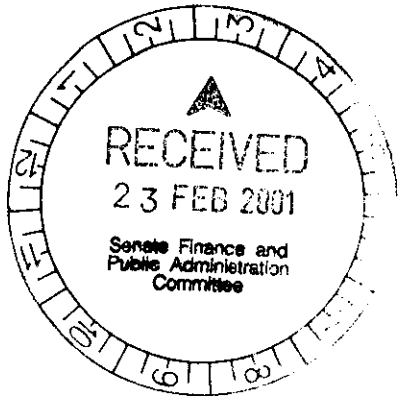
Submission No. 16

Submission to Senate Finance and Public Administration Committee



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1. My comments start with what I take to be the most urgent legislation, which is the bill to establish an Auditor of Parliamentary Allowances and Entitlements. I accept that the other proposed legislation might well be more important over the long run. Most of my comments deal with the process of standards-setting. These Bills provide Parliament with an opportunity to take greater responsibility for specifying appropriate standards for political office holders, a move I strongly encourage.

Auditor of Parliamentary Allowances and Entitlements Bill

2. One clear benefit of this bill is that it relieves the Australian Auditor-General of many difficult tasks that have recently fallen to his office, simply because of the lack of any suitable alternative investigator. I have the highest regard for the role and competence of the office of the Australian Auditor-General but I think that Parliament has been asking too much of the Auditor-General when requesting his assistance to investigate many matters relating to the use and abuse of what are essentially political offices. The Auditor-General has more than enough work to do investigating the 'value for money' being provided by the Commonwealth bureaucracy. The Australian taxpayer has much to thank the Auditor-General for in completing so many recent investigations into inappropriate uses of public resources by politicians and their staff. This is nowhere more telling than in the willingness of the Auditor-General to help Parliament devise relevant standards for proper use of public resources by elected politicians. But the community also has good reason to expect that Parliament itself, as the legitimate form of Australian representative government, will now step forward and take responsibility for determining appropriate standards and establish a purpose-built scheme for the investigation of breaches of those standards.

3. I presume that this Bill means to establish a scheme that will cover all 'parliamentary' allowances and entitlements, including those available to ministers. It would be regrettable if this Bill was limited to allowances and entitlements available to parliamentarians, short of those additional facilities available to ministers. I suspect that this Bill falls short of providing the community with assurances that ministers, as the most powerful of members of parliament, are complying with due standards. I notice for example that under s29 (7) the Auditor may investigate breaches of codes of conduct regulating the employment of public service and parliamentary officials. But there is no mention here of any authority to investigate breaches of any ministerial code of conduct such as the current *Guide to Key Elements of Ministerial Responsibility* issued by the prime minister.

4. The heart of the matter of political ethics is not so much establishing an auditing capacity as determining appropriate standards against which to audit suspect conduct. One lesson from the recent 'telecard' affair is that the current regime has rules about rights of access to facilities but not necessarily rules about appropriate levels of use of facilities. In the 'telecard' case, the Minister in question publicly drew attention to the fact that responsible public servants has no official interest in the levels of use other than as possible indicators of use by ineligible persons. The implication was that the specific entitlement in question was either limitless or that it was not the appropriate role of departmental officials to question levels of usage. If this is in fact the case, the Committee should examine the current authority for this and other ministerial facilities (presumably guidelines issued by the Remuneration Tribunal) to see whether determination of standards for levels of usage should rightly rest with the Remuneration Tribunal or with the proposed new Auditor.

5. The Bill has little to say on the determination of appropriate standards of facilities and their use. Section 16 suggests that the Auditor's power is limited to making recommendations about 'the system of parliamentary allowances and entitlements'; but the final paragraph at s16(h) implies that the Auditor has authority to advise on standards of proper or 'ethical' use of publicly-provided resources: see also s35(1). I fail to see how this useful duty of providing ethical advice can be carried out if the Auditor does not have some substantial role in determining or approving appropriate standards which are essential to his investigative functions. At the very least, the environment in

which the new Auditor works should be one where the Remuneration Tribunal's standards and guidelines are subject to greater public scrutiny. Under the proposed scheme, the Auditor's role is one of *public* accountability and not simply government efficiency. Accordingly, community confidence in the performance of the Auditor will be affected by the standards that he brings to bear in his investigations. It would help sustain community confidence if Parliament had a public process for confirming and legitimating these auditing standards. The Bill as it stands lacks this feature, making it an open question whether the Auditor is meant to adopt the standards implicit in the Remuneration Tribunal guidelines, devise his own standards or wait for Parliament to come forward with more recent and more appropriate standards.

6. One potential defect of the proposed scheme is that the annual budget for the existing Australian National Audit Office will not be sufficient to carry the important activities of the new Auditor. The 'independence' of the proposed 'independent officer of Parliament' requires an adequate budget to carry out the important responsibilities of the new office. The Committee should satisfy itself that the relevant Minister will take to the parliamentary Public Accounts and Audit Committee an adequate budget supplementation and that this parliamentary Committee will itself determine exactly how adequate this supplementary budget will be. This is consistent with the role of this Committee in approving the government's recommended appointee. The fact that the new Auditor's staff must 'be made available by the Auditor-General' (c15) will only work if the overall financial and staffing budget for the Australian National Audit Office is expanded to cover the additional responsibilities.

Government Advertising Bill 2000

7. This Bill is to be welcomed for its explicit aim of establishing 'minimum standards' to regulate government advertising. Once again, the community can be grateful to the Auditor-General for seeing the need for such a regulatory regime and to the Committee for bring it forward for public consideration. The Financial Management and Accountability Act already provides that ministers and officials must not use public money 'improperly' and this Bill amends that Act by specifying improper use in relation to government advertising. What is most attractive about this Bill is that it demonstrates to the community that Parliament can exercise a leadership role by using its legislative authority to restrain governments from inappropriate use of public money.

For far too long, Parliament has been unduly passive in taking at face value the political executive's word that our system of 'responsible government' means that Parliament hands over all effective power to the ministry to determine what constitutes responsible use of ministerial office.

8. Community confidence in parliamentary institutions can begin to be restored if Parliament signals that it is determined 'to deal itself back in' and take a greater leadership role in Australian governance. The electorate wants to see evidence that governments and politicians are prepared to invest more heavily in integrity in government. Parliament for its part can demonstrate its commitment to public integrity by raising the standards that the community has a right to expect of its highest political officials. Self-regulation by the political executive is a necessary but insufficient part of 'responsible parliamentary government': this Bill can send a message that Parliament is prepared to take note of community standards and to devise means for holding government accountable to those standards.

Electoral Amendment (Political Honesty) Bill

9. I have already gone on the record with my support for this Bill (see 'Moderating Ministerial Ethics' and 'Rewriting the Referendum Rules' chapters as attached). I note that this scheme is established in South Australia but I would suggest to the Committee the importance of obtaining expert advice on the scheme's practical effectiveness in that state. Despite my support for the principle behind this scheme, I have no knowledge of its practical success or otherwise. In a number of minority reports attached to reports of the joint standing committee on electoral matters, the Australian Democrats senators have written of the brief history of a similar provision being introduced then deleted from Commonwealth Electoral legislation in 1993 and 1994. For one, I welcome their return, although I am open to persuasion that, whatever their theoretical merits, their practical effect is less than perfect.

Charter of Political Honesty Bill

10. This is the most ambitious of the four Bills. It overlaps with the second Bill with its scheduled Guidelines for Government Advertising. To that extent, object (a) of this Bill is consistent with that of the second Bill I have commented on, although this Bill goes further in establishing an approvals process through the proposed government publicity committee. Objects (b) and (c) relate to parliamentary ethics through a quite distinctive scheme involving a new ethics Commissioner. Object (d) relates to parliamentary protection against ministerial appointments made without primary regard to merit. All are admirable objects. Here I will simply identify some features of objects (b) and (c). This is only in summary form because the Bill presents a formal process of ethics regulation but without any specification of the desirable standards the scheme is meant to promote. The content is left to the discovery of the proposed joint parliamentary committee at some future date.

11. One of the most distinctive features of this Bill is the establishment of a parliamentary committee responsible for determining a code for ministers as well as backbench members of parliament. This code (or pair of codes) would take effect by resolution of both houses of parliament. The community will look positively on any move by parliament to lay down ground-rules for those of its members who enter ministerial office. Here, for reasons of space, I say nothing about the equally important move to establish credible rules for the 'entry-level' office of member or senator.

12. A parliamentary code of ministerial conduct could make great progress by entrenching community standards of conduct expected of ministers in their capacity as peak public decision-makers (notably in relation to clarifying the various dimensions of misuse or abuse of office) and as elected representatives (notably in relation to clarifying their obligations of public accountability through parliament and its committees). But I think that a parliamentary resolution about ministerial standards would only get to the resolution stage in the House of Representatives if accepted and supported by the prime minister. This raises the question about the relationship between

such a ministerial code and any existing code or guidelines issued by a prime minister. My suggestion would be that the parliamentary code for ministers would include the standards of parliamentary conduct expected of ministers in relation to their duties of accountability and answerability to parliament.

13. Of course, parliament does not commission, 'employ' or 'hire' ministers as executive officials, and it lacks authority to de-commission, 'fire' or dismiss ministers. But parliament can declare its lack of confidence in ministers or in a ministry, and this proposed code would allow a house of parliament to decide issues of confidence on a more publicly credible basis by reference to compliance with standards newly articulated in such a parliamentary code. As things now stand, a prime minister can dismiss a minister for a breach of a code of conduct conveying the terms and conditions expected of ministers by that prime minister. This proposed parliamentary code is more of a supplement than a replacement of such a prime ministerial code, and in ideal terms perhaps, one can envisage two overlapping spheres of ministerial regulation: one enforced by parliament and one by the prime minister.

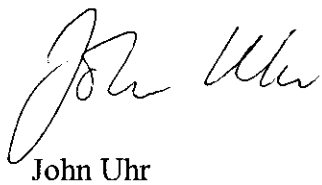
14. It is possible that a prime minister might make employment as one of his team of ministers conditional on compliance with the parliamentary code; and it is possible that the parliamentary code might acknowledge or even incorporate a prime ministerial code as an additional means of reinforcing the high standards expressed in that code. The challenge then would be in managing conflicting interpretations of the parliamentary code that might arise from the different perspectives of a house of parliament and a prime minister.

15. Would the proposed office of ethics commissioner help resolve this potential conflict? The Bill stipulates that a house can refer investigations to the commissioner to investigate alleged breaches of either of the proposed ministerial or parliamentary codes (s14.b). It is important to note that the commissioner reports back to the requesting house and not, eg, to a privileges or standards committee or indeed the joint committee established in this legislation. What action a house then might take is its own responsibility, and most other jurisdictions allow for such a report to be considered by specialist parliamentary committee. Presumably the purposes of the bill would be served if the commissioner's reports about ministers were dealt with by committees of the house in which the minister was a member. This would take some 'operational'

responsibility away from the joint committee established under this legislation, although leaving its 'policy' responsibilities undisturbed. This is difficult to chart in the absence of the detailed content of the core codes of conduct, which the Bill expects to be developed by the proposed joint committee inquiry. There is only so far one can go in commenting on such an open-ended scheme.

Conclusion

16. This submission is in the form of friendly criticism of the four Bills. I am happy to assist the committee further and regret that I have had, at this stage, insufficient time to do justice to the merits of these important Bills.



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Motivating Ministers to Morality
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Moderating Ministerial Ethics:

Putting Political Ethics in its Place

John Uhr[1]

Introduction

Many contributors to the debate over ethics and politics argue that contemporary politicians pay too little attention to ethics. It is common to argue that democratic governance would be better if only governments took ethics seriously. In this view, politics needs more ethics. I can sympathise but in this chapter I want to disagree. Too much ethics can be as bad as too little ethics. Here my interest is directed to moderating two extreme tendencies in the field of ethics and politics: the first associated with unrealistic reliance on chief ministers to regulate ministerial conduct; and the second associated with idealistic over-reactions against this executive-centred model, and the search for alternative models with the capacity to promote moral virtue among public officials.

As my sub-title has it, my aim is to put ministerial ethics back in its place: institutionally as an object of parliamentary and not simply executive regulation; and substantively, as a

project designed to prevent public harm from ministerial misconduct rather than promote personal virtue among ministers and their closest advisers. A parliament willing to exercise institutional leadership could do much to set appropriate standards for ministerial conduct and devise mechanisms to investigate alleged misuse of ministerial office. The task is then for parliaments to use the power of publicity and related forms of institutional leverage to ensure that political executives play fair with public office.

I can clarify the political theory informing my analysis through two illustrations. First, in relation to the institutional norms of responsible government, I refer to the 1940s classic debate between Friedrich and Finer over administrative responsibility in democratic governance, especially Finer's defence of legislative oversight over executive government (Friedrich 1940, Finer 1941). My position here is consistent with Finer's warning about the dangers of official zeal in government agencies, even or particularly when that zeal is motivated by public-spirited concern for cleansing politics of its impurities. Finer appreciated that modern democratic politics works through elective institutions, to which all executive agencies are publicly accountable. Although political and bureaucratic discretion is an inevitable and largely welcome fact of modern government, community confidence in government depends more on the exercise of public accountability through elected political assemblies than on government-appointed ethics agencies.

This brings to me to my second illustration of the political theory informing my analysis. In relation to liberal-democratic political philosophy, I refer to the argument made by Judith Shklar about the necessarily limited place of personal ethical virtue in the public life of modern government (Shklar 1984, 1992). Shklar's case is now the classic counterbalance to that made by advocates of virtue ethics who are uncomfortable with liberalism's reliance on models of self-interested individualism. As the author of a book on *Ordinary Vices*, Shklar contends that liberal-democracy draws its ethical inspiration from an ambitious vision of 'justice without virtue". This summary formula succinctly conveys Shklar's orientation: the ethical basis of liberalism rests on a civic commitment to political justice, without demanding citizens or officials that they commit themselves

to higher virtues of moral excellence (Yack, 1999). My position is consistent with Shklar's implied public policy priority of tackling the common but unacceptable vice of injustice over the alternative of cultivating, through government agency, the admirable but rare virtues of moral excellence.

Two Worrying Tendencies

In the area of ministerial ethics, two worrying tendencies require moderation. One is the cynical self-interest of political executives retaining control over the regulation of ministerial ethics. The other is the over-reaction of idealistic reformers who turn to non-political ethics agencies to clean up public life. My preferred path of moderation falls in-between these extremes and involves a greater role for parliament as the centre-piece of ministerial ethics.

The first tendency requiring moderation is the self-interest of political executives and particularly chief ministers who are determined to retain regulatory control over ministerial conduct. Their responsibilities as party leader mean that their approach will almost always be defensive. It is expecting too much of chief executives to expect them to be law-maker, judge and jury when it comes to ministerial ethics. Chief ministers have a vital role to play in setting the tone of an administration but that role should not be expanded to include exclusive monitoring of ministerial ethics. In contrast, I defend the rights of parliaments to set standards of ministerial conduct and devise mechanisms for securing compliance and investigating alleged breaches.

Parliament is relevant because, as political executives also argue, the task of setting appropriate standards of ministerial conduct is a political rather than simply a legal or ethical matter. Parliament as the elected legislature is the right institution to establish publicly acceptable standards for ministerial conduct. Parliament's claim to establish community standards derives from its representative role as the forum for community deliberation over law and policy. Parliament is capable of securing community agreement

for appropriate standards of political conduct, and of establishing public mechanisms capable of maintaining public trust in ministerial compliance with approved standards.

The second tendency requiring moderation is the misplaced enthusiasm of reformers determined to clean up politics by imposing standards of selfless public service and exemplary personal virtue (Chapman and Galston, 1992). In my view, it is asking too much of elected politicians that they exemplify the highest standards of ethical virtue at the personal as well as the public level. It is also asking too much of ethics and integrity commissioners to expect that they can protect the public interest by promoting moral excellence among public officials. I defend an alternative approach which takes as its policy priority the minimisation of vice in the misuse of public office, as distinct from the maximisation of personal virtue among public officials. In an ideal world, there would be less need for my harm-minimisation strategy if public officials were selected and retained on the basis of their ethical excellence. But this ideal world would not be a liberal-democratic world that, while far from perfect, has much to recommend it as the prevailing intellectual model of contemporary democracy. Liberal-democratic norms of public spirit might lack ethical purity, but their models of official probity are strong enough to inspire the contemporary international support for liberalisation and democratization.

Even if non-liberal regimes of democracy might be superior in theory, there is a considerable risk of letting the excellent get in the way of the good. A basic consideration in ethics is first to ensure that as little harm as possible is done, before beginning the more difficult task of promoting the good (Frankena, 1973, pp. 45-48). The challenge is to chart a politically prudent course between the cynicism of self-regulating ministers and the idealism of ethics advocates. This might sound like an argument against ethics but it is really against the misguided expectation that government agencies, such as ethics commissions, can generate the type of ethical qualities among political leaders that liberal regimes draw on for their perpetuation. The cultivation and generation of exemplary ethics in liberal regimes owes more to institutions of civil society --- such as the family, schools and universities --- than to governmental bodies. The task for ethics or integrity

commissions is to crack down on misuse of office as distinct from cranking up moral excellence.

We can distinguish the desirable goal of political ethics from the dream of ethical politics. My theme is that political ethics can be achieved short of striving for moral excellence among public officials. I acknowledge that political ethics can be "read down" to include the political stage-management of ethics, which is a cynical practice dangerously within reach of one of the two extremes that I am opposing. To leave the management of ministerial ethics solely to the ministry would court just such a danger. But that ethical politics can be "read up" to take the routine practice of politics out of reach of ordinary citizens. The danger here would be that extra-political bodies would be called into play to supervise politics, along the lines of a kind of moral equivalent to the court system, with ethics regulators and moral censors intervening to protect the community against officials' lapses of selfless public spirit. While it is true that tighter ethics regulation is increasingly called for, debates over ministerial ethics highlight the degree to which resolution turns on community agreement on what constitutes appropriate political conduct. This is where parliaments have a role to play as standards-setters: the standards of official integrity and appropriate political conduct are most suitably made by parliamentary institutions, acting in-between the body of ministerial actors and the recommended body of ethics advocates.

Theories of Ministerial Responsibility

The conventional approach to ministerial ethics separates the field into two broad classes of misconduct: official and personal. Official conduct relates to official decision-making and conduct either by the minister or by other officials such as public servants working as delegates of the minister. Personal conduct relates generally to the private conduct of ministers on matters that have nothing to do with their official responsibilities. A central preoccupation of the existing commentary on ministerial ethics relates to real or potential conflicts of interest between ministers' public duties and their personal *interests*, even

though the study of political morality reaches higher and wider themes of conflicting *responsibilities* (see eg Applebaum, 1999; Sutherland 2000, Thompson, 1987). The reason for the weight of commentary on this facet of ministerial ethics is that powerful public officials inevitably find themselves in real, or potential, or externally perceived, conflicts of interests that call out for a regulatory framework. Even where pursuit of private interests involves no real threat to public duty, as in the many examples of private sexual conduct that have damaged ministers' public reputations, there is still the risk that a minister's conduct might amount to misuse of office: for example, by using their power to extract favours or get special treatment. More usually, instances of inappropriate private conduct simply sully a minister's reputation, thereby threatening the minister's public career. Private misconduct can excite charges of hypocrisy and this too can severely damage the credibility of ministers, whose reputation as a trustworthy character has been placed in doubt.

This conventional orientation to the regulation of ministerial conduct is well-summarised in recent comparative reviews of ministerial responsibility in parliamentary systems (Woodhouse 1994, 265-81; Butler 1997; Bovens 1998, 85-89; Thompson and Tillotsen 1999; Weller 1999). Generally the focus is on resignations as an indicator of the force of sanctions, as classically argued by Dicey in his elaboration of "constitutional morality" (Dicey 1959, ch 11; but cf Woodhouse 1994, 27-8, 33-38, 282-5). The general conclusion is: "Politics, not theories of accountability, determines the fate of ministers" (Thompson and Tillotsen 1999, 49). Butler provides a good illustration of the conventional political analysis of ministerial ethics relating the two fields of official and private misconduct to the conventional sanction of resignation from office (Butler 1997; cf Butler 1973, 49-69; Weller and Jaensch 1980). The framework of analysis deals with misconduct primarily in terms of conflicts of interest, with the hope of unearthing patterns of ministerial resignation that might reveal enduring political standards. Butler reserves a small section of his analysis for debates, dealing not with conflicts of interest, but with defective policy management by ministers. Typically these are not given as much attention as the conflict cases since the policy failings only seldom involve ministerial resignation. Of these the most prominent are the "Crichel Down" type cases of administrative failings for which

ministers (once upon a time) took full parliamentary responsibility (Tomkins 1998, 52-57).

One weakness of the conventional approach to ministerial ethics is that it marginalises the cases of lapsed ministerial responsibility in relation to policy management, which constitute the bulk of the cases of parliamentary and public dispute over ministerial responsibility. These policy-failure cases illustrate the very heartland of ministerial ethics, where that is understood in terms of parliamentary disputes over appropriate standards of conduct expected of ministers in the exercise of their official responsibilities. These cases relate rarely to clashes of personal and official interests but deal mainly with standards of competence expected of ministers in their official dealings. They *might* involve issues of conflict of interest but that covers only a part, and not necessarily the major part, of the debated ethical conduct.

These cases deal with ministers' official competence (or their "professional ethics" is you will) and specifically with ministerial conduct in managing their dealings with parliament. Explanation, justification and defence of ministerial performance is itself a core part of the ministerial job. The office is a parliamentary one before it is an executive one. Only elected officials can hold cabinet office. Elevation to the ministry means taking on additional parliamentary duties and accountability obligations, as well as the very many executive responsibilities. Ministers are ministers because they are, in the first place, members of parliament; their ethics of office is broadly a political one, but more specifically a parliamentary one (Reid, 1980). Their conduct is judged according to their ability to manage their parliamentary responsibilities, including their justification of their right to sustained parliamentary confidence in high executive office.

Specifying Ministerial Roles and Responsibilities

The limits of ministerial self-regulation are evident in the current trend to adopt codes of conduct. These ministerial codes illustrate the basic characteristics of the responsible

government model with its bias towards giving the political executive all the "responsibility" that their command of their parliamentary majority deserves. The executive "takes responsibility" based on the "confidence" parliament places in it to exercise the duties of office. Having responsibility is a sign of the "trust" that the parliament has placed in the executive to rule within the generous boundaries of formal requirements of parliamentary approval for annual budgets, which act as periodic reauthorisations of the executive's right to the responsibilities of office.

The 1997 UK ministerial code is one of the most recent and influential ministerial codes. It has a foreword by prime minister Blair about the importance of "restoring the bond of trust between the British people and their Government". One finds nothing directly here about parliament but a lot of about the chief political executive's own expectations of the ministerial team, which include an expectation that ministers will honour their accountability obligations to parliament (CSPL 2000, 4.3-9; cf Tomkins 38-49). Ministers are advised that "they can only remain in office for so long as they retain the prime minister's confidence". Consistent with this, the current Standards Committee has recommended against the establishment of a new ethics commissioner to deal with ministerial ethics, in part because the political realities of ministerial performance really mean that it is for the prime minister alone to judge whether ministerial conduct is fitting or inappropriate (see eg SCPL 2000, paras 4.15-30, 4.59-64, 4.76-78).

This preference for leaving the regulation of ministerial conduct solely in the hands of the political executive is not a view I support. The 1997 ministerial code was prompted by the prior action of parliament in generating a rare Resolution on ministerial accountability as promoted by a House of Commons select committee. This parliamentary Resolution forms a core part of the Blair code, stipulating that ministers have obligations to provide "accurate and truthful information" and to be "as open as possible with parliament and the public". But the placement of these parliamentary-sourced obligations in an executive code highlights a potential tension (or as the Committee on Standards in Public Life (CSPL) style it, the "awkward amalgam" or "twin-faced nature" of this dated doctrine:

CSPL 2000, paras 4.11, 4.64, 4.76) in the priorities of conduct expected of ministers, who must effect a balance of the competing confidences of prime minister and of parliament.

The UK House of Commons Public Service Committee published two inquiries in the mid-1990s identifying the institutional weaknesses affecting the responsibility of individual ministers in systems of responsible government (House of Commons, Public Service Committee (PSC) July 1996, January 1997). These two inquiries are rare examples of parliamentary committees investigating general principles and theoretical standards of ministerial responsibility (Tomkins 1998, 57-63). The basic constitutional context is structured around collective ministerial responsibility, meaning that the ministry holds executive office by virtue of its ability as a body to maintain the confidence of the House of Commons: this form of collective responsibility is potentially at odds with the ethical obligations of individual ministerial responsibility (Woodhouse 1994, 3-11; Tomkins 1998, 38-41).

Ministerial Credibility v Public Trust

A common weakness of ministerial codes is that they allow ministers to arrange their affairs in ways that bolster their personal credibility without really shoring up public trust in government. This results in something of a trade-off between ministerial credibility and public trust. Ministers defend their conduct with pleas that they have been misunderstood and that their actions are more credible than their accusers make out. In looking more closely at the fine grain of ministerial codes, we generally find applications of the wider theory of responsible government which holds that members of the political executive deserve to be trusted with the powers of government until they explicitly lose parliamentary confidence. In practice, the main test of that loss is not an Opposition claim of breaches of trust but the chief minister's decision that the price of responding to such claims exceeds the benefits accruing to the ministry.

The Australian situation illustrates broader problems encountered in Westminster-derived systems of responsible government (Encel 1974, 107-123; Reid 1980; Weller and Jaensch

1980; Weller 1999). The classic Australian policy statement on the limited nature of the Westminster norm of ministerial resignation is that of 1965 by then Attorney-General Snedden, who argued strongly against "vicarious liability" on the premise that the obligation to answer *to* parliament did not imply a duty to answer *for* all departmental failures (Encel 1974, 117, 123). Against this realistic background, the classic policy document at the source of recent Australian developments in ministerial standard-setting is the 1979 report of the Bowen committee on desirable regulatory protections against undue private interests in public decision-making (Bowen 1979, chs 4 and 8).
Prime Minister John Howard's *Guide to Key Elements of Ministerial Responsibility* contains a valuable if succinct account of where ministers stand in the constitutional arrangements of responsible government and of their obligations to parliament which is the relevant forum for resolving political disputes over alleged misconduct by ministers (Howard 1998; cf Uhr 1998a, 194-6; and Uhr 1998b).

The existence of this so-called ministerial code, and its associated cabinet-office system for the registration of interests, is one thing: its implementation is another. The defect in this improved system of declared ministerial standards is that the one official who policies the system is the very same prime minister who devised it. In effect, the guidelines mean whatever the prime minister wants them to mean. The prime minister is both legislator and judge. This situation has given rise to frequent disputes over the prime minister's discretionary use of the guidelines to exempt some ministers from Opposition calls for their resignation, while accepting the voluntary resignations of some other ministers facing similar calls. Since Howard's code came into effect in 1996, three ministers have resigned for alleged breaches of the conflict provisions of the code and three others for misleading parliament when defending themselves against allegations of misuse of office (Thompson and Tillotsen 1999, 52-54; Uhr 1998b).

The Australian ministerial code is a good illustration of the practical operation of the norms of responsible government, with the norms of *collective* ministerial responsibility setting the tone for the practical operation of *individual* ministerial responsibility (Thompson and Tillotsen 1999, 54; cf Encel 1974, 133-140). The two major

responsibilities of ministers are identified as: management of their portfolios; and management of "their accountability obligations" to parliament (Howard 1998, sect 1). The test of correct conduct for ministers is avoiding activity that might "undermine public confidence in them or the government" (Howard 1998, sect 5). This gives rise to two operational rules. The first is biased towards the interest of the political executive: ministers should "ensure that their conduct is defensible" ie susceptible to public justification or plausible as distinct from credible. The second is more compatible with greater parliamentary involvement: ministers must be "honest in their public dealings" and particularly avoid any intentional misleading of parliament which should it occur must be corrected "at earliest opportunity". This second rule provides parliament with considerable leverage over ministers who are liable for procedural as well as substantive failings.

The Howard guidelines also stipulate the limits to private business that may be conducted by ministers on the general rule that there should be "no conflict or apparent conflict between interests and duties" (Howard 1998, sect 5). The emphasis on avoiding the appearance of wrong-doing can be traced back to the Bowen inquiry where "the test of appearance" was formulated in terms of avoiding interests that "look to the reasonable person the sort of interest that may influence" (Bowen 1979, para 2.24). This recognition of the importance of appearances might suggest that the test is in the eyes of parliament.

Ethical Overreach

The second sphere of moderation I foreshadowed relates to the tendency among external expert commentary to inflate ministerial standards to unrealistic heights. Traditional warnings about the dangers of corruption have been replaced by exhortations to promote ethics. The UK Standards Committee has recently canvassed the options for the "external adjudicator" model of an ethics commissioner (CSPL 2000, paras 4.31-4.80). In the UK environment, this would involve a separation of the two roles of the existing Parliamentary Commissioner for Standards and the proposed office dealing with ministerial ethics. This Committee investigated the "crucial confusion" associated with

all such models which slip between being merely advisory to being fully investigatory. The political executive prefers to rely instead on the traditional competence of the courts when dealing with criminal misconduct. But the possibility of alternative strategies to inspire ethical conduct is already in place. The Committee on Standards in Public Life set out such a framework in its initial report with the seven principles of public life, beginning with the demanding virtue of "selflessness" (CSPL 1995).

This influential formulation of the ethics of public office has had enormous impact, a recent example being on the Committee of Independent Experts advising the European Commission (COE 1999, para 7.4). But the most significant impact of the Standards Committee was the 1995 code of conduct for members of the UK House of Commons, which includes the "seven principles of public life" originally devised by the Standards Committee (see Preston, Sampford and Bois 1998, 165-7). Given the central place of accountability in this list, I am reluctant to criticise this attempt to formulate standards appropriate to elected public officials. The one element that deserves comment here is the prominence of "selflessness" as the leading one of the seven model qualities, thereby setting the tone for public expectations of political leaders.

The virtue of selflessness requires office holders to "take decisions solely in terms of the public interest" (CSPL 1995). If this call for impartiality is designed to reinforce the prohibition against using office "to gain financial or other material benefits for themselves, their family, or their friends" (as is also included in the seven principles), there can be little resistance. But "selflessness" can be interpreted as quite a strict standard, requiring of elected members of parliament that they chart their course by reference to the map of "disinterested" community service. Although not directed specifically to holders of ministerial office, and although intended more as an aspiration than a standard for strict compliance, this call for selfless elected politicians illustrates the contemporary inflation of expectations about the need for personal virtue in public life.

An Australian illustration of this pro-ethics orientation is the Queensland *Public Sector Ethics Act* of 1994 which states that all public officials should be strive to "advance the

common good of the community the official serves" and also comply with the obligation to promote the public interest, when that comes into conflict with "the official's personal interests". Prudently, this legislation does not make this obligation mandatory. But the real damage can be seen in the application that such standards of disinterested political conduct can have at the other end of the regulatory spectrum, in the operations of zealous anti-corruption bodies. Again, an Australian example can reinforce the risks of overreach that can come from unrealistically high standards. I refer to the New South Wales ICAC inquiry that effectively brought down Mr Greiner, the state's chief political executive (Uhr 2000).

I emphasise that this case is not evidence against the ethical merits of "selflessness" or of any defective contribution made by the original Nolan Committee. But the Greiner case does provide something of a warning of the potential misapplication of a "selflessness" standard when joined to bureaucratic capacity to ferret out failures of allegedly self-interested political leadership. Carping critics aside, I have no evidence that the Nolan principles have done anything other than enliven public debate over appropriate standards (see eg CSPL 2000, 12-16). But such an orientation to personal virtue might at some point tempt regulators of political conduct to transform their opposition to political vice into a campaign to weed politics of anything less than selfless political conduct. That such a potential exists can be seen in the Greiner case where an anti-corruption agency came to be seen as a moral crusader for a politics of selflessness.

The traditional anti-corruption approach has been reformed to reflect the kind of virtue ethics found in the experience of the NSW Independent Commission Against Corruption (ICAC) (see Fleming, Chapter ...). This new wave of anti-corruption strategies calls on ministers and other high public officials to guard against undue partiality in the exercise of public office. At its best, the policy intention of this fencing-in of partiality is to protect public integrity in the processes of public decision-making. But the external ethics community seems to be redefining "integrity" from its essentially negative orientation to a new and ambitious positive orientation. This new orientation invites integrity commissioners to go beyond tests of procedural justice to experiment with tests of policy

substance, at the risk of imposing their standards of social justice for those devised by duly elected representatives.

Premier Greiner defended his offer in partliament of a government job to an independent member of the legislature as "normal politics", and attacked the charge of partiality-based corruption as ushering in "the death of politics" (ICAC 1992 a, 92). Acknowledging that "this is a very difficult philosophical matter", Greiner defended the practice of political appointments to the public service, claiming that this went to "the very nature of politics itself --- that is, the conflict between the demands of politics and the demands of public office". The political system "is about what is in many ways a largely private interest in terms of winning or holding a seat or holding office". The alternative was the system of what he called "disinterestedness" where elected officials "act only in what they considered to be the national interest". This he condemned as inimical to "a workable system of democracy" (ICAC 1992 a, 92-3).

Clearly, part of the ICAC problem is the broad sweep of the legislative definition of "corruption" which the parliamentary oversight committee is currently working to restrict to the most serious instances of partiality in public office (see for example, COICAC 2000). An alternative is to keep the term "corruption" for the most serious forms of official misconduct and to label lesser forms simply as official misconduct. Without defending the political scheming associated with the Metherell Affair it is important to recognise this instance of institutional over-reach and subsequent roll-back, reflecting as it does uncertainty over how much political partiality is acceptable in what Greiner called "a workable system of democracy".

Promoting Parliamentary Regulation

One of the unacknowledged problems with ministerial ethics is that parliaments themselves resist declaring appropriate standards for ministerial conduct, even though parliaments reserve to themselves the right to judge in particular circumstances whether individual ministers deserve to lose their office of high responsibility. One requirement of

moderating ministerial ethics is moderating the usual partisanship excited by the chase of ministerial resignations. This reform requires greater parliamentary involvement in the declaration of appropriate standards for ministerial conduct and in the determination of disputed cases.

The most positive step taken by a Westminster-derived parliament was modelled by the Commons public service committee just before the election of the Blair labour government. The Commons committee looked beyond the conventional debates over ministerial resignation as the primary test of ministerial responsibility: "Proper and rigourous scrutiny and accountability may be more important to parliament's ability to correct error than forcing resignations" (House of Commons Parliamentary Committee (HC PC) 1996, para 26). Ministers for their part must take personal responsibility for their obligations of accountability, including the obligation to provide public explanations of government performance which is an issue that goes to the core of "democratic control of government" ((HC PC 1996, para 28). The Committee reformulated the "theory of Ministerial responsibility" to require that executive governments be "less coy" in their "definition of what Ministerial responsibility means" (HC PC 1996, para 32). Accordingly, the Committee devised its own working definition of this core term. The political executive are "obliged to give an account --- to provide full information about and explain its actions"; and the executive is also "liable to be held to account" in order to retain the confidence of parliament (HC PC 1996, para 32). With this new parliamentary definition of responsibility, the Committee set out to bring greater parliamentary control, not simply over the conduct of ministers but also over the appropriate public definition of the duties of ministers (see Tomkins 1998, 49-52).

Challenging the political executive's monopoly of control over what constitutes the proper role of ministers, the Committee successfully called on parliament to resolve in its own terms the institutional requirements of ministerial responsibility (HC PC 1996, para 60; cf HC PC 1997, annex 2). This Resolution was carried in the House of Commons in March 1997 (HC Hansard, 19 March 1997, 1046-7; Tomkins 1998, 60-63; CSPL 2000, 4.62-63). From a parliamentary perspective, the practical core of ministerial

responsibility is not the norm of collective support for cabinet, however important that might be to the everyday operation of responsible government, but the surprisingly negative norm of not misleading parliament. The Resolution on accountability notes that failure to provide information to parliament cuts across the duty of ministers not to "obstruct or impede" the prior duty of parliament to carry out its own functions. The accountability obligation of ministers requires that they provide "full and accurate" information to parliament, even to the point of not letting "any inadvertent errors" remain uncorrected. It is for this reason that the vice of misleading parliament is serious enough to deserve the penalty of resignation, which the Committee noted was (strictly speaking) beyond parliament's power to effect (Tomkins 1998, 41-45).

Rights give rise to responsibilities. The Committee's contention was that ministerial responsibilities flowed from the rights of parliament to set terms and conditions on those enjoying executive office. These terms and conditions were not in the nature of employment obligations, because the chief political executive has effective authority to hire, move and remove ministers and by extension to establish any code of conduct expressing the ideals of ministerial conduct expected of members of the executive team. The ethic of accountability to parliament covers a complementary set of expectations deriving from parliament and expressing its expected standards, designed to facilitate the work of parliament rather than the somewhat separate work of the political executive. The basis of the proposed obligation was that its breach would constitute a contempt of parliament, a view that British political executives have refused to accept (HC PC 1997, paras 7-10; cf Tomkins 1998, 57-63).

The proposers of the parliamentary Resolution hoped that it would make ministers "think carefully before withholding information" from parliament (HC PC 1996, para 61). The fact that the relevant sanctions are political rather than legal tells us much about the nature of this dimension of ministerial ethics:. We are dealing with political morality for which Westminster-derived parliaments have no agreed institutional framework other than the usual checks and balances of government and opposition (Reid 1980). The Committee was very conscious that this aspect of ministerial responsibility "is a political

activity, conducted between politicians', and therefore of the need not "to confuse a political activity with a judicial (or quasi-judicial) one" (HC PC 1996, para 67).

Modest Hopes

To their credit, political executives are now responding to public calls for standards appropriate to ministerial officers. But the political executive model suffers from persistent doubts about the ability of chief political executives to put aside the partisan interests of the serving government when judging allegations about self-serving ministerial colleagues. Independent expert models can suffer from the opposite problem: what the 1979 Bowen report termed the "danger to good government" from "moral escalation": raising expectations so high that ethics offices can not sustain the higher standards of public interest they are established to help generate (Bowen 1979, para 3.10). Hence the importance of exploring the potential of the parliamentary model to moderate ministerial ethics, including the moderation of unrealistic expectations about the personal qualities of elected public office-holders.

Putting political ethics in its place means finding a greater role for parliaments as standards-setters. The Bowen inquiry provides a model of best policy practice. Bowen recommended that a Public Integrity Commission be established with powers akin to those of a royal commission and with the obligation of conducting its proceedings publicly, reporting directly to parliament on matters of parliamentary and ministerial ethics (Bowen 1979, paras 12.41-43). Should such an investigative body should act on ministerial or alternatively parliamentary direction? Developments since 1979 have shown the advantage for high officials like the Auditor-General of reporting directly to parliamentary committees as distinct from ministers. Australian debate over how best to regulate ministerial standards should relearn the policy lessons, conceptual and institutional, that are evident in the Bowen design for moderating ministerial ethics.

An example of the Bowen approach is the bill for a Charter of Political Honesty sponsored by Australian Democrats senator Andrew Murray. The fact that the bill comes from a minor party and one in the Senate itself tells a larger tale. The bill is designed to establish a Commissioner for Ministerial and Parliamentary Ethics to implement a code of conduct. A parliamentary committee would take responsibility for preparing a new code of conduct covering ministers and, probably separately, backbenchers. Parliament, through the power of the two presiding officers, would appoint the new Commissioner, responsible for the practical implementation of the code. Duties range from post-election education through to investigation and report of alleged breaches of the code. The proposed Commissioner is more of an investigator than a judge. The Murray bill has been introduced into the Senate but not yet debated. It stands as a useful reminder of the responsibility parliament must face up to if it wants to restore its own credibility in restoring its ethical standards as well as those of ministers.

Conclusion

Although ethics is about right or virtuous conduct, I have argued that there are good public policy reasons for targetting vice (eg, misuse of public office) ahead of virtue (eg, personal moral excellence among public officials). The debate over whether to prioritise vice or virtue was argued out over fifty years ago in the classic Friedrich-Finer debates over the relative merits of internal and external protections against maladministration and defective discretion in democratic governance (see eg Friedrich 1940; Finer 1941; and more generally Uhr 1989). Finer warned about the dangers to democratic governance of over-reliance on the "internal checks" of private ethics compared to the "external checks" of public accountability. In Finer's terms, what is of interest is ministers' ability to manage their accountability obligations, and their personal qualities are relevant to the extent that these qualities help or hinder the proper management of these parliamentary obligations (Finer 1941, 251-6). To oversimplify: an individual devoid of personal virtue might still make a worthy minister if committed to the professional management of their obligations of public accountability and prepared to marshall their personal qualities to do justice to their obligations of office. Just as clearly, individuals with outstanding personal

qualities might make unworthy ministers, particularly if their "overfeasance" gets in the way of their routines of responsibility to parliament.

My fear is similar to the one Finer raised against Friedrich, or indeed at the practical policy level, of Bowen's fears of "moral escalation" and the rise of intrusive "censorial authorities" (Bowen 1979, para 3.10). Friedrich was prepared to trust to the policy discretion of officials, including officials working in bureaucratic watchdogs designed to promote public integrity. By contrast, Finer called for renewed legislative scrutiny of bureaucracy, particularly of bureaucratic guardians of the public interest. Many of the core issues about the best balance of internal responsibility and external accountability remain with us. The modern ethics movement can be seen as an extension of Friedrich's position, which is yet to face its Finer-like challenge and be required to defend its call for new expert-institutions to protect political life against partisan excesses.
In that spirited academic debate of old both protagonists recognized that under contemporary social conditions the rule of law required ever-expanding spheres of official discretion, exercised by unelected officials as well as ministers.Both accepted ministerial and official discretion had come to stay: what divided them was how best to regulate or control discretionary decision-making to make it compatible with the norms of responsible democratic governance. Friedrich was "the modernist": the advocate of reliance on the inner check of the personal ethics of public officials, safeguarded by greater community participation in government decision-making. Finer was "the traditionalist": the advocate of reliance on the external checks of public accountability, particularly the accountability of the political executive to the legislature.

Friedrich's case was a version of the argument commonly made against external accountability. That is, that the great ideal of parliamentary government rarely if ever matched political practice, where legislative oversight either drains official discretion of its motivating qualities or is itself driven and distorted by partisan interests, with norms of party government trumping parliamentary independence (Friedrich 1940, 227-232 ; cf Woodhouse 1994, 16-18). For Friedrich, it made better sense to prepare, educate and train public officials (including ministers) in the arts of responsible public decision-

making and to trust to their good sense and good will, subject to the checks and balances of open government and public criticism.

Finer's response was more than simply a restatement of the traditional ideals of responsible parliamentary government, with administrative officials accountable to ministers who in turn are accountable to parliament. Finer's critique became a larger concern about the pretensions of officials, particularly unelected officials, to exercise their ethical superiority to protect the wider public interest of society, even protecting society against the law and policy as determined by the legislature. His special contribution to this classic debate was to draw attention to the hazards to democratic governance of what he termed "overfeasance, where a duty is taken beyond what law and custom oblige or empower". Overfeasance might arise from dictatorial temper, or from bureaucratic ambition, or from "genuine, sincere, public-spirited zeal". Finer's case was that virtue itself has need of limits, to save society from "public-spirited zeal" (Finer 1941, 252).

Today we can say that both were right in their own terms. Contemporary democratic governance requires both the public official's individual sense of responsibility and the institutional capacity of accountability agencies: ie, both internal and external checks, with motivation through the personal ethics of public officials as well as the safeguards of external checks of public accountability (Uhr 1999). The real challenge is to get the balance right. Both sides of this classic debate linger on today, with now rather dated versions of the Friedrich line on the need for greater virtue in executive officials and the Finer line on the need for greater legislative oversight to restrain the political executive from misplaced zeal. What is long overdue is a blending of these two perspectives, particularly an exploration of the inner checks that should motivate legislators when managing the system of external accountability.

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Rewriting the Referendum Rules

John Uhr*

Introduction

This chapter draws on the experience of the 1999 republic referendum to argue for reform of the underlying referendum process. It is not my purpose to canvass the merits of the 1999 republican model or of any alternatives. My focus is on the merits, and more particularly the lack of merits, of the referendum process --- as distinct from the merits or defects of any proposed referendum outcomes.

Regardless of when or whether Australia adopts a republican head of state, I think that it is timely to revise the way we conduct referendums. The process of constitutional change is just as important as the content of proposed changes. Generally, the rules for referendums have changed very little over the centenary of Federation, apart from repeated attempts by early reformers to separate the routines of referendum campaigns from those of ordinary elections. The aim of the reformers was to give voters an opportunity to participate in a genuine deliberative process, protected to some extent from the partisan ploys experienced in general elections. As I show in this chapter, not all of those attempts were successful.

* An earlier version of this chapter was presented to the Melbourne Republican Group at a meeting convened by Professor Hugh Collins at Ormond College, University of Melbourne, 25 October 2000. I am indebted to this Group for their interest and critical comment, and also to Geoff Stokes and John Henderson at the ANU.

A number of welcome 1999 changes to the referendum process have opened up the renewed possibility of rewriting the rules to strengthen the deliberative potential of referendums. In this chapter I sketch out one possible reform model. The first step is for Parliament to accept its special responsibility and establish a dedicated all-party committee on referendums and constitutional change. The next step is the establishment of a broadly representative Referendum Commission to manage the conduct of referendums, including the prior organisation of national plebiscites where appropriate, followed by popularly-elected constitutional conventions to work through the details of possible constitutional changes. This reform model would help to generate a greater sense of public legitimacy around any referendum topic, including an Australian republic. It is also fitting at the centenary of Federation that this anniversary of achievement be accompanied by debate over 'constitutional renewal', including the renewal of the processes of constitutional change. Such a debate might bring unforeseen community benefits if the focus is not exclusively on the wrangling over alternative models of a head of state but includes an examination of how best to promote the integrity of public determination of constitutional change.

The Problem with Referendums

Democracy is very demanding of process. As referendums illustrate, democracy is more than just a matter of registering the view of the majority. Minorities too have rights, including the right to be heard. Indeed, many majorities are really coalitions of a number of minority viewpoints, each deserving separate consideration. Australian referendums show the difficulty of obtaining a fair hearing for all antagonists in democratic decision-making. A referendum is an important experiment in the capacity of a political system to foster the levels of rational political deliberation expected in ideals of deliberative democracy, where all interested citizens should have opportunities to participate in public decision-making.[1]

Referendums thus test the patience of the political elite. Referendums rely not only on the capacity of voters to pay attention to referendum activists but also on the ability of activists to hear voters and to respond to the issues that they might want discussed. The 1999 referendum left many persons --- minimalist republicans, direct-electionists,

even monarchists --- with the feeling that they were not given an opportunity for their case to be fairly considered.

What can be done to improve the referendum process? A standard view among many political analysts is that the Australian electorate is generally apathetic about public affairs and particularly ignorant when it comes to the merits of constitutional change. In this view, voter apathy and ignorance stack the deck in favour of the opponents of constitutional change. Cynics can argue that Howard relied on this conservatism when allowing the republic referendum to be put to the people, even though that same conservatism meant that the people would not support his proposal for a new preamble. The loss of the preamble, the cynics say, was a small price Howard was prepared to pay to see the republic defeated.

A version of this view is now commonplace in the political science literature on Australian referendums.[2] This view notes that the Australian electorate is historically unsympathetic to constitutional change, the conventional interpretation holding that the referendum system gives too much weight to voter apathy and ignorance. One possible reform might be the abolition of compulsory voting, as was experimented with in the partially-elected 'ConCon' of 1998, designed in part to restrict participation to those genuinely interested in the debate over constitutional change. I do not favour this option.

This temptation to relax the rules for compulsory voting is ironic given, as I mention below, that they were first introduced at national level precisely to help generate greater community interest in debate over constitutional change. The initial but limited reform was made by the Hughes government in 1915 (introduced but in fact never used), nearly a decade before being introduced in 1924 by the Bruce government for general elections.[3] This chapter identifies a range of other possible reforms to the referendum rules clear of abolishing compulsory voting. My theme is that the legitimacy of the referendum process is just as important as the legitimacy of the constitution or the head of state. My claim is that a more open and honest referendum process can do much to ensure that the debate over republican options strengthens rather than weakens civic trust in the Australian system of government and constitutional change.

My position is at odds with the standard reform complaint which holds that the country requires greater consensual leadership and bipartisanship from the political elite. Sympathetic critics of the constitutional change process frequently complain that the basic deliberative defect of Australian referendums is the lack of bipartisan agreement within Parliament. The usual evidence produced is the positive result accompanying open support from Opposition parties for a government's change proposals, such as in 1967 when electors gave overwhelming approval to a constitutional change to delete racially discriminatory provisions from the Constitution. But one lesson arising from the 1999 referendum results is that bipartisanship is not a guarantee of referendum success. The preamble question was defeated even though it had the support of the prime minister and the leaders of not only the official Opposition but also of the third party with the balance of power in the Senate (the Australian Democrats). In point of fact, cross-partisan involvement in both sides of a referendum question might be just as conducive to a Yes vote as bipartisanship was once thought to be.[4]

Describing the Deliberative Deficit

First, some illustrations of the 'deliberative deficit' often evident in Australian referendum practice and unusually prominent in the case of the republic referendum. Generally the deliberative deficit refers to the imbalance between, on the one hand, resources available to strengthen community deliberation and, on the other hand, the deceptions and misrepresentations of many referendum activists which weaken the deliberative process.[5] Despite the federal government's commitment to many new procedures to inform the community about the referendum options, this imbalance was starkly evident in the months leading up to the vote in November 1999. It is important to acknowledge that both sides were at fault in allowing various degrees of misrepresentation to muddy the referendum waters.

Two very important sources of evidence of a deliberative deficit come from two of the most dispassionate protagonists in the republic debate. I refer to Justice Michael Kirby of the High Court of Australia and Barry Jones, former Labor minister and immediate past President of the Australian Labor Party. Each illustrates the degree of

reasoned argument that the two opposed camps were capable of marshalling. But each has also spoken out in protest against the unworthy elements that were allowed to dominate their own camp's public strategy. While both Kirby and Jones have identified many annoying defects of argument found in their opponent's strategy, here I want to draw on what each has said about the defects of their own side's public case.

The relevance of Kirby's contribution cannot be underestimated, given that he was perhaps the main driving force in the original formation of the Australians for Constitutional Monarchy (ACM). In his 2000 Menzies memorial lecture, Kirby suggested two reasons why the Yes case might reasonably have expected to win the republican referendum in 1999.[6] First, all the polling data has consistently shown that a majority of Australian voters are republican in principle, with only a minority registering as monarchists. Second, in the only really fair test of the 1999 republican model during the *Australia Deliberates* 'deliberative poll' held at Old Parliament House, Canberra, on October 22-24,[7] the minimalist model won when the sample of voters were given an opportunity for genuine political deliberation. The *Australia Deliberates* experiment demonstrated that the 50% of the voting community supporting a direct-election alternative to the 1999 republic model collapsed to less than 20% after the experience of the deliberative poll, thereby securing a comfortable if notional victory to the model on offer. To promote really effective public deliberation requires that the tendency of referendum activists to engage in partisan misrepresentations of their opponents is held in check or neutralised through the intervention of a regulatory authority capable of injecting balance into the political debate. This 'check and balance' activity need not require cumbersome bureaucratic 'community information' campaigns but can be achieved more simply through 'smart regulation' that minimises deceit and misrepresentation: examples include arrangements for public retractions, rights of rebuttal, and the promotion of countervailing opinions.

Australia Deliberates experimented with such elements to try to establish a level-playing field for political contest. But the real referendum was quite different. Kirby hoped that it would be and he could see good reasons for the No side to win; but he was honest enough to report that part of the explanation was that the No case played on voters' fears through deceptive misrepresentations and unworthy distractions from

the core issues. Three examples of defective or dishonest argument mentioned by Kirby are: that a Yes result would mean that Australia might not be invited to rejoin the Commonwealth of Nations; that crown land might revert to Aboriginal ownership; and the false contention that the Governor-General was the Australian head of state.[8]

Perhaps it is easy to acknowledge one's campaign weaknesses after one has won the war. Barry Jones went one step further and openly declared his side's campaign weaknesses even before the war was over. A few days after the *Australia Deliberates* victory for the republic, and a few days before the actual referendum vote, Jones told an audience at the Academy of Humanities that the republic case had itself to blame for the looming inevitable loss.[9] He had shared the role of presiding officer for *Australia Deliberates* with former National Party leader Ian Sinclair. He understood that in an ideal debating environment, where partisan misrepresentation was held in check and voter misunderstanding was given time to gather information and repair itself, the republic case could win. Yet he also knew that the Yes case held itself back by 'dumbing down' the referendum campaign with distracting appeals to show-business celebrity and flag-waving patriotism. Three of Jones' examples of the defective or dishonest political argument made by the Yes case include: the comparative brevity of the official Yes case in the AEC pamphlet, with comparative little effort to respond in substance to the extensive No case; the 'lack of intellectual rigour or substance' associated with the appeal to sentiments of national pride and Australia's international standing; and the disasterous distraction of the use of the very dated 'Its Time' sloganeering from the 1972 Whitlam election victory.[10]

The testimony of Kirby and Jones nicely highlights the structural weaknesses of the current referendum framework. There is nothing to stop the widespread use of deception and misrepresentation, and little to encourage the use of substantial argument that honestly airs political disagreements over the debatable merits of constitutional change. My worry is not the lack of consensus but the absence of structures to facilitate productive debate and disagreement. Democracy is all about acknowledging and sorting through our disagreements. Effective democracy requires decision-making procedures that give decision-makers, whether they be members of Parliament or voters themselves, every opportunity to take stock of the merits of alternative views.[11]

Democracy and Disagreement

I am confident that in a properly managed referendum system electors can make their way through political disagreement. The existence of the *Australia Deliberates* experiment shows not simply that we can do better but also that we owe it to our political community to devise a better system. The international experiments in what founder James Fishkin calls 'deliberative polling' show the power of 'citizen juries' gathered together as representative samples of their society to deliberate over policy options under strictly-controlled conditions of balanced exposition of contentious policy arguments.[12] The Australian instance dramatically illustrated the deliberative gains made by sample citizenries when given opportunities to think through policy options in ways that differ quite fundamentally from the partisan wrangling experienced in normal politics. Part of the point of Fishkin's 'deliberative polling' is to demonstrate the deliberative deficit that exists in an unacknowledged way in what routinely passes for the democratic deliberative process. For our purposes, the gap between the deliberative ideal of that interesting experiment and traditional referendum debate shows how much distance has to be covered to bring the real closer to the ideal. This chapter identifies one possibility for beginning to bridge the gap.

I acknowledge that the ideal of deliberative democracy sounds too abstract and distant from the everyday realities of Australian politics. In some very high-minded theories of deliberative democracy, there is an unreal expectation that citizens and political activists can be measured against the strict standards of 'public reason'.[13] As used by theorists like John Rawls, this standard is only reached when political disagreement converges on a shared framework of justifications held to be appropriate to a properly-constituted democratic order. Think of this as an issue of standing: political recognition will only be given to those who abide by civil argument addressing the authorised public agenda. Thus an example of illegitimate deliberation in this view might be the disruptive conduct of a member of a political assembly who works to a separate agenda, explicitly calling into question the good faith of other members and justifying his non-compliance on the basis of the higher value of his particular

mission or calling. The assembly can work as a deliberative forum only when all members, including those in opposition, play by the rules.

But to those of us who are not so high-minded, the rules of the deliberative game must also protect the rights of reformers and challengers. These civil rights of political participation include the right, civilly, to challenge the reigning norms of 'public reasoning'. Rawls' most recent case for deliberative democracy is heavy on deliberation but light on democracy. His model deliberators abide by 'public reason' by favouring reasons that meet the highest deliberative standards of 'public' reasoning about regime interests --- which trump 'private' reasoning about individual or group interests. In this view, democratic deliberation operates as an exchange of different estimates about how best to promote constitutional democracy, with standing given only to those arguments that meet the form of public reasoning, ie with principles of policy justification that are open to acceptance by all participating citizens. Although many in the public might not find all arguments acceptable on their merits, the possibility of acceptance is proof of compliance with the formal standards of public reason.

Of course, in practical politics many disputes over fundamental values can never really converge on any agreed principles of value of morality. Deliberative theorists like Rawls contend that democracy works best when there is a consensus on procedural or constitutional forms of argument and justification that comprise this ideal of 'public reasoning'. It abstracts from many contentious substantial values in the hope of arriving at an agreed formal value, where citizens agree to accept as politically valid only those forms of reasoning that satisfy what Rawls calls the test of reciprocity.[14] This test holds that, ideally at least, one's argument should be potentially open to free and unforced acceptance by others. It is up to them whether they are persuaded by the substantial merits of one's arguments. The 'public reason' seal of approval is a test of product quality and public acceptability, but not a record of community choice.

Thus in this scheme, arguments that comply with public reason satisfy an important test of political legitimacy. Even where others are not persuaded by one's case, the weight of argument remains free from domination and coercion, and thus the

decision-making process generates legitimate and therefore acceptable results. Under such a framework, republicans would only criticise current constitutional arrangements with justifying principles that they honestly believe that their monarchist opponents could also accept as politically reasonable, given their shared commitment to constitutional democracy. So too for monarchists: their defences of the current arrangements would be justified by reference to the sorts of 'public reasons' open to acceptance by citizens sharing the rights and responsibilities of a constitutional democracy.

This idealised model of political argument is not my standard for deliberative democracy. It would transform the referendum process into a stylised legal dispute over appropriate institutional principles to give effect to constitutional democracy in Australia. Issues of national identity and sovereignty would be harder to format than issues of minimal republicanism. In many ways, Rawls' model of public reasoning is that of the impartiality of the judge, whose determination holds sway not because it reflects any particular set of personal interests or values but because it reflects a more general set of agreed conditions about problem-solving and fair dealing. Rawls asks ordinary citizens to conform to a judicial model of impartiality. More appropriate, I suspect, is that political debate have space for the checks and balances of judicious process, short of the stricter requirement for judicial formality. For my purposes, standing need not be so narrowly defined, and reasoning need not be so restrictively-reciprocal to contribute to better political deliberation.

I will return to some of the policy and legal issues later in this chapter, after reviewing the track-record of referendum reform. Contemporary observers of referendum practice should be aware that there is a long Australian tradition of reformist interest in improving referendums. Regrettably, there is also a long Australian tradition of disquiet over allowing the people to get too close to things like constitutional change that the political elite think that the people are unlikely to understand. A preoccupation of referendum reformers has been the attempt to structure public debate around the highest standards of sound argument as distinct from the usual standards of low politics. This requirement for open public argument is potentially one of Australia's great contributions to the practice of deliberative democracy.[15]

The Importance of Argument

The earliest set of referendum reformers were those constitutional framers who struggled during the 1890s to entrench the referendum provision in the constitution. Their task was far from easy as they had to combat traditional prejudices against direct popular participation in government. The political elite in the decade of constitutional debate leading to Federation included many prominent constitutionalists who had fundamental misgivings about the prudence of entrenching the referendum provision in the Constitution. These foundational reservations about the wisdom of popular referendums reflect a widespread elite view, still circulating, about the unsuitability of voters to the task of constitutional change.

The constitutional right for change through popular referendum had to be fought for, against well-argued opposition in defence of the rights of elected representatives, either in Parliament or in special conventions, to decide things on behalf of the community.[16] As I have detailed elsewhere, the advocates of referendums had to overturn at least three deeply-held prejudices against referendums as incompatible with responsible party government, with parliamentary sovereignty, and with majoritarian democracy.[17]

Thankfully, there were champions of wider public deliberation who worked hard to reduce the deliberative deficit of the emerging national political system. The progressive view was put early by Alfred Deakin, who defended the emerging referendum practice because it promised 'an assistance to Parliament if they desire to obtain distinctly and without the introduction of foreign matter the verdict of the people on any particular question'. Note this emphasis on turning directly to the people 'without the introduction of foreign matter'.[18] Deakin appreciated that the success of referendums depended on the ability of Parliament to keep the arena of public debate free from 'foreign matter': ie, partisan misrepresentation about either the intent or effects of change proposals.

Deakin was one of those referendum reformers who carried their struggle over into the early years of Federation. Under the Constitution, Parliament has power to

legislate for the machinery of referendums. The system that has emerged is one of compromise, reflecting the remarkable tenacity of political elite opinion about the lack of deliberative capacity of voters. The original 1906 legislation establishing machinery for the conduct of referendums showed very little signs of the influence of those reformers worried about how to protect voters against the conventional political tricks of deception and misrepresentation. As the prime minister sponsoring the legislation, Deakin's aim was to equipe the electorate with impartial advice about what would change under any given referendum: impartial here meaning free from partisan wrangling of the type routinely experienced among the parliamentary elite, with allegations and imputations about the hidden partisan purposes of disputed proposals.

Referendum proponents like Deakin feared that referendums would work only if elected representatives gave the people an effective opportunity to deliberate and arrive at what he called their 'verdict'. Just a jury's verdict is preceded by an impartial process of cross-examination of disputed evidence, so too the people's verdict at a referendum should be preceded by some sort of impartial process of weighing of the pros and cons. Deliberation literally means weighing up options, as on a set of scales. Those who warmly supported the principle of referendum began to search for new ways in which Australian citizens could be assisted to participate positively. Two strategies emerged: first, protecting public deliberation from total reliance on the sorts of debating practices common in Parliament; and second, providing citizens with impartial information on the core arguments of the pro and con case surrounding referendum proposals.

The original 1906 legislation was silent on voter education. The next wave of reformers were more successful. In 1912 the referendum legislation was amended to include for the first time provision for the preparation of a booklet containing the Yes and No cases as authorised by their parliamentary supporters for distribution to all interested voters. Relevant here is the use of the term 'argument' to describe the content of this voter education material. The electoral officer was given responsibility for making available to each elector 'a pamphlet containing the arguments together with a statement showing the textual alterations and additions proposed to be made to the Constitution'.[19]

Then and now observers wondered how legislators might ensure that voters are provided with genuine 'arguments': ie, credible reasoning as distinct from clever but specious rhetoric? Debate in Parliament canvassed possible independent umpires capable of preparing impartial statements of the opposed arguments, including High Court judges, the Attorney-General, and parliamentary clerks. Eventually, Parliament dropped the search for external authority and turned directly to the authors of each case: ie, the warring political parties in Parliament, allowing them to resort to whatever form of 'argument' they thought appropriate, subject only to a word limit of 2000 words.

Deakin never gave up the struggle for a better deal for voters. From the Opposition benches in 1912, he reflected on the experience of earlier referendums with their 'wide sway of mistaken opinions' resulting in the situations that 'a very large section remained very imperfectly informed'. Deakin held that it was 'our duty to them' to assist electors 'form an independent judgment'. The 2000 words would not burdensome for 'any person who is really interested in the fate and future of this country'. In his view, the contents should not be allowed to duplicate parliamentary debate since 'there are to be no personal reflections or imputations', with the arguments entirely addressed to 'the merits of each question'.[20] It is worth emphasising that this important qualification never made it into the legislation, despite a subsequent attempt by the Hughes government in 1915 to once again amend this provision to ensure that the arguments focused on the constitutional merits and not extraneous matters.

The Beginnings of Compulsory Voting

The next round of reform was the adoption of compulsory voting.[21] In 1915, Parliament slowly edged sideways towards a rather novel safeguard against voter misunderstanding and partisan misrepresentation: compulsory voting. With the defeat of its attempts to legislate to provide voters with information free from partisan misrepresentation, in August 1915 the Hughes government devised a novel approach to electoral responsibility: an experiment with compulsory voting. It was not until 1924 that compulsory voting was introduced for general elections and permanently for referendums. But Parliament legislated in 1915 to provide for compulsory voting

for a series of referendum questions that, given the changing conditions associated with Australian involvement in the First World War, were never put to the people.

The conventional wisdom about the Australian introduction of compulsory voting is that it was introduced to make life easier for political parties, which is probably true as far as it goes. But it is also important to recognise that in its very first national phase, compulsory voting was explicitly designed to repair the deliberative deficit. The idea was simple: if citizens knew that voting at national constitutional referendums was a legal duty, then perhaps they would pay greater attention to the debate over the merits of the proposals. The stated idea behind the proposal for enforced civic responsibility was that put in these terms: 'The majority are able to discuss football records, and make an accurate calculation of to the time in which 6 furlongs can be done at Flemington, but, in many cases, those men have not had their attention sufficiently directed to the affairs of their country to be persuaded to exercise their franchise'.[22]

Critics have suggested that this is a device designed not so much to bolster public deliberation as to lift the referendum approval rating which would suit reformist parties like Labor. There is a supposition that Labor voters have traditionally been among a majority of those who have failed to turn out when elections have not been compulsory. While this might be true, it is still the case that compulsory voting might simply reinforce the conventional bias against constitutional reform by ensuring that the legions of reactive Australian voters turn out to register their disapproval. For years, referendum critics have believed that there is a link between compulsory voting and No voting. One bit of evidence that should confirm this would be a high incidence of informal voting (ie, deliberately spoilt ballots), but this is not in fact the case.[23]

What can be said in defence of compulsory voting? The defences at the time were all related to giving electors a spur to deliberation. For example, it was held that constitutional referendums too important to be decided by a minority of the participating electors, and that compulsion will encourage electors to find out what a referendum really turns on. The responses at the time also addressed the deliberative deficit, contending against 'compelling persons to give a judgment, which may affect important decisions, on matters which they have not studied, and in which they take

so little interest that, if let alone, they would not record their judgment…'. Compulsion alone would not generate voter diligence: compulsion 'will not insure the predominance of intellect in the council of a nation's affairs. It does not follow that everybody will cast a philosophic and intelligent vote'.[24] But compulsory voting stayed and was, as its critics feared, later extended to general elections.

Capturing the Momentum for Change

Between 1915 and 1999 referendums were held on 15 occasions, roughly half at the time of a general election and half separately. Of 31 individual proposals put to voters, six were successful: two at the time of general elections and four when held separately. In many ways, the two referendum proposals put at 1999 simply confirmed the historical trend in which 80% of proposals are defeated.[25] But trends can be bucked: the 1999 losses were a much closer thing than the four losses suffered in 1988 which so far mark out the bottom of the referendum barrel. I want to identify a number of important differences in the 1999 referendum process which point the way to reform.[26] The momentum from these 1999 rule changes can be used to bring in further sets of changes, in the event that we desire a more effective deliberative process.

Elected Conventions

The first and in many ways most fundamental issue is the potential value of elected constitutional conventions. The referendum trigger was the partly-elected 1998 Constitutional Convention which generated greater public interest and participation than traditional referendum triggers, such as the 1985-1988 Constitutional Commission which prepared some of the ground for the four unsuccessful 1988 referendums.[27] The holding of the Women's Constitutional Convention in Canberra a few weeks before 'ConCon' is proof of the benefits of taking even a half-step towards a fully elected constitutional assembly. The women's convention arose from a determination by interested women's groups to take seriously the Howard government's commitment to a more open and representative community process of constitutional deliberation. This pre-convention served to strengthen public interest in 'ConCon', and both conventions made it that much more difficult for referendum

activists on both sides to get away with the rhetorical simplifications of past referendum practice. Importantly, the Resolutions of the 1998 Constitutional Convention called for reform of the constitutional change process to ensure greater public participation as part of a larger agenda of constitutional renewal --- an agenda that is independent of the fate of the minimalist republican model.[28]

The potential role of popularly elected constitutional conventions has the authority of that great constitutional expert, Robert Garran, whose views should carry weight at the time of the centenary of Federation. Speaking 50 years ago at the mid-point of that century of constitutional development, Garran advised a group of non-Labor activists interested in constitutional amendment that popularly elected conventions promised valuable legitimacy for any scheme of constitutional change.[29] He reminded his audience of the pre-Federation struggle for popularly elected constitutional conventions to take forward the issue of preparing a national constitution, and of the legitimacy that came from the equally important commitment to a series of colonial referendums to adopt the draft constitution. At earlier times in our national history, governments have opened the door to elected conventions as a way of mobilising public interest in constitutional change: in 1921 the Hughes government introduced legislation for a partly elected convention which now appears a model for the 1998 Constitutional Convention. In 1925 the Bruce government nearly opted for an elected convention but turned instead to appoint the Peden royal commission. In 1931, the Lyons government considered an appointed convention but declined to proceed, perhaps because it recognised that a non-elected body would not carry public legitimacy.

Garran's warning was that any scheme for constitutional change would be greatly strengthened by first convening an elected assembly to test public interest in reform priorities. That warning still stands. The very limited impact of the six appointed Constitutional Conventions from 1973-1985 highlights the paradox that carefully selected constitutional expertise is no guarantee of effectiveness. Australia still has no agreed approach to a standing process of constitutional revision. Indeed, the 1998 'Con-Con' concluded its final Communique with a call for 'ongoing constitutional review process' involving calling for a new convention with two-thirds of its

members popularly elected.[30] That is a good starting point for those still cautious about a fully elected convention.

Role of Parliament

A second pointer was the enhanced role of Parliament in the development of the referendum process. A distinctive feature of the 1999 referendum was the decision of the Howard government to allow considerable public contribution to the detailed definition of referendum options. The package of legislative bills was released early for public comment and the government particularly invited contributions to its draft preamble. This was an unusual but very welcome invitation to greater public participation in the referendum process. Fortunately, it went further than simply public concessions granted by a tolerant government: another distinctive feature of the 1999 process was the role of the parliamentary select committee especially established to examine the legislative bills containing the referendum proposals. These small but welcome parliamentary contributions should be strengthened and built in to the standard practice for referendums. The select committee chaired by government backbencher Bob Charles performed a very valuable task in two ways: it took mountains of evidence all around the country and it produced a report that had enough influence that it actually forced the government to modify and clarify the precise wording of the head of state question.[31] That report stands as the best single resource for those wanting to revisit the great debates of the 1999 referendum when next we come to examine the details of a republican option: disputes over the presidential nomination process, powers of the president, and the dismissal provisions.

It is hard to overstate the importance of a parliamentary involvement in a referendum process. The usual practice is that many individual members of Parliament participate but without any sustained institutional involvement by Parliament or its committees taking responsibility to provide a prominent public forum for debate over the merits of the legislative proposals. The 1999 select committee demonstrated the value of a forum established by Parliament as distinct from the government of the day. Legislators have a special role in the Australian referendum process: the constitution confines the initiation of constitutional change to Parliament and nothing can happen

until our elected members are convinced of the merits of allowing voters their opportunity to vote. There have been recommendations to widen the scope of initiators to include, for example, the states as well as the Commonwealth Parliament, and perhaps even popular initiative.[32] Whatever the merits of these suggestions, my contention is that Parliament has room to demonstrate greater initiative in its own right, given that it can prevent as easily as it can promote a referendum proposal.

Parliament already has one committee with dedicated responsibility to watch over the general state of electoral law and practice: the existing joint committee on electoral matters should now be supplemented by a new committee with dedicated responsibility for referendum policy and administration. The committee should have representation from all parliamentary parties and operate with a community consultative council comprising a fully representative spread of perspectives on constitutional change, assembling differences in regard to gender and region as well as party. Such a committee need not sit back and wait for referendum business to come its way but could prove its worth right now by anticipating how a better process of community debate and decision-making could be prepared well before we get close to the next round of referendum voting. Establishing such a committee in the year of the centenary of Federation would send a positive signal that Parliament was ready to protect and promote the spirit of popular participation that made Federation possible.

Community information

The third and final reform pointer relates to public instruction. The report of the 1999 parliamentary committee acknowledged the need for greater public resources to be directed to community information during referendums.[33] Another unusual parliamentary pointer to reform was the amendment of the referendum law to overcome the severe limitations on public expenditure available for government use in promoting the referendum. As an experiment, the law was amended to permit the government to spend substantially more than any earlier referendum and so generate a higher level of reliable information to voters. The main beneficiaries were the government-appointed Yes and No campaign committees, each given $7.5 million. This is welcome because the traditional reliance on the official pamphlet is clearly past its use-by date. The pamphlet alone cannot be expected to stay the hand of

partisan manipulation, particularly as it is prepared by the interested parliamentary partisans.

A related reform pointer was the government's decision to establish, with a budget of $4.5 million, an experts' group chaired by Sir Ninian Stephen to direct a 'neutral public education campaign'. The 1999 experience was that this mechanism was not capable of 'neutralising' the deceptions of many referendum activists. One important lesson is that this very traditional model of non-partisan public education might have reached its limits: what works for, say, community health campaigns is not necessarily appropriate for political contests over constitutional change. The committee was too far removed from the real action: the simplistic and possibly misleading referendum media publicity escaped the close scrutiny or the arms-length control of the experts' group. But even if the experts had wanted to intervene, as constitutional lawyers they would have taken particular note of the High Court's narrow reading of the provisions in referendum law designed to prohibit material that is 'likely to mislead or deceive' electors.[34]

Many potential reformers doubt that much can be done to regulate misleading or deceptive campaigning. There is a conventional assumption that all forms of political speech are in a special zone beyond the reach of ordinary regulation. I disagree and can point to emerging new models of appropriate regulation. One precedent is the 1998 Howard government legislation called the *Charter of Budget Honesty Act*, the stated purpose of which is to 'facilitate public scrutiny of fiscal policy and performance'. Given that elections turn substantially on competing claims over fiscal policy, the Charter legislation authorises the leaders of the two major political groupings (government and opposition) to request the Commonwealth departments of Treasury and Finance 'to prepare a costing of any of its publicly announced policies if a general election is called. The costing will then be publicly released' before the date of the election (s2, para6 and s22). The Charter is welcome because it opens the way for citizens to have competing political claims tested against what the legislation terms 'the best professional judgment' of Treasury and Finance officers, ie independent and impartial public servants (s25).

Surely it is not impossible to devise a similar scheme that could subject political claims about constitutional alteration to independent review by a non-partisan public authority or specialist referendum commission. Another model or precedent is the South Australian *Electoral Act* which is a leader in the campaign against misleading advertising. This legislation authorises the state electoral commissioner to take action against parties publishing 'a statement of fact that is inaccurate and misleading to a material extent' (s113 para2). Usually, the electoral commissioner simply arranges for a public retraction by offending parties, but there is nothing to stop such a scheme from going further and arranging rights of reply or rebuttal from those misrepresented. Note that this scheme targets only statements purporting to be factual, and is quite permissive about statements of opinion. The state Supreme Court has upheld the constitutional validity of this restriction on political communication as consistent with the legitimate public interest in protecting the rights of electors to exercise a free vote, uninfluenced by misleading information. The Court has drawn attention to the importance of 'a truly informed elector', ruling that a 'democratic election requires that the electorate be informed so that the electorate can exercised an informed vote'. [35]

Yet another precedent derives from the determination of Leader of the Opposition Kim Beazley who in 2000 introduced the *Government Advertising (Objectivity, Fairness, and Accountability)* bill to draw up new rules in the wake of the Howard government's allegedly improper use of public money when promoting the GST changes.[36] Relying on a new regulatory framework devised by the Auditor-General, the Beazley bill identifies minimum standards of objectivity, fairness and accountability appropriate to government advertising campaigns. My point is that what can be done for government advertising can also be done for a publicly-funded referendum campaigning. Referendum authorities can attach terms and conditions when providing public moneys to Yes and No teams for the promotion of their particular perspectives.

The search for appropriate terms and conditions regulating the use of public assistance began in a modest and not altogether successful way in 1999, with a welcome if limited focus on the financial accountability and reporting requirements of recipients of public assistance. But to be successful, referendum authorities must go much

further and devise a version of the minimum standards of objectivity and fairness used in the Beazley bill. For instance, material 'should not directly attack or scorn the views, policies or actions of others such as the policies and opinions of opposition parties or groups...' There are other models of a regulatory regime that might be extended to cover the conduct of referendums. For instance, Australian Democrat senator Andrew Murray's bill to establish a *Charter of Political Honesty* is also designed in part to attack the misuse of public funds in government advertising campaigns.[37] Murray's bill draws on earlier provisions of the Commonwealth Electoral Act that have since been discarded which attempted to prohibit untrue, misleading or deceptive political advertising. The current Murray bill has come forward because earlier attempts by Australian Democracts senators to restore this provision have been unsuccessful. [38]The standards of political honesty contained in the Murray bill relate to the promotion of materials 'in an unbiased and equitable manner', designed to promote 'information in a way that makes facts clearly and easily distinguishable from comment, opinion and analysis'. Clearly the momentum is gathering for closer public scrutiny of the honesty of political communication made by political parties when using public funds.

The Importance of a Referendum Commission

I turn finally to my proposed Referendum Commission as the operational centre-piece of my plan for a more effective referendum process.

While our deliberative deficit is bad for the prospects of an Australian republic, the existence of a deeper structural deficit in the referendum framework is even worse for the prospects of Australian democracy. My reform plan aims to strengthen community deliberation through a new form of consumer or voter protection against the impact of deception and misrepresentation by referendum activists. Australian referendum practice still has plenty of potential for measures giving consumers or voters opportunities for better-informed choices when deliberating and voting.

Of course, it is not feasible to strike at every instance of partisan misrepresentation by referendum activists or to respond to every reported instance of voter misunderstanding. But one can bring greater balance to the deliberative process by

reserving public space for a more considered and measured exchange of contending views for those voters wanting to hear and contribute to a more informative process of public deliberation. Strengthening the opportunities for public participation and information exchange can do much to advance Australia's claims as a deliberative democracy. Effective democracy presupposes an institutional framework or set of rules to facilitate open, free, and fair public decision-making.[39] The rules of the game most certainly matter, particularly when it comes to electoral contests and voting exercises. Effective political deliberation at referendums requires a new institutional framework and set of rules to protect public space against the 'market domination' and predatory partisanship of referendum activists bent on deception and misrepresentation. The solution is not to outlaw anti-deliberative politics. A better strategy is to invest in balancing mechanisms capable of carving out a space for fairer exchanges of political views. Think of this as a kind of reserved or slow lane (slow in the sense that deliberation suggests the importance of a lack of haste) for those interested in participating in a more open community dialogue.

It is worth noting by way of comparison that US approaches to referendum law and policy permit greater public regulation of the content and format of taxpayer-funder 'voters pamphlets' containing political statements and arguments. For instance, Oregon referendum law allows the election authorities to withdraw any proposed statement from a referendum activist which contains, for example, defamatory or hateful speech[40]. Thus it is mistaken to suggest that it would be impossible to balance the competing requirements of free and fair political speech. Current Australian practice allows the producers of so-called free speech to trample on the rights of the consumers of fair speech. A Referendum Commission could help redress the balance.

Such a Referendum Commission should be established and funded not by the government of the day but by an all-party parliamentary committee on referendums and constitutional change. As mentioned earlier, the current arrangement where the administration of referendums is the responsibility of the Australian Electoral Commission (AEC) has proved worthwhile but is no longer keeping pace with international standards. When considering fundamental constitutional change, a democratic political community has a right to expect that the change process will be

conducted with a degree of honesty and fairness typically absent from electoral contests over who should form the government of the day.

This is not to deny the importance of promoting more open and fairer electoral contests. My focus here is solely on referendums. To cite another instance, the 1996 Nairne Commission in the United Kingdom investigated the feasibility of referendums for future British practice.[41] It recommended that responsibility for referendums be separated from responsibility for everyday electoral administration. Again the case was that the sort of community decision-making expected of referendums was unlike that expected or tolerated in routine electoral contests. This recommendation for an impartial public authority to manage referendums was also taken up by the UK Committee on Standards in Public Life in 1998, at the same time as a similar recommendation by the UK Jenkins Commission on electoral reform.[42]

In these reports there is no suggestion that electoral administrators are anything but impartial in their management of electoral rules, even-handedly applying the law to all parties and electors. The issue is that rule-bound impartiality does not quite capture the form of public management required to facilitate effective public participation in referendum debate and decision-making. Electoral administration involves a largely reactive process of party registration, candidate approval, vote counting and, where it exists, the distribution of public funding according to voter support. A Referendum Commission reporting to an all-party parliamentary committee could effectively engage in more appropriately proactive activities to stage a balanced public contest addressing the issues and the merits as understood by the spread of protagonists. Staging a fair hearing of alternatives will not guarantee that voters converge on a rational consensus. But it can help provide for public access to a fairer debate among all the available perspectives.[43] The distinctive competence of a dedicated Referendum Commission would be its broadly representative (rather than neutral or impartial) character and, flowing from that, its capacity to stage debate and public exchange involving all segments of community opinion.

This Referendum Commission would take over responsibility for funding and managing the public process of the referendum once the proposal constitutional alteration leaves Parliament. One of the most important of these responsibilities would

be to work with the all-party committee to arrange, where necessary, for plebiscites followed by popularly-elected constitutional conventions to replace the partly-elected 'Con-Con' to allow for greater public participation in developing the details of any agenda of constitutional change. Other responsibilities closer to the holding of a referendum would include public assistance to Commission-appointed Yes and No committees, neutral public education programs, including provision of the contending arguments traditionally distributed by the Australian Electoral Commission (the Yes/No booklet), and regulation of the content of publicly-funded contributions to referendum debates to protect its basic integrity, fairness and honesty.

Conclusion

There are limits to what can be expected of rational deliberation. What holds for referendums does not necessarily hold for other democratic practices. Referendums are exceptional, and any reform of referendum rules does not imply that routine politics can also be reformed along deliberative lines. The Australian constitutional framers appreciated that referendums were exceptions to the normal rules of Australian parliamentary politics. Special rules were devised to protect voters' rights to use their infrequent referendum exercise of sovereignty to make an informed decision on constitutional change. My call for a Referendum Commission is consistent with this recognition of the distinctive importance of constitutional sovereignty. It is unrealistic and perhaps unwise to hope that routine parliamentary politics can attract similar protections against undeliberative action. Theorists of deliberative democracy occasionally show impatience with what appear to be the unreasonable strategies of minorities, whose rights of protest, direct action and civil disobedience illustrate valuable dimensions of democratic political deliberation.[44]

I also want to emphasise that my call for reform is not a republican case of sour grapes. My belief in the importance of overhauling the referendum rules would hold even if the republic referendum had won popular approval. As a committed republican favouring greater democratic participation in government, I am convinced that the move towards an Australian head of state should be accompanied by moves to protect citizens' rights to a free and fair process of constitutional change through referendum. Even those who want Australia to retain the current system of

constitutional monarchy should be interested in maximising the opportunities for open and honest public decision-making when using the referendum provision in s128 of the constitution. My motivation does not rest on a desire to increase the rate of referendum approvals. The fact that only 8 of 44 referendum proposals have won popular approval is not really evidence that the referendum system is broke. Voters have probably had good reason to withhold their approval except where the initiators of constitutional change have fairly and openly responded to, first, the unavoidable instances of voter misunderstanding and, second, the less excusable instances of partisan misrepresentation by referendum activists.

Earlier generations of rule reformers have included some who hoped that changing the referendum rules would indeed increase the rate of popular approval of constitutional change. Some reformers have even sought to alter the terms of the constitutional provisions regulating the referendum process. For instance, the Whitlam government put a proposal to the people in May 1974 to alter s128 to reduce the measure of a required majority from a national majority involving majorities in four states (ie a majority of states) to a national majority involving majorities in three states (ie half of the states). Under these revised rules, three past referendum questions might have been carried: two for Labor in 1946 and one for the Coalition in 1977. But this 1974 proposal failed to pass, scoring a majority in one state only and not securing a national majority overall.[45]

My argument is directed more towards a healthy process of democratic deliberation than to any particular scorecard or end-result. The processes of democratic deliberation and good governance have value in their own right, as ends in themselves proving that a people have the capacity to carry on self-government. Australia has a long history with much to teach the world about democratic governance. A century ago, the constitutional entrenchment of a popular referendum was a daring experiment based on an Australian belief that popular government was as viable in practice as it was admirable in principle.[46] Referendum history shows that the regulatory framework has lagged well behind the capacity of the people to make a greater contribution to Australian self-government. A century ago, national referendums were the exception to the parliamentary rule. Over that century, considerable progress has been made in giving greater voice to the people, so that we can expect that the new

century will continue to widen the scope of popular participation in government. There is no better way of putting democratic theory into practice than by rewriting the rules for referendums.

ENDNOTES

[1] John Uhr, *Deliberative Democracy in Australia*. Melbourne: Cambridge University Press, 1998; John Uhr, 'Introduction' in J Uhr Ed, *The Australian Republic; The Case for Yes*. Sydney: Federation Press, 1-8.
[2] Consider R Miles, 'Australia's Constitutional Referendum', *Representation,* volume 35, number 4, pp237-248; John Uhr, 'After the Referendum: The Future of Constitutional Change', *Public Law Review*, March 2000, 7-10.
[3] For details, see John Uhr, 'Making Sense of the Referendum', *Papers on Parliament No35*. Canberra: Department of the Senate, June 2000, 110-111.
[4] Richard Mulgan, 'Defeating Defeatism', in Uhr ed *The Australian Republic*, op cit, pp178-182.
[5] Consider Uhr, 'Making Sense of the Referendum', op cit, 99-111.
[6] Hon Justice Michael Kirby, 'The Australian Referendum on a Republic: Ten Lessons', 2000 Menzies Memorial Lecture, London 4 July 2000.
[7] Ibid, 45. For a report on the deliberative poll, see Issues Deliberation Australia: http:// i-d-a.com.au; see also Uhr, 'Making Sense of the Referendum', op cit, 95-96, 115-116.
[8] Kirby, 'The Australian Referendum on a Republic', op cit, 45-47.

[9] Hon Barry Jones, 'Framing a New Republic', 1999 Annual Lecture, *Proceedings 1999*, Australian Academy of the Humanities. Canberra, ACT 2000, 115-129.
[10] Ibid, 126-128.
[11] John Uhr, 'Testing Deliberative Democracy: the 1999 Australian Republic Referendum', *Government and Opposition*, v35/1, Spring 2000, 189-210. See also C Saunders, 'Referendum Procedures', appendix 7, *Report*, Constitutional Amendment Sub-Committee, Australian Constitutional Convention, June 1984.
[12] James Fishkin, *The Voice of the People: Public Opinion and Democracy*. New Haven: Yale University Press, 1995.

[13] See eg John Rawls, *The Law of Peoples*. Cambridge: Harvard University Press, 1999, 132-140.
[14] Rawls, *The Law of Peoples*, op cit., 14. See generally F D'Agostino and G F Gaus eds *Public Reason*. Ashgate, 1998.
[15] Uhr, 'Making Sense of the Referendum', op cit, 101-111.
[16] James Crawford, 'Amending the Constitution' in Gregory Craven ed *Australian Federation*. Melbourne; Melbourne University Press,1992, pp177-192.
[17] Uhr, 'Making Sense of the Referendum', op cit, 102-104.
[18] Ibid.
[19] Referendum (Constitution Alteration) No 2, Act no 35 of 1912, section 2. See L Lenaz-Hoare, 'The History of the Yes/No case in Federal Referendums', appendix 5, *Report*, Constitutional Amendment Sub-Committee, Australian Constitutional Convention, June 1984, 85-93.

[20] Uhr, 'Making Sense of the Referendum', op cit.,109.
[21] Ibid, 110-111.
[22] Ibid. The author is Senator Russell, assistant Minister in charge of introducing the bill for compulsory voting. See *Commonwealth Parliamentary Debates*, 13 August 1915, p5755.
[23] Mulgan, 'Defeating Defeatism', op cit, pp177-8.
[24] Cited in Uhr, 'Making Sense of the Referendum', op cit., 111.
[25] For details, see *Select Sources on Constitutional Change in Australia*, House of Representatives Standing Committee on Legal and Constitutional Affairs, February 1997, Canberra, 59-114.
[26] Uhr, 'Making Sense of the Referendum', op cit, 112-115.
[27] John Uhr, 'The Constitutional Convention and Deliberative Democracy', *University of New South Wales Law Forum*, v4, no2, June 1998, 13-15.
[28] The 'ConCon' Resolution is in Uhr ed, *The Australian Republic*, op cit, 191-196.
[29] Robert Garran in *Changing the Constitution*, ed F A Bland. Sydney: NSW Constitutional League, 1950, 181-183, 187-197. On the history of constitutional conventions, see also F Louat, ibid, 164-177.
[30] Uhr ed, *The Australian Republic*, op cit, 195-196.
[31] *Advisory Report*, Joint Select Committee on the Republic Referendum, Bob Charles (Chair). Canberra, August 1999.
[32] See *Final Report of the Constitutional Commission, 1988, volume two*. Maurice Byers (Chair), Canberra, 1988, 856-872; Colin Hughes, 'Commonwealth Constitution: Methods of Initiating Amendments', Appendix 3, *Report*, Constitutional Amendment Sub-Committee, Australian Constitutional Convention, June 1984, 34-76.
[33] *Advisory Report*, op cit, 6-7, 97-99.
[34] See eg Evans v Crichton-Browne, 147 *CLR* 169 (1981).
[35] Cameron v Becker 64 SASR 238 (1995): Lander J at paras 16, 18.
[36] Introduced into House of Representatives, 26 June 2000.

[37] Introduced into Senate, 10 October 2000; see also Senator Murray's Electoral Amendment (Political Honesty) bill introduced the same day.
[38] See Standing Committee on Electoral Matters, *Report*, Canberra: June 1997, Senator Murray's minority report at pp152-3.
[39] Uhr, *Deliberative Democracy in Australia*, op cit, 213-231.
[40] See eg *Oregon Revised Statutes*, 251.055
[41] *Report of the Commission on the Conduct of Referendums*, Patrick Nairne (Chair), London: The Constitution Unit and the Electoral Reform Society, November 1996, 26-34.
[42] *The Funding of Political parties in the United Kingdom*, a report of the Committee of Standards in Public Life, October 1998. London; *Report*, Independent Commission on the Voting System (The Jenkins Commission), London: October 1998.
[43] Uhr, 'Testing Deliberative Democracy', op cit, 206-210.
[44] See Rawls, *The Law of Peoples*, op cit, xyz; compare Uhr, *Deliberative Democracy in Australia*, op cit, 13-29.
[45] *Select Sources on Constitutional Change in Australia*, op cit, 99-100.
[46] Consider Robert Garran in Bland ed, *Changing the Constitution*, op cit, 187-197; John Uhr, 'Conclusion', in Uhr ed, *The Australian Republic*, op cit, 187-190.