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Constitutional Politics

Is it the ‘Scottish Question’ or the ‘English Question’?*

Sir Bernard Crick

As a federal system, you may be interested in some of the problems that the United Kingdom is facing through the Westminster Parliament, with its English doctrine of the sovereignty of parliament, having granted a radical form of devolution to a Scottish Parliament.

Two preliminary remarks, as it were scene-setting. Back home I have sometimes had to remind leaders of the new immigrant communities as well as foreigners, that the United Kingdom of Great Britain and Northern Ireland has been a multi-national state ever since 1707; and it has been a multi-cultural state even since the industrial revolution brought in, first, large numbers of poor Irish immigrants into the cities of England and Scotland, and later largish numbers of Jews fleeing persecution from Czarist Russia.

And it used to be said of the Irish question in British politics that every time someone came up with an answer, the question was changed—like a surreal citizenship examination conducted on-line. Now we Brits are not sure if it is a Scottish question, that Scottish politics has become so radically different from English; or an English question, that the traditional constitution of the United Kingdom based on the English doctrine of parliamentary sovereignty no longer works in modern conditions.

The *Scotland Act 1998* gave substantial devolved powers to a Scottish Parliament, some students of politics called it ‘quasi-federalism’ but it was not real federalism. Historically federalism was for nearly all the former colonies but not for the homeland itself. Back in 1703 to 1707 when the Scots debated what were to be the terms of the Act of Union, they were well aware that the English intended—and got—not just a union but an ‘incorporating union’. The old Scottish Parliament was a single chamber feudal

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra on 15 February 2008.

institution with a purported balance of three estates—aristocracy, church and merchant cities; but incorporating union meant being subsumed with minimal representation into an unchanged Westminster Parliament already asserting a doctrine of omni-competent sovereignty.

But even then all was not as it seemed. The Scots drove a pretty hard bargain, so anxious were the English to shut out, in the middle of the wars in Europe against France, any possibility of the French allying with those Jacobite Scots who to keep independence would break from the Protestant succession and restore the House of Stuart. The negotiations over union left the Kirk, the Presbyterian Church, as the established church in Scotland, the end of the Episcopalian dominance of the Church of England; Scotland gained entry into the protective commercial system of the First British Empire; and the Act or Treaty of Union left their legal system intact and all local administration (which was the main presence of government in those days) in Scottish hands.

Scottish opponents of the Act of Union said that the Westminster Parliament could use its power and sovereignty to change the terms of what they called the Treaty of Union. English MPs who believed that their ministers had conceded too much thought the same. But this was a misunderstanding of the nature of sovereignty and power. Legal possibilities have never corresponded with actual power. Political considerations always dominated. Bertram Russell once said that there were two senses of power: ‘power as unchallengability’—no one else can do it if we don’t; but also power as ‘the ability to carry out a premeditated intention’, which often meant a restraint of law and power, sharing power or devolving power to local agents. If England had used its superior power to impose English institutions on Scotland it would have provoked the very thing that made England determined on union: civil war with almost inevitable French intervention.

Forgive all this dehydrated theory and potted history, but I believe that most difficult constitutional and political questions have deep historical roots (you have invited a professor). Two deeply-rooted political points emerge that are fundamental to the possibility of the break-up of the union today. Firstly, the Scotland Act of 1998 did not arise from considerations of constitutional or even democratic theory, but from a contingency, what was thought by the then Labour government to be political necessity: to halt the growth of separatist nationalism in Scotland. Blair was no believer in devolution but he was aware that Labour’s majority in the House of Commons contained 56 MPs from Scottish seats. There could easily come a time when a majority at all might depend on them, even if in 1997 no Conservative MPs were returned from Scotland (a ‘Tory-free zone’, we joked). Quibbling in cabinet in 1997 stopped when the Secretary of State for Scotland, the late Donald Dewar, told his colleagues tersely that if real powers were not granted, the Nats could sweep the board in parliamentary elections. Edmund Burke had asked ministers in 1775 to consider not whether they had a sovereign right to make the American colonists unhappy (by taxation), but whether they had not an interest to make them happy. Dewar’s argument was a kind of knock-down version of Burke.

But the second historical consequence of the concessions in and around the 1707 Act of Union was that Scottish national identity and consciousness was not affected. Even nationalist historians note this. There was no English attempt to anglicise Scotland, no *Kulturkreis*. Nationalist historians who lament the ending of the Parliament fail to see that the Kirk was the greater carrier of national tradition and identity than the aristocratic

Parliament. English threats and bribery were aimed simply at parliamentary unity and maintaining the unity of the crowns.

When I first began to follow Scottish politics thirty years ago, even before migrating to Scotland, many a time I heard on political platforms the cry: ‘If we dinna have oor aine parliament agin, we will loose oor identity.’ I began to see that this was what Jeremy Bentham would have called ‘nonsense on stilts’: the very people saying it were so very, very Scottish, whether or not they were separatist nationalists or simply full of national resolve to get the already devolved institutions of government under democratic control and accountability.

So under Dewar the drafting of the 1998 Act was relatively simple compared to its defeated predecessor in 1977. The existing powers of the Secretary of State and the Scottish Office, already a territorially devolved administration, were handed down to a Scottish Parliament. The reserved powers remaining with Westminster were foreign affairs, levels of social service benefits and taxation—Scotland receives a block grant according to something called the Barnett formula. Education, local government, the legal code and administration remained as before in Scottish hands, as well as the administration of the National Health Service. There was one peculiar but politically highly important exception: Westminster reserved to itself legislation on abortion (the government benignly wished to save the Labour Party in Scotland from tearing itself apart).

However, while the extraordinary flexibility of the UK constitution allowed such an extraordinary constitutional change (as later, with different powers and institutions, for Wales and Northern Ireland too), the ad hoc political decision had unforeseen and unpremeditated consequences quite inconsistent with established parliamentary practice. The most obvious is the so-called ‘West Lothian question’. Any Scottish MP at Westminster, say from West Lothian, can vote on any legislation affecting England, but MPs with seats in the rest of the United Kingdom, predominantly English of course, cannot vote or debate on the devolved reserved matters. Not surprisingly, Conservative MPs at Westminster (who do now have one seat in Scotland) are less than happy. And the predominantly right-wing London press agitate aggressively about this, almost Scotophobic, even though they rarely if ever report on actual Scottish politics. The two systems are drifting apart in mutual incomprehension. Some Conservatives favour an English Parliament, while some even favour, somewhat discretely as yet, allowing Scotland to secede, thus making a permanent Conservative majority at Westminster.

Another unintended consequence of piece-meal, ad hoc constitutional reform was that while the Scotland Act brought in proportional representation (PR) for Scotland, deliberately intended to create a lasting Labour/Liberal-Democrat coalition to contain the Scottish National Party (SNP), the consequence has been that since the 2007 election to the Scottish Parliament, the SNP is now the largest party at Holyrood and has formed a minority government. The Liberal-Democrats felt that they had suffered by being the junior partner in coalition with Labour and so refused coalition nationally with either of the main parties, even though at local government level they work with the SNP (as in Edinburgh itself) to shut out Labour. The SNP became the largest party not for its still strongly-professed policy of ‘independence in Europe’, which only about a quarter of the Scottish electorate support, but for its seemingly popular old-style social democratic, welfare policies. The Labour Party in Scotland is not legally or institutionally a Scottish

Labour Party. Many of its activists have come to find it too London-dominated and many former Labour voters thought it too Blairish and thought Blair too Thatcherite. And I am bound to say, which earns me no love in my Labour Party, that Alex Salmond's social democracy, perhaps even, if more discretely, democratic socialism, is genuine not tactical.

But will this lead to independence? Salmond is prepared to take his time and establish a reputation for good government in a distinctively Scottish style and some distinctively Scottish policies. Compared to nationalism and unionism in Northern Ireland, passions are low if principles are strong; but the situation is fluid, uncharted waters for the constitutionless UK constitution, or some would simply say the incomplete and uncodified constitution. The key constitutional doctrine of the United Kingdom is still widely believed to be the sovereignty of Parliament. The trouble with that is, as some super patriots are well aware, Parliament can abrogate its own sovereignty in such a way that it is politically highly unlikely that it could ever reclaim it. That is clear in the case of the Treaty of Rome and consequent legislation. But consider the famous 'guarantee' to the Ulster Protestant Unionists in the *Northern Ireland Constitution Act 1973*:

It is hereby declared that Northern Ireland remains part of Her Majesty's dominions and of the United Kingdom, and it is hereby affirmed that in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of a majority of the people of Northern Ireland voting in a poll held for the purpose of this section and in accordance to Schedule 1 of this Act.

What a guarantee! Northern Ireland is not constitutionally an integral and perpetual part of the United Kingdom, but a conditional one. And the British-Irish Intergovernmental Agreement of November 1985 pledged *both* governments to the establishment of a United Ireland if the consent of a majority in the North was forthcoming.¹ But British governments of both parties, authors of these pragmatic and essential moves in resolving the Irish question, see no connection with the Scottish question. Perhaps this is because the Scots are not thought likely to proceed through violence.

In last year's election campaign for the Scottish Parliament (fixed term election, by the way) Alex Salmond said something very important but so puzzling to the media in its basic simplicity that it was largely ignored. He said: 'Independence is a political not a social matter.' Indeed a political matter, if the electorate want it ultimately they should have it and can take it politically. But 'not a social matter'? Enigmatic, but I think that was meant to reassure voters that independence would not distance families and friends from each other north or south of the border, nor privilege employment and office-holding to real or true Scots, still less disenfranchise immigrants (whom Scotland badly needs), even English immigrants. Any idea in SNP thinking of an ethnic test for Scottish citizenship was long ago abandoned—well, long enough ago. 'Independence' is, indeed, compared to the old SNP concept of 'separation', a relative term both economically and socially.

¹ See 'The Sovereignty of Parliament and the Irish Question' and 'On Devolution, Decentralism and the Constitution' in my *Political Thoughts and Polemics*. Edinburgh University Press, 1990.

This makes, I believe, Gordon Brown's banging on about Britishness—of which some echo may have reached these shores—both mistaken and irrelevant. In a speech last year to the TUC he used the term, according to the *Guardian*, 34 times, and in his speech to the Labour Party Conference the BBC counted about 80 strikes—not always to define it, of course, but 'our British' this and that attached to all kinds of aspirations and objects ('British jobs for British workers' unhappily slipped out).

If he was gunning for the Scottish National Party it may have been a profoundly mistaken tactic to denounce what he consistently named as 'Scottish nationalism'. For whereas only about a third of Scots favour separation or independence, nearly all Scots have a strong national consciousness of being Scots, both more articulate and more clear than the English have had of Englishness. For my fellow English usually confuse it completely with being British—although in the last decade this is beginning to change.² Anyway Brown probably bangs on about Britishness mainly because he is worried that 'middle England' may think he is too Scottish. But the trouble is that he really does seem to want us to believe that the unity of the United Kingdom is in danger, in relation to immigration not just to devolution, if there is not a stronger, widely held sense of Britishness. Listen to the mission statement or *sloaghan* he had drafted for a conference hosted by the Treasury, no less, back in November 2005:

How 'British' do we feel? What do we mean by 'Britishness'? These questions are increasingly important in defining a shared purpose across all of our society. The strength of our communities, the way we understand diversity, the vigour of our public services and our commercial competitiveness all rest on a sense of what 'Britishness' is and how it sets shared goals.

May I, somewhat impudently or imprudently, read this again altering one word?

How 'Australian' do we feel? What do we mean by 'Australian-ness'? These questions are increasingly important in defining a shared purpose across all of our society. The strength of our communities, the way we understand diversity, the vigour of our public services and our commercial competitiveness all rest on a sense of what 'Australian-ness' is and how it sets shared goals.

Do each of us really need 'a shared purpose' and 'shared goals'?

Such language is, I submit, a tired rhetorical echo of the old destructive nationalism of central Europe and the Balkans. Is this really how states hold together, especially in the modern world of, whether we like it or not, a global economy, where all notions of national sovereignty need to be so qualified as to be practically useless in understanding actual politics? This idea of national purpose is what Goethe called 'a blue rose'. To search for it can prove damaging already as well as frustrating. Both Thatcher and Blair openly spoke of restoring our British sense of national importance, a hangover from the days of Empire and the Second World War—which, of course, we won, with a little help from the USA, the USSR and the Commonwealth. And this search to 'put the "great"

² See Arthur Aughey, *The Politics of Englishness*. Manchester University Press, 2007—an Ulsterman with a wide and deep perspective.

back into Great Britain' has meant the American alliance with too few reservations made or questions asked. Is a heightened sense of Britishness and a clear national purpose needed to hold the Union together? Perhaps my country just needs good government and social justice and to build its existing civil society into a genuinely participative citizen culture (you are a wee bit closer to it than us). National leaders should be careful when they invoke 'our common values', still more if they think they can legislate for them.

In July 2004 Brown gave the British Council Annual Lecture on Britishness and invoked *values*, our British values:

The values and qualities I describe are of course to be found in many other cultures and countries. But when taken together, and as they shape the institutions of our country these values and qualities—being creative, adaptable and outward looking, our belief in liberty, duty and fair play—add up to a distinctive Britishness that has been manifest throughout our history, and shaped it.³

'Liberty, duty and fair play'—well some Scots are beginning to play cricket, of a kind. By such banalities and abstractions my party leader plants both feet firmly in mid-air. Worse, when Brown gives specific historical examples, they are all—yes all—taken from English history.⁴ He clearly wants us to believe that a heightened Britishness is *necessary* to hold the Union together rather than simply a rational calculation of mutual interest and advantage, as Adam Smith would have seen it, or as David Hume and Edmund Burke would have it, tradition and habit. So Brown attacks the SNP in Scotland with the wrong weapon. He plays into their hands by confusing nationalism as tradition and national consciousness with nationalism as separatism. If there is a threat to the Union, I agree with the writer Neal Ascherson, it is less likely to come directly from the Scottish electorate than from English insensitivity or even provocation (if, as is quite possible, the Conservatives get back in).⁵

Two of Brown's colleagues put the matter better than he in a recent Fabian pamphlet neatly called *A Common Place*. Said Ruth Kelly and Liam Byrne: 'Britishness is like an umbrella under which different identities can shelter.'⁶ That is a good, homely metaphor (I think their speech writer borrowed it from me). But Brown speaks as if his British broly can only shelter one identity. I'm sure he doesn't really believe that. He almost denies it himself. But leaders should say what they really believe, if they are to be truly respected and trusted.

Penultimately, let me return to Alex Salmond's remark about independence being a political and not a social matter. Some years ago I was waiting in a corridor for an officer of the House of Commons when he happened to come by. He asked me in good

³ Speech of 8 July 2004 on 'Britishness', the British Council Annual Lecture. See also his speech of 14 January 2006 to the Fabian Society's Conference on 'The Future of Britishness'.

⁴ As Simon Lee has clearly but cruelly shown in his 'Gordon Brown and the "British Way",' *Political Quarterly*, July–September 2006.

⁵ Neal Ascherson, 'Homo Britannicus: Scotophobia', an Orwell Memorial Lecture delivered at Birkbeck College, 13 February 2007. An extract appeared as 'Diary', *London Review of Books*, 5 April 2007, pp. 38–39.

⁶ Ruth Kelly and Liam Byrne, *A Common Place*. London, Fabian Society, 2007.

humour whether I would return to England when Scotland got its independence. I replied that I would *probably* have voted against independence in the final referendum, but would then want to be near the head of the queue in Glasgow to get a Scottish passport. He expressed pleasure and surprise. Well, I said, ‘I really don’t believe that independence can bring all the good some hope for nor all the troubles others fear.’ He laughed. I may be imagining but it sounded to me more like a laugh of recognition than a mocking laugh, what Berthold Brecht once called ‘the laughter of free men’. Significant social and economic interrelations most often usually survive separations, both nationally and domestically.

Finally, let me say how honoured I have been at this invitation, and also how flattered that in a speech mainly on Australian identity addressing the National Press Club here in this Parliament House on 25 January 2006, the then Prime Minister Howard said:

I believe in our unique democracy because I believe passionately in the virtue of politics. The political philosopher Bernard Crick put it well when he said: “The moral consensus of a free state is not something mysteriously prior to or above politics: it is the activity (the civilising activity) of politics itself.”

But I must in all honesty draw from what he quoted a rather different conclusion than he did. I believe that the cohesion of states like Australia, Canada and the United Kingdom depends not on the state attempting to define and to heighten national feeling but more simply on maintaining and enhancing a just and caring democratic politics. Then immigrants may come to like it and identify with a national spirit, a spirit that can grow on one over time and be strongly felt but is best left undefined—especially by prime ministers snatching for strong straws.



Question — Gordon Brown has been carrying on about written constitutions and bills of rights and constitutional reform, and parliaments having to agree before we go to war and so on. What has led to that?

Sir Bernard Crick — I’m not sure. He is talking the talk but, as we say, will he walk the walk? I’ve grave doubts about this. There is a great deal of talk from Labour ministers and I think it’s a shadow of their old beliefs, not the socialist values so much as democratic values. They talk a great deal now about trying to increase participation in the community, but they are not talking about regional government, they are not talking about restoring powers to local governments, so it’s difficult to know what they are talking about. After all, England is a centralised regime of over 50 million people, without Scotland and Wales. There is hardly a state apart from China and South and North Korea that tries to govern so many people centrally without some form of radical devolution or some form of federalism.

It interests me here in Australia that historically the Brits felt that federalism was right for the colonies but never for themselves. They are going to try and pour millions into community participation but they are looking at trying to do this centrally over a country

of 50 million. I don't really believe it can be done. In the very early years of the Labour Government I had the honour to chair the committee that brought citizenship into English schools as a compulsory subject. That was based on active citizenship rather than good citizenship. Thank God the public thought it was all about good citizenship. I'm all for good citizenship but we went beyond that and said, no, active citizenship, and that's what is in the schools. Perhaps the next generation may think differently, but the structures through which kids with a participative urge can enter, when they come into voting age, are rather limited.

Question — A former prime minister of ours, Paul Keating, made a remark during the 1996 election, that when the government changes, the country changes. Ever since, that remark has been treated as though it was the ultimate wisdom by all sorts of political pundits, even to the point where John Howard said it during the election campaign of 2007. Do you think it's true or sensible to say that when the government of a country changes, the country changes?

Sir Bernard Crick — No. Not if one means by country the totality of society. Certain key policies may change. When Kennedy came in in the United States, there had been Harry Truman and his wife and daughter who had nice round chubby faces and suddenly with John Kennedy's wife, all women seem to have long, fine-boned features. Certain types come forward and are more apparent with changes of government.

If you're talking about changing values, moral change, well why not? But you're talking about generational change, you're not talking about parliamentary timetables. This is what irritates me when party leaders start talking about changing values: all the evidence that we know show that the changes of values are very slow and generational.

Question — I have been reading the Scottish story with Scottish history so I came here primed, and what did I hear? I heard Erin Go Bragh! This comes from the Scottish Gaelic; I use this constantly myself, because of my origins. My people came here in 1835, and every government we've had has yet to achieve a thing that I call an Australian language. Do we speak Australian as the Scots undoubtedly speak Gaelic?

Sir Bernard Crick — All I'd say about Erin Go Bragh is that Ireland must be free if you're looking for the ideal state. About a quarter of those who vote for Sinn Fein and are Catholic in Northern Ireland, still say they favour the Union. I think they favour the union of Ireland but they want to know what's in the package, like the Scots in 1707. They are not mad nationalists: 'My country right or wrong, Ireland shall be united what ever the cost.' No, they are family men and they are sensible people and they're thinking in practical, pragmatic terms. If the terms of a union are good terms they will take them.

Question — I have a question about language also. There has been some controversy recently about the rather expensive digital TV that's just been announced for Scottish Gaelic. I know Welsh is very important for the Welsh identity. I wondered if you had a few words about the role of Gaelic?

Sir Bernard Crick — I think I share the view of my Scottish friends that it's a pity to see an old culture vanish, in the way that you have the cultural debate here about Indigenous or Aborigine culture, and a very difficult debate it is, because it is not actually helping people live in a way that is compatible with modern health and the

modern world. This doesn't arise in Scotland because the Gaelic speakers are living in a perfectly normal way and they are bilingual anyway, so it's a question of preserving language. It's a question of how much expense it is worth. So there is a pragmatic political argument in Wales. There was a panic way back in Macmillan and Heath's time in the late 50's and 60's when the Welsh Plaid Cymru, the party of Wales, began to displace Labour and Liberals in Wales. They got six or seven seats, and to put it very crudely I think they were bought off with massive subventions for Welsh television, and legislation allowing county by county votes so that half the education in schools, half the subjects could be taught in Welsh, the other half had to be taught in English.

I remember an old leader of the Welsh Nationalists saying to some of us at a conference (in the bar, admittedly): 'You know Bernard, the trouble with most of my fellow party members is that they cannot count, because if we had independence there are a majority of non-Welsh speakers and they would not stand for all this stuff in courts and Parliament and having to speak Welsh.'

I think at heart the Welsh Nationalists have got what they want, in the sense of a massive protection of the language. I had a hand in the new immigration tests in Britain, and the statute stated, as the old statute did, that there must be a test conducted in English, Welsh or Scottish Gaelic. There was a rumour two years ago (and I think I know who started it: a witty member of my old committee, a Muslim Welsh woman) that claimed that somebody had turned up wanting to be examined in Welsh. The new government of Wales, tremendously strong on bilingualism, were in an absolute panic because nobody had thought of translating the immigration test, or the 68-page handbook. I'm joking, but a multicultural society is already dug in there in statute. In political terms, Scottish Gaelic is quite unimportant, although not surprisingly the Gaelic speakers tend to vote Nationalist; but it is only in the very small, very thinly populated areas of the highlands and islands.

Question — Are any proposals for devolution in England dead, specially after the failure of the ham-fisted referendum in North East England?

Sir Bernard Crick — The Deputy Prime Minister, who did believe very strongly in devolution I think, was just hung out to dry by his colleagues to be absolutely blunt. There wasn't a concerted government campaign in favour of trying it on the North East first, even though the North East do have I think a stronger sense of identity than some of the other administrative English regions. There are six regions administratively. It is not a real question politically.

An idea of the early Study of Parliament Group in 1972 was that there should be regional committees of the House of Commons, and very surprisingly this was revived last year by the government I think desperate to make some sense of talking about devolving powers without actually devolving very much power. So there would be these Westminster committees. It was all drawn up; the clerks were nearly going bananas about how to do it because in parliamentary rules you have to have, as here, a governing party majority on each committee. Well, what self-respecting Conservative would want to serve on the North Eastern committee, and what self-respecting Geordie or MP for Newcastle would want to go down in the South East? These committees could have been an endless source of trouble. They were supposed to be looking at regional administration but when you look at English regional administration many of the

boundaries are not the same for different functions of government. There are a lot of civil servants out in the regions. The practical difficulties and also the difficulties I think of manning these committees and getting political balance meant the whole scheme was pulled at literally 24 hours notice.

It is a theoretical solution. My old friend John MacIntosh, passionate for Scottish devolution in the early 1970s when there was very little public opinion behind it, tried to answer the West Lothian question by saying well if there were elected regions in England it would be much easier to tolerate Scotland having its own reserved powers. But it's a curiosity now, there seems to be no strong regional sentiment in England behind it. I mean, it's the theoretical answer but it's not practical politics. Alas, I'm thinking of stuff I wrote advocating regional government in England in the 70s. I'm embarrassed at it now.

Women Leaders and Executive Politics Engendering Change in Anglo-American Nations*

*Patricia Lee Sykes*¹

For several years, pundits speculated about Senator Hillary Clinton's prospects of becoming the first woman President of the United States. Preoccupied with the question: 'Can she win?' few commentators stopped to consider whether a woman President would make a difference. During the 2008 primaries, Senator Clinton declared that her presidency would signal a sea change in public policy and send a stirring message to millions that any girl in America can grow up to become president. If she had won the nomination and the election, she would have quickly discovered that our institutions, ideology, and evolution make it very difficult for women executives to engender change by promoting policies that advance the interests or enhance the status of women.

In this respect, the US is not alone or exceptional. Only two Anglo systems have elected women chief executives—the United Kingdom and New Zealand, and New Zealand's only elected woman prime minister, Helen Clark, has succeeded in a recently reformed system that differs dramatically from its Anglo counterparts. Canada allowed its first and only woman prime minister, Kim Campbell, to lead for a few months before she faced and failed to win a general election. The Republic of Ireland has elected two women presidents, but the Irish presidency remains a largely ceremonial post, even though President Mary Robinson substantially stretched the scope of its influence. While the US and Australia remain the only two Anglo countries without any women national executives, the other nations have little to boast about.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra on 7 March 2008.

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Ironically, Anglo-American systems often serve as models of democracy for the rest of the world, but the experience of women leaders as executives calls into question the democratic character of these regimes. With the exception of NZ, Anglo-American systems rank low on the list of modern, liberal democracies in terms of the representation and leadership of women. Once women do make it to the top, few of them manage to achieve their central policy goals. Anglo-American institutions, ideology, and political development are highly ‘masculinist’—they privilege traditional masculine traits in leaders. And masculinism presents significant challenges for women executives, especially those who attempt to engender change.

To facilitate programmatic change, adversarial systems concentrate power in the executive, and to ensure accountability, they rely on combat between two major parties. In general, the more adversarial the system, the more masculinist its norms and expectations of executive leadership prove to be. Of course, the role of Commander-in-Chief and superpower status magnify the masculinism of the US presidency. Nevertheless, some measure of masculinism characterizes executive leadership in all Anglo adversarial systems. Women leaders in such systems usually need to develop styles and strategies that show they are capable of being strong, determined, and decisive.

Margaret Thatcher—the best known and arguably the most successful woman leader in the Anglo world—adopted exactly that approach. Thatcher insisted that she alone had a remedy for the problems that plagued the UK, and she described her public philosophy in highly masculinist terms by extolling the virtues of rugged individualism and fierce anti-communism. Moreover, she developed a distinctly masculinist style, which she described during the 1979 campaign when she declared:

I am a conviction politician. The Old Testament prophets did not merely say, ‘Brothers, I want a consensus.’ They said, ‘This is my faith and my vision. This is what I passionately believe. If you believe it too, then come with me.’

It was that style as much as the substance of her leadership that conjured up the image of Boadicea—the ancient warrior Queen—and earned her the appellation Iron Lady.

In the combative environment of the British adversarial system, the practice of ‘conviction politics’ enables women to come closer to meeting the gender-specific expectations of executive leadership. Compared with politicians who equivocate and backpedal, conviction politicians promise to provide strong, decisive leadership. Thatcher shows how women who practice conviction-style leadership can manage to convey the requisite masculine attributes by appearing tough, firm, and determined. For most of her premiership, an overwhelming majority of the public admired Thatcher for precisely these leadership qualities, even when they opposed some of her specific policies.

Throughout the Anglo-American world by the early 1990s, Thatcher and her counterparts overseas had become personally unpopular, although a new consensus had emerged based on the neo-liberal changes they enacted in the 1980s. Their immediate successors faced a substantial challenge: they needed to distance themselves from their radical predecessors without denouncing their parties and by maintaining the new neo-liberal consensus. In Canada when Kim Campbell replaced Brian Mulroney as prime

minister, she inherited an environment similar to the situation faced by Thatcher's successor John Major and Reagan's successor George Herbert Walker Bush. These 'kinder, gentler' times (to borrow the phrase coined by Bush) might be considered more 'feminalist'—favoring traditional feminine attributes and thereby enhancing the prospects for a woman leader. Yet even in an environment that calls for conciliation, moderation, and maintaining consensus—essentially a softer style—Anglo adversarial arrangements generate highly masculinist expectations of executive leadership.

To a great extent, Campbell confronted the dilemma by pursuing the same strategy Major and Bush adopted. All of them avoided taking precise policy positions and issued mainly ambiguous, equivocal statements. Admittedly, their critics alleged that both Bush and Major lacked vision, and Campbell might have created the same impression during her 1993 campaign. Instead, as a woman, Campbell's evasions conveyed incompetence and ignorance. No one ever questioned the intelligence of Major or Bush (I), but Campbell's vague statements raised doubts about her abilities. Never mind that she had been a university lecturer in political science (whom critics had once condemned for her intellectual elitism), when Campbell adopted the strategy of her male counterparts, her public image went from egghead to airhead—and the media magnified the metamorphosis.

Campbell also attracted criticism when she chose to articulate specific positions. She continued to advocate many neo-liberal policies, but she was a feminist who believed the state should play a positive role in setting social policy. In fact, it was the substance and style of her feminism that frequently foiled her efforts. The government rejected her proposals to reform the judicial system, for example, because they would constitute 'special treatment' for women. When she practiced what she called the 'politics of inclusion' by holding more cabinet meetings and consulting provincial premiers, she appeared weak and unable to make a decision on her own. Even her refusal to be stage managed during the campaign made her seem naïve. As a feminist, Campbell wanted to defy stereotypes, not reinforce them, but she repeatedly ran up against the highly masculinist norms embedded in the position of a Canadian prime minister and in the prevailing ideology.

In the 1993 election, Campbell's Progressive Conservative Party retained only two seats (with seventeen per cent of the vote), and Campbell failed to carry her own riding. Several factors account for their loss, and the party won roughly the same percentage of the vote that it had secured in the polls when Mulroney resigned and Campbell became leader. Nevertheless, after handing her the poisoned chalice, the Conservatives blamed her for their devastating loss, and then forced her to resign shortly after the election.

Among Anglo-American women leaders, the only one who has managed to succeed by following a conciliatory, consensus-building approach is New Zealand Prime Minister Helen Clark. Like other Anglo nations, New Zealand experienced the neo-liberal revolution of the 1980s, but by the 1990s the public desired maintenance, not change; cooperation and conciliation, not combat. The 1999 general election that put Clark in the premiership indicates how a less masculinist, more feminalist environment made a difference. With two women leading the two largest parties, an editorial writer for the *New Zealand Herald* observed: 'Women will not be alone in looking forward to a more feminine style of debate.' The media found few differences between Clark and her major opponent Jenny Shipley, but neither candidate suffered as a result. As one journalist put

it: '[T]his election is about caring, not daring. It will not be a case of who dares wins, because none of the parties likely to win seats has any daring policies at all that they've announced to date.' Throughout the campaign, both Shipley and Clark delivered vague, equivocal statements about their parties' policies, and yet they escaped the harsh treatment Campbell received in Canada.

As Australians know, New Zealand's neo-liberal revolution had been much more radical than change in other Anglo countries: the nation went from having one of the most controlled economies to adopting an open, unregulated market. In contrast to other countries, in New Zealand the Labour Party initiated the neo-liberal policies, and Labour Prime Minister Clark only wanted to halt the change, not reverse it. Strategically situating her party in the middle of the ideological spectrum, she quickly endorsed the centrist approach of President Bill Clinton and Prime Minister Tony Blair known as 'the third way'.

Yet Clark differs from these men in the value she places on social and economic policies that affect women. She is a self-described feminist who first became involved in politics as a student activist in the women's movement. In my interview with her, she reflected on her government's major policies concerning health, education, and welfare by highlighting their positive impact on women. Clark has engendered some change—incrementally and while exercising fiscal restraint.

Several factors explain Clark's success. She has had an advantage as the second woman prime minister (though the first elected) in a country with the highest representation of women in the Anglo-American world (and the only Anglo country to make it into the top ten worldwide). The incremental changes that Clark is able to achieve suit her strategic environment in terms of public opinion, but that was also true of Campbell. Even when the electorate is concentrated in the center with a high degree of consensus, the institutions must generate norms and expectations that women can more easily meet. Perhaps Clark's greatest advantage was the introduction of mixed member proportional representation (MMP): she has been prime minister in a recently reformed system that greatly reduces the masculinist norms and expectations of executive leadership that prevail in other Anglo systems.

When New Zealanders adopted MMP, they wanted a system more representative than first-past-the-post (FPP), but even more important, they wanted to check against the excessive executive power that had produced dramatic, radical change. In the post-MMP regime, New Zealanders expect their leaders to be conciliatory, willing to compromise, and able to maintain consensus, attributes traditionally nurtured in and exhibited by women. As a woman in this system, Clark could more easily satisfy the expectations of executive leadership than her counterparts in adversarial systems. Public opinion polls attest to Clark's success in satisfying post-MMP public expectations. For example, several polls indicate she is admired for her 'flexibility'. In that case, a vice in an adversarial system—what Americans disparage as 'flip-flopping'—has become a virtue in a system with MMP.

By contrast, in adversarial systems, the institutions continue to generate distinctly masculinist norms, even when the electorate demands a softer style of leadership in kinder, gentler, more feminalist times. As a result, women leaders frequently get caught in a double bind. Consider the dilemma that Senator Hillary Clinton encountered in the

2008 primaries. Clinton generally followed Thatcher's example and presented herself as the strong, experienced candidate capable of tackling tough decisions on war as well as law and order. Her campaign commercials emphasized her 'can do' spirit and commanding capabilities. But initially the public responded by perceiving her as cold and hard hearted. Throughout the nominating process, polls repeatedly showed the public searching for a conciliator, not a combatant, to change the Washington partisan battlefield. In the New Hampshire primary campaign, Clinton tried to soften her image by showing a bit of emotion when she expressed her concern for and commitment to her country. 'The tracks of her tears'—as Sky Broadcasting tagged the story—might have won the hearts of some voters, but it immediately sparked her opponents to question her qualifications for Commander-in-Chief. In the 2008 primary season, public expectations of leadership and the institutional norms of the presidency called for conflicting gender-specific qualities, and the only woman candidate in the contest got caught in the conflict.

Anglo nations have produced one serious woman prospective president and a few prime ministers, but cabinet ministers provide more examples of women struggling to meet gender-specific norms of executive leadership in Anglo countries. Just as significant, their experience also illustrates how masculinism pervades recent ideological and institutional developments.

In the case of Anglo countries, liberalism constitutes the dominant ideology, and it is a distinctly masculinist ideology in both its classical form and its neo reincarnation. In classical theory, liberalism embraces the concept of a disembodied, genderless individual, making it more difficult for women to seek redress under the law for the concrete ways that their experiences differ from those of men. In Anglo nations, women leaders are likely to be liberal (or neo-liberal) feminists, if they are feminists at all, and so the liberal ideological framework limits the degree of change they seek even in the best of times. Neo-liberalism makes matters worse for women because its market-oriented ideology shifts public policy away from the goal of equality to equity (fairness and impartiality), reinforcing the bias of classical liberal theory that fails to recognize differences between men and women. Just as important, in a neo-liberal period of fiscal conservatism, budgetary constraints have made it difficult for women leaders to promote new social and economic programs or protect existing ones from cuts. As a result, neo-liberal times impose new limits on the ambition and creativity of women as increasing numbers of them move into cabinet posts.

Most of the women ministers in Anglo systems have occupied posts that deal with domestic policies and programs. Traditionally, women have dealt with the 'domestic' in the home, so it is not surprising to find them in charge of similar duties in government. In particular, politicians, the press, and the public often consider subjects such as education, health, and welfare 'women's issues', and polling data consistently show that women do care about these issues more than men do. In cabinet, many of these positions threaten to become regendered as the 'women's posts'. As Mary Hanafin, Minister for Education in Ireland, declared: 'I can go to a European Council meeting now, and all the education ministers are women. It's kind of a branding almost.' In the case of women cabinet ministers in the last twenty-five years or so, they have also been the areas that endured the most severe budget cuts or diminished rates of funding. As a consequence, the political costs of implementing the neo-liberal agenda have outweighed many benefits women might have derived from fitting into feminalist slots.

In the UK, budget cuts in education started in the 1970s and continued until the twenty-first century. Ironically, Thatcher was the first woman Secretary of State for Education who was forced to endure the unpopularity of budget cuts. When the Conservative government decided that older elementary school children should no longer receive free milk, the popular press vilified ‘Thatcher the Milk Snatcher,’ and asked: ‘How could a woman deprive children of milk?’ Several subsequent women ministers in charge of feminalist domestic policies such as education, health, and welfare would suffer similar fates.

Thatcherism lingered long after her premiership, and when Labour returned to government after eighteen years in opposition, its women ministers continued to endure the political costs of budget cuts. Dubbed ‘Blair’s Babes’ by the Times (of London), one hundred one women Labour MPs won seats in the 1997 election. The Labour Party had taken several affirmative steps to increase the representation of women, adopting women-only short lists for parliamentary candidates and reserving at least three spots in the shadow cabinet. The party required Prime Minister Blair to bring members of the shadow cabinet into government, and predictably he placed all but one of the women in domestic posts. The first time a British government included many women ministers, the prime minister put them in positions where they would encounter stringent fiscal constraints and substantial political controversy—as the case of the current Deputy Leader of the Labour Party Harriet Harman illustrates.

As Secretary of State for Social Security (1997–98), Harman was responsible for cutting benefits for single-parent households, a policy New Labour called the New Deal for Lone Parents, essentially a neo-liberal program that substituted workfare for welfare. Gender clearly colored much of the criticism directed at Harman. As she described the ‘flack’ she got, she conveyed the tone of the attack:

‘You’re forcing mothers to work. You don’t value motherhood.’ ... It was a woman cutting women’s benefits. I mean if I had been a gray anonymous man, then I could have got away with it. But I was incredibly high profile.

Blair might have thought that a woman could more easily institute these cuts and soften their impact, but instead the media magnified the maternal role and Harman’s failure to fulfill it.

Admittedly, as part of the New Labour movement, Harman had supported the party’s commitment to maintain fiscal restraint. In its manifesto, Labour promised to adhere to the Conservative spending limits at least for the first two years in government. That electoral pledge helped modernize party policy and proved successful at the polls, but it also placed the Minister for Social Security in a politically untenable position, conceivably the worst spot in the New Labour government. Harman continued to explain:

I inherited a budget that was going down. So I had to stand in the dispatch box, newly elected as the new government and say, ‘Hello. We’re Labour. We’re here to cut all your benefits.’ Well you can imagine that was not very popular... [I]t caused absolute turmoil and uproar.

Harman believes the policy ultimately proved successful once she had ‘been sacked and [the government] started putting benefits up,’ but to achieve that success, she served as the sacrificial lamb on the altar of electoral expediency and in the name of economic efficiency.

In Ireland during the period of economic reform in the 1980s, one woman minister Gemma Hussey successively occupied all three of the highly sensitive, feminalist posts: Minister of Education (1982–86), Minister for Social Welfare (1986–87), and Minister for Health (1987). As Hussey described her experience, she recalled:

Because of the fiscal constraints, from day one I was thrown into the deep end...Any attempt to introduce any cutback was opposed bitterly in parliament. You go into the Dail everyday and you’re faced with the howling mobs—and the teachers unions, the parents associations. I was the villain, the number one villain for most of the time.

When Hussey needed to cut one of the teachers training colleges, she recalled: ‘You’d think that I had declared World War Three. The reaction was so (pause), I was never off the front page, it seemed to me.’ Inevitably (and to her dismay), the mass media compared Hussey with her nemesis Thatcher.

In Australia, one of the first women cabinet ministers, Margaret Guilfoyle served successively as Minister of Education (1975), Minister of Social Security (1975–80), and Minister of Finance (1980–83) in Liberal governments—and she expressed some of the same sentiments as Harman and Hussey. According to Guilfoyle, at ‘the Social Security Department, you’d wake up every morning thinking: “Who hates us today?”’ In her two feminalist posts, Guilfoyle was subject to the same scrutiny and harsh criticism as her Anglo counterparts.

In Anglo-American countries, only a few women have occupied the highly masculinist cabinet posts pertaining to finance, justice, and foreign affairs. Masculinist norms and expectations have always pervaded these positions, but neo-liberalism seemed to intensify and exaggerate the need for masculine virtues of strength, toughness, and hard-heartedness. Finance ministers in the neo-liberal era needed to make cold, calculating cuts, and they left no room for ‘bleeding hearts’. Justice ministers had to convey their ability to maintain ‘law and order’ more than ever before, and even when a woman managed to meet masculinist standards, the media might well mock her for her masculinity (Americans will remember Attorney General Janet Reno’s character on Saturday Night Live). In foreign affairs, the global status of the nation affects the degree of masculinity demanded of a minister, but neo-liberalism in international politics has generally required a leader willing to fight fearlessly for freedom. The two women Secretaries of State in the US—Madeleine Albright and Condoleezza Rice—have had to walk a fine line between maintaining their femininity and meeting masculinist expectations. Predictably, presidents placed both of them at the Department of State, not Defense. While State is not yet regendered, the US view of diplomacy makes it somewhat feminalist in the field of international affairs.

Regardless of their position, most women describe the atmosphere within the cabinet room as distinctly masculinist. Women ministers use words such as ‘boysey’ and ‘blokey’ to characterize cabinet conversations. While admitting they must scramble to

stay in the ‘scrum,’ women ministers also tend to dismiss or joke about the implications. Many believe that discussions in cabinet meetings matter very little—when compared to the significance of decision making between presidents or prime ministers and their personal staffs.

Whether the system is parliamentary or presidential, there has been an increasing tendency for chief executives to go their own way by relying on their personal staff and circumventing the institutions of the legislature, parties, and cabinet. Furthermore, within this dramatic development the individual prime minister or president has moved to center stage, adding an element of personalization. In general presidentialization has coincided with the increasing representation of women in cabinet. As a consequence, by the time women arrived in cabinet, this phenomenon had eroded the authority of the institution and diminished the influence of individual ministers.

Like many women ministers in the UK, Secretary of State for Northern Ireland (1997–99) the late Mo Mowlam reflected on the success she achieved outside cabinet while expressing the frustration she felt within it. By contrast to the feminalist atmosphere she nurtured in the negotiations, cabinet provided a distinctly different environment in which a single man dominated. While Mowlam joined the other women who believed ‘the cabinet was not functioning as cabinet government should,’ she also expressed her regret that the prime minister’s presidential style prevented women from making their unique contribution. She explained:

I mean I can give you the line that Tony is sympathetic to women. You know what the line is, but he doesn’t listen to anybody [in cabinet] but Gordon Brown. And Gordon Brown is even worse. I don’t think any of them actually fundamentally thinks they need women there. And they do. I think women are better conciliators. So I think there are a lot of advantages women bring to politics, but [the men] don’t necessarily benefit from them ... *My views are quite jaundiced because I think they use us for window dressing, and they haven’t actually accepted us as bone fide women MPs.*

Mowlam’s experience led her to acquire that jaundiced view. After she successfully concluded the agreement that produced the Good Friday Peace Accord in 1998, Blair sacked her and put his personal friend Peter Mandelson in the post.

Among the women in Blair’s governments, Secretary of State for International Development (1997–2003) Clare Short proved to be the staunchest, most outspoken critic of his leadership. As she described it: ‘Tony doesn’t run a cabinet of equals ... [He’s] a very, very great centralizer and dominator.’ Moreover, Short extended her critique beyond the prime minister’s personal style. She understood fully the implications of presidentialization for women in cabinet when she recalled:

It wasn’t just the women who were being excluded, but as women took their place in parliament, took their place in cabinet, power moved. I don’t think it’s cause and effect, but it does have consequences for women.

And Short added: ‘It is notable that [Blair’s] inner groups have no women in them.’ By the time women arrived at the cabinet room, power had moved to 10 Downing Street, a club that remained reserved for men.

The shift in power has had wider, more profound consequences for the constitution, according to Short. When Blair decided to go to war in Iraq, she resigned and in her resignation speech, she warned Parliament that the UK had achieved the worst of two worlds: presidential leadership with large parliamentary majorities, producing an excessive concentration of power in the hands of the prime minister.

Among the negative consequences of presidentialization, Short also emphasized that the prime minister's ability to go his own way leads him to overlook the expertise and advice of departments as well as cabinet ministers. While acknowledging that this development had started before 1997, Short observed:

But it's leapt under Blair ... We have this prestigious committee for big foreign policy questions, chaired by the prime minister, and all the big ministers plus heads of the intelligence agencies plus the chief of the defense staff, and it never met. I mean it's shocking. And everything was so informal. It leads to bad decisions.

According to Short's assessment, a combination of factors has produced a perilous period in politics, and the British prime minister's decision to go to war in Iraq provides 'the most spectacular example' of the dangers.

On the other side of the Atlantic, critics of the US president's decision to attack Iraq have rendered a similar critique, although in this case they call the culprit politicization rather than presidentialization. In the politicized presidency, chief executives trust their own staff in the White House more than the professional, permanent bureaucracy. Several accounts document how President Bush and a few close associates (including only one cabinet member, Defense Secretary Donald Rumsfeld) planned the war while circumventing conventional channels, bypassing bureaucratic expertise, and excluding a cabinet member as significant as Secretary of State Colin Powell. As National Security Advisor, Condoleezza Rice should have played a central role; yet she increasingly moved to the margins of the inner circle—from the 9/11 attacks to the decision to invade Iraq.

As the only woman among the foreign policy players inside the White House, Rice also seems to have been the only one who expressed doubts about the decision to go to war. By most accounts, her voice as an honest broker gradually weakened until she fell silent. While anyone in that lonely position might have done the same, it must have been especially challenging for the only woman to take a softer stance and still struggle to be heard by the president's men. After the decision to go to war, the president moved her out of the White House and over to the State Department. The mass media celebrated the symbolic significance of her appointment as the first black woman to become Secretary of State, but Rice's step outside the White House and into cabinet constitutes a step down from her previous proximity to the president.

The chief executive has become increasingly dominant and personalized in Canada and Australia as well as in the UK and the US. Australians recently witnessed a general election that focused almost entirely on Prime Minister John Howard. Some distinctive features of each system affect the degree of presidentialization, but even Prime Minister Clark has observed the phenomenon in New Zealand. Although her cabinet continues to meet weekly, she believes a degree of presidentialization has occurred—despite

reformers' efforts to constrain the executive with MMP. As Clark explained: 'What's happened I think is that the parliamentary systems are transforming themselves almost into presidential systems.' Then she added:

Well, we're the head of government as prime minister just as the American president is the head of government. So there are certain functions that go with being the head of government—and sitting around parliament for hours isn't one of them.

The adoption of MMP might have stalled presidentialization, but it has not prevented it.

Finally, presidentialization not only diminishes the role of women in cabinet; it also intensifies the masculinist nature of the top job. To the extent that Thatcher presidentialized the position of prime minister, she actually fueled changes that could make it more difficult for women prime ministers in the future, at least as long as stereotypes about women continue to raise doubts about their ability to lead. No longer 'first among equals,' the prime minister personally bears responsibility for the fate of the nation. As the only case of a woman prime minister in the UK, Thatcher's extraordinary experience might prove insufficient to indicate that women are capable of carrying out such a commanding role. The more parliamentary systems come to resemble presidential ones, the more daunting the challenge for women as national executives. Just ask Senator Clinton.

In conclusion, executive leadership in Anglo adversarial systems is distinctly gendered. To assess the nature and consequences of women presidents, prime ministers, and members of cabinet, we need to consider the masculinist character of our institutions, ideology, and development. Otherwise, we will continue to puzzle over the paradox of Anglo nations as models of democracy, while women remain limited in their opportunities to provide executive leadership and engender change.



Question — Professor Sykes, I want to ask you whether you think recent developments in Australia perhaps go beyond the rather bleak picture you've painted. If you look at the major commitments of the new government, if you look at the most difficult portfolios, they all seem to be filled by women. Look for example at industrial relations, one of the main commitments; that portfolio is filled by a woman—by the Deputy Prime Minister. If you look at climate change, another major commitment, that portfolio is filled by a woman. Education, yes, you've said it's feminalist, but the government came to office with a commitment to what it called an education revolution, a major commitment, and again the portfolio was filled by a woman. So I suggest that in this country we may have gone a little beyond the bleak picture that you have painted.

Patricia Sykes — Well I'm certainly looking forward to watching the new government. I think it is very exciting that there are a few more women in Australian government. I do think they have been given very difficult jobs, you would probably agree, and that's one of the points I made, that when women make it in there they are not given the

glamorous jobs in cabinet, by any means. I think they have substantial challenges that they have to face.

I also think that some change might be happening, not just in Australia. There is reason to be optimistic that throughout the Anglo-American world we may be seeing the last days of the neo-liberal regime, which would mean that education, health, and welfare would start to become priorities again, and people would be willing to fund those programs. I hope women are there to institute the new programs and design them. So I think you are right; we do have a lot to look forward to in Australia, and I think maybe even throughout the rest of the Anglo world, so perhaps things will improve. But the women still have tough jobs to do.

Question — In Australia, at the state and territory level, we've had examples of five or six female leaders, premiers or chief officers. Can you explain how they can achieve the heights at that level but be denied at the national level?

Patricia Sykes — There are a number of ways to answer that question. I do think there might be some reason to be hopeful by looking at what's going on at the sub-national level where women have successfully led the states and territories in Australia and also in the United States and Canada. I guess I'm maybe perpetually pessimistic, but when you say there have been six, I believe that only in the territories they were elected. In other cases they followed men in their own parties who had failed, or were handed the poisoned chalice, as in the cases of Carmen Laurence and Joan Kirner. Claire Martin, who was elected, is a fascinating example of someone who did generally succeed and faced some really daunting obstacles or challenges.

I guess one reason why women might succeed at the local rather than the national level would have to do with the emphasis on domestic rather than international politics. The most masculinist aspects of executive leadership tend to be commanding the troops, committing the troops to war, and that's for the most part removed from states and territories and the concerns of premiers or first ministers. But on the other hand, I also think we should wonder why we don't have more examples to look at below the national level. We should look very closely where the women have succeeded, as Claire Martin did in the Northern Territory, and Anna Bligh in Queensland will be another important example to follow.

Question — Is it really essentially an issue of women not being interested in public power? How do we attract women to be more interested in nominating themselves? I think if we looked at the statistics in Anglo-American culture, I don't know how it differs from other cultures, but there are very few of us that actually choose to offer ourselves as public figures in a whole range of areas. How do we deal with that?

Patricia Sykes — Lots of studies have shown that women leaders, not just in Anglo-American countries but worldwide, are drawn into politics because they are motivated by issues and ideology rather than power. If we ask a young boy why he wants to be President, he will respond: because I want to have all that power. Women respond: I want to change the world, I want to make the environment better. So that can mean that women presidents and prime ministers can be extremely influential if they are motivated by ideas rather than power for power's own sake.

But I think there is a problem there. Not only do we have difficulty getting more women interested in pursuing positions in public office, but they often retire after they are there for a very short period of time. That happened to the class of 1997 in the UK. Quite a few, I can't recall the exact number, chose not to run in the next general election. That rarely happens with male politicians in the UK or the US; the rates of incumbency for men are quite high. As long as these systems are aggressive and adversarial and combative, women are put off. The hope is that women will change that environment but I'm skeptical about the degree to which they can do that when the environment is determined by institutions with very long histories and traditions of adversarial politics.

I'm going to have to find something more cheerful to say on International Women's Day!

Question — You have been talking about the Anglo-American world. Is that completely different from other areas? I was thinking in particular that for example in Europe there are quite a number of Ministers for Agriculture who are female, especially in the Scandinavian countries and Germany. Also, in the Scandinavian countries there seem to be many more women not only in Parliament but as ministers. Sometimes half of them are women; something which here you don't even think would be possible. Is that a completely different system from the Anglo-American one?

Patricia Sykes — I think so. In fact the Scandinavian countries are a wonderful point of contrast. They are different systems; they're not the aggressive, adversarial, confrontational, combative systems of the Anglo world. They operate with a high degree of consensus; they do not have the same rugged individualism at the root of law and philosophy. There are a number of contrasts you could draw between not just Scandinavia, but especially Scandinavia, and these other Anglo countries. So, yes, Scandinavia is a sharp contrast.

At one point Norway had majority of women legislators; obviously Gro Harlem Brundtland was Prime Minister for a very long period of time, and she was a feminist and she brought about feminist changes. Women have dominated politics there, but I also think you would say it's a country where there is a kind of collectivist consensus about things like health and education and public services, and the state has a much more community-wide sort of basis and perspective than those countries dominated by liberal individualism and bolstered by institutions that encourage and foster combativeness and aggression. I'm talking only about Anglo countries today, but obviously I'll be making contrasts along the way, and perhaps Scandinavia is almost at the extreme opposite end of the spectrum in terms of the opportunities and experiences of women and the character of government.

Question — I think we conveniently forget that the number three or four ranking politician in the American presidential system is the Speaker of the House, who is a woman and a Democrat. I think that is probably the highest achievement ever attained by a woman in the United States system. Why was it not a possible for her to put herself forward ahead of Senator Clinton who she clearly outranked, and was a Democrat? Was it simply a personal allegiance to her family and her state of California?

Patricia Sykes — I think in fact I emphasised executive leadership, and there is a big difference between executive leadership and legislative leadership. It is in many ways

easier for a woman in the legislative arena, this is why I'm concerned about parliamentary systems becoming more presidential. What do you need to do in the legislative context? You need to build consensus, you need to build a coalition, you need to conciliate and compromise, and that is easier for a woman to do. I hear Nancy Pelosi does it with a pretty heavy hand, but those skills are completely different than the skills required of an executive. A wheeler-dealer in the White House is not a plus, but what you need in the Congress is exactly that, and so in some ways I think it's not as surprising as it might seem that a woman became Speaker long before she became President. Also the House of Representatives has a fairly minor role to play in foreign policy, at least when compared to the Senate, never mind the presidency, so you once again avoid that issue and the expectations that go along with Commander-in-Chief.

Siren Songs and Myths in the Bill of Rights Debate*

James Allan

I have resisted the temptation to entitle this talk ‘Whaling is for Scientific Purposes; Homeopathy Actually Works; and a Bill of Rights Will Enhance the Role of Parliament—These are a Few of My Favourite Myths.’ All in all it was a bit unwieldy. But it will become plain, as I proceed, why I was tempted, not least by the dripping sarcasm.

Many, if not most, of those pushing for some form or other of a bill of rights instrument like to point to the fact that Australia is one of the very few democracies—depending on how you look at the Basic Laws in Israel and the judiciary’s unwillingness to make much of what they have in Japan and a few other non-common law countries, perhaps the only one—without a national bill of rights. On its own, of course, such a ‘we differ from everyone else’ type of argument tells us nothing. After all, Australia is one of only two democracies with preferential voting; only a handful more have compulsory voting; few have a form of bicameralism with an elected, genuine house of review Upper House; and many lack federalism. Ought we to change any of these on the sole ground that we stand out from the pack? Of course not.

The real question is not whether we should emulate others but whether a bill of rights is a good idea in its own right. Would having one deliver better outcomes than we achieve without one?

My answer is an emphatic and resounding ‘no’. Here is why.¹ To start, notice that any sort of bill of rights enumerates a list of vague, amorphous—but emotively appealing—

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra on 4 April 2008.

moral entitlements in the language of rights. It operates at a sufficiently high level of abstraction or indeterminacy that it is able to finesse most disagreement. Ask who is in favour of ‘freedom of expression’ or ‘freedom of religion’ or a ‘right to life’ and virtually everyone puts up his or her hand. And of course this is where bills of rights are sold, up in the Olympian heights of disagreement-disguising moral abstractions and generalities; this is where they are being sold right now in Australia.

Nevertheless, that is not where these instruments have real effect. People do not spend hundreds of thousands of dollars going to court to oppose ‘freedom of speech’ in the abstract. They do not take a case all the way to the Supreme Court of Canada or the United States or to the House of Lords in the United Kingdom, with all the costs and time and worries that entails, to argue that they are opposed to ‘freedom of movement’ or to a ‘right to life’ or ‘to liberty and security of the person’ (or to any other of the enumerated rights in Victoria’s *Charter of Human Rights*).

Bills of rights have real, actual effect down in the quagmire of social-policy decision-making where there is no consensus or agreement across society at all about what these indeterminate entitlements mean. Rather, there are smart, reasonable, well-informed, even nice people who simply disagree about where to draw the line when it comes to campaign finance rules or hate speech provisions or defamation regimes or whether Muslim girls can or cannot wear veils to school or whether to sanction gay marriage and so much more. One could sit around in groups, holding hands, singing ‘Kumbaya’, and chanting ‘right to free speech’ or ‘right to freedom of religion’ for as long as one wanted and it would help not at all in drawing these contentious, debatable lines.

What a bill of rights does is to take contentious political issues—and I will deliberately say this again, issues over which there is reasonable disagreement between reasonable people—and it turns them into pseudo-legal issues which have to be treated as though there were eternal, timeless right answers. Even where the top judges break 5–4 or 4–3 on these issues, the judges’ majority view is treated as the view that is in accord with fundamental human rights.

The effect, as can easily be observed from glancing at the United States, Canada and now New Zealand and the United Kingdom, is to diminish politics and (over time) to politicize the judiciary. Meanwhile, the irony of the fact that judges resolve their disagreements in these cases by voting is generally missed. The decision-making rule in all top courts is simply that five votes beat four, regardless of the moral depth or

¹ What follows is a selective overview of my reasons for opposing bills of rights. For more detail, arguably mind-numbing detail, see eg. James Allan, ‘Bills of Rights and Judicial Power—A Liberal’s Quandary?’ (1996) 16 *Oxford Journal of Legal Studies* 337; James Allan, *Sympathy and Antipathy: Essays Legal and Philosophical*. Aldershot, Eng., Ashgate, 2002; James Allan, ‘Rights, Paternalism, Constitutions and Judges’ in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law*. Oxford, Eng., Hart, 2002, p. 29; James Allan, ‘Oh That I Were Made Judge in the Land’ (2002) 30 *Federal Law Review* 561; James Allan, ‘Paying for the Comfort of Dogma’ (2003) 25 *Sydney Law Review* 63; James Allan ‘A Modest Proposal’ (2003) 23 *Oxford Journal of Legal Studies* 197; James Allan ‘An Unashamed Majoritarian’ (2004) 27 *Dalhousie Law Journal* 537; James Allan, ‘Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century’ (2006) 17 *King’s College Law Journal* 1; James Allan, ‘Thin Beats Fat Yet Again—Conceptions of Democracy’ (2006) 25 *Law & Philosophy* 533; James Allan, ‘The Victorian *Charter of Human Rights*: Exegesis and Criticisms’ (2006) 30 *Melbourne University Law Review* 906.

reasoning of the dissenting judgments, or that they made more frequent reference to J.S. Mill or Milton or the International Covenant on Civil and Political Rights. Only the size of the franchise differs.

None of this deters bill of rights proponents from talking repeatedly about how such an instrument ‘protects fundamental human rights’, as though these things were mysteriously or magically self-defining and self-enforcing. They are not. They simply transfer the power to define what counts as, say, a reasonable limit on free speech over to committees of ex-lawyers (who have no greater access to a pipeline to God on these moral and political issues than anyone else, but who are immune from being removed by the voters for the decisions they reach).

Of course in the Australian context proponents who formerly championed some sort of American or Canadian-style constitutionalised bill of rights that would allow judges to strike down legislation now tell us (after repeated failures to get Australian electors to agree) that they favour only statutory bills of rights. And they make much of how these statutory versions leave the last word with elected politicians.

By no means is this the sort of Damascene conversion some proponents pretend. Quite simply, these statutory versions are virtually as potent as their constitutionalised cousins. They too shift much power to the unelected judiciary, however much some proponents may indicate otherwise.

The proof of the pudding, of course, is in the eating. And the evidence from New Zealand and the United Kingdom (both jurisdictions having statutory bills of rights, indeed ones that were the models copied by the state of Victoria’s *Charter of Rights*) is clear and unambiguous. The top judges there have become more powerful since the arrival of the respective bills of rights.

How? One of the main (and little publicized) devices is a provision in these statutory versions that is known as a ‘reading down provision’. These end up being a license to rewrite (as opposed to strike down) legislation. What they do is direct the judges, *so far as it is possible to do so* (Victoria and the UK) or if they can (NZ), to read all other statutes as consistent with the enumerated rights. Of course what is and is not consistent with such rights is wholly up to the judges, as is the question of what is and is not possible. Even the secondary question of what limits on rights are reasonable is one that bills of rights leave wholly with the unelected judges. They decide what aspects of other statutes are or are not consistent with the vague, amorphous rights provisions; they decide what is and is not possible insofar as giving other statutes a different meaning; and they decide what is and is not reasonable.

Remember that when you hear proponents of statutory bills of rights continually talk in gaseous platitudes about protecting fundamental rights. Remember that people disagree down in the quagmire of detail about where to draw the line to do that protecting; remember that the judges have no greater moral (not legal, but moral) perspicacity in knowing what will and will not be the course of action that does that upholding of fundamental rights than you or I or plumbers or secretaries or, dare one say it, politicians; and remember that when the unelected judges disagree amongst themselves on these tough rights questions, as they inevitably do, they themselves resort to voting and letting the numbers count, the exact same decision-making procedure so many bill

of rights proponents like to belittle, at least in quiet moments of honesty over a drink or two.

Turning back to these various sorts of reading down provisions—these directions to give the words of other statutes a meaning that you, the judge, happen to think is more moral and more in keeping with your own sense of the demands of fundamental human rights—the danger is that just about any statutory language (however clear in wording and intent) might possibly be given some other meaning or reading.

Put differently, reading down provisions such as these throw open the possibility of ‘Alice in Wonderland’ judicial interpretations; they confer an ‘interpretation on steroids’ power on the unelected judges. So although there is no power to invalidate or strike down legislation, the judges can potentially accomplish just as much by re-writing it, by saying that seen through the prism (that is, their own prism) of human rights, ‘near black’ means ‘near white’. They can make bill of rights sceptics like me half long for the honesty of judges (under constitutionalised bills of rights) who strike down legislation rather than gut it of the meaning everyone knows it was intended to have (rule of law values notwithstanding—and by that I mean the value we citizens, if not judges, all otherwise put on knowing in advance what the laws are that we are required to abide by so that we can plan accordingly and have our legitimate expectations satisfied).

Now that allegation of ‘Alice in Wonderland’ interpretations can sound alarmist. So the question arises, has anything remotely like that occurred under the UK and New Zealand reading down provisions? As it happens, the answer is a definite ‘yes’.

Here I will simply quote from the leading House of Lords decision from four years ago. Read what Lord Nicholls (supported, more or less, by all the other Lordships) was prepared openly and explicitly to say:

It is now generally accepted that the application of s.3 [the reading down provision] does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s.3 may none the less require the legislation to be given a different meaning ... Section 3 may require the court to ... depart from the intention of the Parliament which enacted the legislation ... It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant [meaning bill of rights compliant].²

The other Lords (even Lord Millett in dissent) were broadly in agreement with these revolutionary views. Lord Steyn was clear that the interpretation adopted need not even be a reasonable one. And just to give you the full potency of these reading down provisions, it is crucial to realise that in reaching this result their Lordships overruled one of their own House of Lords authorities—a case on the meaning of exactly the same statutory provision, an authority only five years old, and one that had held the meaning to be clear.³

² *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at pp. 571–572.

³ *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

Lest anyone be inclined to think this was some rogue case, note what was said two years later: ‘The Human Rights Act 1998 [incorporating the European Convention on Human Rights—their bill of rights] created a new legal order.’⁴ It is a new order, of course, in which a good deal more of the moral and political line-drawing in society is being done by committees of ex-lawyers. I do not think it is in any way an unfair characterisation to say that what is happening in the United Kingdom is the diminishing of democracy (where democracy is understood in its usual sense of ‘majority rules’ or ‘letting the numbers count’). And the various people who are presently pushing for one of these statutory bills of rights here—and I am not clear whether that includes the Attorney-General or not—should at least have the good graces to come clean and tell everyone that there is the potential for this statutory bill of rights of theirs ‘to create a new legal order’, one that will enhance significantly the role of unelected judges while diminishing that of the elected representatives of the voters.

Certainly after looking at the experience of the United Kingdom one could summarize what has thus far happened there by saying that under a statutory bill of rights the most senior judges of what was once considered to be the most interpretively conservative court in the common law world now tell us they can give other statutes—statutes they concede would otherwise be clear and unambiguous—the exact opposite meaning as that intended by the elected parliament. They can read words in, read words out, and opt for clearly unwanted outcomes. Wow! As I said, that is Alice in Wonderland stuff. It certainly looks to me to amount to a power to redraft or rewrite disfavoured statutes. And it is precisely that which bill of rights advocates have shifted to promoting in Australia. It is largely that version of a statutory bill of rights, with a bit of New Zealand’s thrown in, that Victoria has enacted.

The experience in New Zealand with their reading down provision reinforces this assertion. Despite on the face of things having the most enervated bill of rights imaginable—not least because the remedies provision had to be wholly removed and a unique ‘this bill of rights loses to all other statutes’ provision (s.4) inserted to get the Bill through Parliament—the judges across the Tasman have done the following: a) in the first case⁵ ever to reach the highest domestic court Cooke P. suggested that this new bill of rights, with its reading down provision, may require a court to depart from long established interpretations as regards the meaning to give to other statutes; b) the remedies clause was read back in, while creating a new public law remedy sounding in the bill of rights;⁶ c) s.4 was and has been more or less completely ignored; d) exclusion of evidence rules were re-written (and re-written again), to the advantage of accused; e) the judges simply gave themselves a power to issue declarations of incompatibility (see below), with no statutory warrant whatsoever.⁷

And here’s what they came within a whisker of doing. They came within one judicial vote of saying that they, the judges, could use the bill of rights (with its reading down provision) to say that old statutes—when perceived to be inconsistent with one of the amorphous rights entitlements—could prevail over inconsistent statutes of more recent enactment. In other words, three of seven top Kiwi judges thought that if the judges

⁴ *Jackson v Attorney General* [2006] 1 AC 262 at [102] per Lord Steyn.

⁵ *Flickenger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 at p. 441.

⁶ *Simpson v Attorney-General [Baigent’s Case]* [1994] 3 NZLR 667.

⁷ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

happened to conclude that an old statute was more in keeping with rights than a new one, and the two were inconsistent, the judges could say the old one prevailed (The seventh judge decided the case on other grounds).⁸

Think about that. The doctrine of implied repeal, based on the notion that each generation should decide matters for itself, would go out the window. This would have been a power to choose whether newly enacted statutes can be ignored in favour of older, existing statutes the judges happen to prefer, or to think more in keeping with their notion of what is a rights-respecting outcome. And this on the basis of an enfeebled, enervated bill of rights much weaker than those of the United Kingdom or Victoria. All that Australian proponents of such instruments tend to say in response is a) that at least this worst sort of wild, unintended outcome did not, in the end, come to pass in New Zealand; and b) even the New Zealand top judges have on one occasion disapproved of the UK approach.⁹ So even if all the other matters I enumerated above are true, and they are, at least the New Zealand top judges haven't gone as far down the 'giving statutes a meaning you think they should have, rather than the one they clearly do have' path as the UK judges have. Does that comfort any of you in the audience?

I think I have said enough to back up my earlier claim that the experiences of the United Kingdom and New Zealand throw open the possibility of Alice in Wonderland interpretations, should we opt for a statutory bill of rights. And were this to come to pass it would look to me very much like what the judges do in Canada and the US under constitutionalised bills of rights. There they strike down statutes. In the UK and New Zealand they simply re-write them (under the guise of pretending to interpret them) to say what they, the judges, think would be preferable. And in New Zealand they came one vote away from simply handing themselves the power to ignore new statutes in favour of other, older, inconsistent statutes.

No one could ever say, with a straight face, that reading down provisions do not hold out the prospect of transferring much power to the unelected judiciary.

So what do the singers of the 'bill of rights for Australia' Siren Song say in response? And here I hope you'll forgive me for descending into a technicality or two, but if you bear with me you might just think it worthwhile. In effect they point to four words that are part of the *Victorian Charter of Human Rights* but that are not part of the UK or New Zealand bills of rights. I am referring to the respective reading down provisions. The UK's (s.3(1)) states: 'So far as it is possible to do so [other legislation] must be read ... in a way which is compatible [with this bill of rights].' By contrast, Victoria's Charter (s.32) states: 'So far as it is possible to do so *consistently with their purpose*, all statutory provisions must be interpreted in a way that is compatible with human rights.'

It is those extra four words ('consistently with their purpose') that we now are being told will make all the difference. Those four words will be our bulwark against the tide of interpretation on steroids type House of Lords' results, results that are not interpretation so much as redrafting. Those four words will ensure that parliament in Australia remains supreme (within the confines of the Constitution). To paraphrase Churchill, 'never has

⁸ *R v Pora* [2001] 2 NZLR 37.

⁹ *Hansen*

so much been owed by so many to ... four words', at least if we are to take this latest incarnation of the pro-bill of rights camp's assurances seriously.

Before tracing out their argument, and why it is a feeble one, notice that this bill of rights debate in Australia has taken on something of a smoke and mirrors quality to it. You can never quite pin down proponents on what they actually think or believe. To start, most proponents were all in favour of a vigorous US-style or Canadian-style entrenched, constitutionalised bill of rights. After something of an apparent Damascene conversion for some of them, not least when Australian voters continually rejected their hopes for one of these, we then learned it was only a harmless little statutory bill of rights they wanted. What harm could a mere statutory version cause? But as the evidence came in from the UK and New Zealand, that position was abandoned too in favour of this new gloss: that these four words will make all the difference in reining in the unelected judges.

Here's the gist of their argument. With these four words in place judges are directed to read down all other statutes, just as they are in the UK and New Zealand, BUT here they are being directed to do so only when that reading down outcome will be 'consistent with the purpose' of the statute being interpreted. So here's the crucial question. How constraining on the point-of-application interpreter of a statute is that extra four word injunction? You can read words in, read words out, have no need to wait for any ambiguity before doing so, indeed (given that subsection (2) of Victoria's s.32 reading down provision explicitly tells the judges to consider overseas case law, and that includes quite clearly what the House of Lords and top New Zealand courts are doing) you can even copy all these international trends, provided only that the meaning you end up attributing to the statute after this reading down exercise is one that is 'consistent with its purpose'. To repeat the key question, how constraining on a judge is that?

Not very much at all is the short answer. I would say that any half decent lawyer, told that his preferred human rights rewriting of a statute would only be allowed if he could also say that it was in keeping with the purpose of the statute, would rarely have much difficulty driving a truck through that sort of purported constraint. The fact is that most decent sized statutes have a multitude of purposes.

Here's how the famous American legal scholar Lon Fuller of Harvard made the point about the porousness of purposive limitations or constraints when it comes to interpretation (and Fuller was an advocate of such a purposive approach, he just was honest about its malleability) in his famous mock hypothetical *The Case of the Speluncean Explorers*:

We are all familiar with the process by which the judicial reform of disfavored legislative enactments is accomplished. Anyone who has followed the written opinions of Mr. Justice Foster [who is the fictional judge Fuller created to put forward the purposive case] will have had an opportunity to see it at work ... I am personally so familiar with the process that in the event of my brother's incapacity I am sure I could write a satisfactory opinion for him without any prompting whatever, beyond being informed whether he liked the effect of the terms of the statute [or not].

The process of judicial reform requires three steps. The first of these is to divine some single ‘purpose’ which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the classes of its sponsors. The second step is to discover that a mythical being called ‘the legislator’, in the pursuit of this imagined ‘purpose’, overlooked something or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course, to fill in the blank thus created. *Quod erat faciendum*.¹⁰

Here is the truth of the matter. Any judge inclined to fancy himself or herself a latter day philosopher king—an arbiter for the rest of us of what is and is not in keeping with the amorphous notion of fundamental human rights—will not in the least be prevented from doing so by these four extra words. Those who balk at what the House of Lords has done would balk without these four extra words. And those who would not balk, who think they have some sort of pipeline to God when it comes to all these incredibly contentious and debatable line-drawing exercises connected to rights-based disputes that always and everywhere lead to disagreement and dissensus amongst smart, reasonable, well-informed and even nice people, well those sort of judges are simply not going to be deterred by these four words. Does anyone really think, hand to heart, that these four words would have made the crucial difference to a Steyn or Hoffmann or Cooke? (Discretion being the better part of valour I refrain from mentioning any Australian judges here, but I’m quite sure those in the audience would not find it an overly taxing job to list a few for themselves.)

If the assurances against runaway judicial conceit and over-powerful judges and juristocracy and kritarchy now rest on the four words ‘consistently with their purpose’, then I am afraid they don’t rest on much at all.

So reading down provisions can turn, and in the UK and New Zealand to a significant extent they have turned, a statutory bill of rights into something that gives the unelected judges almost as much power as they are afforded under an entrenched, constitutionalised bill of rights. You might like that, or—like me—you might not. But pretending it is not a possibility is at odds with what is happening in jurisdictions that have already gone down the statutory bill of rights path. It is simple prevarication or naivety, you pick. And in those other jurisdictions, as with here, we were heartily assured before the enactment of the bill of rights that ‘the judges here are so interpretively conservative you have nothing to worry about.’ Elsewhere those assurances have proven to be hollow to the core.

Given my time constraints I will say no more about reading down provisions. Let me instead say a few brief words about the other main provision in a statutory bill of rights that transfers power to the unelected judges—yes, there is more than one—though I will have to be brief. Then I want to move back to some more general concluding remarks.

¹⁰ (1949) 62 *Harvard Law Review* 616 at p. 634.

Section 36(2) of the *Victorian Charter of Rights* has a provision that gives that state's Supreme Court the power to declare that in its opinion a statutory provision cannot be interpreted consistently with one of the enumerated rights. I do not have time to go through all the problems with this provision. But notice that s.36 furthers the tendency—one indulged in almost always by bill of rights proponents—to conflate 'what the judges think about rights' and 'what is actually the case about rights'. It is as though a committee of ex-lawyers had some authoritative, definitive (and to me, mysterious) ability to know and to declare precisely where to draw all the highly contestable and disputed lines that comes from turning political disputes into pseudo-legal ones.

Yet put that to one side, along with the potential chapter III and s.73 issues related to advisory opinions.

Instead, let's take this declaration of inconsistent interpretation provision on its own terms. In the absence of any power to strike down legislation (as per constitutionalised bills of rights as in the US and Canada), and assuming (wildly optimistically in my view) that the judges will not go too far down the Alice in Wonderland path of how to use the reading down provision, it is precisely these judicial declarations that are supposed to give rise to all the benefits proponents of statutory bills of rights predict. The claim is that there will be some sort of dialogue¹¹ and that the legislature—on learning that one of its statutes has attracted one of these judicial declarations—will ponder it and reflect on how best to accomplish its aims while at the same time attempting to uphold the various enunciated human rights, or at least limit them only to an extent that is reasonable and justifiable.

That is the claim. However, that claim is only remotely plausible where the elected legislature is left in a position in which it feels it can, on occasion at least, disagree with and overrule the unelected judges. Remember, judges are not gods and so there is no reason at all to think their view on some moral or political issue is by definition the correct one. So if the *Victorian Charter of Rights* is really to result in a dialogue, a scenario in which the judges' views do not routinely prevail, then it must be the case that sometimes—in fact—the elected legislators stand up to the unelected judges and say, in effect: 'We've heard your view and we've considered it but after more reflection we disagree.' If the judges always prevail that in no way resembles a dialogue.

The signs on this front are bleak indeed. In Canada, with its constitutionalised *Charter of Rights* that nevertheless contains an override that in theory allows the elected parliament to trump the judges, the elected federal parliament has not used that override—not one single time—in the 26 years of the Canadian *Charter's* existence.

Perhaps, though, that can be ignored as what flows from a constitutionalised model (or so, at least, we regularly are reassured). What then of the UK? It has a statutory bill of rights. It has a provision allowing the judges to make declarations of incompatibility. What, in fact, happens over there after the judges issue them? Does the elected legislature ever dispute what almost always amounts to a highly debateable line-drawing

¹¹ Personally, I think such claims highly implausible. For an attack on the very plausibility, coherence and likelihood of any judicial-legislative dialogue, see Jeremy Waldron, 'Some Models of Dialogue Between Judges and Legislators' in G. Huscroft and I. Brodie, eds, *Constitutionalism in the Charter Era*. Markham, Ontario, Lexis Nexis Butterworths, 2004.

call, one over which sincere, reasonable, well-informed, even nice people can and do disagree?

The answer is ‘no’. According to Klug and Starmer, writing in 2005, ‘[i]n every case where remedial action had not been taken before the [judicial] declaration was made, the government responded by repealing, amending or committing to repeal or amend, the relevant provision.’¹² In other words, after every single judicial declaration of incompatibility in the UK, *every single one of them*, the elected legislature deferred to the unelected judges.

Dialogue should be made of sterner stuff. And so, too, should be claims that this declaration power will not make it impossible for the elected parliament to disagree with the judges, will not have the de facto effect of making the judges’ views the ones that end up prevailing.

My allotted time is virtually up. Let me turn, therefore, to a few concluding remarks. As a native born Canadian I had thought about recounting to you what the judges have done in Canada with their bill of rights. Yes, I know theirs is a constitutionalised one, but the way things are going with statutory versions there won’t be much, if any, difference between what the UK and Canadian judges can do. Of course when I point to Canada I’m often told I’m scaremongering. In this instance, however, a little scaremongering might go a long way.

So let us recall some of the decisions of the Supreme Court of Canada. The judges there have decided that free speech concerns trump health and safety concerns in the context of tobacco and commercial advertising;¹³ they have decided what campaign finance rules are acceptable,¹⁴ that each and every refugee claimant to Canada must be given an oral hearing (at a cost of billions of dollars, and massive ongoing delays),¹⁵ and that the legislature’s ban on private health insurance was unconstitutional,¹⁶ as was its confining of marriage to opposite sex couples.¹⁷ They have twice over-ruled the federal Parliament on whether convicted and incarcerated prisoners must in all cases be allowed to vote,¹⁸

¹² Klug and Starmer, [2005] *Public Law* 716 at p. 721 (emphasis mine—and note that the authors see this as a *good* thing).

¹³ See *RJR MacDonald Inc v Canada* (1995) 127 DLR (4th) 1.

¹⁴ See *Harper v Canada (Attorney General)* [2004] 1 SCR 827 or *Libman and Equality Party v Attorney General of Quebec* [1997] 3 SCR 569.

¹⁵ See *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177.

¹⁶ See *Chaoulli v Quebec (Attorney General)* 2005 SCC 35. Strictly speaking this was a 7 member court splitting 3–3 on whether s. 7 of the *Charter* was violated. The casting vote held that the Quebec Charter was violated, so there were 4 votes for striking down the legislation.

¹⁷ See *Halpern v Canada (AG)* [2003] OJ No. 2268. After this Ontario Court of Appeal decision the court was awarded the title of ‘nation builder of the year’ by the *Globe and Mail* newspaper and the judges posed for a portrait.

¹⁸ See *Sauve v Canada (Attorney General)* [1993] 2 SCR 438 and *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519. And as for any vapour and vacuous notions of a dialogue between elected and unelected branches of government, the Chief Justice’s core view is made clear in the latter case: ‘Finally, the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a dialogue. Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a

indeed in the latter of those cases the Chief Justice of Canada has referred obliquely to countries that disagree with her court's 5-4 ruling, including Australia, the UK, the US and New Zealand, as 'self-proclaimed democracies'.¹⁹ (Perhaps I should pause for a moment and allow fully to sink in the staggering self-assuredness—no, the out and out moral sanctimoniousness and self-righteousness—of a top Canadian judge calling New Zealand, Australia, the US and the UK 'self-proclaimed democracies'? What would have been the reaction had George Bush said that?)

I could go on and mention other Canadian cases, say the one striking down the compromise abortion legislation²⁰ or others. However, let it suffice simply to recall the case of *Reference Re Remuneration of Provincial Court Judges*,²¹ a scandalous decision in which the Canadian Supreme Court struck down legislation reducing the salaries of provincial judges as part of a general province wide reduction of public servants' pay. As Jeff Goldsworthy describes it:

[F]irst year law students [are] taught to clear their heads of 'mush' and think like lawyers. In [this] case, the Supreme Court seems to have undergone something like the same process in reverse. But there is a difference: the Supreme Court's mush is calculated—it is mush in the service of an agenda ... [it is] a disingenuous rationalization of a result strongly desired by the judges on policy grounds.²²

So I finish with this thought. Democracy is the best form of government for people who aren't sure they're right. Bills of rights, by contrast, are for people who think their moral antennae are better than everyone else's, who are sure they're right. Actually, that's not quite correct, is it? Because bills of rights—in turning debatable and contentious political and moral line-drawing exercises into pseudo-legal exercises where one side or the other has to be proclaimed to be the one on the side of fundamental human rights—actually empower a small group of unelected judges. The bet that proponents are making isn't that they have a pipeline to God, but that the judiciary does. They're betting that judges have greater moral and political perspicacity than do the elected representatives of the people. It's an unattractive bet, in my view, when it's presented openly and honestly, rather than when it's disguised in moral abstractions and grand proclamations about 'protecting rights' (as though Australia were some North Korea whose citizens lacked rights; as though at present, without a bill of rights, we didn't outscore Canada in terms of the scope citizens are afforded to express themselves without constraints and didn't outscore the UK in terms of having the less harsh anti-terrorism provisions).

At core, if we're at all honest, any sort of bill of rights is about imposing an aristocratic or anti-democratic element into government. It's about handing an awful lot of line-drawing powers as regards an awful lot of highly contentious moral and political issues

dialogue between legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try, again." ' (at paragraph 17, per the Chief Justice)

¹⁹ Ibid. para [41]. The reference is to countries discussed in Justice Gonthier's dissent. See paragraphs [125], [130] and [131].

²⁰ See *R v Morgentaler* [1988] 1 SCR 30.

²¹ [1997] 3 SCR 3. For a similar view see Jeffrey Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11(2) *Constitutional Forum* 60.

²² Ibid. p. 64.

to committees of ex-lawyers, who will resolve their disagreements on these issues by themselves voting, the only difference being the size of the franchise. Those of us who think democratic decision-making—for all its many and obvious faults—is nevertheless the least bad form of government going (and certainly better than what you'd get if you added an element of judicial oversight) had better start voicing their opposition to a Commonwealth bill of rights now, before it's too late.

This won't be easy. Emotively-laden appeals up in the Olympian heights of amorphous moral abstractions have a certain attraction in some quarters. It's time to start explaining why that attraction is superficial, vacuous and, down in the quagmire of day-to-day detail, at odds with giving each Australian a more-or-less equal say in how we are all governed.



Question — I was fascinated by so many aspects of your address but let me try and focus on three. First, I was intrigued by your somewhat sarcastic criticism of courts making decisions by majority. Now we live in a constitutional democracy and the courts regularly adjudicate on challenges to the validity of legislation, and they make their decisions by majority. How else? Would you suggest that parliament should be the final arbiter of its own constitutional powers? No, that's the role of the courts. If it's the courts that make the decision, how else would they adjudicate otherwise than by majority, when you have an appellate court?

James Allan — My point is that people who propose bills of rights by and large either explicitly or implicitly bring into their argument something about the tyranny of the majority and the fundamental problem with deciding on a majority rules basis. My point is that that is how judges decide. Judges don't decide based on who writes the most moral judgement.

In most pieces of legislation I don't have any problem with judges voting because how else are they going to decide, you are perfectly right. But normally when the judges interpret the Tax Act or the Companies Act and the legislature doesn't like the outcome of that interpretation, they bring in an amendment. You can't do that with a bill of rights. The fundamental difference even with a statutory bill of rights is that the judges get the last word. It's not the same as common law decision-making where the judges create a long set of rules about personal negligence, say, and the New Zealand Parliament comes along and passes a no fault tort system where they say: 'We've heard what you judges say, and we're changing it.'

Every single time the judges make a declaration in the UK, there's no response. Every single time the judges make a decision in Canada on the bill of rights, even though in theory formally the Parliament could respond, they can't respond because these things are sold at such a high level of moral abstraction where there is a mantra for protecting peoples' rights, as though that is some sort of uncontentionous, obvious thing. In fact the legislature cannot respond, that's the difference, and what you are stuck with is that

seven judges will decide by voting what we end up with, with no response for us. At heart I am a democrat, and that really bothers me.

Question — You made no mention of the fact that the Human Rights Bill/Act provides a yard-stick for measuring future legislation. We've seen the difference between the Commonwealth and the ACT in relation to the anti-terrorism legislation and we all know the outcome. Do you not agree that that was a very important outcome in the ACT and a much better one than the Commonwealth one?

On the reading-down provisions, can I give you an example where a reading-down provision would have introduced a much more beneficial result and ask you to comment on it? You'll be familiar with the Al-Kateb decision where Mr Al-Kateb was a failed refugee applicant who was stateless. He couldn't be deported anywhere because no state would take him. The legislation provided that someone in his position had to be held in detention until either a visa was granted or he was deported. But he wasn't going to get a visa and they couldn't find anywhere to deport him. The Court held by four to three that that meant that he was to be held in detention indefinitely. We now know that one of the members of the majority, Justice McHugh has said since his retirement that had there been a bill of rights he could have interpreted that legislation as against human rights standards and found another way. Wouldn't that have been a preferable outcome? Does that not illustrate the benefit of a reading-down provision?

James Allan — On the first point, it is true that I haven't mentioned all of the many parts of a bill of rights; there are lots of other bad parts to them. There's one in the Victorian one, section 28, which is a statement of compatibility, where the Minister or the Attorney-General gets up in the House and says yes or no, this bill being introduced is or is not in my view compatible with the bill of rights. Sounds great, but the idea was supposed to be that the parliamentarians would start thinking twice about whether their bills infringe rights. What ends up happening is that you hire a bunch of lawyers in the Attorney-General's chambers or somewhere and the lawyers decide whether the bill is compatible with bills of rights. How do they do that? They look and see what the judges have done, and if they haven't done anything here they look and see what the judges have done in Canada; so in other words even at the statement of compatibility stage it becomes legalised and lawyer-driven.

About the terrorism legislation. The UK has a very strong bill of rights and that has done nothing to make their terrorism legislation less harsh than Australia's. Australia's is less harsh than the UK's. You can be held in detention in the UK for 28 days. What is it here? Two? Four? Now, it's true that the ACT has incredibly liberal laws but I don't think it's the bill of rights myself, I think it's the kind of people who live in the ACT.

What about Al-Kateb? Well you know my answer to that because I've written about it. I think that the four majority judges on Al-Kateb got it right. The best judge in the US last century was Oliver Wendell Holmes, and he said: 'My job is this as a judge: if the people through their elected representatives want to go to Hell then my job is to help them, that's what I am paid for.' The problem with the minority judges in Al-Kateb is what I call 'do the right thing judging'. They are just rewriting the legislation. Now if the question is, wouldn't it be nice if a bill of rights allowed judges to just rewrite legislation, then my answer is no, and in fact after Al-Kateb I don't know exactly what the legislature did but they actually softened it.

That's what you should do. If you don't like Al-Kateb, get out there, spend a few Saturdays working for a party that's going to change the rules on stateless refugees. The worst thing you can do is rely on a few judges to fix the system for you. If that's what you want then you and I fundamentally disagree on what the best way to live in a democracy is. You can't always win in a democracy. I mean in my university I never win, but leave that aside. You can't expect to win every issue. You can't expect to win every issue even if it's a moral and political issue that you feel very strongly about. The fact is if your decision-making rule is to let the numbers count, you're going to lose some. Work for a political party.

Question — As one of these enlightened citizens of the ACT we're already being freaked out here. I'm very morally opposed to cloning. We are debating it right now in the ACT Legislature. But of course the bill to permit it has that little moral cache saying it has been found compatible with the ACT Human Rights Act, as if that's meant to impress me. When you lobby you are told it is compatible; what if it's incompatible in my view? I'm still entitled to argue it. And then we have a very interesting gloss: Mr Stanhope's Human Rights Act said it was based upon the ICCPR provisions. Article 6 says everyone has a right to life. In the preparatory works to that Convention it was quite clear that there were very strong differences about the abortion issue as to whether that applied, and countries have gone their own different ways, but our Human Rights Act here actually adds a paragraph in Section 9 that says these rights do not apply before birth. I think that's rich. In a lecture I attended at the ANU about two years ago, a Human Rights Commissioner, on being asked why this clause was added, said it was obvious that they shouldn't apply before birth. I said, well, some of us would like to argue about that, and she said: 'The Chief Minister doesn't want it introduced.' But what do you think about legislatures themselves that seem intent on glossing human rights statements. Will it will come back and affect them when they do something that the lawyers don't want them to do?

James Allan — Well you and I can probably sit around and debate what the situation would be if the legislature actually sat down and debated whether a particular bill was compatible with human rights. And you might not like that or you might, but that's not what happens, it is way worse than that. Bills are declared to be compatible with bills of rights or not compatible on the basis of a few students just out of law school having sat down and read what the judges are saying. They don't look and see, what does a legislature think, what do the legislators think? The Minister gets opinions based on what the lawyers are deciding based on what the judges are deciding. That has been so in New Zealand, when they look and decide if a bill is compatible or not. The people in the Crown Law office, the twelve or thirteen full-time lawyers who are working on the bill of rights, they look and see what their top judges have said about this sort of thing, and if they can't find anything in New Zealand they then look at the Canadian Supreme Court and the American Supreme Court. Your statement of compatibility is a statement of what judges think: that's the irony of it.

Yes, you are right, there are other knock-on negative effects of a bill of rights that I haven't got to because I had fairly short period of time, but there's no doubt that if you are, say, a legislator in Congress in the US and you know that sitting behind you are some philosopher king judges, you can abdicate your responsibility. You could pass a piece of legislation that outlaws flag burning, not because you support that ridiculous piece of legislation but because you're very confident that the judges behind you are

going to strike it down so you comply. You don't have to take any moral responsibility for your legislation. Absolutely that's a knock-on negative affect and that will certainly happen although it happens more in the US because they have such a long history.

Question — You have mentioned the impact that a bill of rights can have on campaign finance law reform. I'm really curious as to whether it's statutory or constitutionally entrenched, and exactly how that line is drawn and what cases we've seen in other countries.

James Allan — The cases in Canada have come out of Alberta. Basically the question is this: you have campaign finance questions, how are you going to stretch your electoral campaign? Australia has some public money go in, and the US tends to be more wide-open, so what happens is you trigger the question of the right to free speech. If you are a multi-gabillionaire you can spend all your money to buy lots of television time to support one political party over another. Obviously you have to make a compromise between some sort of view that you don't want money, wealth, having too big a role in election campaigns and on the other hand not wanting to stifle people's views when they go to speak, express themselves in terms of the party they prefer to win.

There is a long line of cases in the US and Canada, where if you try to bring in any legislative constraints on money the American judges consistently tend to say that's a breach of the first amendment, free speech. Now John McCain and McCain-Feingold I think it was, they have compromised but it hasn't worked very well. The Americans tend to be really pro free speech which puts very few limits on campaign finance. In Canada the legislature tries to take some of the money out of campaign financials. The Canadian Supreme Court has upheld that because the judges like it. We've had 40 years of Liberal Party government in Canada so every single judge in Canada pretty much has been appointed by the Liberal Party which is another way to get around a bill of rights, if you can stay in power that long.

So the question is, what about Australia? Ironically, of course, as you probably know, in Australian there is so-called implied rights jurisprudence, where the High Court might just make up some rights because they weren't there and they wanted to put some in. The first one was the ACTV (Australian Capital Television v Commonwealth of Australia) case, and that's ironic because the judges decided that in the fabric and inner workings of the Constitution somehow there is this freedom of political communication during campaigns. It sounds great when you read it, but the practical effect was that legislation I think brought in by a Labor government to try to take some of the money out of campaign financing got struck down as unconstitutional. Now I don't know where I stand on my first order preferences of those sort of things; probably, here's the irony, I'm with the judges. My own nice middle-class sensibilities probably get more of my first order preferences satisfied by the judges, but ACTV and all of those implied rights cases really offend me just as much as a bill of rights, because the judges are making highly debatable calls. It's a highly debatable call. Where are you going to draw the line in terms of how much money you're going to let people spend of their own to try to influence local campaigns? There's no right answer in the sense of an obvious morally correct answer.

Bills of rights never trigger the sort of cases people like to talk about: when some little blue-eyed baby boy is about to get murdered and the bill of rights steps in to save him:

that's never what the case is. It's always highly debatable; such as how you're going to structure your campaign finance rules, your defamation regime, or wearing veils to school or something like that. There is no doubt that bills of rights have had a huge effect on campaign finance, but is it the case that different judges and different jurisdictions draw different lines? Absolutely. The Canadians draw a line that really favours limits. The Americans draw lines that put hardly any limits. In fact that's another irony, when the judges under a bill of rights say they're going to look overseas for guidance, they can get any answer they want. You tell me the answer you want, I'll tell you the jurisdiction to look at.

Question — Bills of rights are often criticised because you're freezing in time a particular moral or political environment and views about rights, and it's interesting to hear argument on the other side which is that a statutory bill will give judges open slather to interpret. I am wondering about your views on entrenching bills of rights.

James Allen — The sort of people who say: 'Oh, a bill of rights is going to lock us in' are the kind of people who want a bill of rights. The judges are so unconstrained that outside of Justice Scalia in the US there is almost no-one who says the way to interpret a bill of rights is to give it the meaning that the people at the time originally understood it to have. It is a version of originalism. If you flesh Scalia's argument out it is a persuasive one. He says that, in other words, a bill of rights is providing a floor, below which government cannot go. But if you want more than that, if you want legislation that allows same-sex marriage, or other things, then you've got parliamentary sovereignty. There is nothing in the bill of rights that stops you from having more liberal outcomes. Scalia's argument is: we have to interpret bills of rights as setting a floor, and they don't move. You want to change the bill of rights then you need a constitutional amendment.

And people say: 'That's awful, how do we keep pace with civilization, its 200 years old, what do we do, 250 years down the road?' and Scalia says: 'You pass an statute, that's what you do, nobody is stopping you, its called voting.'

That's an attractive position in my view. If you are going to have a bill of rights, give me bunch of Scalias who are going to lock things in. I don't want people keeping pace with civilisation, treating bills of rights as a living tree.

But the fact of the matter is there is one Scalia and thousands of non-Scalias. And as a practical matter judges don't actually lock things in. It doesn't happen outside of Scalia and Thomas in the US. What judges do is they say: 'This is part of our Constitution, it's a living thing, it needs to branch out, blah blah blah, we need to keep pace with civilisation.' What they mean is, we judges can amend the Constitution, everyone else has to use Section 128. So it will not be locked in, what will happen is that it will be amended from time to time as the various justices of the High Court feel that in their view it needs updating. Everyone else will have to use Section 128 and it will be impossible.

I don't think that the threat of locking things in is as much of a threat as people pretend it is, because you can still pass a statute, there is always a floor, but you are never stopped from going higher.

Parliamentary Architecture and Political Culture*

Clement Macintyre

In Book 1 of *Paradise Lost*, Milton writes of the fall of Satan from Heaven (that, in turn, presages the fall of man), and he describes the design and building of Pandemonium. This was the capital of Hell, and it was where an assembly gathered to debate ‘Their state affairs’.¹ Book 1 concludes with an account of their deliberations:

In close recess and secret conclave sat
A thousand demi-gods on golden seats,
Frequent and full. After a short silence then
And summons read, the great consult began.²

Milton was not describing the Parliament of Australia (or the 1000 voice 2020 Summit), but he may, however, have anticipated some aspects of it. Without wanting to labour the analogy too far, drawing some parallels between Pandemonium and the Parliament is tempting. Milton’s Pandemonium emerged from the ground after a ‘crew / Opened into the hill a spacious wound.’³ It was built ‘in an hour’ and ‘with incessant toil’ by ‘hands innumerable’.⁴ Then, when the members of the council entered, they swarmed in like bees—as the Great Hall of Pandemonium reduced the figures to the size of insects.⁵

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra on 9 May 2008.

¹ John Milton, *Paradise Lost*, i 775, John Leonard (ed.), London, Penguin, 2003.

² Milton, *Paradise Lost*, i 795–8.

³ Milton, *Paradise Lost*, i 685–6.

⁴ Milton, *Paradise Lost*, i 697–9.

⁵ Milton, *Paradise Lost*, i 767–70.

Today we are gathered in a building that emerged from a wound in a hill, a building that was produced by innumerable hands,⁶ and parts of it at least, are of a scale that can intimidate and overawe the many who visit it. And while it may not have been built in an hour (though anyone who has seen the time lapse film of the building of the Parliament may be forgiven for thinking it was), the fast tracking construction techniques meant it was built with great speed. Perhaps more obviously, we can make the connection between ‘pandemonium’, a by-word for a rowdy and chaotic environment, and the occasional unruly behaviour of MPs during critical debates or Question Time that is reported so lovingly by the television news and other media.

However, as anyone who looks below the immediate surface and spends more than a few minutes observing the Parliament knows, the image presented on the nightly news of the shouting, conflict and abuse that can sometimes dominate the set piece presentations is an unfair characterisation. The bulk of the work that takes place is done in a more orderly and civil environment. But whether it is pandemonium, or sober and responsible policy setting and law making, there can be no argument that what takes place in this building shapes the patterns and values of the nation. It is where our ‘state affairs’ are debated.

This is self-evident with regard to the laws that are made. Yet, it is also true in the way that debates and ideas that are proposed and contested here help fashion the culture of the Australian people. Inevitably, as the site for these debates and contests, there has been some attention given to the way that the form of this building and the use of space within it helps to determine the character of the activity that takes place in and around it.

Parliamentary buildings occupy a unique place in that they simultaneously reflect and shape parts of the national culture in which they are found. Many are instantly recognisable and are seen as symbols of national identity. Images of the Palace of Westminster and the Congressional buildings in Washington are frequently used as shorthand references to the UK and the USA, as well as to the democratic and legislative processes that take place within them. The buildings used to house any nation’s parliament are frequently seen as representations of aspects of the national identity as well as working buildings. Studies that look at the relationship between the architecture of parliamentary buildings and the character of the political processes of communities regularly make this point: ‘National parliamentary buildings are among the most prominent symbols of government in any polity,’⁷ and (to quote from a study of the relationship between architecture and democracy):

By definition parliament buildings are expressions of the relationship between government and architecture. The buildings demonstrate faith in the cultural identity of a nation, serving two symbolic purposes simultaneously: acting as potent symbols of political power internally, that is to the people within a

⁶ *Australia’s Parliament House. The Meeting Place of Our Nation*. Canberra, Joint House Department, 1989. Page 26 suggests that more than 10 000 workers were employed in the building of the Parliament House.

⁷ Charles Goodsell, ‘The Architecture of Parliaments: Legislative Houses and Political Culture’, *British Journal of Political Science*, vol. 18, no. 3, July 1988, p. 287.

nation, and also providing an external example to foreigners of the confidence in that nationhood.⁸

The importance of this dual role was recognised in the briefing document prepared as part of the competition to design the permanent Parliament House in Canberra. There is a specific reference to the symbolism that the new building should have:

It should become a major national symbol, in the way that the spires of Westminster or Washington's Capitol dome have become known to people all over the world.⁹

But in building a symbol, the competing architects also had to accept some quite narrow design requirements. As well as its symbolic value and distinctive architectural identity, the new building was expected to satisfy three other key criteria. These were environmental sensitivity, functional efficiency and an engineering feasibility within a given cost. Then, the seating capacity and disposition of the two chambers was specified as was much of the detail of the accommodation of the executive within the building.

Inevitably, the final design produced mixed feelings. The official guides lavished it with praise and described it as 'one of the most acclaimed buildings in the world' and 'a significant architectural achievement'.¹⁰ An early architectural commentary described it as 'an elegant resolution' of the design problem and a 'triumphal result'.¹¹ Its early reception also stressed its symbolic value. So, in his opening address, the Prime Minister, Bob Hawke, talked of how the design and the location 'must enhance the traditional place of Parliament in our society.'¹² Others were less kind. Tom Uren thought that the use of space—both internal and external—did not work well. Inside there was less engagement between the members, outside there was not the same 'public open space' that could be used for peaceful demonstrations and 'public meetings in front of the national Parliament'.¹³ Barry Jones famously said:

The atmosphere is dead: indeed I have been at crematoria that were more fun. There is no life ... I suspect that the huge scale of the building ... is a psychological disincentive to venturing out ... [it does not have] a good debating chamber. Members are too remote to see the whites of their opponents' eyes.¹⁴

⁸ Deyan Sudjic and Helen Jones, *Architecture and Democracy*. London, Laurence King, 2001, pp. 42–3.

⁹ *Parliament House, Canberra: Conditions for a Two-Stage Competition*. Canberra, Parliament House Construction Authority, 1979, vol. 2, p. 15.

¹⁰ *Parliament House Pictorial Guide*. Canberra, Public Relations Section, Joint House Dept., [nd], p. 1; and *Australia's Parliament House: the Meeting Place of Our Nation*. Canberra, Joint House Department, 1989, p. 6.

¹¹ Haig Beck (ed.), *Parliament House, Canberra: a Building for the Nation*. Sydney, Collins, 1988, p. 30.

¹² Bob Hawke, address at the opening of the new Parliament House, cited in Kerry Sibraa, 'Australia's New Parliament House', *Parliamentarian*, vol. 69, no. 3, July 1988, p. 164.

¹³ Tom Uren, 'Introduction' in James Warden, *A Bunyip Democracy. The Parliament and Australian Political Identity*, Canberra, Department of the Parliamentary Library, 1995, p. viii.

¹⁴ Barry Jones, Age, 25 October 1988, cited in Greg McIntosh, *Rounding Up the Flock? Executive Dominance and the New Parliament House*. Canberra, APSA-Parliamentary Fellow Monograph,

These are criticisms from two members of the House of Representatives in 1988 who had spent much time in the old Parliament. Similar views were expressed by others who moved from the old, to work in the new building. Michelle Grattan of the *Age* wrote of the way that the move to the new Parliament had a significant effect on the way that the various groups that worked within it related to each other as, for example, Ministers were more able to find ‘private escape routes’ to avoid the media.¹⁵ The themes that run through most of these and other criticisms are about the chambers, the location of the executive and public access to the space. It is to these aspects that I will now turn.

Debating chambers are, of course, the central part of any parliamentary building. They are the public face of the Parliament and the site in which the fundamental representation of the community takes place. The broadcasting of Parliament means that together with the external view of the building itself, the two chambers—but especially that of the House of Representatives—provide the mental picture that most Australians have when they think of the Parliament. It is in the chambers that the parliamentary performance is found. The Palace of Westminster in London has been described as the ‘stage upon which some of the most extraordinary events in national history have been enacted and remains ... the focus of pageant and politics: the pre-eminent “theatre of state”.’¹⁶ It is perhaps harder to make the same colourful claims about a Parliament building that is just twenty years old, but the two chambers in this building certainly carry the same symbolic roles. The importance of the theatrical aspect was acknowledged by the Parliament itself. The Joint Select Committee on the New and Permanent Parliament House in 1970 argued that the chambers in the Australian Parliament were ‘public theatres where the people can witness the interplay of political forces in the legislative processes of government.’¹⁷

In the Westminster parliaments the chambers are deliberately designed for debate and to accommodate conflict. The oppositional seating arrangements assume and encourage the division of members into two distinct groups that face each other. Many students of the Parliament will be familiar with the origins of this arrangement. Long before the current building at Westminster was constructed in the mid 1800s, the members of the House of Commons met first in the Chapter House of Westminster Abbey, then from 1547 in St Stephen’s Chapel.¹⁸ Here the seating reflected the ecclesiastic pattern of opposed benches. Charles Barry’s winning design for the new Parliament replicated these same basic arrangements and this model has influenced the shaping of most of the chambers now found in parliaments through the Commonwealth.¹⁹ So entrenched and ‘natural’ is this arrangement of seating that the design brief to the competing architects left little

1989, p. 44 and James Weirick, ‘Don’t you believe it: critical responses to the new Parliament House’, *Transition*, Summer/Autumn 1989, p. 9.

¹⁵ Michelle Grattan, ‘Sharing the Same Kennel: the Press in Parliament House’, in Julian Disney and John Nethercote (eds), *The House on Capital Hill*. Sydney, Federation Press, 1996, p. 218.

¹⁶ Christine Riding and Jacqueline Riding, *The Houses of Parliament. History Art Architecture*. London, Merrell, 2000, p. 8.

¹⁷ Joint Select Committee on the New and Permanent Parliament House, 1970; cited in *Parliament House, Canberra: Conditions for a Two-Stage Competition*, op. cit., vol. 2, p. 29.

¹⁸ Harry Boardman, *The Glory of Parliament*. London, Allen and Unwin, 1960.

¹⁹ Albeit sometimes with a ‘U-shape’ turning of the benches at the end furthest from the Speaker. For a discussion of the rebuilding of Westminster after the fire of 1834 see Alexandra Wedgwood, ‘The New Palace of Westminster’ in Riding and Riding, op. cit., pp. 113–135.

room for variation. The virtues of the Australian horseshoe version of the Westminster seating plan were detailed:

All seats more or less face the chair;
Independents or parties not aligned with either Government or Opposition can be seated in a neutral position; and
A large Government majority can encroach on the opposition side of the Chamber without destroying the basic duality of the Chamber.

and all entrants were told that they ‘must use the seating layouts’ shown in the briefing document. After these requirements were met, competitors were free to determine the shape of the new chambers though again, they were advised that:

the chambers are used for debates, and that a sense of intimacy is highly desirable. The Chambers should not be thought of as auditoria and the room volumes should promote an atmosphere conducive to face-to-face debates.²⁰

However, the fact that Barry Jones could not see the whites of his opponents’ eyes suggests that face-to-face confrontation did not remain a priority.

A bigger chamber necessarily changes the mood and the dynamic of the debates. People behave differently in differently shaped space. There are many studies that show how differently configured rooms will ‘induce’ particular patterns of behaviour.²¹ There is anecdotal evidence as well. A few weeks ago, commenting on the outcomes of the 2020 Summit, Glyn Davis acknowledged that the meetings in the more formal rooms were conducted with a different feel than those that met in less formal spaces.²²

Large and more open spaces tend to mean that people speak more slowly.²³ Smaller and more intimate rooms can lead to greater tension. Almost every writer who has discussed the importance of the size of the debating chamber has cited the speech given by Churchill (as did Glyn Davis) ahead of the reconstruction of the Commons chamber after it was destroyed by German bombing in 1941. Churchill argued that the temptation to re-build the chamber so that it was finally large enough to accommodate every member should be resisted.²⁴ What is less commonly known is that the limited size was a deliberately designed feature of Barry’s bombed chamber. The directions given for the 1835 competition specified that the chamber should not be large enough to give every member a seat. Although there was no ‘direction for how the chambers [the Lords and the Commons] should relate to each other’, entrants were given clear directions that the

²⁰ *Parliament House, Canberra: Conditions for a Two-Stage Competition*, op. cit., vol. 2, p. 30.

²¹ Roger Baker, *Ecological Psychology: Concepts and Methods of Studying the Environment of Human Behaviour*. Stanford University Press, 1968; and Paul Carter, *Repressed Spaces: the Poetics of Agoraphobia*. London, Reaktion, 2002.

²² ABC Television, 20 April 2008.

²³ Goodsell, op.cit., p. 297.

²⁴ See for example, Ken Coghill and Despina Babbage, ‘Seating in Legislatures’, *Legislative Studies*, vol. 5 no. 2, Spring 1991, pp. 15–22, Goodsell, op. cit., pp. 287–302, Gavin Stamp ‘ “We Shape Our Buildings and Afterwards Our Buildings Shape Us.” Sir Giles Gilbert Scott and the Rebuilding of the House of Commons’ in Riding and Riding, op. cit., pp. 149-161; and Jenny Hutchinson, ‘Setting the Scene’ in Julian Disney and John Nethercote (eds), *The House on Capital Hill*. Sydney, Federation Press, 1996, pp. 1–11.

Commons should retain its ‘oppositional character’ and that there should be ‘seats for only 428 of the 658 members’.²⁵

In arguing against rebuilding with a larger chamber, Churchill asserted that the shape and size of the Commons was a crucial force in influencing the character of the debates that had occurred within it: ‘We shape our Buildings and afterwards our buildings shape us.’²⁶ It was important for Churchill that the Parliament, and specifically the Commons, was ‘a strong, easy, flexible instrument of free Debate’. He believed that the way to achieve this was an ‘intimate’ debating chamber with a sense of ‘crowd and urgency’. A small chamber meant that the important speeches were delivered to a congested House and ministers needed to be able to command the space and draw strength from the tension. It also meant that the great majority of debates would not be in ‘the depressing atmosphere of an almost empty chamber’. Admittedly, several back-bench members were less persuaded than those on the front-bench by the merits of re-building without enough seats, but one at least one remarked on the decline in quality of debates during the time that the Commons were forced to meet in the (slightly longer) Lords chamber.²⁷

Critics of this argument point out that adversarial environments are not necessarily conducive to the best policy outcomes. Where Churchill saw merits in political tension and ‘urgency’, others have argued that this may lead to fruitless conflict, uncooperative and ultimately, unproductive behaviour.²⁸ Some have argued that the oppositional form suits some, but not all, members. One of the first to speak against Churchill was Nancy Astor—the first woman to take a seat in the Commons. Arguing against the lining up of government and opposition directly facing each other she said: ‘I do not believe that the fights in the House of Commons helped democracy.’²⁹ In making this case Astor was identifying one of the key problems with the adversarial system. It can work to disadvantage any member who does not relish, and flourish in, a conflictual environment. Marian Sawyer has usefully made the point that ‘women perceive themselves as doing less well in the adversarial chamber politics characteristic of majoritarian Westminster systems.’³⁰ She suggests that the physical organisation of the chamber—the layout of the seats with opposing parties facing each other—encourages ‘masculine styles of politics’. This, in theory at least, is more likely to lead to the dominance of those who can assert their strength of will over the collective assembly. Similarly, this arrangement is unlikely to advance the diversity of voices that a truly representative chamber should accommodate. As she proposes, one solution might be to consider arranging the seating not by party allegiance but by region, with members from adjoining constituencies sitting next to each other (as is the case in Sweden) or by lot (as is the case in Iceland).³¹

²⁵ Deyan Sudjic and Helen Jones, *Architecture and Democracy*. London, Laurence King, 2001, pp. 69 and 74.

²⁶ Winston Churchill, *Hansard*, Commons, 28 October 1943.

²⁷ Godfrey Nicholson, *Hansard*, Commons, 28 October 1943.

²⁸ Coghill and Babbage, *op.cit.*, p. 17.

²⁹ Nancy Astor, *Hansard*, Commons, 28 October 1943.

³⁰ Marian Sawyer, ‘Parliamentary Representation of Women: From Discourses of Justice to Strategies of Accountability’ *International Political Science Review*, vol. 21, no. 4, 2000, p. 369.

³¹ *Ibid.* pp. 369–70.

While it is true that that a differently configured chamber—either semicircular like those in the US Congress and many European Parliaments—or a mixing of the parties, may lead to debates assuming a different character, there is little evidence that parliamentary conflict would diminish. Indeed, it is notable that those parliaments where the tension builds to the point of direct physical confrontation tend to be the so-called ‘consensual’ or ‘non-adversarial’ chambers. Any search for examples of debates that have broken down and led to violence, in fact shows that they are much less frequently found in Westminster style oppositional chambers than they are in semi-circular ones.³² Some of this might be accounted for by the fact that managed and ritualised conflict is part of the design of the Westminster system. By institutionalising and accommodating conflict in the seating and the oppositional form, the chance of ‘unmanaged’ and more physical conflict is diminished. Part of it, of course, also reflects the very different political practices that operate in different parliaments and the diverse political parties and representatives that varied electoral systems generate.

More generally, there is an intrinsic strength in the adversarial system. We should not lose sight of the fact that debate—the contesting of ideas—is vital if a democracy is to stay strong. If I turn again to Milton, in an essay against censorship he wrote:

out of many moderat / varieties and brotherly dissimilitudes that are not vastly / disproportionall arises the goodly and the gracefull / symmetry that commends the whole pile and structure.³³

A similar architectural metaphor is used by a contemporary of Milton’s, Andrew Marvell. In a poem reflecting upon the achievements of Cromwell’s ‘attempts to establish constitutional order’,³⁴ he sees oppositional debate as necessary to give the outcome strength. He wrote:

While the resistance of opposed Minds,
The Fabrick as with Arches stronger binds³⁵

In other words, the dynamic of debate is important. Policies that have weathered testing and challenge by spirited opposition are likely to be better refined and better developed and—like Marvell’s arches—more likely to hold up. The challenge is determining the best space and best arrangements within that space to promote productive debate. I will leave it to those who have sat as Members in this Parliament to say whether or not the chambers are too large—but to my eye, even during the major set piece announcements when the chambers are full—there is not the same air of close engagement and productive tension that can be found in more crowded assemblies.

³² Clement Macintyre, ‘Designing Debate: the Implications of Parliamentary Architecture’, *Legislative Studies*, vol. 12, no. 1, 1997, pp. 46–7.

³³ John Milton, ‘Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, to the Parliament of England.’ *The Complete Prose Works of John Milton*. New Haven, Yale University Press, 1953–1982, vol. 2, page lines 11–14.

³⁴ David Aers and Gunther Kress, ‘Historical Process and Individuals in *Areopagitica*’, in David Aers, Bob Hodge and Gunther Kress (eds), *Literature, Language and Society in England 1580–1680*. Dublin, Gill and Macmillan, 1981, p. 173.

³⁵ Andrew Marvell, ‘First Anniversary of the Government under his Highness the Lord Protector’, lines 96, 97. *The Complete Poems*. Elizabeth Story Donno (ed.), Harmondsworth, Penguin, 1972, p. 129.

So we can see that in the Australian parliamentary model there is some friction between the belief that the arrangement of space produces a dynamic exchange of ideas, and the idea that this very arrangement may diminish the expression of a broad representation of views. There is, I think, a further tension built into the structure of this Parliament. That is the co-location of the executive and the legislature. The nature of the changing relationship between executive and parliaments is one of the perennial topics of investigation by political scientists in Australia.³⁶ As with governments in Europe and North America, the Australian story is one of growing executive power at the expense of the Parliament.³⁷ This is a result of several factors.³⁸ Principal among these is the scale and scope of policy matters that governments now routinely deal with. A study conducted among MPs and parliamentary officials in the late 1980s showed that 75 per cent of the MPs and 70 per cent of the officials interviewed either ‘agreed’ or ‘strongly agreed’ with the proposition that ‘increasing complexity ... made it harder for the Parliament to check the Executive.’³⁹ Moreover, any examination of the responsibilities assumed by governments over time shows an extraordinary and consistent increase in the number of executive decisions and legislative initiatives.⁴⁰ Commentaries from more than 25 years ago drew attention to the diminished time that Parliament had to consider bills in detail, and there can be no question that time is more pressured now than it was in the early 1980s.⁴¹

Added to this very considerable growth in the complexity of policy issues, we have seen a growth in the volume of data that informs and influences policy making, and a much more substantial (frequently international) policy focus required by government. One last key factor that must also be recognised is the way that the media, especially the electronic media, tends to focus principally on the Prime Minister and, to a lesser extent, on a narrow range of ministers, rather than on the parliamentary processes that endorse or refine legislative initiatives. All these factors—with others (I haven’t for example, touched at all on the role of parties)—have meant that the Australian political process has been subject to similar forms of concentration to those seen elsewhere. The executive is able to operate from a position of strength and dominance, and is frequently able to prevail over the legislature and so limit the capacities of the legislature to undertake its classic roles of scrutiny and the maintenance of government accountability.

Then, in Australia, there is one further factor that reinforces the power of the executive. This is the fact that, by deliberate design, the key executive offices are located in the same building as the legislature. This arrangement seems to be a peculiarly Australian

³⁶ For a good overview of the history of the relationship see Jim Chalmers and Glyn Davis, ‘Power: Relations between the Parliament and the Executive’, Parliamentary Library Research Paper 14, 2000–01.

³⁷ Thomas Poguntke and Paul Webb (eds), *The Presidentialization of Politics: a Comparative Study of Modern Democracies*. Oxford University Press, 2005.

³⁸ See Michael Keating and Pat Weller, ‘Cabinet Government: An Institution Under Pressure’, in Michael Keating, John Wanna and Pat Weller (eds), *Institutions on the Edge? Capacity for Governance*. St Leonards, NSW, Allen and Unwin, 2000.

³⁹ McIntosh, *Rounding Up the Flock?* op. cit., pp. 34–36. Members of the media were more forthright: seventy-nine per cent of them strongly agreed or agreed with the proposition.

⁴⁰ Gordon Reid and Martyn Forrest, *Australia’s Commonwealth Parliament 1901–1988: Ten Perspectives*. Carlton, Vic., MUP, 1989.

⁴¹ Gordon Reid, ‘The Parliamentary Contribution to Law Making’, *Politics*, vol. 15, no. 1, 1980, pp. 40–41.

practice. Or more accurately, a peculiarly Commonwealth government practice, as the states maintain separate sites for their parliaments and executive offices. The account that is generally given for the co-location of the executive and the Parliament is that there was no alternative when the Federal Parliament re-located from Melbourne to Canberra in 1927.⁴² The administrative centres of the federal departments remained in Melbourne for some time and the Prime Minister and ministers found space in the provisional Parliament House—and then just remained there. This accounts for how and why the executive originally found itself working in the parliamentary buildings, but it does not really explain why they remained there for the following 61 years or why they were given their own discrete accommodation in the new Parliament House.

There is no simple answer to these questions. Cost would have been a major disincentive in the years before the Second World War. Then, it may well be that inertia and different priorities combined to discourage the construction of a separate executive building as Canberra grew in the post war years. However, for whatever reason, there seems to have been minimal debate about using the opportunity offered by the building of the new Parliament House to find a new location for the executive offices. The various parliamentary committees that considered the new Parliament House seem to have operated on the assumption that a larger space for ministerial offices would naturally form part of the new building.⁴³ Perhaps it was simply the case that after so long:

A political and bureaucratic culture had emerged which resisted the resumption of [a] normal ministerial presence amongst Federal bureaucrats.⁴⁴

By the time the design briefs went to the competing architects, the co-location of the executive and the legislature had been turned into a virtue and the claimed ‘advantages’ of this arrangement were listed. In essence, these were saving time on travel and ease of communication between ministers and between ministers and other parliamentarians.⁴⁵ So, the executive ‘element’ of the proposed new Parliament House was explicitly defined and had to meet narrow and clear criteria. Chief among those was the need for separation and security. There are echoes here of Milton’s ‘close recess and secret conclave’.⁴⁶

The competing architects were told that ‘Security is of paramount importance’, that the ‘Executive Government element should be a clearly defined zone’, and that connections with other parts of the building should be kept to a minimum. The area had to be ‘secure and self contained’, but not ‘isolated’ as the ‘interaction patterns of Ministers and staff preclude that’. There was to be secure entry to this area from the rest of the parliamentary building, but there was also to be a ‘private entrance for the sole use of Ministers’ with ‘direct and secure access to their vehicles in a location away from public areas’. The schematic diagram that accompanied the written brief had the main public

⁴² Terry Fewtrell, ‘Parliamentary Order’, *Australian Journal of Public Administration*, vol. 44, no. 4, December 1985, p. 324, McIntosh, *Rounding Up the Flock?* op. cit., p. 17, and Weirick, ‘Don’t You Believe It’, op. cit., p. 44.

⁴³ See for example, letter from Edward St. John (Member for Warringah) to The Joint Select Committee on the New and Permanent Parliament House, 12 September 1968.

⁴⁴ Weirick, ‘Don’t You Believe It’, op. cit., p. 34.

⁴⁵ *Parliament House, Canberra: Conditions for a Two-Stage Competition*, op. cit., vol. 1, p. 22.

⁴⁶ Milton, *Paradise Lost*, i 775.

foyer of the Parliament at the furthest point from the executive and showed a ‘very low’ expected pattern of usage or traffic. The next closest to the fringe were the senators and members with low traffic anticipated. The area placed closest to the executive and expected to produce the highest volume of traffic was ‘Refreshments’.⁴⁷

Now there can be no argument that security was of growing importance in the late 1970s—the Hilton Hotel bombing in Sydney had occurred in February 1978—and the design brief was in some ways quite prescient in its anticipation of this as a priority. Yet the stress placed upon it suggests an obvious problem with the assumptions underpinning the conception of the new building. If security was paramount, if it was vital that ministers should have a secure and private car entrance that was remote from public and media gaze, why were they being housed in what is—or what should be—a public building? We know from the design brief that ministers’ suites were expected to be no more than two minutes from the chambers.⁴⁸ This, of course means that ministers could be working at their desk and be available for divisions. However, appearances in the chambers constitute a relatively minor part of a minister’s life. To take just the House of Representatives, the number of sitting days when ministers need to be physically in the building averages somewhere between 65–75 a year. In comparison to other parliaments, this is a low number. The average number of sitting days per year for the Commons in the 26 years before 2004–05 was 160 (and peaked at 244 in one year) yet ministers seem able to balance their legislative duties at Westminster with their departmental duties elsewhere in Whitehall.⁴⁹

Many of the problems of co-location have been covered by others. Before the building was complete, Terry Fewtrell had argued that the accommodation of the executive in its own discrete wing of the new building reflected ‘the strength of the Executive *vis-à-vis* the Parliament in recent times’. Further, he feared that the concentration of the power of the executive would be increased when all the ministers were concentrated into a single area, rather than being spread through the building as had been the case in the Provisional Parliament House.⁵⁰ In his study of the relationship between the executive and the Parliament, Greg McIntosh cited Fewtrell’s work and numerous other commentators—a mixture of MPs and external observers—who all expressed concerns about the retreat of the executive to a ‘citadel’ in which they would be less accessible to backbench MPs during their time in the parliamentary buildings.⁵¹ Significantly, several commented that it was not just the formal access that was diminished, but the fact that casual meetings in the corridors became less frequent meant that there was a reduced interaction and exchange of ideas. This was also a problem for the media. McIntosh’s study shows that 61 per cent of MPs agreed that face to face communication had become

⁴⁷ *Parliament House, Canberra: Conditions for a Two-Stage Competition*, op. cit., vol. 2, p. 65.

⁴⁸ Beck, *Parliament House*, op. cit., p. 158.

⁴⁹ House of Commons Sitings since 1979, <http://www.parliament.uk/commons/lib/research/notes/snsg02226.pdf>.

⁵⁰ Fewtrell, ‘Parliamentary Order’, op. cit., pp. 325–6. However, see also Fewtrell, ‘Welcome To Our House’, *Canberra Times*, 9 May 2008, in which he is less concerned about the location of the executive.

⁵¹ McIntosh, *Rounding Up the Flock?* op. cit., pp. 18–9.

harder while 94 per cent of those interviewed from the Press Gallery agreed.⁵² As we have already seen, Michelle Grattan was one who made similar criticisms.⁵³

The lament by many who had worked in the provisional Parliament House that it was no longer possible to bump into ministers while passing through King's Hall or while having a coffee, is a recurrent theme. The importance of this was recognised in the design brief that called for the maintenance of the easy communication between members and ministers. However, the brief also recognised—as unfortunately we must today—that security is of prime importance, and specified that a secure site for the executive was essential. These competing requirements led to an unfortunate outcome. We now have the executive in a discrete wing within the Parliament House. This means that senators and members are unlikely to pass through this section while going about their normal daily activities and the 'casual' access of the media to ministers is restricted. Surely a better solution would have been to acknowledge the reality of the separation and to physically divide the legislature from the executive. This would mean that ministers spent most of their working days in their departments (and would possibly foster greater levels of ministerial responsibility). Then, on those days that the Parliament was sitting, ministers could work from offices distributed through the secure parts of the building and engage more readily with other parliamentarians and the media.

If the Parliament was the site of just the legislature and not also the home of the executive, then I think it would be different place. Having the legislature and the executive housed in their own buildings would allow each to function in a way less inhibited by the presence of the other. If this building was unambiguously the place of the elected representatives of the people rather than being simultaneously the symbol of the government then visitors, elected members, and those who work here in other capacities would view the building in a different light. While I cannot quantify this in any measurable way, it is self-evident that the perceptions of a place change the way that it is used and the way that occupants engage within it.

I have already commented on the lack of casual interaction that was once a feature of a central space such as King's Hall in the Old Parliament House. All the anecdotal reports that I have received is that the equivalent space in this building—Members' Hall—does not work in the same way. Like King's Hall in the Old Parliament, Members' Hall in this building is the link between the two chambers, but there are two key differences. Firstly, Members' Hall is not the same pivot point that King's Hall was in the Old Parliament House. When it is used by members and senators, it is as a thoroughfare rather than as a meeting place. Secondly, there is no access for the general public. This means that there is not the same sense of energy and bustle as was the case in the Old Parliament House. Anyone who had the chance to stand in the middle of King's Hall and watch the interaction of the ministers, members, press and public while the Parliament sat in that building will see a stark contrast with the level of engagement that takes place in Members' Hall here. The architects intended this central space to be a place where reflection and informal discussion would occur: 'the literal and symbolic meeting place between the two Houses'.⁵⁴ The pool of water reflecting the movement of the clouds and the flag above was intended to connect the members with the outside world. But there

⁵² McIntosh, *Rounding Up the Flock?* op. cit., p. 52.

⁵³ See note 15 above.

⁵⁴ Beck, *Parliament House*, op. cit., p. 122.

must be better ways to get the outside world into the Parliament. This is, I think, one of the unresolved problems. The scale of the building and the number of people working in it mean that the building has assumed some aspects of an insular and enclosed community. This should not be a surprise, as it was clear from the start that this would be in issue. The brief that guided the architects made reference to the building operating with some of the resources of a small self-contained community and, as commentators have pointed out, the building and its working population is bigger than a small town.⁵⁵

Of course some of this could not be resolved by the architects. The decision to place the building on top of Capital Hill meant that the Parliament would always be remote from its own community. It is not easy to step outside the Parliament and mix with the workers and residents of the city here in the way that it is in most of the Australian state and territory parliaments.⁵⁶ The building is not physically adjacent to a commercial or residential centre. It is designed to be approached by car. That means that most people who work here arrive by car and enter directly from the car park. Visitors who come by car similarly have the rather drab concrete interior of the car park as their first impression. In fact, the building is best approached by a walk up Federation Mall from the back of the Old Parliament House, but this is scarcely practical for most visitors. The relative isolation of the building means that crowds are less likely to gather spontaneously than in other public places. Having said that, one of the joys of the building is the way in which those who are on foot can choose to ignore the entrance and keep going so that they are walking across (at least part of) the roof of the building. This sense of the people being above the representatives was one of the key conceptual features of the architects and, even now with limited access, it still works—albeit that there have been times when even this is denied because of the ever-present security concerns.

Those visitors who do enter do not, in fact, get to see all that much of the building. It is true that they are certainly likely to be impressed by the foyer and the Great Hall. The scale and finish of these rooms are designed to impress. In Milton's *Pandemonium* it was the 'porches wide, but chief the spacious hall' that reduced the occupants to the scale of bees as they swarmed within it.⁵⁷ In the public spaces of this building people similarly bustle about as though bees in clusters. Visitors can then enter the galleries of the chambers and they can peer over the balcony at the (generally deserted) Members' Hall. However, not much more than this is on open access. I accept that the world has changed and that appropriate security measures in places such as this are needed but applying a *cordon sanitaire* to all other areas does nothing to promote the healthy engagement between the citizens and their elected members in this the most symbolic of political spaces. Isolation is not good for democracy.

So, to conclude: parliaments and parliamentary buildings are more than just institutions and places where elected representatives meet and consider legislation. They have a symbolic role as the theatre of state, and the buildings themselves often come to

⁵⁵ *Parliament House, Canberra: Conditions for a Two-Stage Competition*, op. cit., vol. 1, p. 19 and Beck, *Parliament House*, p. 21.

⁵⁶ Though one notable exception to this is the Western Australian Parliament which is separated from Perth by a major cutting holding a busy freeway.

⁵⁷ Milton, *Paradise Lost*, i 762.

represent or reinforce ideas of national identity.⁵⁸ This means that in taking stock of this building over its first twenty years we need to consider not just how well it works as a modern and efficient parliamentary space, but also how well it represents the character of Australian democratic traditions. There can be no argument that the increased space and improved facilities means that it should be a more productive work environment than the Old Parliament. Whether we can be as clear about the more theatrical or symbolic roles is less evident.

In this talk I have considered the way that the space in the chambers works and whether it encourages or acts against productive debates, I have considered the implications of siting the executive in the same building as the legislature, as well as the effect of limited public access. Clearly, these are not things that can be—or, more accurately—will be changed. The chambers will not be re-designed, the executive will not be moved and security concerns will not disappear. Given this, what can be done? I will finish by suggesting some of the goals that possible reforms should be aimed towards. And I do so, not pretending that these will resolve my concerns, but perhaps hoping to spark some debate or further consideration of these issues.

Firstly, some effort should be directed towards enhancing the independence of the House of Representatives and, to a lesser extent, the Senate (lesser for the Senate because it already has a greater level of independence). Breaking the dominance of the parties has been the dream, albeit forlorn and unrealised, of many academic critics. It is unrealised largely because the adoption of reforms depends upon the support of the parties and, not surprisingly, they take a bit of convincing. However, such initiatives as a more formally independent Speaker, distribution of the chairs of committees more evenly, Parliament's control of an independent budget, better resources for back-bench and non-government members are all obvious steps forward for any Parliament. Similarly, electoral reform for the House would generate a more representative range of voices. One way or another, the more that the elected representatives feel capable of resisting the dominance of the executive, then the more the Parliament will be able to genuinely reflect the 'interplay of political forces in the legislative processes of government'.⁵⁹

Similarly, if re-locating the executive to a new building is not feasible, then some effort should be made to increase the informal interaction between ministers and other parliamentarians during sitting times. Perhaps a redistribution of the space so that there is a better mix of offices would allow for the casual encounters that were a feature of the Old Parliament House without threatening the security of any member. This might mean that some ministers find it harder to avoid the media—but I don't see this to be a particular problem.

Lastly, how can this 'people's house' be made more accessible to the public without compromising the security requirements? This has both symbolic and physical dimensions. If the Parliament—that is the elected representatives—can demonstrate their independence from the executive, if there is a greater sense of engagement and open debate, if the executive is less remote in its 'secret conclave' then I think that the Parliament may be seen to be more unambiguously an open and accessible place to consider what Milton called our 'state affairs'. If even some of this can be achieved, then

⁵⁸ Sadjic and Jones, *Architecture and Democracy*, op. cit., p. 42.

⁵⁹ *Parliament House, Canberra: Conditions for a Two-Stage Competition*, op. cit., vol. 2, p. 29.

the community may well feel more engaged and able to feel that they are part of our 'theatre of state'.



Question — I am a resident of Canberra, and I have been watching Parliament's activities for a few years. You make the argument that the size of the debating chambers cuts down the exchange of ideas. My feeling from watching Parliament for so long is that very little exchange of ideas takes place in the debating chambers. I suspect that most of the ideas come from Senate committees, or other committees. They are more intimate spaces, and that is where exchange of ideas takes place.

Clement Macintyre — It wasn't so much that the size cuts down on the capacity to generate ideas, but the way in which those ideas are then debated and challenged, and tested. I have not sat in the Parliament, I have not even been on the floor of the chamber in this building, but every time I look at it I get a feeling that it is lacking in a sense of energy even during big and serious debates. There is not the same bite and energy and fire that I think is productive of challenging and testing the ideas that may well come from committees. I probably wouldn't disagree at all with your main proposition.

Question — You were discussing how the design of the Parliament reflects the democracy which it embodies. But you have only discussed this in terms of the actual sitting chambers and the siting of the executive. I may say that I agree with you completely on the executive, having a lot of knowledge of the South Australian Parliament, which is so different. But you didn't consider the other parts of the building which are very much integral to its function: the Library, the meeting rooms, the lack of child care in the original design of this building, all reflect also on the democracy which gives rise to it, and also the workings of the building and the interactions of the people there. I wonder if you would care to comment on some of these ancillary facilities.

Clement Macintyre — I was always told by Janine Haines that it was a choice of child care or a swimming pool and the boys won, to quote Janine. I am not sure if that is true, but it is a good story.

I think you are right. It is the informal engagement that often shapes the character of a Parliament as much as the debating spaces, and the buildings are partly influential in the manner and the nature of that engagement and partly it is the political culture that somehow is intrinsic to the people who are elected. As I was reflecting on things to say today I was told by one senator that she was banned from dancing in the corridors after one raucous night. I am told that the original bar is closed down and that is where, in the opinion of a number of people, informal engagement and exchange of ideas across political divides would take place. Watching *Lateline* or something like that and sharing a beer with somebody from the other side of politics, you would be able to get a different feel and a different sense of where ideas were coming from and what lay behind them, and that level of informal engagement perhaps takes place less than it once did.

Having said that, it is inconceivable that we could go back to the Old Parliament House. The number of people working here, you mentioned the Parliamentary Library, and the resources and the facilities available in this building are extraordinary and it would be inconceivable to turn our backs as it were and undo that and I am not arguing for that for a moment. I suppose it is a plea for using the opportunity of the 20th anniversary of the completion of this building to think about how it is working and thinking about whether or not there are ways that we can tweak some of the behaviour patterns that may take place within it.

Question — I am a local and independent tour guide, so I deal with the public in this building. You mentioned about the limited public access. I was wondering whether you had any statistics or had looked at comparative figures of visitors to the actual public galleries of the debating chambers, compared to other systems around the world. It has always been my impression on visiting others that that part is much more open here.

Clement Macintyre — I don't have figures, but it is good point you make. The design brief said that there should be much larger public spaces around the chambers in this Parliament than was the case in the provisional Parliament House and also mandated the glazing-in of a couple of the galleries so that they could be used for educational purposes without disrupting the proceedings of the house. I think they are excellent initiatives.

Different parliaments in different parts of the world have different characteristics. It is very difficult to get into some of them. I was recently in Rome and went to have a look at the Italian Parliament and got told that it is open for an hour on one Sunday a month or something like that. There is a stark contrast between that and the access that the citizens of Australia have to this building and that is a great thing for us. I think it is one of the most popular tourist attractions, at least in the early years; I think the numbers have declined a bit in recent years in terms of visits but it is clearly a place people come to when they are visiting Canberra. That is all great. I don't think though that they get to see enough of it, and if you come in as I have done several times myself, as a tourist having a look around, you don't see Members of Parliament, you don't see the working spaces, other than peering in from above. I am conscious as I'm saying that that we have to recognise the importance of security but some way or another we should be thinking about ways to make that balance more effectively than it is at the moment.

Question — The question of the role of the physical nature of the building and the way Parliament operates is obviously a very complex one. I am not sure that most of the things you mentioned weren't happening anyway. When I was first a public servant in Canberra, ministers did have offices in their departments, and I can remember that you would often see the minister. That stopped long before new Parliament House. It stopped because of movements within the government, not because of the structures of Parliament House. So I am wondering whether the building really matters that much or whether what we are seeing is simply the reflection of trends that were already happening.

One final question: Are kids still permitted to roll down the lawns from the top of Parliament House? I can remember when my kids were young they used to have a wonderful time rolling down the grass. You used to be able to go up to the top and they used to roll all the way down. This was a marvellous symbolism and I think made a

marvellous comment: that my kids were having a great time rolling over the top of the parliamentarians doing their duties.

Clement Macintyre — I take your point about the ministers. I think it would be a good thing if the ministers were back in their departments a bit more. I am not a local in Canberra but the stories that I hear is that there are nice ministerial offices in many of the departmental buildings and they are not used all that much by the ministers, and I suspect that it would be a good thing both for the departments as well as the ministers if they were used a bit more. But if that is not going to happen then I suppose it is my plea for the distribution of ministerial offices throughout this building, rather than having them tucked away in a separate and secure area of their own. I think if we can't get the engagement of parliamentarians with the public because of questions of security then let's make sure that ministers can't hide away from the accredited journalists in the building, and the most junior backbencher who is also here.

Absolutely I agree with you about the roof. I remember as an undergraduate student when the design of this building was announced and when the competition result was announced thinking what a splendid innovation that we would be able to walk over the top of the elected members; the symbolism of that is superb. I am not sure when complete access went but I can report, happily, that I was here a week ago with my young son who was doing somersaults down the grass. He stopped as the police started walking towards him in a meaningful way. So maybe the balance isn't quite right but there is still some sense of that passage across the top.

Question — I tried to walk up there this morning to see what would happen. I met a barrier and was glared at quite intimidatingly by a security guard, so I didn't feel that the sort of free and easy access over the top that I used to know was still there, and that's a pity.

Clement Macintyre — Perhaps there is an echo there of the earlier comment about the building reflecting the patterns of democratic behaviour in Australia, and we have seen changes in recent years that are also being reflected here. It is not something that I enjoy seeing.

Question — We had a lecture some time ago from Sir Bernard Crick, a very distinguished British political scientist, and he told me afterwards that he was convinced that reform of the Westminster Parliament had been greatly inhibited by the neo-Gothic design of the building: dark, gloomy, medieval. It made members think they were subjects of a feudal monarchy; whereas the classical design of the Capitol in Washington encourages members think they are Roman senators, people of great importance, so there may be something in that.

Question — Is the complaint about the design of this building more about modern architecture, comparing it to Westminster, say, and the old Parliament House? I was in St Patrick's Cathedral in Parramatta this week, designed by the same architect, and the parish priest was complaining about how he wasn't interacting with the parishioners any more, because of the design of the building. So it is a common problem obviously; beautiful and all as the Cathedral is. I think maybe this is just modernity rather than anything wrong with this particular building.

Clement Macintyre — I hear the comments about the appearance of Westminster and the provisional Parliament House down the hill in front of us here. They are terrific buildings and I love going into them. It is a great joy for me to go into the House of Commons, and every time I get the chance to go into the House of Representatives in the old building the hairs stand up on the back of my neck. I think they are very important symbolic places for our democratic forms. This building is too, though. I wanted not to like this building when I first started thinking about it. I have been back to it several times and I have looked at it from different angles and in different ways, sometimes just walking in as an unescorted tourist doing the walk-through and other times coming in with members and having a bit of a hunt around the back. I think most times I come here I like it a bit more, in terms of the architecture and the aesthetics of it. It is an impressive piece of architecture however you look at it. I am just not persuaded that some of the ways in which it is operating on the inside are as reflective of the symbolic values that the architecture displays.

If I could have one wish, perhaps it would be to reconsider the discrete and separate location of the executive. I think that is a do-able and achievable change. The chambers are not going to be redesigned, and security is not suddenly going to cease to be an issue. I would be interested to see what happened if the ministers were scattered through—not so much that suddenly we would get better legislation and all the problems of the world disappear, but I think that the elected members of the Parliament would feel that the Parliament operated in a different way, and a way that suited them a bit more.

The Rudd Transition.

Continuity and Change in the Structures of Advice and Support to Australian Prime Ministers*

Anne Tiernan

Introduction

When Kevin Rudd won the November 2007 federal election, he became Australia's 26th Prime Minister. Less than a year after wresting the leadership from Kim Beazley, Rudd led Labor to victory over a Coalition government that had reigned for eleven years and which just months previously, had looked virtually unassailable.

Labor detected a mood for change in the electorate and pursued it relentlessly. Throughout the campaign, Rudd offered the Australian people 'fresh thinking', a 'new style of leadership' and 'a positive plan for our country's future'. Though criticised for 'me-tooism' and for casting himself as 'Howard-like', he projected moderation and caution, reassuring the electorate that changing their vote would be a safe option. Voters rewarded him on polling day with a net gain of 23 seats in the House of Representatives.¹

The November 2007 election victory was historic in several senses. For the first time since Federation, Labor governments held office in every Australian jurisdiction. Rudd, a Queenslander as he reminded voters throughout the campaign, became only the fourth Prime Minister to be elected from his home state. His deputy, Julia Gillard, became the first woman to hold the office of Deputy Prime Minister. John Howard became only the second Prime Minister to lose his seat, when Bennelong fell to Labor's Maxine McKew.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra on 30 May 2008.

¹ John Wanna, 'Political Chronicles: Commonwealth of Australia. July to December 2007.' *Australian Journal of Politics and History*, vol. 54, no. 2, 2008, pp. 289–296.

Transitions occur only occasionally in Australian politics. Federal governments have changed only six times since World War Two. For political scientists these rare events are a great opportunity. They offer a window into how the system of government is operating; how key institutions have been shaped or changed by the former government and how this compares with their historical trajectory. The arrival of a new administration offers opportunities to distinguish the idiosyncratic from the systemic; to identify the larger forces at work within the political system. It is generally recognised that the few first weeks of a new government's life are crucial. Its early days in power set the tone for how it will govern. Thus we can learn a great deal from the early decisions of a new government—what it changes and what it keeps; what lessons it has drawn from prior experience and from predecessors on its own side as well as from its opponents.

In my lecture today, I outline the Rudd Government's transition to office, drawing on insights from the literature on government transitions in Australia and internationally. I present some early findings from an analysis of the system of advice that is emerging under the Rudd Labor Government, with a particular focus on support for the Prime Minister.

In Australia, a transition to government begins when the election result is known and lasts until the new Prime Minister and ministry are officially sworn in. In reality, of course, the period is much longer. It lasts for as long as it takes to get the necessary arrangements in place in terms of people, process, politics and policy. I will argue that the Rudd transition has been successful because of its attention to these four 'p's' and because it was underpinned by detailed planning, both in terms of Labor's policy priorities and also about how it intended to take the reins of government.

A crucial test of transition is the ability to move from campaigning to governing, which as I will argue, has different imperatives and requires different skills. Transitions offer important lessons for governing. In my concluding remarks I will outline what I think are some of these for the Rudd Government into the future.

My analysis of the Rudd transition spans the period from Labor's pre-planning through to its first budget in May 2008. My argument for adopting a broadly six-month timeframe in this case is that the election occurred in late November 2007. The new ministry was sworn in on 3 December and Cabinet held its first meeting in Brisbane on 6 December. There was frenetic activity in the lead-up to Christmas—Rudd convened a COAG meeting on 20 December, for example. But the summer holidays inevitably had an effect on the process of change. During his election night victory speech Rudd told Australians that his team might have 'a strong cup of tea, and even an Iced Vo-vo on the way through',² but that the hard work would begin immediately. They could, he mused, have Christmas and Boxing Day off, but then would begin the task of implementing Labor's ambitious reform agenda. As it happened, the Prime Minister took a short break—probably well advised after a year of continuous campaigning. Ministerial staff were recruited, ministers took up their portfolios, but Rudd's own department was without a Secretary until Terry Moran arrived in March 2008. Major changes to the structure of the Department of the Prime Minister and Cabinet (PM&C) were announced in early May. So I feel justified in taking a longer view than might be considered usual.

² Kevin Rudd, Election Victory Speech. Brisbane, 24 November 2007.

Six months is as long as a new government's 'honeymoon' lasts. Thereafter, as we have seen in the past week, both the public and the media begin to more closely scrutinise how matters are unfolding. Given that 24 May marked six months since Kevin Rudd was elected Prime Minister, the timing of this lecture almost couldn't be better.

Transitions

Much of what we know about transitions of government is drawn from the United States, where a change of President brings a seismic shift in government structures and personnel. There, not surprisingly, transition planning is regarded as 'essential to ensure continuity in the working affairs of government' and for governmental effectiveness.³ For incoming governments in the US, the formal transition period runs from the day after the November general election until 30 days after the inauguration—a period of around three months. Transitions have been extensively studied by scholars of the American presidency, informed by academic and practitioner perspectives. There is a broad consensus that effective transitions require extensive planning, ideally informed by lessons drawn from the experience of previous administrations, be they positive or negative.

Things are much less dramatic in Westminster-style political systems. In theory, a professional and impartial career bureaucracy ensures continuity of administration and personnel. There is a seamless transfer of bureaucratic loyalty from one administration to the next. The democratic transfer of power from an outgoing to an incoming Prime Minister occurs peacefully, and as Rudd has observed, with great elegance. Like other Westminster traditions, much of this is assumed.

Comparatively little has been written about transitions in Australia, but we know from experience that changes of government can go well or go badly. It is generally agreed, for example, that the Whitlam Government's transition was rushed and chaotic, due mainly to the inexperience of the incoming ministry and its difficulties managing the pent-up ambitions of ALP supporters after 23 years in opposition. In 1983, by contrast, the incoming Hawke Labor Government pursued a deliberate but cautious approach, consciously intended to avoid the mistakes of its predecessor. That transition is regarded as having been successful because it was achieved without major disruptions to the public service or the business of government, but also because it launched a program of reforms that would become the hallmark of the government.

In 1996 the incoming Howard Government eschewed formal transition planning, believing it had cruelled its prospects in the 1993 election campaign. It drew criticism for sacking six departmental secretaries when it took office. While the move asserted the new government's authority over the public service, it had a detrimental impact on relationships and performance. Its negative consequences hampered the Howard Government throughout its first term,⁴ and became a potent symbol in Labor's critique of its lack of respect for public institutions.

³ Stephanie Smith, *Presidential Transitions. CRS Report for Congress*. Washington DC, Congressional Research Service, 2007.

⁴ Anne Tiernan, *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard*. Sydney, UNSW Press, 2007.

Transitions of government offer unrivalled opportunities both for change and to achieve policy goals. Newly elected leaders have great reserves of authority and goodwill and face fewer constraints than at subsequent phases of their tenure. Paradoxically, however, their ability to fully exploit these opportunities is constrained by a lack of experience and the need to focus on getting basic arrangements in place. While obviously a greater imperative in the US, where a new President must assemble a Cabinet, and arrange more than 7300 competitive appointments to the White House staff and the federal bureaucracy, developing basic arrangements is becoming increasingly relevant in the Australian context.

The transition to government no longer involves only ministers and senior officials, but also large numbers of ministerial staff. Higher rates of turnover in the public service workforce challenge conventional assumptions about the policy content and institutional memory available to incoming ministers. In early 2008, Kevin Rudd observed that two-thirds of the current APS workforce was not employed in the service when the government changed in 1996.⁵ Thus 60 per cent of Commonwealth Public Servants had only ever served Howard Government ministers. Given changes in structures and relationships within the Australian core executive over the past 30 years, it is pertinent to question whether our assumptions about transitions of government remain valid or whether they should be adapted to reflect new political realities.

Taking over: Kevin Rudd's transition

Kevin Rudd is unique among incoming Australian prime ministers in that he is the first with previous experience as a senior bureaucrat, a department head and a ministerial Chief of Staff. Consequently, as he told a group of senior public servants, he knows all the Yes Minister tricks. According to the Prime Minister:

... I did remind them that I'm probably the first bloke for quite a while who has been at one stage of his life both Humphrey, Bernard and now the Minister, and in this case now the Prime Minister, so there is very little I haven't seen before.⁶

In a speech to the APS, Rudd drew attention to his own experience of transition, in Queensland in 1989, where as Chief of Staff to Premier Wayne Goss, he encountered a bureaucracy that had not experienced administrative change in 32 years.⁷

Rudd's experience in November 2007 was radically different to that of the Goss Government as described by Weller.⁸ PM&C had, as is conventional, prepared two sets of briefings for whichever of the parties contesting the November 24 election became the incoming government. At 9am on Sunday 25 November, Dr Peter Shergold, Secretary of PM&C, flew to Brisbane to brief the Prime Minister-elect. So too did Dr

⁵ Kevin Rudd, 'The Economy, Inflation and the Challenge of Housing Affordability.' Address to Business Leaders Forum, Queensland University of Technology, Brisbane, 3 March 2008.

⁶ Quoted in D. McLennan, 'Respect at top of PM's agenda.' *Canberra Times*, 11 February 2008.

⁷ Kevin Rudd, 'Address to Heads of Agencies and Members of the Senior Executive Service.' Great Hall, Parliament House, Canberra, 30 April 2008.

⁸ Patrick Weller, 'Transition to Government. 5' in *Political Crossroads: the 1989 Queensland Election*. R. Whip and C. A. Hughes (eds). Brisbane, University of Queensland Press, 1991, pp. 191–206.

Ken Henry, Secretary to the Treasury, to brief Wayne Swan, who Rudd had confirmed would retain the portfolio he held in Opposition. Rudd has described his government's transition as 'seamless', noting this was 'a credit to the APS'.⁹ This echoed the outgoing PM&C Secretary's observation that 'in some ways the value of professional public service is fully appreciated only at the moments of transition when prime ministers or governments change.'¹⁰

Labor's plan

If, as both the literature and conventional wisdom suggest, planning underpins a successful transition, Labor was well served by plans that had been in development since the 1998 election. Though beaten comprehensively at the 1996 poll, Labor was confident it could defeat John Howard on a backlash to the introduction of a goods and services tax (GST) and given the stumbles that characterised its first term. Shadow Minister for Public Administration, Senator John Faulkner, began planning the machinery of government should Labor win office. A renowned historian of the party, he drew on Gareth Evans' 1983 transition report, and convened a reference group of long-standing parliamentarians and senior staffers to advise on its development.

Over successive elections, Labor would refine its plans for taking office. In 2004 its intentions were published as a comprehensive policy commitment. *Machinery of Government: the Labor Approach*, was one of the first policy announcements of the 2004 election campaign.¹¹ The 2004 document provided a solid basis for planning in 2007. Policy commitments for the 2007 campaign reflected the critique Labor had been developing (and which intensified in the wake of the 'children overboard' affair), questioning the integrity of the Howard Government and the lack of accountability of ministers and their staff.

In a joint media statement issued in August 2007, Shadow Minister for Finance, Lindsay Tanner and Shadow Minister for Public Administration and Accountability, Penny Wong, outlined the measures a Labor Government would take to increase accountability and address 'the waste and mismanagement of the Howard Government'.¹² These included: a commitment to cut ministerial staff numbers by 30 per cent, to reduce spending on media monitoring, and to reduce 'abuse of government advertising' by requiring that all advertising campaigns over \$250 000 be vetted by the Auditor-General or their delegate.

Subsequently, Wong reiterated Labor's commitment to Westminster traditions of public service independence and neutrality. She announced that, if elected, there would be no purge of senior public servants as had occurred when the government changed in 1996. Ministers would be expected to allow time to develop good working relationships with department or agency heads. Moreover, Labor would remove performance pay and

⁹ Kevin Rudd, op. cit., 2008.

¹⁰ Peter Shergold, Valedictory Lecture. Address to the Australian Public Service Commission (APSC). Canberra, 8 February 2008.

¹¹ *Machinery of Government: the Labor Approach*. Australian Labor Party Policy Document, 2004.

¹² Lindsay Tanner and Penny Wong, 'Cleaning Up Government.' Media Statement by Shadow Minister for Finance and Shadow Minister for Public Administration and Accountability, 8 August 2007.

introduce a more rigorous and transparent appointments process, with five year contracts for agency heads, ‘unless the appointee has a preference for a shorter period’. Further, Labor would adopt a Ministerial Code of Conduct to reinforce the principle of ministerial responsibility, which, she argued, had been compromised under the Coalition.¹³

These proposals established the contours of Labor’s plan for taking government. Adopting a cautious and positive approach to the public service appealed to grievances that many officials had felt under the Coalition and allayed fears that a ‘night of the long knives’ would destabilise the APS. Once the campaign was formally underway, a small group comprising Penny Wong, Victorian Senator Robert Ray, John Faulkner and Rudd’s Chief of Staff, David Epstein, met regularly at campaign headquarters to discuss transition issues. But the approach was modest and deliberately low-key, reflecting political reticence at being seen to be formally engaged in preparations for government, given the potential to be portrayed as arrogant and hubristic.

Assuming the reins of government

If Kevin Rudd was overawed by his responsibilities as Prime Minister, his countenance never betrayed it. As if to underscore the shift of political gravity from the nation’s southern capitals, and in a nod to the home state that delivered Labor a net gain of nine seats, Rudd conducted the business of government from the back deck of his Brisbane home. He looked remarkably at ease as he received a steady stream of official and international visitors. The new Prime Minister’s informality and self-deprecating style was both a symbolic distancing from the Howard years and the beginning of the narrative that ‘Kevin from Queensland’ was beginning to weave about what Australians could expect from his leadership.

Appointing the ministry

Rudd moved quickly to appoint the new ministry, asserting his authority as election winner to cement his commitment that, if elected, it would be he as Leader and not caucus that would select and appoint the ministry, ‘based on a combination of talent, experience, ability and the needs of an incoming government.’¹⁴ The commitment challenged 100 years of ALP tradition, that the ministry be selected on a vote of the full caucus. Ramsey notes that in making the announcement on the campaign trail, Rudd ‘ambushed his own party to get his own way.’ Only after the ministry was chosen was the leader formally granted the power he had demanded, through an amendment of caucus rules. The decision was an early indicator of Rudd’s determination to ‘modernise’ the Labor Party and to achieve the discipline he considered necessary to win and retain government.

Though several seats remained in doubt, the makeup of the ministry, comprising twenty Cabinet ministers, ten outer ministers and twelve parliamentary secretaries, was announced on 29 November, and officially sworn-in on 3 December. Significant decisions included the appointment of Deputy Prime Minister Julia Gillard to the mega-

¹³ Penny Wong, ‘Labor’s Approach to the Australian Public Service.’ Speech to the Institute of Public Administration Australia (ACT Division), Ainslie Football Club, 20 September 2007.

¹⁴ Alan Ramsey, A. ‘What Kevin Wants, Kevin Gets—For Now.’ *Sydney Morning Herald*, 22 March 2008.

portfolio of Education, Employment and Workplace Relations, and the splitting of the Environment portfolio with Penny Wong as Minister for Climate Change and Water (in the Prime Minister's portfolio) and Peter Garrett as Minister for Environment, Heritage and the Arts. These changes had implications for the machinery of government.

John Faulkner became Cabinet Secretary and Special Minister of State with responsibility for Labor's integrity in government agenda, which includes many of the reforms foreshadowed in its 2004 policy, the Public Service, Cabinet and an evolving collection of other commitments. One third of incoming ministers were appointed to different portfolios than they had held in Opposition. Notable among these was Stephen Smith, who reportedly learned of his appointment to the Foreign Affairs portfolio just hours before it was announced in the media. Ten others gained new or additional responsibilities. A further six were demoted or dropped.¹⁵

Rudd's choice of ministers was favourably received. Freed of the constraints of caucus control, some noted a 'creative tension' in his decision to include some of Labor's newest and most promising talent as parliamentary secretaries in key portfolios. Only four: John Faulkner, Simon Crean, Bob McMullan and Bob Debus (a former Attorney-General in NSW) had prior ministerial experience, though many of the new cohort had significant political experience, mainly in senior ministerial staff roles. Indeed the Rudd ministry is notable for the state government experience of many of its members (and of their ministerial staffers)—a theme that has caused some consternation in Canberra. Some commentators have questioned whether the government may be especially vulnerable to special interests, inclined to respond to negative polls and publicity with populist 'quick fixes', and to favour style over substance. Several 'backflips' in the early months of the government's tenure, notably over carers' payments, whether a rise in the rate of GST should be considered as part of a wide-ranging tax review, helped to fuel these concerns. George Megalogenis has questioned whether because of his populist instincts, Rudd will become Australia's first 'federal Premier—a master of the media cycle who ultimately runs a do-nothing government.'¹⁶

Recruiting ministerial staff

Rudd also moved quickly to appoint ministerial staff. On taking office it made good its 2004 commitment to establish a Government Staffing Committee. Like its predecessor's Government Staff Committee, it deals with all appointments at Adviser level and above.

Within days of taking over, Rudd wrote to ministers outlining their staffing entitlements—the broad formula for allocation being: eleven for Cabinet ministers, eight for non-Cabinet ministers, with larger allocations for the Deputy PM, the Treasurer, Leader of the Government in the Senate and the Manager of Government Business. These allocations had been foreshadowed in the 2004 policy document, but needed to be managed within the promised 30 per cent reduction in staff numbers.

As is standard procedure after an election or a change of leader, all staff positions were automatically spilled. Rudd insisted on a full merit process. Even loyalists who had done

¹⁵ John Wanna, op. cit., 2008.

¹⁶ George Megalogenis, 'A Show About Nothing'. *The Australian*. 19 April 2008.

the hard yards in Opposition were required to apply for jobs in the new administration. This attracted some adverse comment,¹⁷ especially because it included key positions in the Prime Minister's Office, although not Chief of Staff, David Epstein, who Rudd had confirmed in his role during the campaign.

Even before advertisements were placed, Labor had received 1800 applications. Government sources estimate that in total, around 5000 applications were received for approximately 334 positions.

By 30 April 2008, 328 ministerial staff had been formally appointed. Eighty-three of 104 Opposition staff made the transition to government. For most ministers, Chiefs of Staff were the main concern. Those who wanted to retain their Chief from Opposition, or had someone in mind for the job, were required to submit a proforma attaching the individual's curriculum vitae. After preliminary assessment for suitability and experience, appointments were referred to the Government Staffing Committee. For those like Wayne Swan, who retained their shadow portfolio in government, appointments were fairly straight-forward. Others, whose allocation of portfolio was not anticipated, or who have been appointed to portfolios undergoing machinery of government change, it has been a greater challenge.

I have been interested to watch how Labor has recruited its ministerial staff. It has a pool of talent not naturally available to the Coalition, as the Howard Government found in 1996. Some highly experienced individuals with long links to the ALP have returned, including from lucrative private sector or senior government positions. Others came out of retirement to assist the transition process. Many among the senior staffing cohort in the offices of the Prime Minister and central ministers have worked together previously in former Leaders' offices. Sources report that strong personal relationships, developed in Opposition, have helped to foster a collaborative culture. There has been some movement of staff between ministerial offices as the Committee has worked to ensure an appropriate 'fit' of styles and experience. It seems the Rudd Government has adopted an organisational approach to ministerial staffing—at this stage it appears skills, experience and merit have been more important considerations than have personal relationships with the Prime Minister, though the influence of Faulkner and Epstein should not be underestimated.

Labor's approach to ministerial staffing has been informed by its experience of government both federally and at state level. But it is also shaped by its perception of developments under the Howard Government, and it is here that John Faulkner's influence can be clearly discerned. He did significant work in Senate committees during Labor's years in Opposition, particularly around staffing issues in the wake of the 'children overboard' inquiry. Many of the recommendations of the Senate Finance and Public Administration (F&PA) Committee's 2003 inquiry into staff employed under the Members of Parliament (Staff) Act found their way into the 2004 transition document, and have been adopted in government. Labor has committed to introduce a Code of Conduct for ministerial staff. It has also made mandatory the attendance of all ministerial staff at induction sessions specifically designed to orient them to their new roles within government. Faulkner has promised greater accountability for ministerial

¹⁷ Glenn Milne, 'Muttering As Rudd Cracks the Whip.' *Sunday Telegraph* (Sydney), 23 December 2007.

staff and a ‘more traditional role’ than was the case under the Howard Government.¹⁸ It is too early to tell whether these messages will be reflected in ministerial staff behaviour, particularly when there is turnover among the foundation cohort of Rudd Government staffers.

Relations with the public service

Another priority was the government’s relationship with the public service. At the Prime Minister’s request, departments provided senior officers to assist in establishing ministerial offices, for a period of around twelve weeks until the full complement of personal staff could be recruited. Secretaries responded enthusiastically, sending experienced and talented officers with strong organisational and policy skills. This is seen as having been vital in enabling ministerial offices to get up and running quickly—establishing procedures and protocols for working effectively with the bureaucracy. It also cemented good relationships and ministerial office appreciation of the professional skills available within departments. This contrasts with the early experience of Howard Government ministerial offices, many of which, for want of basic administrative arrangements, were, as one senior minister described them, ‘dysfunctional’ for months.

Notwithstanding a generally positive attitude towards the bureaucracy, the incoming government seemed underwhelmed by its performance, especially in providing innovative and creative policy ideas. The public service has struggled to adjust to the priorities and style of the new Prime Minister, whose energy and work ethic—legendary in Queensland—has, it seems, become even more ferocious in Canberra. From the early weeks of the new government’s tenure, there have been complaints about workload, the demands being made on both ministerial staff and public servants, and whether the relentless pace demanded by the Prime Minister dubbed ‘Kevin 24/7,’ is sustainable. These are more than the idle whinges of bureaucratic time-servers. They are seen as workplace health and safety issues but also as management problems that could potentially undermine the government’s ability to achieve its policy goals. Ministers are conscious of these anxieties. Even Rudd has acknowledged how hard officials have worked during the transition period.

But the leak of two Cabinet documents this week has undermined trust between Rudd and the APS. Veteran journalist Laurie Oakes told reporters he did not receive the leaked Cabinet submission from a minister, but that the leak ‘reflected bureaucratic anger at the non-stop nature of Rudd and his failure to follow their advice.’¹⁹ Rudd’s response was quick, determined and ominous. Asked whether he now regretted not purging the public service when he came to office, he told reporters:

Well, the Government took a view before the election that there would be no ‘night of the long knives’. We accept the consequences of that decision. And, we think that it was the right thing to do in order to restore something which resembles the Westminster system in Australia ...

¹⁸ John Faulkner, ‘New Arrangements for Merit and Transparency in Senior Public Service Appointments.’ Media release, Special Minister of State, 5 February, 2008.

¹⁹ ‘Government Defends Fuel Watch Scheme’. Australian Broadcasting Corporation, PM, 29 May 2008.

He also said:

... I understand that there has been some criticism around the edges that some public servants are finding the hours a bit much. Well, I suppose I've simply got news for the public service—there'll be more. This Government was elected with a clear cut mandate. We intend to proceed with that. The work ethic of this Government will not decrease, it will increase.²⁰

Shaping the machinery of government

Labor's plan included changes to the machinery of government, particularly to arrangements that support the Cabinet. Consistent with its 2004 election commitment, the Cabinet Policy Unit (CPU) was abolished—its administrative functions were returned to the Cabinet Secretariat within PM&C. Rudd appointed Faulkner as Cabinet Secretary, the first time since 1940 that a minister has held the post. It had been intended the position would be returned to the Secretary of PM&C, but Rudd had other plans. His Queensland experience persuaded him there were benefits to having a politician in the role. Moreover, it created an opportunity for Faulkner in Cabinet, effectively as 'Minister for Politics'—with a wide-ranging brief as Cabinet gatekeeper, trouble-shooter and guardian of government strategy, mainly ensuring Labor's election commitments are delivered. Faulkner is a crucial player in Rudd's system of advice; a moderating force against the instincts of more political operators. He has a unique, important and highly personalised role in supporting the Prime Minister, though this is something he has been keen to downplay when questioned on the topic.²¹

Cabinet committees have been restructured. Labor has established several new committees, including the Strategic Budget Committee, a Climate Change Committee and it has re-energised the Expenditure Review Committee (ERC) and the role of the Minister for Finance within it. The ERC has met consistently from the earliest days of the Rudd Government, to deal with the need for economic restraint given uncertainty in global financial markets, the credit crunch and the challenge of rising inflation in the domestic economy.

A major change to Cabinet arrangements has been the introduction of Community Cabinets, modelled on the Queensland experience. This fulfilled an election promise that Commonwealth ministers and senior officials would travel to meet with delegations and individuals in their local communities. To date, there have been three Community Cabinets. These have been reasonably well received, though are a significant logistical challenge for a bureaucracy unaccustomed to such intense community engagement as well as for security personnel. Cabinet has met frequently outside of Canberra. Like his predecessor, Rudd favours traditional Cabinet processes. Until recent leaks, the Labor Cabinet has projected as united and disciplined, under Rudd's leadership and that of other senior ministers—Gillard, Swan, Tanner and Faulkner.

²⁰ Kevin Rudd, Press Conference, 29 May 2008.

²¹ Senate Finance & Public Administration Legislation Committee *Hansard*, 26 May 2008, pp. 68–74.

The system of advice

John Howard's advisory system comprised: a large and personalised Prime Minister's Office (PMO), the CPU, headed by a politically-appointed Cabinet Secretary (a MOP(S) Act staffer) with responsibility for strategy and the smooth running of Cabinet and the Department of PM&C—the permanent bureaucracy which grew substantially in size and influence in the latter years of the Howard Government. Under Rudd, arrangements are slightly different, though there are discernible continuities.

Rudd's advisory system is a work-in-progress, but currently includes: a large and powerful PMO and a strong and active Department of PM&C that will be radically reorganised under plans announced recently by the new Secretary.

All prime ministers have a range of formal and informal advisers with whom they consult from time to time. Since coming to office Kevin Rudd has demonstrated a more obvious willingness to engage a broader range of players in the provision of advice to government, consistent with his oft-repeated theme that government does not have a monopoly on good ideas. He has a coterie of close personal advisers including: Professor Glyn Davis, who co-convened the Australia 2020 Summit; his former boss, Wayne Goss; state Labor premiers who provided support in Opposition, especially John Brumby and Anna Bligh, and a network of personal and professional colleagues and friends.

Aside from the Australia 2020 Summit—a bold experiment that yielded a mixed response, Rudd has commissioned a raft of reviews, inquiries and commissions across a diversity of policy areas. His COAG reform agenda has created a plethora of working groups and parties, all focused towards delivering on his promise to reform the federation and 'end the blame game'. For this he has been criticised for being 'a bureaucrat', obsessed with process and policy detail. A more substantive question is the government's and particularly Cabinet's capacity to process and digest the advice it receives.

Like Howard before him, Rudd's system of advice reflects his authority as Prime Minister. It is highly centralised and responsive to the unrelenting demands of the leader. It is reported that Rudd refers to his office jokingly as 'Stalag Kevin'. The long hours worked by staff and the high performance expectations of the Prime Minister have been widely reported, as has Rudd's insistence on personal control across the full spectrum of the government's policy and media management. Senior sources report that it is 'impossible to exaggerate the degree of personal intervention by the Prime Minister. It's his personality.'

Bruce Hawker argues that micromanagement is necessary in the early stages of a new government. 'After about six months, when other ministers have their systems in place, then you can back off a bit.'²² But by temperament and experience Rudd inclines towards 'control freakery'. It may be difficult to adapt his style, given the focus on leaders in the era of the permanent campaign. But it is widely recognised, including within the government, that the current approach poses significant risks—mistakes and

²² Katharine Murphy, 'Rudd's Will To Power.' *The Age* (Melbourne), 29 March 2008.

burnout, and potentially a loss of support among Cabinet colleagues and staff, and as we have seen this week, parts of the public service.

Assessing the transition

In light of this how might we assess the Rudd transition?

The Rudd Government came to office with a well developed plan for taking over the machinery of government and reshaping the system of advice. For the most part it got people (ministers and ministerial staff) quickly and efficiently in place and established positive relationships with the public service. It affirmed the government's commitment to contestable policy advice drawn from a wide range of sources, and asserted the primacy of Cabinet and its committees in policy and decision-making. Labor also had a comprehensive program of election promises, which the Prime Minister declared he was determined would be delivered. Progress towards that achievement was reported in a 100 Days report, a model imported from state governments.

By establishing what presidential studies scholars would describe as 'discipline and effectiveness', the new government was able to 'hit the ground running'. It exploited the opportunities of the transition period to achieve some important and symbolic policy goals, and harnessed popularity and goodwill to frame a new and distinctive narrative of governance. It is hardly surprising then that commentators, including some of Rudd's political opponents, agree that Labor has made a comparatively smooth transition to government.

But six months is as much of a honeymoon as any modern leader can expect. Since the Budget things have been getting very much harder for the Prime Minister and his ministers and some of the strains are beginning to show. Labor has made a successful transition from Opposition to government, but questions remain about whether it has made the more difficult and profound shift from campaigning to governing.

Matthew Dickinson identifies a 'growing disjunction' between what is required to win elections and what is required to govern in an increasingly complex and contested policy and political environment.²³ Campaigns place a premium on rhetoric, political symbolism, and skillful and responsible media management aimed at 'winning' the daily news cycle. Governing, as the Prime Minister and members of his team are learning, is much harder. Certainly far harder than opposition where everything seems possible and there is no responsibility for actually achieving it, let alone any expectation that it will be reconciled within existing priorities and structures. Governing federally is more complex than it was when Labor last held office, and vastly different to state government, where many members of Team Rudd cut their teeth.

Governing requires patience, the ability to compromise, and in an environment characterised by uncertainty and power dependence, sensitivity to the needs and interests of other stakeholders. The media and public expect governments to have total command of the details of existing and new policies, as well as of the full gamut of ministers'

²³ M. Dickinson, 'No Place For Amateurs: Some Thoughts on the Clinton Administration and the Presidential Staff.' *Presidential Studies Quarterly* vol. 28, no. 4, 1998, p. 768

portfolio responsibilities. We expect leaders to respond immediately to new and emerging issues and crises nationally and internationally.

Hence the need for advisory systems that are efficient and responsive, which ensure balanced advice, which help to avoid surprises, which capitalise on a leader's strengths and compensate for any weaknesses. Rudd's advisory system will continue to evolve over the course of his prime ministership. Experience suggests it will be shaped by environmental demands and organisational dynamics as much as by his own personality and working style.

Labor has established policy and decision-making arrangements, but it will take time to develop structures and routines that fully mesh with the new government's agenda and style. There has been significant instability and turnover within PM&C. Since the election, the department has been recalibrating to meet the needs of the new Prime Minister in establishing Community Cabinet, managing the Australia 2020 Summit, servicing a complex and wide-ranging COAG reform agenda—all without a permanent Secretary until March. At times the advisory system has struggled to keep up with Rudd's ambitions.

A key challenge will be to adapt to and assert some control over the 'rhythms' of governing. Echoing presidential scholars, Arthur Sinodinos has argued that 'most importantly, you need to guard against the urgent crowding out the important.'²⁴ Achieving long-term policy objectives requires an ability to focus beyond the daily media cycle, and to 'hold firm' if required, on changes that may be unpopular.

It is also important to develop a sustainable operational tempo. To date Rudd has ignored warnings that his government and advisory system, and importantly, the people who comprise it, can't be expected to run at more than full capacity all of the time. More and better outcomes may be achieved by tempering the pace and by moderating public, and some in the government's own expectations.

Yet the Prime Minister seems unwilling to slow down. Last night and again this morning he said that his team was working hard for all Australians, and that the government's work-rate was more likely to increase than to abate. Campaigns are a sprint, governing is, most political parties hope, a marathon. The imperatives of governing require a different mix of skills, and also, a different mindset.

Kevin Rudd has described the transition to government as a 'learning experience for everyone'. This is true for himself as much as for his ministers, their staff and the public service. I have described the transition process, its key elements and some of the lessons it might hold as the Rudd Government confronts the future. But as I noted at the outset, these are preliminary findings. The real test will be how the government learns and adapts through the experience of its first term, particularly its current troubles. We will know far more about the true measure of Rudd as Prime Minister and about the tenor of his government as Labor approaches its mid-term.

²⁴ Katharine Murphy, *op. cit.*, 2008.



Question — I am interested in your views on Departmental Liaison Officers. I have read your book and I am interested in the DLOs and their role in ministerial offices, and the same DLOs operating in different governments, whether it is appropriate for public servants to do that.

Anne Tiernan — DLOs are public servants sent over to ministerial offices from departments. They remain departmental employees when they go to work in the office of the minister. Their main role as far as I understand it is to manage the paper flow between the department and the ministerial office. I don't know enough yet about the structure that has been adopted by the new government, to tell how the DLOs are working. I know that the numbers of DLOs are about the same as they were. There was criticism by Labor that those numbers had grown very large under the Howard Government. It's very hard to evidence what is going on with the DLO cohort. It was always regarded as a great experience for public servants to be seconded to ministerial offices, to really get their heads around what it's like for people on the other side of the telephone or the email. I understand that the rates of secondment have dropped, but I just don't know enough yet about how the DLO system is working under the new government to be able to give you an informed response.

Question — I wonder if you could give us your opinion on what roles advisors can and should be taking; in particular, what sort of guidance or direction they should be giving to departments and whether they should be signing ministerial correspondence, that sort of minutiae.

Anne Tiernan — I argue in my book that ministerial advisors have outstripped in lots of ways the frameworks that the system was premised on. Staff have over time taken much more active roles; they do a bunch of important and necessary things supporting over-burdened ministers to manage the demands of office.

Maria Maley's study of ministerial staff under the Keating Government identified roles that advisors play: important roles in coordinating, in communicating, in policy, in media management. But the dilemma about ministerial advisors is still that in theory they are an extension of the minister. What does that mean? Well, there is a lot of contestation about what it means. Is it realistic that 41 people are channelling the Prime Minister? I am not sure. Labor has foreshadowed a more traditional approach to ministerial staff, and at the 20/20 Summit John Faulkner was talking about the need for accountability where ministerial advisors are exercising executive authority. Executive authority? What does that mean? How do public servants know whether someone has the authorisation of the minister to be asking them to do something? These are vexed questions in all staffing systems and they become an issue once they reach a certain size. The government promises a more traditional approach, and I am aware that staff have been told to operate within the parameters of their roles. But inevitably, there are shades of grey, and often how the office is going to run is something negotiated with the agency head, the minister.

I don't think I am going out on a limb if I predict that somewhere along the line there is going to be an issue where there is a dispute over what executive authority looks like, and where someone has the authority of the minister. And that is why I argued in the book, that we need proper management frameworks to take account of that. But also, we need a much better understanding than what we have got, and this is true for the staff themselves, of really how these roles work. It has evolved so quickly, and with so little planning and organisation, that it is actually quite hard for someone to end up in an office and know what they should be doing. It's very much the mark of the minister. So I think it will be something to watch.

Question — I'm wondering whether we can learn from the past. From what you have said there are certain parallels between the current government and the Whitlam Government. After long periods in Opposition, there are some similarities, and some differences. First of all, both governments have a minority in the Senate and can expect opposition. Secondly, there are some differences. Whitlam did not have all-Labor governments and he had to accept a caucus-elected ministry. However, there are enough similarities and slight differences to wonder whether or not you can predict what the likely future is going to be for the current government in their transition, knowing that both governments did not win, but the governments they defeated lost.

Anne Tiernan — I don't agree that there are enormous parallels between the Whitlam and the Rudd Governments. The Rudd Government looks a bit to me more like the Hawke and Keating Governments in its transition. If anybody thinks Rudd is going to let anyone run about without discipline they don't know him very well, haven't understood his style very well.

Incoming governments increasingly have long periods in opposition, and this is a huge issue. It is a huge issue when you lose, and it is a big issue for the Coalition, because they have lost, and there is nowhere for their people to go in terms of professional skills. I wanted to make the point that Labor has this pool that it can draw on that's not always contingent on there being state Labor governments, but there is nothing in terms of a place for the 470 outgoing Howard Government advisors to go. That is a management issue down the track; and a recruitment issue down the track. I would never be so bold to predict (political scientists almost never do that, because they know that, like prime ministers, they'll be paying for it in years to come), but I do think that there is an issue about the government's capacity to digest everything it is bringing in, and people have said to me that that reminds them more of the Fraser Government than of the Whitlam Government.

I think there is a huge amount to be learned from the past, and I don't think we do anywhere near enough to understand the lessons from one transition to the next. But John Faulkner does. Do the Coalition have a John Faulkner? Will Labor have one in the next cycle, is an issue for pollies to think about.

Question — My question relates to your emphasis on the pace of work, which clearly has been covered by a lot of commentators and has had a lot of coverage in the popular media. With respect to the events of the last week, I wonder to what extent some commentators also reflected on the challenge of reform in the APS and the challenge within the APS in terms of moving to a new government after twelve years of the past

one; of loyalty; and of the realities of the current situation as compared to the theories of the Westminster system.

Anne Tiernan — That was why I emphasised that we assume that a lot of these things are going to happen, and will happen easily. I am not sure that is any longer true, because it assumes people have been in the Public Service for a long time, that they would have huge amounts of experience. Two-thirds of the current APS cohort have not worked for a different government, and if it is anything like the Queensland Public Service, of which I am an independent commissioner, the churn is unbelievable. The turnover is just extraordinary. That is not something that our model really accounts for, so that is another way in which the traditions, the narratives, might need to be adapted.

It is my own view, a gut feeling, that the lack of a permanent secretary of PM&C at that crucial time made it easier for the government to do a number of things it wanted to do but it left the APS wondering about what was going to happen, even though they had been told there would be no night of the long knives and that kind of stuff.

There are big issues there to be confronted. If you think about how things went under the Howard Government, it really took the public service two years or so to understand where the government was coming from. Now I would say that Labor has come in with a clearer set of plans, but it is still very much about style and personality and the dynamics. The trust will have been really, really damaged by the events of this week and it will be very interesting to see where things go. Again I avoid prediction. Terry Moran has a very big job to do in showing that the bureaucracy can be gotten on top of in terms of loyalty. I think the other thing too that media commentators won't pick up is that I am not sure there are armies of public servants rushing to the Press Gallery with documents. It only takes one or two. But the consequences for trust are immense.

Question — This question is really more about policy transition than structural transition. It is legendary that when a government comes in with promises to do things like reform freedom of information laws or introduce whistleblower protection, all of those integrity in government measures, the clock ticks hard and fast on how long it is before the forces kick in that make them either drop or curtail those measures and step back into incumbency mode. Given the events of the last week, given that we are talking about a government that has got a commitment to introduce, say, whistleblower protection legislation, (and of course whistle-blowing and leaking are not the same thing though they can overlap) my great fear at this point would be that suddenly the true political leaker has queered the pitch for the true public interest whistle-blowing public servant who potentially needs protection. My question is: how hard and how fast do you think the clock is ticking?

Anne Tiernan — That's a hard question. I think that Faulkner is crucial in all this. A bunch of commitments have been made and the fact that they are in the platform or are election commitments means that there is some willingness to do them. But will it happen straight away? Will it happen at the pace the people outside the government might think is appropriate? I don't think it will. Do I think we will see a repeat of what some people have construed as the behaviour of the former government? I am not sure. I don't necessarily think so.

We've got a freedom of information inquiry happening in Queensland as well, and this is sometimes an issue of intent and implementation. A lot of what David Solomon is finding up there is that some of the issues about protecting information are actually in the bureaucracy itself. So that goes to the earlier question about how you make those change processes happen. At the political level I think Labor has taken a lot of lessons from what has gone before and Faulkner is pretty firmly committed to the integrity in government agenda. If it's not there by the end of three years then I think your clock will have reached midnight.

Question — You mentioned the Rudd Government's commitment to a stable public service and keeping permanent heads in place, yet I would expect with any sort of employee/employer relationship, after six months in office perhaps some of those ministers and departmental heads are just not clicking for whatever reason. What is your opinion on how the government might be expected to handle that over the next few months?

Anne Tiernan — The government has said that time will be allowed for the government to establish relationships with permanent heads. If that can't be done, I would expect that a good practice would be for the head of the Prime Minister's Department to step in and to broker some change. I don't think, given the government's and the 20/20 Summit's focus on the skills and capacity of the Public Service, that we can really afford to lose people of professional skills and abilities. The role of the head of PM&C and the Public Service Commissioner are going to be really crucial in that endeavour and it is my sense that for now that will be allowed to work. Some people will say: 'I'm not working like this, I have a stomach ulcer, I don't want to do it anymore'; some people will go themselves I think. And people will always make that choice. I think the government was right to not cut off heads, because it understood that that really did inhibit the Howard Government for a long time. You can't afford to lose that kind of memory and expertise. You might keep it on a short rein but you don't necessarily cut it off on the first day.

Question — I hear in politics a lot of white-anting and aggressiveness and in the media we have seen what has happened this week and my question is: how can we as Australians move towards being more care-fronting of one another rather than confronting of one another? I speak as a woman who has had a husband who has been an assistant secretary of a department and is now well and truly retired, but how can we care-front in politics rather than confront?

Anne Tiernan — I think it is a reasonable question. I think it is very hard. Professional politics is extraordinarily unforgiving. You really do wonder why people do it, just getting flayed all the time, and quite personally too. A small insight into that is that it is not only politicians, although it is primarily them, and their families sometimes. Everytime I have heard the debate this week about 'the butler' on the Prime Minister's staff, I have thought, you know, that is someone working in a role, and is that an appropriate way to be talking about somebody? That person has to go home and see their children.

Professional politics is a hard game and all the players to it understand that. And you must have to have a particularly thick skin to be able to cope with it. One of the lessons of Community Cabinets in Queensland has been that it is a good thing for people to see

you out talking to them and they want to be heard. And they actually prefer that much more direct engagement with leaders and senior officials than having it filtered through the media. Of course there are limits to how much of that sort of thing you can do. But there was concern, particularly as contentious issues come up, about the civility that is shown to senior bureaucrats or to ministers when they go out. It is a pretty unedifying spectacle to have some citizen poking the premier in the chest over some issue. So it is a very confrontational culture a lot of the time.

Question — My question relates to two issues that have been discussed and I would like to try to bring them together: the frenetic pace or pressure on public servants, and the role of ministerial advisors. I suspect that the pace is no greater than it was in the first months of the Whitlam Government, and you may wish to react to that, but I think there is a key difference and that is that in the days of the Whitlam Government instructions came directly from ministers and senior officials who worked directly back to ministers and they debated out the issues. The impression I have now is that many of the instructions come from advisors, and the work goes back to advisors and very often doesn't see the light of day in terms of government. That causes I gather a great deal of frustration and resentment on the part of the officials who have worked so hard. That seems to raise an organisational and management issue which seems to need more work. I wonder if you agree with that observation.

Anne Tiernan — Not the first bit. I fundamentally disagree that the pace is the same as when the Whitlam Government came to office and I will give you three reasons why I think that is so. First, the scope of government is just larger, much larger: many more agencies, many more people employed in the Public Service. We could pull the data out and have a look but I would be surprised if that wasn't exponentially different. The second thing is the rise of the 24-hour news media. When I was doing research for my book I talked to Keating Government advisors. In the latter years of that government, which only left office in 1996, there wasn't email, there wasn't the Internet, the 24-news media was just starting up, so there have been extraordinary technological changes, and extraordinary changes in citizenship expectations which I think make it impossible for ministers to interface personally. That more distant relationship has created some issues, and I have argued elsewhere that the move to this building really changed that dynamic in some quite important ways. It is very different, as I am often reminded, how public servants and state governments experience ministers. They are up in your face all the time because you are co-located in the same building; those dynamics are very different. So I disagree with you there.

It seems to me there are some unanswered questions or anxieties about: why isn't he listening to us, why isn't he doing what we said, because we know best. Well, I don't know whether that's true, and I can tell you that ministers don't think it is true that the Public Service knows best. For a variety of reasons they have sought to reform the Public Service to make it more responsive. One dimension of that is that I don't know that it would have ever been appropriate for a public servant to keep jacking up if a minister didn't accept their advice. Public servants advise, ministers decide. And it says to me that there is something about professional norms, and it speaks to me about a real uncertainty about how things are working. I think that is a huge, important issue. I have been very interested in how both Swan and Rudd have handled matters this week, how they have said: yep, we've got advice from the department, we did this, we did that, and

now we have chosen this. Public servants advise, ministers decide. And that was always true.

Question — The two-thirds figure that you mentioned regarding the turnover, or the churning in the Howard Government, could you disaggregate that?

Anne Tiernan — It was a number that was cited from the Australian Public Service Commission in a speech that Rudd gave, I think in Brisbane in March. The reference for it is in the written part of my paper but you will be able to see it in the State of the Service Report. I couldn't possibly disaggregate that figure if my life depended on it, not only because I am innumerate at times, but because the APSC would have done it. You would imagine that it is probably an overstatement to some extent of people engaged in direct policy roles, because it would include some of the service delivery agencies, which we know, turn over quickly. But that number would be in APS data, for sure.

Compensating Victims of Disaster The United States Experience*

Kenneth R. Feinberg

‘Compensating Victims of Disaster’ (it really should have a question-mark). Is it sound public policy to do so? I will start off by reminding everybody that there has never been anything quite like the 9/11 Victim Compensation Fund. Let’s start there and talk about the implications of that Fund and how it may apply or not apply in the United States, Australia or any other country.

Eleven days after 9/11 Congress passed a law in the United States signed by President Bush and the law was very simple. It said: any party who lost a loved one on 9/11—World Trade Centre; the aeroplanes, the Pentagon—or anybody who was physically injured as a result of the attacks on 9/11 could voluntarily waive their right to litigate; don’t go to court, don’t sue the airlines, don’t sue the World Trade Centre, don’t sue the manufacturer of the aeroplanes, don’t bring a lawsuit; instead, at your option, come into a very generous, publicly funded compensation system. You don’t have to: you can go file a law suit if you want. But why not instead come into a compensation fund funded entirely by the taxpayer and be compensated very, very generously, in amounts unprecedented in American history, or as far as I could tell, unprecedented anywhere? That was what the law said. The law also said that Congress would ask the Attorney General of the United States, and the President, to designate one person to design the program, implement it and administer it, and the President asked me to do it. And I did it for 33 months.

If statistics are any indication, the Fund was a clear, unqualified success. Ninety-seven per cent of all eligible claimants entered the fund voluntarily. Two thousand, nine hundred and eighty dead—their family members entered the Fund—and two thousand four hundred physically injured victims of 9/11 entered the Fund. Only 94 people

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra on 20 June 2008.

decided not to come into the Fund and instead decided to litigate in court. Of those 94, here it is seven years later or so, 90 have settled. So today there are only four people, victims of 9/11, who are still litigating.

There were seven people who did nothing. They never entered the fund; they never filed a law suit. Paralysed by grief, unable to get out of bed, they allowed the fund time limits to expire, and never did anything. I visited some of them. I saw one woman. I said:

Mrs Jones, you have six weeks to file before the fund expires. I'll help you to fill out the application.

Mr Feinberg, I lost my son, go away.

Just sign it. You are going to get about two million dollars tax free.

It won't bring my son back. Go away.

And she never filed. Seven people never filed or never opted to file a law suit. So in grief were they, they were unable to do either. Everybody else came into the fund, or a few people decided to sue.

How much money, publicly funded, was expended? A little over seven billion dollars. The average award for a death claim? A little over two million dollars per claim, tax free. The average award for a physical injury claim? A little over \$400 000 tax free. The awards ranged from five hundred dollars that was awarded to an individual who broke her finger at the World Trade Centre, all the way to 8.1 million dollars that was awarded a woman who survived 9/11 and came to see me with third degree burns over 85 per cent of her body. That was the range of awards.

There were about 7300 claims that were filed and we found eligible about 5300 people, dead and physically injured.

Now the statute creating the fund compensating the victims of this unique disaster was extremely problematic. For example, the statute required that I award different amounts to every claimant. That made sense because, remember, Congress was trying to divert people out of litigation. If you want to entice people out of litigation, you've got to give more money to the stock-broker, the bond trader and the banker than the waiter, the bus boy, the cop, the fireman, the soldier. In other words, by tying the program to the American litigation tort system, it guaranteed that everybody would get a different amount of money, in order to convince people not to sue. That decision of Congress to require one person, me, to evaluate every claim and give everybody a different amount of money was extremely problematic and very, very divisive.

Mr Feinberg, my husband died a fireman at the World Trade Centre, a hero. You're giving me a million dollars less than the banker's widow who worked for Enron. That doesn't sound very fair to me. Am I missing something? Why are you demeaning the memory of my husband?

Well Mam, I'm not demeaning the memory. I'm not looking at the moral, intrinsic worth of anybody. I'm simply calculating awards based on economic circumstances, blah blah blah.

That didn't sit well with people in grief. Now judges and juries do it every day in America. Compensation is the barometer used in compensating victims of loss. If you get killed in an automobile accident, if you fall off a ladder, if you take a drug that doesn't work properly, if you breathe asbestos, compensation, dollars, is a surrogate for loss, for damage. You try telling that to 5300 grieving people. That everybody's going to get a different amount of money. It's a problem.

I'm asked all the time what were the most difficult problems I confronted in designing and administering the program. Well, the first problem was the one I just explained. I was required by law to explain that every single claimant that everybody, your next door neighbour, is getting a different amount of money. Not only was it a problem, but it was a problem administering a program like that. If you are going to give everyone a different amount of money, it is based on what the victim would have earned over a work-life, but for 9/11. What would the banker have made, what would the soldier have made, what would the fireman have made, what would the secretary have made, if they had continued to work?

Mr Feinberg, you ought to calculate based on the future.

Well, you try calculating based on assumptions of what people would have done.

Mr Feinberg, I lost my son, he was soldier at the Pentagon, but he was going to retire from the Pentagon in two years and then get a very good consulting practice and work as a private consultant for the Department of Defence.

How do I know that? That's what you say. How do I look into a murky crystal ball, and try and calculate the future? A big, big problem.

Mr Feinberg, I lost my daughter, she was a first year law associate, she had just graduated law school and was working for a law firm in the World Trade Centre and she was killed. But when you calculate the loss, don't you rely on her first year salary. She was going to be at that law firm for six years and then become a partner in the law firm. And in the seventh year they were going to change the name of the firm to add her name.

Well, Mrs Jones, you don't know that your daughter was going to ...

Don't tell me about my daughter. Did you ever meet her? Did you ever know her?

No.

Well how dare you. You will listen to what I say. It is not speculation. I know!

It was very, very difficult you see so that was problem number one.

Problem number two. The law required me to also award, in addition to economic loss, pain and suffering, emotional distress. Well, I said at the outset, I am not Solomon, and I am not going to calibrate different degrees of emotional distress. Everybody who died had pain and emotional distress. Everybody gets the same: \$250 000 for the death of the victim, plus \$100 000 for each surviving spouse or dependent. That's it for non-economic loss, for pain and suffering. Very controversial.

Mr Feinberg, if I go to court I will get two million dollars for pain and suffering.

You will? You'd better be careful. If you go to court you may get nothing.

That was the second problem.

Then there was the third problem Congress created in its infinite wisdom. After you calculate the awards, you must deduct any money that the victim got from collateral sources, like life insurance, like workers' compensation benefits, like state victim crime payments. Those must be deducted before you cut the cheque.

Mr Feinberg, I don't get it. I was going to get three million dollars from your fund but you are deducting a million dollars because my wife had life insurance. So you're only going to give me two million dollars. My next door neighbour is getting three million, because instead of buying life insurance, they went to Las Vegas and gambled it away. You are penalising me for sound financial planning. I don't get it.

Well Mam, the law requires blah blah blah.

Talk about horizontal inequity. It was a serious problem.

Problem number four. The law made no distinction between American citizens and other people. They were all eligible. I believe six Australians got paid under the 9/11 fund. Six Australians died in New York City or the Pentagon or on the aeroplanes. They were all eligible. But I met in London with families from 65 foreign countries.

I'm here to tell you that you are all eligible. Any questions?

Up go the hands.

Do we have to give up our citizenship to get the money?

No.

Do we have to surrender our passports?

No.

Do we have to come to the United States to get the money?

No.

Do we get the money in local currency or dollars?

You get the money in dollars.

We'll think about it. CIA. This guy must be from the CIA. You mean to tell us that your government is going to give us over two million dollars for the death of our daughter?

That's right.

No strings?

That's right.

We'll think about it. Don't call us, we'll call you.

Now eventually they all came into the Fund. But trying to convince people that I was there to give them money raised scepticism, about the motives of the United States. Now that was a problem

Then there was this problem. Eleven people died, on 9/11 in the World Trade Centre, who were undocumented workers. Illegal immigrants. They were working illegally in the World Trade Centre. Their wives and children were all eligible. I went up to New York, to the Bronx, to the Spanish community. I translated the 9/11 application into Spanish. I translated the immigration rules into Spanish, and I met with the families up there, with the wives of the dead.

Mrs Domingas, you are from the Dominican Republic, your husband was working illegally. It doesn't matter. I'm here to give you and your three children compensation. Any questions?

Will we be deported?

No. In fact, the United States will give you a green card allowing you to seek permanent employment.

Will I be put in gaol?

No.

Will you take my children away?

No.

The frustration in getting people to accept this money, gratis; eventually they all took the money; they saw there was no hidden agenda.

By far the worst problem, not even close, kept me up at 3am at night. We decided, wisely, that any eligible claimant who so desired could have the opportunity for an individual hearing with me in confidence under oath to state whatever anybody wanted

to tell me. You didn't have to. Half the people didn't ask for a hearing. But the other half asked for permission to come and see me and to vent about life's unfairness. That was the biggest problem, the impact on my psyche listening to over a thousand people individually, like a truth and reconciliation commission. They came to me with their tales of woe.

Mr Feinberg, thank you for seeing me. I'd like to start off my hearing. I was married to my wife for twenty-five years and I'd like to start off the hearing by playing you a video-tape of our wedding twenty-five years ago. I want you to see what a wonderful woman she was in happier times.

Mr Feinberg I'm here to tell you that my wife is dead and I want to play for you the audiotape of her calling me trapped from the 103rd floor of the World Trade Centre saying goodbye and screaming that I should take care of our children.

Mr Jones you don't have to play that. That won't have any bearing on ...

I want you to listen to what those murderers did to my wonderful wife.

Play the tape.

People would come with diplomas, ribbons, medals, certificates of good conduct, reference letters, all attempting to memorialise, validate, a lost loved one. And the stories I heard.

Mr Feinberg, I'm twenty-four years old, I'm sorry about my composure, I'm sobbing, but I want you to know I'm twenty-four years old and my husband was a fireman at the World Trade Centre and he left me with our two children six and four. And I want the money and I want it in thirty days.

Mrs Jones we have to go through procedures here. Why do you need the money so quickly?

Why? I'll tell you why. I have terminal cancer. I have eight weeks to live. My husband was going to survive me and take care of our two little children. Now they are going to be orphans. I need that money quickly, while I still have all my faculties, to set up a fund for them.

Now you can't think up stories like this.

A 70 year old man comes to see me, crying.

Mr Feinberg I lost my son at the Pentagon on 9/11. When the plane hit he got out of the Pentagon. He escaped. He thought his sister was trapped. He went back in to look for her. She had got out a side door. He died looking for her. There is no God Mr Feinberg, that would allow this to happen.

A lady comes to see me, crying:

I lost my husband at the World Trade Centre. He was a fireman. He brought thirty people to safety from the World Trade Centre. And the battalion chief said: 'Stay here, it's too dangerous.' He said: 'Chief, I've never disobeyed you but I see ten people trapped in Tower One. I am going to go rescue them and bring them back.' Mr Feinberg, he died while he was running across the World Trade Centre Plaza, he was killed when somebody jumped to their death from the 103rd floor and hit him. Like a missile. They both died. There is no God, Mr Feinberg.

All of the stories I heard varied, every one, but there was one that kept me up at 3am, I didn't know what to do. A lady comes to see me:

Mr Feinberg I lost my husband at the World Trade Centre, he was a fireman, and he was Mr Mom. Every day that he wasn't at that firehouse he was home, teaching our six year old how to play baseball, teaching our four year old how to read, reading a bedtime story to the two year old. He was Mr Mom. What a cook! He cooked all our meals, he was the gardener around the house, he was my right arm and I will never be the same, no matter how much money you give me Mr Feinberg. I would trade it all tomorrow just to have my husband back. My kids are without a father. I am only living for my three kids. I will never be the same. I have lost my best friend.

She leaves. The next day I get a telephone call from a lawyer in New York City.

Mr Feinberg did you meet yesterday with Mrs Jones with the three kids?

Yes.

Mr Mom?

Yes.

I'm not trying to cause you any trouble. But I want you to know that she doesn't know that Mr Mom had two other kids by his girlfriend in Queens, five and three. Now I am calling to tell you this because when you cut your cheque, there are not three children who survive, but five and I want you to know that I represent the girlfriend as guardian of these two other kids. I am sure you will do the right thing.

Click.

Do you tell her about these two other kids? Tell her, look, I'm cutting cheques because there are five children, not three? Well, I never told her. I don't know the facts. Who am I to prick the bubble this woman has of the memory of her husband? I'm just trying to do this job and get this money out. We cut one cheque to the wife and the three kids and we cut a separate cheque, in confidence, to the girlfriend as guardian of the two kids.

Now I am sure at seven years later that they know. But I didn't feel, tossing and turning, that it was appropriate for me to disclose all of this information to this woman who has a

memory of her husband. There are people in this audience whom I am sure would have done it differently. But that was the toughest part of the job: the hearings.

People didn't come to these hearing to talk about money. People came to these hearing to vent about life's unfairness, and that was the most difficult part of the job.

The fund worked. It worked. The fund by statute ended on December 22nd 2003. If you didn't file a claim by that date there was nothing I could do. Two-thirds of all the applications were filed in the last six months. As the statutory deadline approached, Senator Kennedy came to me and said:

Ken, shouldn't we extend the deadline to give people time to file?

Don't you dare! If you extend that deadline, people will procrastinate, people will wait, people will hum and hah, people will think it over, People won't do it. Leave the date.

And sure enough, in the last couple of weeks people were throwing applications over the transom. We kept our offices open until midnight. The flood of applications that came in!

So that's how the program worked. Let us asks some questions about the Fund.

Why did the Fund work so well? What was it about the Fund that got 97 per cent of the people to come in, but not only that: how did you even get Congress to do a fund?

1. There was tremendous bi-partisan political support for the 9/11 Fund. It was supported by Republicans, Democrats, Liberals, Conservatives, President Bush over here, Senator Kennedy over here. It was supported by virtually politicians across the board.
2. Very generous. Two million dollars per claim on average. No appropriation by Congress. We hereby authorise the 9/11 Fund, whatever it is going to cost, let Feinberg figure it out. We do not authorise, we do not appropriate one nickel. Thank goodness. Can you imaging if I had to take from Peter to pay Paul? Instead, Congress, in its wisdom said, whatever Feinberg says, just authorise it, it will paid out of petty cash from the United States Treasury. No appropriation. That helped. If I needed more money I printed it, basically. Seven billion dollars is a pretty attractive program.
3. The absolute support of the American people. The press, everybody, editorials, wonderful, keep up the good work, get it done, what a task, good work, don't falter, we're behind you. I still walk down airport corridors, somebody comes up to me and says: Aren't you the guy who did the 9/11 Fund? I get ready to duck. Wonderful, thank you, for what you did for the country. You have got to have a political wave of support to do compensation funds that will work.

Another very interesting thing about the 9/11 Fund is that the United States government agreed to this Fund without ever apologising for anything. To this day the United States government has never apologised for 9/11. It was a sneak attack by foreign terrorists,

what are we apologising for? No apology. Compensation? Yes. We will show our solidarity with the victims. We are a compassionate nation. Pay. But don't ask for an apology, we didn't do anything wrong. There will be no apology. And yes, we will pay seven million dollars. Rather unique.

Some more questions about the Fund:

1. Was the Fund a good idea? Was it sound public policy? I think the 9/11 Fund was a fabulous idea. It was the right thing to do at the time. It was a unique response to an unprecedented historical tragedy in America, rivalled only by the American Civil War, Pearl Harbour, and the assassination of President Kennedy. The idea of the Fund was to not only divert people out of the torts system so they won't sue the airlines, but also in its generosity to demonstrate the social cohesiveness, the national solidarity of the American people toward not only American victims, but foreign victims from Australia and everywhere else. Fabulous idea, and it exhibited I think the best of the American character, and the American heritage. So my answer is I think it was a wonderful idea. But I must tell you in all honesty it is a very, very, close question.

You should read some of the emails I received when I was administering the Fund:

Dear Mr Feinberg. My daughter died in the Oklahoma City bombing. Where is my cheque?

Dear Mr Feinberg. My son was on the USS Cole in Yemen, when he died when there was a suicide attack on the Cole. How come I am not eligible for your fund?

Dear Mr. Feinberg my brother died in the African embassy bombings in Kenya. How come I'm not eligible for your fund?

Dear Mr Feinberg. My daughter died in the basement of the World Trade Centre in the 1993 terrorist attacks committed by the same people. Where's my cheque?

Not just terrorists, not just terrorism.

Dear Mr Feinberg. I don't get it. Last year my wife saved three little girls from drowning in the Mississippi River, and then she drowned a hero. Where's my cheque?

How do you justify, in a democracy, carving out for very special treatment unbelievable financial generosity for only a very few people who are the victims of life's misfortune, and all these other people, through no fault of their own, who have been thrown a bad curve ball, get nothing? It's very, very difficult, as a philosophic matter, to say: these people are entitled to two million dollars each. You? Nothing. It's tough. Now I think it can be justified and I told you, I think the 9/11 Fund was unique, it can be justified not from the perspective of the victims, but from the perspective of the American people. They wanted to do it, to exhibit to the world post-9/11 the solidarity and support of

America for the victims all over the world. So I think from the nation's perspective it was the right thing to do, but it is a very close question.

2. Is it a precedent? Will it be replicated? Will Congress do it again? Absolutely not. This program, the 9/11 Fund, was a unique response to an unprecedented historical event. Congress has no interest in doing this again. In fact, after Hurricane Katrina, there were hundreds of people who died in New Orleans, one of the worst natural catastrophes in American history. There wasn't the slightest interest in creating a 9/11 Fund for the victims of Katrina. No. The 9/11 Fund stands alone, and should not be seen as a precedent for anything. It should be looked on as a historical aberration from the norm.
3. If Congress decides to do it again, or if any other country decides to set up such a fund, do you think it is a good idea to give people a different amount of money? No, I do not. If you are going to use public money, and you are going to compensate death, give everybody the same amount. Don't make distinctions which just fuel disagreement. If you are going to do it, whether you are the waiter, or the soldier, or the cop, or the banker, all life is worth the same when it comes to public compensation. Congress would have been much better off not tying the fund to the tort system and instead saying everybody gets \$250 000 or whatever it is. It would have made my job a lot easier. So if it is done again I suggest that everybody get the same amount.
4. Did it make any difference that the 9/11 Fund did not have with it an apology? Yes, it did. It would have been much easier when I held these hearings for the family members to know that the government was not only giving them the compensation but was formally and officially sorry for what happened. It just made my job more difficult, the absence of an apology.

Are there precedents in American history for an apology coupled with payment? Yes, one that I am aware of. You'll recall that right after Pearl Harbour in 1941 the United States government compelled relocation of American citizens of Japanese descent from California, too close to Pearl Harbour, to Arizona and New Mexico. They were forced to leave their homes and be relocated in camps in Texas, New Mexico and Arizona. Forty years later President Reagan and the Congress passed a law, and the law said: to all descendants of Japanese-American citizens who were forcefully relocated after Pearl Harbour, we hereby apologise, and we will give each descendent in a family \$20 000 as a token of our apology. And President Reagan signed that law. I don't know of another situation in American history where the United States government formally apologised for anything. It hasn't apologised formally for slavery, it hasn't apologised formally to native Americans. The Japanese situation was a unique situation where President Reagan went along with the Congress: we apologise, and here is a payment.

But it again raises this whole question of carving out in a democracy special treatment while others are not eligible. And that's why I get back to my final point, which was my first point, which is you had better have the political will not to make compensation for disasters in a democracy a political football. It better be apolitical, it better be bi-partisan, it better have the solidarity of its citizenry, as 9/11 and Japanese compensation did, otherwise it won't work. And if you are going to compensate for disaster, or

historical trauma, you better in advance answer the following basic fundamental questions:

1. Who's eligible? And who isn't eligible?
2. How much are we going to pay these people? Are we going to pay them money, or are we going to give them health care or social services, or what exactly is the 'compensation' that's going to be provided?
3. Who's paying for this? The American taxpayer put up seven billion dollars to pay 9/11 victims.
4. What procedural rights are people going to have to file with the Fund? Are you going to give them a hearing, are you are going to let them go to court if they don't like the award (a terrible idea). What exactly is the process you are going to create?

Unless you deal with all these issues, and have the political will to do it, take on some other social goal, because it is just too complicated, too political, too divisive, and lacking the type of bipartisanship you need. America did it. They did it for 9/11, they did it for the Japanese/American citizens, so they did it twice in 200 and some odd years. It is not much of a precedent for anything.

It was Congress that did this. It was Congress that considered it, not the executive branch, not the courts, it was the elected representatives, like the Parliament here in Australia, debated it, and decided to do it, without objection.



Question — How many staff did you have?

Ken Feinberg — I worked pro bono without any compensation. You couldn't get paid for this job. I had eighteen lawyers on my staff. And then Price Waterhouse Coopers staffed twelve offices, opening thousands of envelopes, thousand of calculations, there were about 450 people involved. We administered the 9/11 Fund, Price Waterhouse Cooper had a contract, for \$94 million. We dispensed over seven billion dollars. That's less than three per cent overhead. You show me a federal government program anywhere that did it that cheaply.

Question — You are probably aware of the issue of the stolen generations here in Australia. There are lots of lessons from what you said. Every situation is different. Do you have any comments as a general issue in regard to appropriate mechanisms for compensation? We have actually done that in one state here, in Tasmania, but there is bipartisanship on that, in terms of a national approach: it is bipartisanly opposed to it. So in one sense it sounds totally unsuited. I guess I am interested in your flow-on comment that it doesn't just have to be a specific sum of money or whether there are other

mechanisms, whether other types of services targeted at a specific group is a valid mechanism.

Ken Feinberg — Far be it for an American to comment on the stolen generations. I don't know enough about it other than that a report was issued. But my blueprint sort of applies. Is there the political will to provide special compensation, either cash or services, to a select group of people? Do you have that political will to do so? If you do, then you've got to ask yourself: stolen generations: who's eligible? I had a terrible problem in the 9/11 Fund deciding who was eligible because the United States Congress didn't tell me in the statute who is eligible.

Mr Feinberg, I lost my sister in the World Trade Centre. When you cut your cheque make sure you don't give any money to her brother. She hated her brother.

Mr Feinberg I was the fiancée of the victim. We were going to be married on September 12. I should be treated like a spouse.

Biological parents of the victim, what do you say to that?

That marriage was never going to take place. My son called me and said 'I am calling the whole thing off.'

Stolen generations, like a lot of proposed ideas for compensation: who exactly is eligible? How do you define eligibility? What is the nature of the compensation? Are you going to give eligible claimants cheques, like Japanese Americans who were relocated, give a family \$20 000, divide it up any way you want.

Who is going to pay for it? Is it the Australian taxpayer? Or are there companies, or churches, or others, who bear some responsibility who should contribute?

I haven't got the foggiest idea as to answers to those questions. But when you discuss the possibility, and from what I've read it sounds like a terrible tragedy, when you get down to figuring out how you might do it, the 9/11 Fund offers some interesting elements. Based on the local circumstance here in Australia those who want some sort of plan would be well advised in advance to figure out answers to these elements if the program is not to be perceived as some sort of runaway program, without boundaries, carved out for just a very few people. Those are the issues: I had the same issues.

Question — What are you going to do about slavery, the descendants of slavery. You touched on it.

Ken Feinberg — That's an excellent question. There has been litigation pending in the United States for ten years, brought by descendents of slaves seeking damages from the United States government and from a score or more companies that historically promoted slavery in the United States. That litigation has got nowhere. The courts have said it is not defined, it is a political question, better addressed by Congress. There has been no interest in the United States, or to put it another way, the idea of compensating for slavery lacks the political bipartisanship, the political groundswell of support in the United States to justify it. There have been some informal apologies. I don't believe the

government has even formally apologised for slavery; maybe it has, I don't know. But I think it highly unlikely that there will be any type of compensation program to rectify the injustices of slavery in the United States. Should there be? Hey, a terrible wrong. But try figuring out how you are going to do it in a democracy; very, very difficult.

Question — I am sure you have thought about this. You've obviously had to think about so much in that time. What is the value of a human life?

Ken Feinberg — I will respond in two ways: as a lawyer and as a priest. As a lawyer the value of a human life in America is directly tied to compensation. It's directly tied to a determination of what that life achieved in the economic marketplace. That's the way it is for 200 years in America. What is the value of a bond trader's life when he falls off a ladder and dies? Well, he was making \$500 000 a year and he was 38 years and he would have worked until he was 62. Five hundred thousand times whatever the number of years and pain and suffering and we will give you \$4 223 623. That's the lawyer, and I must say that approach is ingrained in the American character. In American history, that's the way you value lives. Economic loss, plus pain and suffering.

Now, when I put on my hat as a priest on 9/11, when each family member who came to see me, asking what is my husband's life worth, what is my wife's life worth, I would say: I am not a priest, or a rabbi, but all lives are the same. I am not Solomon. I cannot calculate the moral, intrinsic worth of any human being. So what is a life worth? The question-mark remains. I would say once again, if governments are going to get into this business, they would be advised to deal with your question by giving everybody the same amount of money, and avoid the distinction, that cannot help but trigger an emotional adverse response from the very people you are trying to help. A bad answer I think, to a very good question.

Question — Could I ask a question as a lawyer and a priest. In terms of the Japanese internees, could you give us an idea of the range of reactions, because as I understand they only got \$20 000 each. Presumably there would be some who said: that's very tokenistic, but there would be others who would have thought, well, how can you apologise without giving us something?

Ken Feinberg — Political support, basically unanimous. First of all there were no law suits that could be filed. The statute of limitations had run. Most of the Japanese-American citizens relocated had died. There was no real legal course of action that anybody could advance. So the notion of providing gratis \$20 000 per family when the alternative was zero, was politically and socially acceptable. Obviously the \$20 000 meant more to some families than others but that accompanied with the apology was an expression by the American people that we can't rectify the past wrong but we are sorry and here is a gift, a token of our acknowledgment of responsibility.

Question — As an active emergency services worker, how does a fund or compensation work in terms of health, much later than the thirty-three month period? Some are suffering now; some died penniless without health benefits. Would that be a better way to compensate people? In addition, what about volunteers and their role in the response?

Ken Feinberg — Absolutely eligible. We paid over a billion dollars to rescue workers who developed respiratory injuries after 9/11 down at the World Trade Centre. They

were all eligible. The problem we have run into in the United States today is that there were thousands of rescue workers who didn't develop any physical disease until after the fund had expired. There are currently about 11 000 rescue workers litigating in the United States. Not as a result of the 9/11 attacks but after the attacks. Working down in the World Trade Centre pit, breathing that guck, from the collapse of the towers. Since there is no 9/11 Fund, they are all litigating, seeking compensation, damages. It is a terrible problem. Congress has been thinking about reactivating the Fund and as I have said to you, that virtually will never happen. So yes, we did pay quite a bit, and we would have paid these people, except that they didn't get sick until after the Fund had expired.

Question — You mentioned problems with singling out people in a democracy for special treatment. You also phrased what the fund was doing in terms of incredible financial generosity when the alternative might have been very little, but the other viewpoint is that the US government was doing something quite advantageous to itself by excluding people from litigating by entering the fund. Also obviously there was a feel-good factor of being seen to be generous and addressing a crisis. So on the balance how would you say that relates to other compensation situations?

Ken Feinberg — I've never been convinced that the United States government did something helpful to itself in terms of its financial exposure. I think these law suits that were brought against the United States and the World Trade Centre, on the merits, never had a prayer of succeeding. But I think you are asking a very good question, and this is a good way to end this discussion today. There would have never been a 9/11 Fund but for the desire of the United States to protect the airline industry, the World Trade Centre, from tort litigation, you are absolutely right. One should not assume this Fund was created entirely out of compassion and generosity. There was a real calculated reason for creating the Fund.

Having said that, the airlines and others could have been protected without giving seven billion dollars to a very select group of people. I think you have to look at the Fund both ways: a reasoned decision designed to prevent the airline industry from being brought to its knees, while at the same time, patriotic fervour, to demonstrate national solidarity with the victims. You've got to look at it that way I believe.

Legislative Power and Executive Privilege in the Courts

Harry Evans

An article entitled 'Parliamentary Privilege and Search Warrants: Will the US Supreme Court Legislate for Australia?', in *Papers on Parliament* No. 48, January 2008, referred to an issue of parliamentary privilege, the immunity of members of the Parliament from the seizure of their legislative documents by the execution of search warrants. The article recounted cases in the Senate and involving senators, which were influenced by a judgment in an American case, and which led to an agreement between the Senate and the government about the execution of search warrants in the premises of senators. These developments in turn were conveyed to American legislative officers involved in another court case there, and that case resulted in a judgment of the Court of Appeals supportive of the Australian arrangements and favourable to the legislative immunity.

Subsequently the US administration sought a review of the judgment by the Supreme Court. There was an apprehension that the Supreme Court might reverse or dilute the earlier judgment, and that this could ultimately have the effect of unravelling the law and the arrangements in Australia, where the US judgment could be persuasive. As it turned out, the Supreme Court in April 2008 declined to review the Court of Appeals judgment, which therefore stands.

Now another case is before the US courts which could have an indirect, persuasive influence in Australia if it results in an authoritative judgment. This involves executive privilege, the claimed right of the executive government to withhold information from the legislature on public interest grounds.

The Australian Senate, the US Houses of Congress and other legislatures worthy of the name have never conceded that there is any such thing as executive privilege. The position of the Senate was stated as long ago as 1975 in a resolution arising from the Overseas Loans Affair: if the Senate demands the giving of evidence or the production of documents, and the executive government claims that they should be withheld on public interest grounds, the Senate will consider whether the grounds are made out and

determine whether the evidence or documents should be produced. This resolution reflected the position previously arrived at by common law courts, which dispensed with the term 'Crown privilege' (also used in executive claims against the legislature), substituted the term 'public interest immunity', and held that the courts would determine whether the public interest grounds for a claim of such immunity are made out. Eminent scholars who researched the question from the standpoint of history and law came to the same conclusion,¹ and the US Houses have generally maintained this line.

In both countries, the issue has not been resolved as an issue of law before the courts. It has been regarded as a political issue to be determined between the legislature and the executive. The Australian Senate has not resorted to law and the courts when the executive has refused to produce information in response to Senate demands, but has pursued disputes as political matters and sought to impose procedural and political penalties on recalcitrant executives. In the United States, however, the situation is somewhat different because of historical enactments of the Congress. This has brought the matter before the courts in the past and has now done so again.

In all of the past cases, the courts have avoided becoming involved in resolving specific executive claims of immunity. Usually such claims have been settled by some kind of compromise, and often the Congress has gained the better of the arrangements which have been made. The courts have sought to stay out of the confrontations until political settlement comes to the fore. Court judgments have suggested that there may be some constitutional basis for executive privilege, but have not ruled on the issue in relation to particular legislative/executive contests.

Early in 2007 nine federal prosecutors were dismissed. There was a suspicion that they had been deprived of their positions for political reasons, and that the administration was seeking to replace them with others who would be ideologically aligned with the White House. This touched on the impartiality of the prosecution service and the even-handed administration of justice. Congressional inquiries were initiated. Evidence supported the suspicions. The Attorney-General was forced to resign over the affair. The House Judiciary Committee subpoenaed administration officials to tell what they knew. The President claimed executive privilege, on the basis that internal administration deliberations should be protected from disclosure to preserve confidentiality of advice to the President, and the subpoenaed officials refused to appear. The House then 'cited' the officials for contempt.

At this juncture, the House had a choice which would not be open to the Australian Senate. The House could direct that the officials concerned be prosecuted for the criminal offence of contempt of Congress under a long-standing statute which provides for the prosecution of recalcitrant congressional witnesses. There is no such statute in Australia, and, apart from procedural and political remedies, the Australian Senate would have only its power, under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*, to impose penalties directly on the witnesses. The US Houses also possess this power, called there an inherent power because it is not specified in the Constitution but has been held by the courts to be inherent in the legislative power constitutionally possessed by the Houses. The choice was made not to go down that route, to the disappointment of commentators, learned and otherwise, who urged the

¹ Eg. Raoul Berger, *Executive Privilege: a Constitutional Myth*. Harvard, 1974.

House to use its inherent power, not exercised since the Senate last used it in 1934. The House then sent its 'citation' to the Justice Department, in effect demanding that the contemnors be prosecuted. The replacement Attorney-General, however, declined to allow this, claiming that federal prosecutors were not obliged to initiate a prosecution when the President asserted executive privilege.² The House then brought a civil action in a US District Court, seeking to support its subpoenas. This potentially involves the court in the question of whether a claim of executive privilege confers immunity against the legislature's demand for information. The Judiciary Committee argued that an attempt by the House to use its power to punish contempts would be contested in court by the administration and thereby would ultimately lead to this situation in any event.

In response to this action the administration raised an expansive claim of a general and absolute immunity of administration officials from congressional subpoenas, and also claimed that the court lacked jurisdiction in the matter.

In one respect the response by the administration was surprisingly candid. In urging that the courts should not determine the issue as one of law, but should leave it as a political matter to be resolved between the legislature and the executive as in the past, the executive pointed out that the Congress possesses ample power to enforce its orders by political means, such as its power to refuse approval for all future presidential appointments, and to cut off funds for executive agencies. It is remarkable to have an executive government virtually inviting its legislature to exercise these kinds of powers against it.

In a preliminary judgment delivered on 31 July 2008, a District Court held that the courts have jurisdiction to enforce congressional subpoenas, and rejected the claim of absolute immunity of administration officials. (The latter aspect of the judgment could have implications for claims sometimes made in Australia that ministerial staff have some kind of immunity from inquiry by the legislature.) The court at this stage has not passed judgment on specific claims of immunity relating to the particular information concerned, but has invited the parties to settle such claims by negotiation, as in the past.

It remains to be seen whether the court will be able to avoid further involvement in the dispute, or whether it will have to determine specific immunity claims. Any judgment by the court, which could be unfavourable to the position of either the legislature or the executive, would almost certainly be appealed and would probably end up in the Supreme Court. The administration in any event may appeal the judgment already made.

Any further judgments will be awaited with some anxiety in Australia. It is possible that some future Senate majority will regard the procedural and political remedies of the past as inadequate, and will push a dispute with the executive over the disclosure of information to its limit, for example, by imposing a penalty on a public servant, which the government might then contest in court. A US judgment could then be persuasive in any Australian judicial resolution, for good or ill in the cause of parliamentary accountability.

² If the Australian Parliament ever adopts the oft-made suggestion that all contempts of Parliament should be converted to statutory criminal offences prosecutable in the courts, it should be careful to explicitly provide that each House, or indeed any person, may initiate a prosecution, to avoid this situation.

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