range of issues relating to flags. One of them was whether an ensign could be a national flag. There was some support in the Prime Minister's Department for a new flag, the design of Australia's ensigns being seen as perpetuating Australia's 'colonial status'. With the Union Jack in the corner the flag could not be 'truly Australian'. However, the committee recommended that the blue ensign should be proclaimed as Australia's national flag, since it had been used on the jackstaff of Australian warships since 1911 and was the flag preferred in the Menzies statement of 1941.

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But the proposal which brought this recommendation to Cabinet came from a departmental committee planning the jubilee of federation celebrations: the presentation of a blue ensign to every school. Perhaps its chairman, the head of the prime minister's department, saw the jubilee as a rare opportunity to establish the blue ensign as the Australian flag—especially since the press took so little notice of his department's statements over the years to establish it as such. When a state director of education queried the choice of ensign, Menzies as the new prime minister took the issue to Cabinet. Organisers doubted that 10 000 flags could be made and delivered to schools by May 1951 as other issues—including the war against North Korea—took precedence on Cabinet's agenda. But finally Cabinet made the decision early in December 1950.

Government reluctance to negotiate sensitive matters of symbolism still mattered in 1953. When Menzies introduced the Flags Bill to have the blue ensign designated the Australian national flag, he hid the change taking place, explaining that the legislation would make 'no change'. That was not true. He reassured those attached to the Union Jack that it would still fly beside the Australian flag, and that the Act guaranteed Australians' right to fly it. But he did not explain that the Australian national flag would now take precedence over the Union Jack. Further reassurance was the Queen's assent to the Act given in Canberra in February 1954.

Governments' promotion of the Australian flag over the next three decades eased the transition from British to Australian national flag, as did the fact that the Australian flag still carried the Union Jack in the place of honour—a legitimising symbol.

But how were governments going to respond to the possibility of a further transition: the removal of the Union Jack from the national flag? Only in early 1992, after the ALP had dropped its policy of flag change, did Paul Keating's Labor government tackle the issue: 'We can fly two symbols of our nationhood no longer', was Keating's view. But with no obvious alternative flag design, and as the target of campaigns by the RSL and its offshoot, the Australian National Flag Association, and the Coalition, the Labor government dropped flag change in mid-1994 to avoid compromising its move to a republic.

The John Howard Coalition government's amendment to the Flags Act in 1998 was unusual in attempting to prevent future governments from changing the flag without a national vote. Previous governments had been free to make such changes to national symbols: as Labor's Andrew Fisher in 1912 had in changing the coat of arms; Menzies, in changing the national flag in 1954; and Hawke in changing the national anthem in 1984. Curiously, the passing of the amendment against flag change in March 1998 occurred just as the Morgan Poll revealed that a majority of Australians wanted a new flag.

#### *Dual national identity*

Governments' reluctance to explain the changing symbolism of Australia's national flags reflects Australians' history of a dual national identity. Until recent times, most Australians saw themselves as Britons as well as Australians. They belonged to two nations. Henry Parkes, often called the father of federation, had urged the Australian colonies in 1890 to federate because of the British background they shared—the

crimson thread of kinship', he called it. But Australians' vote for federation also represented Australians' desire to be a nation.

In state schools after federation we see the tension between these two identities in the school ritual of saluting the flag. Sir Frederick Sargood, a respected politician from Victoria and soon to be a Senator, had introduced the Union Jack into schools in 1901, supposedly to celebrate the opening of the first Parliament, but really to remind future generations of Australian children that they were British. Saluting that flag became an established ritual. Sir Frederick feared that in becoming an Australian nation, Australians would forget that they were British. The introduction of Empire Day in 1905 further bolstered the ritual, again reinforcing the British connection. Prompted by the British Empire Union, also known as the League of Empire, conservative premiers and prime minister saw Empire Day as an opportunity to turn the electorate against a growing Labor Party which talked of developing Australia as a self-reliant socialist community.

What place would there be in schools for an Australian flag, especially given Australians' emotional attachment to the Union Jack as the flag of freedom and strength? South Australia provides an extreme example of how difficult finding that place was, even in the 1950s, where country was still defined as the British Commonwealth, not Australia.

Menzies maintained a strong sense of a dual nationality in reflecting on the first fifty years of federation. The *Canberra Times* reported him as saying in May 1951:

In those years Australia became a really well-knit nation, and we became Australians ... We are Australians and we must thank God for that. In our 50 years there has never been argument about whether we are British or not. We are British.

By that time the Chifley government in the Australian Nationality and Citizenship Act of 1948 had formally defined the status of Australian citizenship, although Australians continued to be British subjects until 1984.

#### *A vulnerable society*

Not only sentiment but also fear tied Australians to the Union Jack. Sir Frederick gained support for putting that flag into schools in 1901 because of the heightened imperial sentiment during Australia's involvement in the South African war. Most Australians saw British ties as essential to their defence. They were only too conscious that the small egalitarian European society they were creating in this vast continent on the edge of Asia far from 'home' depended on the Royal Navy keeping at bay other European powers and, from 1905, expansionist Japan. Australia's ties with Britain, at the centre of the dispute over conscription during the First World War, became even more important to Australia in an insecure post-war world. The wearing of British ensigns by the Royal Australian Navy from 1911 and the Royal Australian Air Force from 1922 at Britain's insistence underlined that fact.

At imperial conferences after the Great War Australian governments discouraged calls by Canada, South Africa and Ireland for Britain to recognise their independence. When those calls led to such recognition in the Statute of Westminster in 1931,

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Australia chose not to ratify it until 1942. The closer Australia's ties to Britain, Australian governments argued, the more likely Britain would defend and promote Australian interests.

That view became increasingly impossible to maintain, as Labor Prime Minister, John Curtin, and later Robert Menzies recognised in seeking alliance with the United States. That the decision to present the blue ensign to all schools in 1951 was made in the midst of the Korean War is significant—a recognition that children must increasingly be taught to be Australian, rather than British. The Vietnam War, in which Britain was not involved, emphasised the point. From 1967 Australian warships no longer flew the British white ensign but an Australian one. The RAAF had already made that transition in 1949.

By the mid-1980s Australian governments found it easier to separate British and Australian sentiment and interests. But since then polls and competitions revealing the strength of calls for change to the flag, in particular removing its Union Jack, sparked a reaction by the more conservative, troubled by economic change and the changing ethnic composition of Australian society. The assumption that only those of British or European stock were Australian resurfaced. The Australian flag became a British symbol. By 1997 Pauline Hanson of One Nation fame was wrapping herself in it. In response, the Howard Government, encouraged by the Australian National Flag Association, promoted the flag ever more zealously, especially amongst the young from 2002 to 2004, ignoring the strong and continuing division among Australians over its Union Jack. Again, war—in Afghanistan and Iraq – made its task easier, patriotism in schools becoming the preserve of the federal rather than state government. The expansion of the number and size of private schools—including Islamic schools—encouraged by the Howard government, now required the flying of the Australian flag if they received federal funds.

In more recent times young people have begun wearing the flag at sports events and at Gallipoli, and, more worryingly, using the flag as a weapon. Australian flags at the centre of the riots at Cronulla Beach in December 2005 and at the Big Day Out in January 2006 challenged sociologists, psychologists, anthropologists and historians to explain their meaning. Wearing the national flag had become more than simple exhibitionism to catch the eye of the TV camera crews. In those contexts the flag represented ethnic chauvinism at the heart of Australians' sense of vulnerability.

***Why is so little known about the transition in national flag from Union Jack to Australian national flag?***

The reluctance of governments between 1901 and 1954 to explain to Australians the relationship between the Union Jack and its ensigns left both governments and people uncertain about the history of the blue ensign. After 1954, when it became the Australian national flag, replacing the Union Jack, governments presented it as the uncontested national symbol since 1901.

The flag certificate accompanying the blue ensign into schools in 1951 introduced it as 'this symbol of our unity and nationhood' since 1901, the flag's Union Jack showing 'Australia's link with Britain'. Effectively its text hid the role of the Union Jack as the national flag and the role of the red ensign as the people's flag, making it

appear that the blue ensign had always been the national flag. In several editions of the booklet on the national flag based on the certificate, governments have continued to hide that history.

Yet the booklets reveal clues to a very different history from the one they presented. Why was it necessary to assure Australians until the 1970s that they were allowed to fly the Australian national flag and the Union Jack? Why until the mid-1980s did they include illustrations showing how to correctly fly or display the two flags together?

We need to explore and enjoy the flag's history in all its complexity. Hiding it leaves governments and people vulnerable to misinformation and mythmaking.



**Question** — At the outset you showed a photograph of the British coat of arms and the Australian coat of arms on doors in Old Parliament House. Now I may be wrong but I think I counted seven points on that star. Why are there seven when we have six?

**Elizabeth Kwan** — The Commonwealth Star on the Australian coat of arms of 1908 and again of 1912 had seven points: six for the federating states; and a seventh point for Australian territories after Australia became responsible for Papua in 1906. The Australian ensigns, gazetted in 1903, had had a six-pointed Commonwealth Star. It gained a seventh point in 1908 to be consistent with the seven-pointed star in the first coat of arms approved earlier that year.

**Question** — I would like to congratulate you on putting in front of us a wonderful picture.

What about the Celtic fringe, the Scots, the Welsh and the Irish, who were the foundations of this country? What right did politicians have to decide on a flag for them, and where are these nations in it?

**Elizabeth Kwan** — Well, we were settled as a British settlement, and I think part of being British is that people wear several different hats. The Welsh and the Scots and the Irish saw themselves as individual nations, but they also wore a British hat. Within Australia, people are wearing all kinds of hats all at the same time, but in different contexts. So I think that's really the issue we're wrestling with here.

**Question** — Dr Kwan first of all, if we were so wedded in Australia to the Union Jack at the time of federation, why was a national competition held for a so-called Australian flag? Secondly, following up on the first question today, why does the Southern Cross design have on its stars five, six, seven, eight and nine different points as you go around the Southern Cross?

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**Elizabeth Kwan** — As Canada had its two shipping ensigns, so Britain expected Australia to have two ensigns. These were to be ensigns of the Union Jack, which continued to be the national flag. The national competition was to determine the colonial symbol on the ensigns.

The design of the two ensigns selected from the competition gave the stars of the Southern Cross five, six, seven, eight and nine points to indicate the varying brightness of the five stars in the constellation. But the Admiralty modified that design by giving all stars seven points, except the smallest which had five. And it also refined the shape of the Commonwealth Star.

**Question** — When I was at school, which was during the Second World War, and we put up the Union Jack first of all, it was sacred and you must never let the flag touch the ground. I'm amazed at what people do with the flag now. They wrap themselves in it, they paint themselves with it. So I'm wondering has your study touched on that aspect of it?

**Elizabeth Kwan** — It's a good point and it's one that I think concerns us today. I wonder, for example, how the Australian National Flag Association, which keeps pushing this flag, feel about the way people are treating it because of course, the flag should never touch the ground. There is a flag company now that is making flags as capes, so they are catering for this new demand to wear the flag without it touching the ground.

I think there is a strong element of exhibitionism in this use of the flag, but if we are speaking of Cronulla in 2005, of course it was much more than that. I felt that people were staking out their ground, and I think that this relates to their sense of vulnerability—they feel that they are being invaded by non-Australians, and they have this idea that to be Australian you must be British in background, or at least European. I think that attitude has resurfaced and is actually being verbalised now since Pauline Hanson. A lot of people still assume that in the way they use language; not always necessarily in an offensive way, although of course it is offensive to those who are not from a European background.

## **Sources of Images**

### **Image 1**

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### **Image 2**

Elizabeth Kwan

### **Image 3**

Film World and Cinesound Movietone Productions, from the collection of the National Film and Sound Archive, a division of the Australian Film Commission

### **Image 4**

Film World and Cinesound Movietone Productions, from the collection of the National Film and Sound Archive, a division of the Australian Film Commission

### **Image 5**

Senate Resource Centre

### **Image 6**

Ralph Kelly

### **Image 7**

‘Were You There Then?’ National Library of Australia nla.pic-an14107674

‘Come On Boys—Follow the Flag’, courtesy of the James Northfield Heritage Art Trust

‘Oppression/freedom’, South Australian State Recruiting Committee Poster, State Records of South Australia GRG 32/16/33

### **Image 8**

Australian War Memorial Negative Numbers REL/15959 and P01095.001

### **Image 9**

World War I badges ca. 1914–1920, courtesy of the State Library of South Australia, SLSA PRG 903.

### **Image 10**

Historic Memorials Collection as part of the Parliament House Art Collection, courtesy of the Department of Parliamentary Services, Canberra, ACT

### **Image 11**

*Age*, 16 February 1938





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