TOO MUCH LAW AND NOT ENOUGH THEORY – A CRITIQUE OF THE COMMONWEALTH CONSTITUTION

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The Commonwealth Constitution has never undergone a process of comprehensive, systemic reform. Yet its institutions fail to give effect to fundamental constitutional theories such as accurate representation of the will of voters, effective control by the legislature over the executive and protection of individual rights. The federal system remains a feature of the Constitution despite its enormous cost. Debate over the republic has failed to address the key issue of codification of the reserve powers. Yet despite these flaws, constitutional reform appears unattainable, due in no small part to the fact that the shortcomings in civics education leave voters ignorant of the constitution and thus fearful of changing what they do not understand. This paper contains a broad discussion of the most pressing constitutional reforms and what is necessary for them to be achieved.

I Introduction

One of the most striking characteristics of public life in Australia is the almost complete absence of debate on systemic constitutional change. The country truly remains, as Geoffrey Sawer so vividly said, a 'frozen continent'.[1] Despite piecemeal changes to the *Constitution*, it has never undergone wholesale reform. The most recent public inquiry into broad constitutional reform was initiated in 1985 and

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1 Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

led to the publication in 1988 of the *Final Report of the Constitutional Commission*,[2] a document which is excellent for its breadth of coverage of constitutional issues, but which is rarely referenced in academic writings. Yet, from the constitutional reformer's perspective, Australia is, or ought to be, a land of opportunity, given the multiple defects evident in its constitutional arrangements.

This article casts a critical eye over our constitutional arrangements in the broadest sense, covering not only the text of the *Constitution* but constitutional law more generally. Its key purpose is to present a comprehensive suite of reforms, taking account of the fact that a change in one area of constitutional law usually has implications for others. The article approaches reform from the perspective of pure theory, meaning that the reader is invited to discard any preconception that the constitutional order – and still less the text of the Constitution – is a given, and to think instead about concepts such as democracy, governmental accountability and individual freedom, asking whether current constitutional arrangements properly give effect to them. The article also takes an ahistoric approach, meaning readers are asked to set aside views such as, for example, that because federalism was adopted as a necessary political step to bring Australia into being we should be deterred from considering whether federalism continues to serve any useful purpose. In short, what this article attempts to do is to ask readers to adopt a blank-slate approach, to consider what defects are evident in the current constitutional dispensation and to think about what remedies we would adopt were we to embark on a process of constitutional re-design. I approach this task from the position of the academic who has the luxury – I would say the duty – of discussing reform without regard (at least initially) to the political barriers to reform, a question which lies in the province of political actors. I do, however, offer some thoughts on issues of practicality at the end of this paper, along with a related discussion of the shortcomings of civics education.

Part II of this paper examines the distortions produced by the electoral system for the House of Representatives and argues that it fails the key democratic test of accurately reflecting voter sentiment. The Mixed-Member Proportional (MMP) system used in New Zealand, and the Single Transferrable Vote (STV) system, variants of which are used in Australia, Ireland and Malta, are examined as suitable alternatives. Part III highlights the immunity from effective parliamentary scrutiny that governments enjoy, despite the fact that Australia supposedly has a system of responsible government, and argues that the model of judicial intervention which operates in the United States to secure executive compliance with legislative inquiries, is worthy of emulation here. Part IV considers the issue of rights protection, and criticises the failure of Australian constitutionalism to keep pace with international human rights theory following World War II. As an exemplar, specific attention is paid to the way in which debate has been conducted on whether a constitutional right not to be discriminated against on grounds of race should be included as part of the process of recognising Indigenous Australians

2 Constitutional Commission, *Final Report of the Constitutional Commission* (Commonwealth of Australia, 1988).

in the *Constitution*. Part V examines federalism and poses the question as to why, given its cost, we maintain this system though it confers no significant benefit, pointing out that this is an issue for which there is public appetite for reform. Part VI considers the issue of a republic and the reserve powers, and argues that codification of the reserve powers is a necessary corollary of a move to a republic, particularly if we had an elected President, but that codification is a reform which ought to be undertaken even in the absence of a move to a republic. The final substantive section of the article, Part VII, urges reform to civics education in Australia and critiques the suppositions underlying debate on Australian constitutional reform, before offering suggestions on how best to muster public support for reform.

II Representation

Australia prides itself on having a democratic government, yet the way the term 'democracy' is used, indicates that there is limited understanding of its true nature. Democracy is a system, not a moral concept. Such moral value as attaches to it depends upon the extent to which it serves some norm which is external to it. According to political theory developed in Ancient Greece,[3] that norm was the entitlement of citizens to participate in law-making. During the Enlightenment this came to be phrased in the language of rights – that each citizen was of equal status, from which flowed an equal right to participate in law-making, the only practical way of achieving that being through the mechanism of representative democracy.[4] It was crucial to the success and vindication of that right that the franchise not be restricted by class or be distorted in its effect by, for example, weighting one person's vote differently from that of another, or by allocating law-making authority to legislative chambers representing social classes unequally.

Once one appreciates the concept of democracy as a mechanism used to give effect to a higher norm, two conclusions follow. First, democracy depends for its justification on a theory of individual rights, to which it is therefore subordinate. This point is referred to later in this paper in the discussion of the constitutional protection of rights. Second, whether an electoral system can be described as democratic is a question of degree, and depends on the extent to which that system gives effect to the right of citizens to equal influence over the law-making process. Thus the effectiveness of an electoral system in serving its purpose must be determined by how accurately it reflects the political sentiments of the voters, and where an electoral system is less consistent with democracy, the greater the extent to which arbitrary factors distort that reflection.

3 For an overview of Athenian democracy see Mogens Hansen, *The Athenian Democracy in the Age of Demosthenes* (Blackwell, 1991) 90–93, and 129.

4 For a discussion on the development of modern representative democracy see Sanford Lakoff, *Democracy: History, Theory, Practice* (Westview Press, 1996) 99–117.

The *Commonwealth Constitution* is silent as to electoral systems – ss 7 and 24 state only that Senators and Members of the House of Representatives are to be 'directly chosen' by the people, a phrase which the High Court held in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* [5] and *McGinty v Western Australia*,[6] does not mandate equality of voting power and leaves Parliament free to determine what electoral system should be adopted. Subsequently, in *Roach v Electoral Commissioner* [7] and *Rowe v Electoral Commissioner* [8] the High Court held that ss 7 and 24, as well as the doctrine of representative government which the *Constitution* incorporates, imply a right to universal adult suffrage and that it would be unconstitutional for Parliament to disenfranchise people in a manner which disproportionately limited that right. Yet the Court did not take the further step of finding that a law which deprives a vote of equality of impact is unconstitutional.

Whereas the electoral system contained in the *Commonwealth Electoral Act 1918* (Cth) falls within the spectrum of democratic systems, in that it allows every adult citizen to vote, it falls far short of giving effect to the right to exercise equal voting power by each citizen. The single-member electorate system used for elections to the House of Representatives is the most distorting possible when compared to the range of electoral systems on offer. This is because the most important factor in determining how many seats a party obtains in Parliament is not the number of votes it obtains nationwide but rather the accident of where voters live relative to electoral boundaries. Furthermore, this arbitrary system (i) always leads to parties receiving a different percentage of seats to the nationwide percentage of votes cast which they obtained, (ii) frequently leads to a party winning government without obtaining a majority of votes and (iii) sometimes even leads to a party winning a majority of seats with fewer votes than the major opposition party. A few statistics demonstrate the magnitude of the problem.[9]

In 1990, the 11.4 per cent of first preference votes won by the Australian Democrats yielded not one seat for the party – yet by contrast, the Nationals won only 8.4 per cent of first preference votes and gained 9.5 per cent of the seats in the House of Representatives – simply because of where their voters lived relative to electoral boundaries. In 2004 and 2007, the Greens won more than 7 per cent of the vote but achieved no representation in the House; they won their first and only seat in the House in 2010 after winning 11.7 per cent of first preference votes nationwide. The result of this is that the major parties have won an astonishing 99.1 per cent of all House of Representatives seats in the 26 elections held since 1949.

5 *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.
6 *Roach v Electoral Commissioner* (2007) 233 CLR 162.
7 *Roach v Electoral Commissioner* (2007) 233 CLR 162.
8 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
9 Calculations are based on election results data published by the Australian Electoral Commission, (2016) <http://results.aec.gov.au/>.

Even more disturbing for democratic legitimacy are the anomalies produced on a national scale. Take, for example, the following table which contains results from the elections held in 1990 and 1998.

Year	Party	Nationwide % of first preference votes	% of House of Representatives seats
1990	Labor	39.4%	52.7%
	Coalition	43.4%	46.7%
1998	Labor	40.1%	45.2%
	Coalition	39.1%	54%

What is striking about these results is that clearly the 'wrong' party won both elections, in that the victor (that is, the party which obtained a majority in the House of Representatives) was less popular in terms of nationwide share of the first preference vote than the vanquished. This is by no means a rare occurrence: Governments also came to power with fewer votes than were won by the opposition in 1954, 1961 and 1969.[10]

Because it is the location, rather than the number, of voters that a party obtains that is critical to its electoral success, parties put most effort into campaigning in marginal seats. The influence of the marginal seats is dramatic. While 12 930 814 votes were cast in the 2007 election, the outcome was effectively decided by just 8 772 voters in 11 electorates.[11] If those voters had given their first preferences to the Coalition instead of to Labor, the Coalition would have achieved victory. Yet, this was an election which, after the allocation of seats in Parliament (83 to Labor and 65 to the Coalition), gave the appearance of a Labor landslide. In 2010 the margin was even closer – 13 131 667 votes were cast, but if only 2 175 voters in two electorates voted for the Coalition instead of Labor,[12] the Coalition would have won power. How can an electoral system be considered fair when winning government depends upon the geographical location of a tiny number of voters?

Another result of systems using single-member electorates is that they inevitably lead to a never-ending transfer in power between two parties, and thus the establishment of what is really a duopoly in place of a democracy. This, I would suggest, is a key reason why voters are becoming resentful of, and disengaged from, the political system. A reflection of this is the fact that an ever-increasing

10 Cited in the table of statistical highlights of federal elections in Stephen Barber 'Federal Election Results 1901-2010' (Research Paper No 6, Parliamentary Library, Parliament of Australia, 2011), <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1112/12rp06>.

11 These electorates were: Bass, Bennelong, Braddon, Corangamite, Cowan, Deakin, Flynn, Hasluck, Roberston, Swan and Solomon.

12 These were the electorates of LaTrobe and McEwen; this suggestion also assumes that the Greens and independents would have made the same decisions as to who to support in government.

number of voters are expressing their frustration with the major parties by directing their first preference votes to parties other than Labor or the Coalition. In the 2007 election 14.5 per cent of first preference votes went to minor parties or independents,[13] but this increased to 18.2 per cent in 2010, 21 per cent in 2013 and 27 per cent in 2016. This is despite the fact that a first preference vote cast other than for one of the major parties amounts, in most instances, to no more than a gesture made before having to make a reluctant choice between the parties that can actually win a seat even though the voter may have no affinity with those parties whatsoever.

Yet there is no translation of this political disillusionment into calls for reform to the electoral system. It is interesting to note commentary by an Australian academic that the result of the 2013 Malaysian elections was manifestly unfair, given that the governing Barisan Nasional party obtained 60 per cent of the seats in Parliament with only 47% of the votes.[14] The occurrence of similarly distorted results in New Zealand in elections in 1978 and 1981 led to the major parties agreeing to hold a referendum on electoral reform, despite it being patently contrary to their own interests to do so. Why then do Australian federal election results not attract the same criticism from academic writers?[15] While it is understandable that the major political parties would never instigate such a reform, it remains a puzzle as to why there is no public demand for it. This is an issue to which I will return at the end of this paper.

The electoral system embodied in the *Commonwealth Electoral Act 1918* (Cth) must be reformed if we are to enjoy the benefits of true democracy. As to which electoral system would best achieve the goal of according each voter a vote of equal weight, two in particular from among the many available achieve the dual objectives of ensuring that parties achieve representation proportional to their nationwide electoral support and that voters have identifiable local representatives. The first is the Mixed-Member Proportional (MMP) system, adopted by New Zealand after referenda in 1992 and 1993, under which half the seats are allocated

13 That is, to parties other than the Liberals, Labor and the various manifestations of the Nationals (Liberal Nationals, Nationals and Country Liberals). The calculation ignores informal votes.

14 Pippa Norris, *Why Elections Fail* (Cambridge University Press, 2015) 122.

15 Academic commentary has focused on interpretation of the requirement under s 24 of the *Constitution*, which states that members of the House of Representatives are to be 'directly chosen by the people', but none of it has addressed the more fundamental question of whether the *Constitution* should be amended to prevent the gross disproportionality that s 24 permits—and which the High Court has said it permits in *Attorney General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 and *McGinty v Western Australia* (1996) 186 CLR 40. See, eg, Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125; Anthony Gray, 'The Guaranteed Right to Vote in Australia' (2007) 7 *Queensland University of Technology Law and Justice Journal* 178; George Williams, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melbourne University Law Review* 828; Bryan Mercurio and George Williams, 'Australian Electoral Law: 'Free and Fair'?' (2004) 32 *Federal Law Review* 365. What is perhaps particularly astounding is that there was only one paper in an entire issue of the *Federal Law Review* devoted to electoral law (Volume 32(3) 2004) which discussed proportional representation—and its topic was the law in New Zealand. The disparities produced by the system in Australia went without comment.

to electorates and half to party lists, and a 5 per cent threshold of the party vote is set as the threshold for representation in Parliament for any party which has not won an electorate seat. The other is the multi-member electorate Single Transferrable Vote (STV) system, which Australian voters are already familiar with, as it is used for the lower house of the Tasmanian Parliament and for the ACT Legislative Assembly.

Analysis of results from a large number of elections held in different jurisdictions[16] indicates that the MMP system produces highly proportionate results that make it almost impossible for a government to be formed by parties representing less than 50 per cent of voters. The only disadvantage of this system is that voters have no control over the identities of those candidates who win seats via party lists.

The extent to which STV produces proportionate results depends entirely on the number of seats per multi-member electorate. In Ireland[17] governments have been able to win power without a majority of first preference votes twice[18] in the 18 elections held since the introduction of the system, which uses a mix of three, four and five member electorates. In Malta, which uses five-seat electorates, a party has won power with less than a majority of votes six times[19] in 23 elections.[20] The case of Tasmania[21] is particularly interesting, because it had seven-seat electorates between 1959 and 1986, during which period eight elections were held and no government won power with less than a majority of votes. From 1989 the number of seats per electorate was reduced to five, and in the eight elections held since them, governments were twice able to win power with a minority of votes.[22] This indicates that the STV system allocating a minimum of seven seats per electorate is likely significantly to reduce the likelihood of a party with a minority of votes winning a majority of seats.

Although electoral reform could be achieved by introducing either of these systems simply by amending the *Commonwealth Electoral Act 1918* (Cth), the degree of proportionality that could be achieved would be constrained by the fact that s 24 of the *Constitution* allocates a minimum of five seats to each State and s 29 prohibits electoral boundaries from crossing State boundaries. Thus true proportionality would require removal of these distorting provisions from

16 For a comparative analysis of the degree of proportionality achieved by different electoral systems see David Farrell, *Electoral Systems: A Comparative Introduction* (Prentice Hall, 1997) ch 7.

17 Information on elections in Ireland is obtainable from the Department of Housing, Planning, Community and Local Government at <http://www.environ.ie/en/LocalGovernment/Voting/>. A convenient summary of election results since 1918 can be found at Nicholas Whyte, *Daily Elections since 1918* (3 June 2007) <http://www.ark.ac.uk/elections/gdala.htm>.

18 In 1965 and 1969.

19 In 1921, 1927, 1981, 1987, 1996 and 2008.

20 See the discussion of Maltese election results at University of Malta, *Parliamentary Election Results 1921–2013* <http://www.um.edu.mt/projects/maltaelections/elections/parliamentary>.

21 Information on elections in Tasmania can be obtained from the Tasmanian Electoral Commission at <http://www.tec.tas.gov.au/>. A summary of Tasmanian election results since 1909 can be found at Parliament of Tasmania, *House of Assembly Election Results 1909–2014* (3 April 2014) <http://www.parliament.tas.gov.au/tpl/Elections/ahares.htm>

22 In 1982 and 1989.

the Constitution. It would also be advisable to increase the size of the House of Representatives, both in order to keep the new electorates to manageable size and in order to reduce the ratio between voters and their elected representatives, which is currently significantly higher in Australia than in comparable democracies, which means that Australians are significantly under-represented at the federal level.[23]

III Parliamentary Control of the Executive

The theory underpinning responsible government as developed in the United Kingdom during the 18th century was that through the requirement that the ministry, both collectively and individually, had to maintain the support of the House of Commons and the legislature would exert control over the executive. This system worked well in an era when the party system was weak and when a significant proportion of the Commons remained untied to any party. The consequential vulnerability of ministers to votes of no confidence meant that the conventional rules of responsible government were not only considered binding but were also effective. The rise of a defined party system in the United Kingdom in the 19th century meant that the conventional rules were effective only to the extent that the major parties acquiesced in their application.[24]

The *Commonwealth Constitution* was drafted on the assumptions that the Westminster system would operate in Australia in the same way as it did in the United Kingdom. Unfortunately, the rigidity of the party system in Australia, which goes far beyond anything experienced in the United Kingdom, has meant that the system of control by the legislature over the executive has become dysfunctional. Where no system of accountability can function without access to information, a system based on convention is inherently vulnerable due to its dependence upon the acquiescence of its participants. Nowhere is this more apparent than in relation to the ability of Parliament and its committees to access information from ministers and public servants.

In theory, committees of either house of Parliament have the power to call ministers and public servants to account and to punish them for contempt if they refuse either to attend or to provide information,[25] though in practice, an invitation is sent to a person to attend and for them to attend voluntarily.[26] However, in reality, the rigidity of party discipline in Australia means that committees of the House of Representatives, on which the government comprises a majority,

23 In 2016 the average number of voters in each House of Representatives electorate was 104 511, as compared to 75 853 voters per electorate in Canada, 68 803 in the United Kingdom and 25 988 in New Zealand.

24 For a discussion of parliamentary government in the United Kingdom, see Ian Ward, *The English Constitution – Myths and Realities* (Hart Publishing, 2004).

25 In the case of the Senate see Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 11th ed, Canberra, 2004) 30, 57 and 377.

26 Ibid 378.

will never make findings adverse to a minister who refuses to give information or who has engaged in misconduct. That leaves the Senate, where twice a year each legislative standing committee acts in its 'Estimates' capacity and inquires into how the government has spent the money allocated to it by Parliament in relation to the portfolios within the particular committee's areas of responsibility. Because all government activity requires the expenditure of money, committees are able to range the scope of their inquiries at estimates hearings to include all aspects of government activity.[27] This gives committee members (and in particular, members of the opposition) the opportunity to question ministers and public servants on any matter pertaining to the operation of the departments for which they are responsible. Furthermore, in periods when the government does not have a majority in the Senate (which is usually the case), opposition parties have the opportunity to initiate ad hoc inquiries into government activities. However – and even given the advantages that the Senate enjoys over the House – ministers who refuse to answer questions posed by committees are unlikely to face sanctions; although such conduct is punishable as contempt, under the rules of parliamentary privilege the power to impose a sanction vests not in the committee, but rather in the chamber as a whole – and here again one encounters the effects of the Coalition/Labor duopoly, because neither side of politics will use its power when in control of the Senate to set a precedent that may be applied against it when positions are reversed.

This was revealed most clearly in 2002, when a Senate committee was established to inquire into the Children Overboard affair.[28] The critical issue in contention was at what stage the information that children had not been thrown overboard by asylum-seekers was communicated by defence personnel to ministers in the then Coalition government. Peter Reith, who had been Defence Minister at the time the events occurred, refused to give evidence before the Senate committee, and the cabinet also ordered that his staffers not comply with the committee's requests to attend. At the time, the Coalition lacked a majority in the Senate, so that Labor, in conjunction with the minor parties, had sufficient numbers in the Senate to compel attendance and could have used their majority in the Senate to initiate contempt proceedings, against Reith. Despite the fact that the Australian Democrats and Greens supported such a step, the reason it did not occur was because , Labor refrained from using its Senate votes to exercise the contempt powers.[29] So the most that ever happens when ministers refuse to provide evidence to Senate committees is that a motion of censure is passed against them – a remedy which the major parties are happy to use when in opposition because it causes political embarrassment to the government, but does not establish a

27 Ibid 369.

28 See the Senate Select Committee for an Inquiry into a Certain Maritime Incident, Parliament of Australia, *Inquiry into a Certain Maritime Incident* (2002) at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/index>.

29 See Megan Saunders, 'Truth is Out There, Somewhere', *The Australian* (Sydney), 25 October 2002, 12.

precedent that would be used to impose significant penalties such as suspension from Parliament, a fine or imprisonment on them once they are back in power.[30]

The result of this is that ministers commonly refuse to answer questions put by parliamentary committees and/or they instruct public servants not to do so. Examples of these include the ministerial prohibition of defence force personnel appearing before the inquiry into what knowledge the Australian Defence Force had of torture of Iraqi prisoners at Abu Ghraib,[31] and the prohibition against public servants appearing before the inquiry into the Australian Wheat Board scandal.[32] The most striking recent example of ministerial defiance of legislative oversight occurred in 2013–14 when the then Minister for Migration, Scott Morrison, refused on public interest grounds to answer questions posed by a Senate committee relating to how many asylum-seeker boats had been intercepted in Australian territorial waters, and also refused to provide the committee with documents it had requested.[33] In 2016 officials from the Department of Immigration and from Operation Sovereign Borders refused to answer when a Senate committee asked whether the government had paid people smugglers to return asylum-seekers to Indonesia.[34] This is in line with an emerging trend on the part of the government to label virtually all information relating to border control as too sensitive for public discussion. The problem with this, of course, is that there is no test – other than the government's own assertion – for determining whether the public interest justifies non-disclosure of information, and thus nothing in theory to prevent ministers adopting the same secretive approach if asked about matters as mundane as the number of paintings in the store-rooms of the National Gallery.

30 For discussion of the political dimension of this issue see Laurie Oakes, 'Hypocritical Oath', *The Bulletin* (Sydney), 13 March 2002, 17; Margo Kingston, 'Labor Backdown Opens Black hole of Accountability', *Sydney Morning Herald* (online), 1 August 2002, <http://www.smh.com.au/articles/2002/07/31/1027926912621.html>; Sarah Stephen, 'Refugee Drownings: Labor Sabotages Inquiry', *Green Left Weekly* (online), 11 September 2002 <https://www.greenleft.org.au/glw-issues/508?page=2> Margo Kingston, 'Labor's Latest Travesty', *Sydney Morning Herald* (online), 23 October 2002, <http://www.smh.com.au/articles/2002/10/23/1034561546910.html>.

31 ABC Television, 'Major O'Kane Barred from Senate Estimates Hearing on Prisoner Abuse', *The World Today*, 1 June 2004 (Alexandra Kirk) <http://www.abc.net.au/worldtoday/content/2004/s1120461.htm>.

32 See Samantha Maiden, 'Gag in Senate Illegal, Clerk Warns', *The Australian* (Sydney), 12 April 2006, 4; Ross Peake, 'Cover-Up Claim as Officials Gagged', *Canberra Times* (Canberra), 14 February 2006, 2.

33 See Emma Griffiths, 'Immigration Minister Scott Morrison Defies Senate Order to Release Information about Operation Sovereign Borders' *ABC* (online) 19 November 2013 <http://www.abc.net.au/news/2013-11-19/morrison-defies-senate-order-to-release-information/5102342 >; Joel Zander, 'As it Happened: Scott Morrison Fronts Senate Committee over Asylum Seeker Policies' *ABC* (online) 31 January 2014 <http://www.abc.net.au/news/2014-01-31/scott-morrison-fronts-senate-committee-over-asylum-seeker-policy/5230098 >.

34 Stephanie Anderson, 'Senior Officials Refuse to Answer Questions on Payments to People Smugglers' *ABC* (online) 5 February 2016 <http://www.abc.net.au/news/2016-02-05/officials-refuse-to-answer-questions-on-people-smuggler-payments/7143162>.

In light of this it is no wonder that the late Harry Evans, Clerk of the Senate, made the following comment in relation to the condition of responsible government in Australia:

> Responsible government was a system which existed from the mid 19th century to the early 20th century, after which it disappeared. It involved a lower house of parliament with the ability to dismiss a government and appoint another between elections. This system has been replaced by one whereby the government of the day controls the lower house by a built-in, totally reliable and "rusted on" majority. Not only is the government not responsible to, that is, removable by, the lower house, but it is also not accountable to it. The government's control of the parliamentary processes means that it is never effectively called to account[.][35]

How then is this to be remedied? Clearly constitutional conventions have lost their binding force and it is no longer satisfactory to leave the workings of responsible government to the good-will of the executive. The answer is therefore to replace these conventional rules with statutory provisions, which compel executive subordination to legislative oversight with penalties for non-compliance.[36]

Obviously provision would have to be made for genuine cases where the national interest militates against public disclosure. This would not mean allowing the executive to claim immunity from providing information to parliamentary committees merely on its own assertion that the public interest requires that, or allowing blanket suppression of information where public interest immunity exists in relation only to part of it. Rather what is required is a set of rules under which (i) the default position is that there is a legal, not just political, duty on ministers to answer questions and provide such other evidence as is required by parliamentary committees, (ii) which allows proceedings to be taken in the courts in cases of non-compliance, with an appropriate regime of penalties and (iii) which allows ministers the opportunity to make out a defence of public interest, in *in camera* court proceedings if necessary, in relation to that part of the information which they say ought not to be disclosed for objective reasons of national/ public interest. It would be critical to the success of such a system that the right to initiate proceedings for non-compliance should vest not only in houses of Parliament and in committees as a whole, but should also extend to individual

35 Harry Evans, 'The Australian Parliament: Time for Reform' (Speech delivered at the National Press Club, Canberra, 24 April 2002) at <http://australianpolitics.com/2002/04/24/harry-evans-parliamentary-reform-speech.html>..

36 In 1994 Senator Kernot of the Australian Democrats introduced a Bill which would have made it a criminal offence, prosecutable in the Federal Court at the instance of a House of Parliament, to fail to comply with an order of a House or a committee. The Bill would also have empowered the Court to order compliance with the legislature's request. The Bill provided for a public interest immunity defence, with the onus being on the accused to prove that the public interest in not complying outweighed the need for open parliamentary inquiries. Courts could conduct *in camera* hearings to determine whether the defence had been established. Unsurprisingly, the Bill did not proceed due to opposition by the major parties.

committee members. This could be achieved by appropriate amendments to the *Parliamentary Privileges Act 1989* (Cth).

Putting executive accountability to the legislature on a legal, rather than a conventional, footing and making the application of penalties no longer dependant on the support of political majorities would have dramatic consequences for the doctrine of responsible government.

First, in the vast majority of cases, ministers would simply acquiesce and answer questions, in recognition of the fact that that public immunity would not apply. Then, in those cases where ministers did decline to provide information on grounds of public immunity, on many occasions agreement might be reached between the minister and committees as to measures which might be taken to limit publication of the information – for example, by holding closed-door hearings. It would in all likelihood be that only a small minority of cases would ever need to be taken to the courts for adjudication as to whether ministerial silence was contemptuous or was based on a genuine claim of immunity. This has certainly been the experience in the United States, where long-standing precedent gives Congress the right to obtain information from the executive,[37] and to have recourse to the courts to enforce subpoenas against members of the administration, most famously during the Nixon era.[38] However, in most cases, the two branches reach a political compromise,[39] and it is a quite normal feature of the political process in the United States for members of the executive, including members of the cabinet, to appear voluntarily before public hearings of congressional committees,[40] or for information to be provided in a confidential briefing to members of a committee.[41] Disputes are thus almost always settled by negotiation between Congress and the administration.[42] The fact that the judicial branch is the ultimate determiner of the degree to which the executive is accountable has not led to the courts being confronted with questions that they are incapable of deciding without becoming involved in party-political disputes. It is a matter of supreme irony that the legislative branch in the United States has far greater power than is the case under the system of responsible government we have in Australia, which supposedly subjects the executive to legislative control.

If courts in Australia were called upon to determine the validity of executive claims to immunity they could draw upon the existing body of case law governing

37 See *Anderson v Dunn* 19 US (6 Wheat) 204 (1821) and *McGrain v Daugherty* 273 US 135 (1927).

38 See *United States v Nixon* 418 US 683 (1974) and *Nixon v Administrator of General Services* 433 US 425 (1977).

39 See Louis Fisher, 'Congressional Access to Information: Using Legislative Will and Leverage', (2002) 52 *Duke Law Journal* 323, 325.

40 Ibid 394–401. Although an incumbent President has never been summoned to appear before a congressional committee, President Ford agreed to do so voluntarily to answer questions relating to his pardoning of former President Nixon. See Mark Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* (Johns Hopkins Press, 1994) 90.

41 Rozell, above n 40, 150.

42 William Marshall, 'The Limits on Congress's Authority to Investigate the President' [2004] *University of Illinois Law Review* 781, 806–08.

public interest immunity in so far as it applies to proceedings before the courts. There is no reason why the same rules should not apply when determining the circumstances in which public interest immunity would entitle the executive to withhold evidence from the legislature. The leading case on this issue is *Sankey v Whitlam*,[43] in which the High Court held that public interest immunity is not absolute and that it is up to the courts to balance the need for confidentiality of government communications against the needs of justice in any given case.[44] The courts have applied the test in *Sankey v Whitlam* in a number of circumstances, including the admissibility of ASIO documents in litigation.[45]

The key point arising from these cases is that public interest immunity should not be conceived of as a trump to be waved in the face of Parliament or the courts which permits the executive to avoid scrutiny. This is why the case law from the United States is particularly significant. The role it gives to the courts to balance the competing claims of legislative inquiry against executive confidentiality ensures that the executive is not judge in its own cause when questions of its amenability to legislative inquiry arise. The outcome of the balancing process would depend upon the facts of each case, however one would expect that cases involving foreign affairs and national security would be ones in which a high degree of deference would be shown to the executive once it proves its claim – at *in camera* proceedings if necessary. Similarly, discussions between members of the Cabinet, and documents which were genuinely related to Cabinet proceedings,[46] would also be likely to remain immune from legislative inquiry. A court adjudicating upon such issues might find that the leading of evidence or the production of documents is wholly covered by executive privilege, or it might allow a parliamentary committee to receive the evidence subject to conditions – for example that the evidence be presented *in camera*[47] and only before the members of the committee unassisted by parliamentary staff, with prohibitions on the recording of the evidence, as happens in the United States.

The conferral by the *Constitution* of a power on members of parliamentary committees to compel witnesses to give evidence before Parliamentary committees

43 *Sankey v Whitlam* (1978) 142 CLR 1.

44 Ibid 38–43.

45 *Alister v The Queen* (1984) 154 CLR 404. See also *Commonwealth v Construction, Forestry, Mining and Energy Union* (2000) 171 ALR 379 and *NTEU v Commonwealth* (2001) 111 FCR 583.

46 Confidentiality would thus not apply to a document merely because it had been physically present during a Cabinet meeting – for an example of trolley-loads of documents being wheeled into Cabinet meetings simply in order for it to be said that they were 'Cabinet documents' see Greg Roberts, 'To Hell with the Critics' *The Australian* (Sydney), 26 August 2006, 23.

47 This procedure is already recognised as being available to committees—see Evans (ed), above n 25, 379. A similar procedure (colloquially named the 'crown jewels' procedure) operates in the United Kingdom, where members of parliamentary committees are permitted to view documents which are of diplomatic, military or commercial sensitivity, subject to negotiated restrictions on publication. For a discussion of this see the First Report of the Liaison Committee of the House of Commons, HC 323, 1996–97, *The Work of Select Committees*, <http://www.publications.parliament.uk/pa/cm199697/cmselect/cmliaisn/323i/lc0104.htm>.

and, subject to a defence of public interest immunity, to make non-compliance an offence, would reverse the power imbalance that exists between legislature and executive, and would make government truly responsible to the legislature – which is what our system is supposed to do. No longer would it be the case that ministers could refuse to provide information to the legislature without fear of sanction and without having to satisfy a test as to whether there are objective grounds justifying non-disclosure.

IV Rights Protection

It is a truism to say that the purpose of a constitution is to allocate powers between institutions of the state and to define the powers of the state vis-à-vis the individual. Although our *Constitution* does the first, it does the second hardly at all. Yet of course the *Constitution* is the only document capable of protecting the individual from legislative power.

The question of whether to have a Bill of Rights, and what form it should take, is at its root philosophical, not legal. The starting point for this question should be a determination of the proper relationship between the power of the state on the one hand and the inherent dignity of the individual on the other. Does the dignity of the individual entitle them to a degree of protection for their autonomy even in the face of the general will, or are individual 'rights' simply the playthings of passing political majorities? What limits on the power of the state are mandated by respect for individual autonomy?[48] It is only after these questions have been addressed – and a theory of rights arrived at as a result – that one can then sensibly discuss constitutional design, when the implications of that theory for issues such as the allocation of powers between the courts on the one hand and the legislature and the executive on the other are worked out. In Australia, however, for the most part debate takes place in a normative vacuum without prior reference to fundamental rights theories. The focus is on utilitarian considerations in which primacy is given to the democratic will[49] without consideration of the incompatibility of that approach with human dignity, which requires that a real and effective limit be placed on the

48 For a discussion of dignity as the foundation of rights see Nathan Rotenstreich, *Man and his Dignity* (Magnes Press, 1983); Harold Lasswell and Myers McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 *Yale Law Journal* 203; Harold Lasswell and Myers McDougal, 'Criteria for a Theory About Law' (1971) 44 *Southern California Law Review* 362.

49 For examples of this approach see Gabriel Moens, 'The Wrongs of a Constitutionally Entrenched Bill of Rights' in MA Stephenson and Clive Turner (eds), *Australia, Republic or Monarchy?: Legal and Constitutional Issues* (University of Queensland Press, 1994); Frank Brennan, *Legislating Liberty? A Bill of Rights for Australia* (University of Queensland Press, 1998); Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004) 181–8. An eloquent presentation of the case for legislative subordination to a Bill of Rights is provided by former Deputy Chief Justice of South Africa, Dikgang Moseneke, 'The Balance between Robust Constitutionalism and the Democratic Process', (Speech presented at the Seabrook Chambers Public Lecture, University of Melbourne, 16 June 2016) <http://law.unimelb.edu.au/__data/assets/pdf_file/0012/1998183/Seabrook-Chambers-Lecture-2016-Justice-Moseneke.pdf>.

power of the state vis-à-vis the individual and which in turn is achievable only if the individual can vindicate constitutionally-protected rights before the courts.[50]

The absence of a full Bill of Rights from the *Constitution* is a notorious fact of Australian constitutionalism. I use the word 'full' deliberately, in recognition of the fact that the *Constitution* protects five rights. However, it is significant that these rights were included as the result of a pragmatic response to political controversies which needed to be settled in order to gain the consent of the colonies to federation – it was not as the result of any recognition of inherent human dignity. Thus s 51(xxxi) (requiring just terms compensation for the acquisition of property), s 117 (requiring equal treatment of residents of different States) and s 92 (protecting freedom of inter-State trade, commerce and intercourse) all obviously addressed apprehended abuses of Commonwealth powers by the States or by the States vis-à-vis each other. The prohibition of religious discrimination in s 116 reflected a concern that sectarian tensions not influence law-making by the Commonwealth.[51] Only the s 80 requirement of jury trials for indictable Commonwealth offences is conceivably identifiable as a provision protecting fundamental rights, yet it can easily be circumvented simply by the way in which the Commonwealth Parliament classifies offences as either summary or indictable. The aspect of the Constitutional Conventions of the 1890s which is most revealing of attitudes to rights was the debate over the question as to whether a right to due process should be included in the *Constitution*. That proposal was rejected for the morally discreditable reason that would prevent racially discriminatory legislation being enacted against Indigenous people and Asians.[52]

The usual justification advanced for the absence of a Bill of Rights is that Australians prefer to put their trust in democratically elected representatives rather than in the courts. The classic enunciation of this by Robert Menzies was as follows:

> There is a basic difference between the American system of government and the system of 'responsible government' which exists both in Great Britain and Australia … With us a Minister is not just a nominee of the head of the Government. He [sic] is and must be a member of Parliament, elected as such, and answerable to Members of Parliament at every sitting … Should a minister do something that is thought to violate fundamental human freedom he [sic] can be promptly brought to account in Parliament.[53]

50 Myers McDougal, 'Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies' (1974) 14 *Virginia Journal of International Law* 387.

51 Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth* (Melbourne University Press, 1976) 19–20, 130.

52 *Official Record of the Debates of the Australasian Constitutional Convention*, Melbourne, 8 February 1898, 665–6 (Sir John Forrest). See also Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Random House Australia, 2009) 7.

53 R G Menzies, *Central Power in the Australian Commonwealth* (Cassell, 1967) 54. See also Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009) 34–5, 54–9.

This argument might at least have internal credibility if the electoral system reflected the will of the majority yet, as we have seen, it does not. More fundamentally, however, Menzies' comments reflect a glib fantasy. As already discussed, the executive is not subject to control by Parliament – the strength of the party system and the way the rules of parliamentary privilege operate serve to make the government a virtual elective dictatorship. Furthermore, Menzies' argument, which is re-stated in various forms by current opponents of a Bill of Rights, ignores the fact that it is *Parliament itself* that poses the principal threat to rights. As Geoffrey Robertson states, a Bill of Rights:

> means justice for people whose particular plight would never be noticed by Parliament, or prove interesting enough to be raised by newspapers or a constituency MP. Far from undermining democracy by shifting power to unelected judges, it shifts power back to unelected citizens: democracy from its inception has relied on judges ('unelected' precisely so they can be independent of party politics) to protect the rights of citizens against governments that abuse power. Indeed, there is now ample evidence from the UK showing that bills of rights improve democratic governance by making liberty a concern of politicians who would otherwise forget about it, and of public servants who might otherwise act arbitrarily or unfairly.[54]

Robertson's comment also highlights the key reason why protection for rights is better left to judges than to politicians. The object of politics is the acquisition, retention and use of power, and so political decision-making is directed towards power-maximisation, not the defence of objective notions of justice. Judicial decision-making, by contrast, involves the application of principles to contesting parties by judicial officers who have no power-interest in the outcome. It is therefore precisely because judges are unelected that the protection of rights should lie in their hands, because the issues they would be charged to determine – which in aggregate boil down to the protection of human dignity – are not ones which should be decided through the interplay of party-political forces. Furthermore, few seem to have grasped the inconsistency inherent in the argument based upon democracy. Democracy, in the sense of an entitlement to political participation can itself be justified only by reference to an external norm, namely the right to political equality of individuals and the corollary that each person has a right to participate in the law-making process. In other words, democracy is subordinate to, and dependant for its own justification on, the concept of rights, not the other way round.

The absence of comprehensive rights-protection in the *Australian Constitution* is all the more cynical, given that Australia is signatory to all the major human rights conventions – and one will search these documents in vain to find a footnote which says 'These rights do not apply to democracies'. There is, unfortunately, an attitude of Australian exceptionalism at play in relation to fundamental rights,

54 Robertson, above n 52, 8.

which puts us at odds with the post-World War II international consensus.[55] Yet, given that our *Constitution* already grants express protection to five rights and that legislation inconsistent with those rights can be invalidated by the High Court, it cannot be said that the constitutionalisation of the full range of rights which we have pledged to uphold internationally would be alien to Australian constitutionalism. Such a step, while expanding the range of rights protected, would certainly not confer any new function on the courts. If the existence of justiciable rights is offensive to constitutional principle, then surely opponents of a full Bill of Rights should be asking for the *Constitution* to be amended so as to remove those rights it does protect? Yet calls to remove provisions such as s 116, for example, which protects freedom of religion, have been conspicuous by their absence, so the question needs to be asked: If freedom of religion is protected, why should that not be so in the case of the full range of fundamental rights?

The lack of a Bill of Rights leaves the individual vulnerable in the face of legislation which infringes basic freedoms. To take some examples, it puts Australia in the position where there is no express constitutional right to due process (it being a terrible irony that, in the very week of the 800th anniversary of Magna Carta, the principal concern of the government was the drafting of legislation to allow deprivation of citizenship without the need to go to court – the very antithesis of due process promised by Article 39 of Magna Carta),[56] no bar to racial discrimination and no recognition that in relation to intimate personal choices – and here I am thinking specifically of same-sex marriage – there should be a right to privacy, in the sense of personal autonomy, to shield the individual from the prejudices of parliamentary majorities. The fact that there is no constitutional prohibition of cruel and unusual punishment means that there is no limit to the harsh conditions to which asylum seekers, both on and off-shore, may be subjected.

55 For the history of the Bill of Rights debate in Australia and exceptionalism in relation to the post-World War II international rights consensus see Paul Kildea, 'The Bill of Rights Debate in Australian Political Culture' (2003) 9 *Australian Journal of Human Rights* 65 and Gillian Triggs, 'Australian Exceptionalism: International Human Rights and Australian Law' (Speech delivered at the Human Rights Lecture, University of Melbourne, 4 August 2016) <http://events.unimelb.edu.au/recordings/151-human-rights-lecture-australian-exceptionalism-international-human-rights-and>. There is unfortunately a strand of extreme positivism and utilitarianism in the Australian rights debate, starkly illustrated by the publication of a defence of torture, something which one would have thought beyond the contemplation of lawyers trained in the Australian tradition: Mirko Bagaric and Julie Clarke, 'Not Enough Official Torture in the World? The Circumstances in which Torture is Morally Justifiable' (2005) 39 *University of San Francisco Law Review* 581. It was gratifying to see this view firmly rebuffed by Desmond Manderson, 'Another Modest Proposal: In Defence of the Prohibition against Torture' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU Press, 2008) 27–43, and by Rodney Allen, 'Torture, Criminality and the War on Terror' (2005) 30 *Alternative Law Journal* 214, 216.

56 ABC, 'What can Tony Abbott learn from the Magna Carta?', *The World Today*, 15 June 2015 (Eleanor Hall) <http://www.abc.net.au/news/2015-06-15/modern-australian-politicians-could-learn-from/6546728>.

The most recent inquiry on human rights protection at the federal level was the National Human Rights Consultation (NHRC),[57] the chief recommendation of which was that the Commonwealth should enact an ordinary-statute Human Rights Act.[58] The import of this recommendation was however reduced by the fact that the NHRC's terms of reference specifically prohibited it from recommending the adoption of a constitutionally entrenched Bill of Rights[59] or, to put it more accurately, from recommending the addition of any new rights to those already entrenched in our *Constitution*. Yet, given that the raison d'être of a Bill of Rights is to limit the capacity of the state to infringe individual liberty, obviously only a constitutionally entrenched Bill can fully realise that purpose.

One would expect that an Australian Bill of Rights would draw heavily on the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Social and Cultural Rights*. However, as the contents of a Bill of Rights merits a paper on its own, I will deal with the way debate has been conducted in relation to just one issue – the inclusion in the *Constitution* of a right not to be subject to racial discrimination, which has become a live issue since debate started in earnest on the constitutional recognition of Indigenous people in 2011 when the Expert Panel on recognition was appointed by then Prime Minister Julia Gillard. The inclusion of such a right, in a proposed new s 116A in the *Constitution*, was among the recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, which published its report in 2015.[60]

It is scarcely credible that a right not to be discriminated against on grounds of race is contentious, yet it remains so. Former Prime Minister Tony Abbott said that Indigenous recognition should not lead to legislation being 'subject to second-guessing by non-elected judges'.[61] Similarly, Senator Cory Bernardi warned that the referendum might be racially divisive[62] – the sub-text of which meant that conservative support for an amendment would be lost if the proposal included a right not to be discriminated against on grounds of race. Frank Brennan, while supporting constitutional recognition, argues against the inclusion of a constitutional right prohibiting discrimination. The grounds of his opposition are numerous – invidiousness in protecting only Indigenous people from racial

57 National Human Rights Consultation Committee, Parliament of Australia, *National Human Rights Consultation Report* (2009) <http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads.html#pdf>.

58 Ibid xxiv (Recommendation 18).

59 Ibid.

60 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015) 89.

61 Anna Henderson, 'Government Renews Reservations about Race Discrimination Ban in Constitution ahead of Indigenous Recognition Summit' *ABC* (online), 4 July 2015<http://www.abc.net.au/news/2015-07-04/government-renews-reservations-about-race-discrimination-ban/6594726>.

62 Anna Henderson, 'Senator Cory Bernardi Warns "Divisive" Indigenous Constitutional Referendum "Doomed to Fail"', *ABC* (online), 21 May 2015 <http://www.abc.net.au/news/2015-05-21/senator-warns-against-'divisive'-indigenous-referendum/6485538>.

discrimination,[63] invidiousness in not prohibiting discrimination on other grounds or of protecting other rights,[64] difficulties in interpreting such a non-discrimination right particularly if it included an affirmative action provision,[65] the inability of the public to understand an affirmative action clause,[66] public opposition to the conferral of power on an 'unelected judiciary'[67] and potential opposition by such interest groups as National Farmers' Federation, the Minerals Council and the Business Council of Australia.[68] These arguments illustrate much of what is wrong with constitutional debate in Australia. Most fundamentally, they fail to prioritise the principle of inherent entitlement to dignity which is the basis of human rights theory, and which imposes a moral duty to overcome rather than surrender to difficulties.

Brennan's objections can be addressed in turn as follows. The anti-discrimination provision contained in the proposed s 116A would prohibit racial discrimination against all Australians, not only against Indigenous people. Of course it would be preferable to adopt a full Bill of Rights which prohibited discrimination on a wide range of grounds – but that is no reason to argue against the progressive embedding of specific rights in the *Constitution* or to require Indigenous people, who have been waiting for more than 200 years for constitutional protection against racism, to wait still longer. As to difficulties in interpretation, if courts in other jurisdictions have been able to interpret a right to non-discrimination in tandem with affirmative action provisions, why should that be beyond the wit of courts in Australia? Any change to statute law requires interpretation, and in this respect constitutional interpretation is neither more nor less difficult. If uncertainty over the effect of a change was accepted as a general objection to constitutional reform, then reform would never occur and, remembering that the issue is one of fundamental principle, saying that it would be 'too difficult' to interpret a new right is to trivialise what is at stake. So far as public misunderstanding of, and apprehension in relation to, proposed reform is concerned, surely the remedy here is to apply every effort to convincing the public of the nobility of the cause – as was done during the 1967 referendum – and to muster arguments to assuage their doubts? This, in my view, is where those committed to racial equality ought to be directing their efforts. The argument relating to the conferral of power on an 'unelected judiciary' ignores the fact that the existence of express rights in the *Constitution* means that the inclusion of a new right would not confer a new function on the judiciary. What institution other than the courts can protect the individual from the majority? And if justiciable rights are an anathema to the Australian constitutional order, does that mean that such rights as do exist in the

63 Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia* (University of Queensland Press, 2015) 6–7.
64 Ibid.
65 Ibid 220, 244–7.
66 Ibid 270.
67 Ibid 271.
68 Fran Kelly, *Frank Brennan on Abuse within the Catholic Church and Indigenous Recognition*, (19 May 2015) ABC Radio National Breakfast, <http://mpegmedia.abc.net.au/rn/podcast/2015/05/bst_20150519_0806.mp3>.

Constitution should be removed? Finally, so far as opposition from commercial groups are concerned, even assuming that these interest groups had the audacity to come out publically against a right to non-discrimination, what of it? Are the contours of constitutional rights to be determined by economically powerful groups? Should they have a veto on fundamental freedoms? Ought we not publically challenge such views rather than defer to them?

We are left in the bizarre position that while s 117 of the *Constitution* protects the right not to be discriminated against on the grounds of which State one resides in, our *Constitution* does not offer protection against discrimination on grounds of race. This is not the time to propitiate conservatives. What is needed is the same moral leadership as was in evidence during the 1967 referendum, which confronts the constitutional conservatives on this issue, and overcomes their arguments. We must reject any approach which makes concessions bargaining away the rights of Indigenous people – even before battle has been properly joined – in order to win conservative support for watered-down reform. Above all, we need to move away from the idea that consensus is the only basis for constitutional change. Sometimes change requires that its opponents be confronted head-on, and their arguments refuted in the public arena. A commitment to non-discrimination is certainly such an occasion.

V Federalism

It is trite to say that Australian federalism was born of political pragmatics. The object of the process was to reach an agreement which addressed the political interests of the future States vis-à-vis each other on the one hand and between them and the Commonwealth on the other. Seen in its best light, the adoption of federalism in preference to unitary government was the necessary price of creating Australia as a nation. In its worst it can equally be seen as a base compromise pandering to colonial jealousies, which saddled the country with an unnecessarily complex and expensive form of government.[69]

If the federal system is looked at with ahistorical objectivity one must find it astounding that a country with a population the equivalent of a major city in many other countries should have nine governments. The economic cost of federalism is enormous. In 2002 it was estimated that, at an absolute minimum, the very existence of the federal system drained the Australian economy of $40 billion per year, a figure which would now be very much higher.[70] This covers obvious costs such as running State and Territory governments, costs to the

69 For a discussion of the origins and purpose of Australian federalism see Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1997) and John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, 2000).

70 Mark Drummond, 'Costing Constitutional Change: Estimates of the Financial Benefits of New States, Regional Governments, Unification and Related Reforms' (PhD Thesis, University of Canberra, 2007) 442.

Commonwealth of interacting with the States and compliance costs to business. It excludes intangible costs in terms of time and inconvenience – think of simple matters such as car registration or entry into a new school system – experienced by anyone who has moved inter-state.

Furthermore, this cost is not balanced by equivalent benefit. The usual justifications of federalism hold water in Australia. It would be idle to pretend that Justice Louis Brandeis' famous statement in *New State Ice Company v Liebmann*[71] that federalism creates circumstances where 'a state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country' operates in any real sense here. Differences such as the effective lack of a fuel excise in Queensland and the availability of X-rated videos over the counter in the ACT can hardly outweigh the reality of striking uniformity in the way states do things – in almost every area it is just more of the same from State to State, with the only impact of federalism being that inter-State migrants having to do things such as re-license their vehicles and re-apply for trade licenses. It cannot be said that Australia presents a diversity of vibrant social dioramas. The other supposed major benefit of federalism, is that it provides protection against tyranny by diffusing power.[72] But federalism does not offer the individual proper protection from governmental power because it does not affect *what* things governments may do to individuals, only *which* government may do them. In other words, *distributions* of power are not as effective in protecting liberty as are *restraints* on power. While the courts may, through decisions relating to separation of powers and inter-governmental immunities, restrain the scope of power of the Commonwealth and the States as separate levels of government, federalism cannot provide an effective limit to what the Parliaments, State and Commonwealth, can *in aggregate* do to the individual – as I have argued, only a justiciable Bill of Rights can do that.

Despite these problems, academic commentary on federalism remains focused on 'reform' of the system,[73] with only rare voices raised addressing the more fundamental question of whether the system ought to be maintained.[74] Yet, in contrast to most other areas of potential constitutional reform, there is already a degree of public appetite for the abandonment of federalism. A 2014 survey

71 *New State Ice Company v Liebmann* 285 US 262, 311 (1932).

72 See the discussion of federalism in the dissenting judgment of Kirby J in *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 222–9.

73 See, eg, Anne Twomey and Glenn Withers, *Federalist Paper I—Australia's Federal Future*, Report for the Council for the Australian Federation (2007), available at <https://www.caf.gov.au/Documents/AustraliasFederalFuture.pdf>; Augusto Zimmerman and Loraine Finlay, 'Reforming Federalism: A Proposal for Strengthening the Australian Federation' (2011) 37 *Monash University Law Review* 190; Anne Twomey, 'Reforming Australia's Federal System' (2008) 36 *Federal Law Review* 57; Anna Rienstra and George Williams, 'Redrawing the Federation: Creating New States from Australia's Existing States' (2015) 37 *Sydney Law Review* 357.

74 See, eg, Guy Scott, 'Overcoming the Institutional and Constitutional Restraints of Australian Federalism: Developing a New Social Democratic Approach to the Federal Framework' (2006) 34 *Federal Law Review* 319, and Kenneth Wiltshire, 'Australian Federalism: The Business Perspective' (2008) 31 *University of New South Wales Law Journal* 583.

on public attitudes by the Griffiths University Centre for Governance & Public Policy found that 71 per cent of respondents favoured changing the current system (among whom there were differing preferences for the allocation of functions to national, regional and local governments).[75] This is consistent with a survey commissioned by the public lobbying group Beyond Federation that same year, which found that 78 per cent of respondents favoured having a single set of laws for the country.[76] It therefore seems that de-federalisation is a constitutional reform proposal which would be well-received by voters. I leave consideration of this issue by posing the following question: If we were writing the *Constitution de novo*, would we really create this nine-government system again? And if the answer to that is 'no', then why would we not abandon it?

De-federalisation would render the Senate redundant. As is notorious, that chamber has never discharged its intended role of acting as a 'States' house'.[77] Its primary current utility, as a house where committees may be established to inquire into government conduct, is limited to those periods when the government lacks a majority in the chamber, and is in any event hampered by current rules on parliamentary privilege. The adoption of the reforms recommended in Part III of this article would enable committees of the House of Representatives to subject the government to far more scrutiny than the Senate can today, thus leaving no reason for the continued existence of the latter chamber. Furthermore, the adoption of proportional representation for the House of Representatives would make anomalous the continued existence of the Senate, given the unequal voting power resulting from the fact that voters in each State elect an equal number of Senators irrespective of the State's population.[78]

VI The Republic and Reserve Powers

Although it is the most frequently discussed constitutional reform, the issue of a republic is, in my view, the least important. This is not to say that issues of symbol are without any importance. A severing of the constitutional link between the monarchy and Australia would serve to signal Australia's separate identity on the world stage, and would ensure that there is no office under the *Constitution* to which Australians may not aspire.

However, of far greater importance is the codification of conventions regulating the use of the reserve powers, a step which should be taken irrespective of whether

75 Centre for Governance and Public Policy, Griffith University, *Australian Constitutional Values Survey 2014*, 2014, <https://www.griffith.edu.au/__data/assets/pdf_file/0015/653100/Constitutional-Values-Survey-Oct-2014Results-2.pdf>.

76 Galaxy Research, *State Government Study Prepared for Beyond Federation*, 2014, <http://members.webone.com.au/~markld/PubPol/GSR/Polls/Galaxy%20State%20Government%20Study%20May%202014.pdf>.

77 Greg Craven (ed), *Australian Federation – Towards the Second Century* (Melbourne University Press, 1992) 49, 60.

78 Thus, on current figures, a vote in Tasmania has 13 times the impact of one cast in New South Wales.

we retain or sever the link with the Crown. This issue is of course linked to that of a republic in so far as significant political capital is made by monarchists out of the supposed risk that an Australian President – particularly one chosen by popular election – would abuse the reserve powers by departing from the conventions which govern their use. This risk is probably overstated. It is nevertheless true that the abuse of power argument diminishes the chances of an Australian republic modelled on a directly-elected President winning approval in a referendum – and polls show that, leaving the reserve powers issue aside, direct-election is by far the most popular form of republic.[79] This problem must therefore be addressed if there is to be any chance of a republic.

Perhaps the most surprising aspect of the 1975 constitutional crisis was the fact that no effort was made in the wake of it to prevent its recurrence. There is no doubt that Governor-General Kerr acted in accordance with s 61 of the *Constitution* when he dismissed Prime Minister Whitlam. The question which continues to engage Australians is whether he acted in accordance with convention. But the real issue post-crisis is why the *Constitution* was not amended so as to avoid a repetition of these events. The drafters of the *Constitution* were well aware of the problem that lay dormant in allowing the Senate a power to veto even money Bills, and were fully conscious of its implications for responsible government.[80] At the 1897 Sydney Convention, Alfred Deakin said that to combine a government that was responsible to the House with a Senate having the power of veto would be to create 'an irresistible force on the one side and what may prove to be an immovable object on the other side',[81] while at the 1897 Adelaide Convention, John O'Connor said that 'it is utterly impossible to carry on responsible government with responsibility to two Houses'.[82]

One possible change would have been to remove the Senate's blocking power over supply legislation, and to import into the *Commonwealth Constitution* the distinction made between money Bills and other legislation contained in the *Parliament Act 1911* (UK), s 1 of which allows the House of Lords to delay money Bills for only one month.

But if this was too radical, then it is astounding that the crisis did not at the very least lead to an amendment of the *Constitution* in such a way as to codify

79 See John Warhurst, 'The Trajectory of the Australian Republic Debate' (Papers on Parliament No. 51, Parliamentary Library, Parliament of Australia, 2009) who cites opinion polls which show that 80% of respondents favoured a directly-elected President if Australia was to become a republic.

80 See, for example, the speech by Sir J W Hackett of Western Australia at the 1891 Convention who stated 'if that is the [model of] responsible government which it is proposed to graft upon our new federation, there will be one of two alternatives – either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government', *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 12 March 1891, 280 (Sir J W Hackett).

81 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 15 September 1897, 582 (Alfred Deakin).

82 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 13 April 1897, 499 (John O'Connor).

the conventions regulating the Governor-General's exercise of the reserve powers, so as to remove uncertainty in relation to the circumstances under which they could be exercised. Some support for this was contained in the report of the 1988 Constitutional Commission,[83] and in 1993 by Winterton,[84] but those instances aside, the issue has not been the subject of academic debate. Yet this is not an overly complex matter, and there is no shortage of examples from the international Commonwealth arena which could be drawn upon. Several Commonwealth countries have retained links with the Crown and have maintained the office of Governor-General but have also codified the conventions.[85] The same is true of others that have become republics with a figurehead President exercising the powers formerly exercised by a Governor-General.[86] Finally, one can point to Germany and Ireland, republics whose constitutions contain codified rules almost identical to those operating in Commonwealth countries.[87]

Codifying the reserve powers would remove the possibility of a Governor-General or President from acting contrary to accepted rules. It would also remove the most potent argument from the armoury of those opposed to a republic and, in particular its most popular model, direct election. Yet it is important to recognise that this reform is justifiable on its own merits, irrespective of whether Australia became a republic.

VII Prospects for Reform and the Need to Enhance Civics Education

Turning finally to the question which I deferred at the start of this paper, what are the prospects of constitutional reform? I would make three points.

First, public opinion in Australia reveals a paradox of extreme conservatism in relation to constitutional change, coupled with disenchantment with, and disengagement from, the political process. Yet there seems to be no recognition that unless people become accepting of constitutional reform, none of the shortcomings which are the source of disillusionment with the political process can be addressed. Two examples arising from the issues canvassed earlier in this paper illustrate this: Our unfair voting system perpetuates the hold that Labor and the Coalition have over the levers of power and limits the realistic chances of a political career, and thus the pool of political talent, to those who are willing

83 Commonwealth, Constitutional Commission, *Final Report of the Constitutional Commission*, (1988), 93–5.

84 George Winterton, 'Reserve Powers in an Australian Republic' (1993) 12 *University of Tasmania Law Review* 249.

85 See, eg, the *Constitution of Barbados 1966*, arts 61, 65, and 66; the *Constitution of Bahamas 1973* arts 73, 74 and 66; the *Constitution of Grenada 1973* arts 52 and 58; and the *Constitution of Jamaica 1962* arts 64, 70 and 71.

86 See, eg, the *Constitution of Dominica 1978* arts 59, 60 and 63; the *Constitution of Malta 1964* arts 76, 79, 80 and 81 and the *Constitution of Mauritius 1968* arts 57, 59 and 60.

87 See *Constitution of Ireland 1937* arts 13.1.1 and 28.10, and the *Constitution of the Federal Republic of Germany 1949* arts 63 and 68.

to sell their souls to one or other of those blocs. The fact that parliamentary committees lack effective sanction powers makes the executive unanswerable to the legislature and gives the not inaccurate impression that ultimately ministers are able to avoid scrutiny. Both of these contribute towards public disillusionment with the political process, and both could be rectified by constitutional reform.

Second, history shows that successful constitutional amendment supposedly requires bipartisan endorsement by Labor and the Coalition. This has a number of invidious consequences. Only the most uncontentious amendments – which in reality means those which have the least impact – have a chance of passing at referendum. The perceived need for bipartisan support means that the major political parties have a *de facto* stranglehold over constitutional reform, which is paradoxical, given voter disenchantment with politicians. More significantly, since the major parties are unlikely to endorse changes that alter the balance of power in the *Constitution* in a direction that is adverse to their own interests, the capacity they have to derail constitutional reform perpetuates the status quo. In addition, shortcomings in civics education (discussed below) put voters at a significant disadvantage when evaluating constitutional reform proposals, making them easy prey for politicians who exploit ignorance about constitutional matters and stoke groundless fears about the effect that constitutional change would have. This means that since most of the necessary reforms are antithetical to the interests of the major parties, true reform will happen in spite of the major parties, not because of them. Therefore, the only hope of achieving real reform lies in mass mobilisation of public opinion to an extent which puts the major parties under irresistible pressure to put reforms to the people.

Third, it follows from the first two points that the key to constitutional reform lies in harnessing prevailing public disenchantment with the political order to whichever constitutional reform has sufficient populist appeal to overcome the voters' notorious suspicion of constitutional change. In my view, a campaign advocating change to proportional representation would have the greatest chance of success as it has the advantage that its case can be based squarely on the concept of fairness. Success in political campaigns relies as much upon emotional factors as it does on technical arguments. Drawing public attention to the gross unfairness of the current electoral system, and to the random effect on results caused by geographic factors should, if done properly, lead to public outrage and put opponents of change on the defensive. The rise of a true multiparty system in Australia would have a radical effect on the political dynamic, and would surely open the way for further constitutional reform. There is no doubt that opposition to such a change will be bitter, particularly from the major parties – but that will be the best demonstration to the community of how worthy it is.

Leaving aside this immediate strategy, it is clear that, in the long term, constitutional reform depends upon there being a citizenry sufficiently knowledgeable about the current *Constitution* and its shortcomings to be able to critique it. Here the deficiencies in civics education in Australia need to be considered. Civics education in Australia is descriptive rather than critical. The

Commonwealth syllabus *Discovering Democracy*,[88] which was made available for voluntary adoption by State and Territory education departments in 1997, and the Civics and Citizenship subject contained in the new *Australian Curriculum*, published under the auspices of the Australian Curriculum and Assessment Reporting Authority during the period 2011–13 and revised in 2015,[89] explain the *Constitution* as it is, but fail adequately to critique the existing constitutional order. The curriculum explains things as they are, without providing the students with an opportunity to debate what they might be. The *Constitution* is presented as representing the final culmination of an historical process, and the sub-text essentially is that the *Constitution* is the best that it can be. As was stated in a discussion paper which pre-dated *Discovering Democracy*:

> young Australians often leave school imbued with democratic values, which they have picked up by a kind of osmosis. The weakness is that many of them might not have any clear idea where those values come from, or even how to put them into words. How are they able to defend those values unless they know the processes by which those values and not others emerged? How are they to challenge values with which they do not agree, unless they can see the processes by which a society can change?[90]

Similarly, when the *Discovering Democracy* curriculum was being written, the following criticism was levelled at the historical state of civics education in Australia:

> Students were presented with facts about Australia's political history and political system, but were not encouraged to think critically about their political inheritance and what aspects, if any, they might think needed to be changed.[91]

Also absent from the school curriculum is any coverage of philosophy, familiarity with which is a necessary prerequisite for the analysis of the institutions of government. Contrast this with European countries, where both philosophy[92] and civics[93] have long been part of the curriculum and are taught throughout a student's school career, with the result that students are imbued not only with a knowledge of their institutions but also with the capacity to question them.

88 Education Services Australia, *Discovering Democracy* (1998) Civics and Citizenship Education, <http://www.civicsandcitizenship.edu.au/cce>. See also Stacey Hattensen and Robyn Platt, *Australians All! Discovering Democracy Australian Readers – Lower Primary* (Curriculum Corporation, 2001).

89 Australian Curriculum and Assessment Reporting Authority, *7–10 Civics and Citizenship* (2015) <http://www.australiancurriculum.edu.au/humanities-and-social-sciences/civics-and-citizenship/curriculum/7-10?layout=1>.

90 Donald Horne and Penelope Layland, *Teaching Young Australians to be Australian Citizens – a 2001 Centennial National Priority* (National Centre for Australian Studies, Monash University, 1994) 2.

91 Kate Krinks, 'Creating the Active Citizen? Recent Developments in Civics Education' (Research Paper No. 15, Parliament of Australia, 1998–99) 13.

92 See Hugh Schofield, 'Why Does France Insist School Pupils Master Philosophy?' BBC News (online), 3 June 2013, <http://www.bbc.com/news/magazine-22729780>.

93 Eurydice, 'Civics Education across Europe' December 2012, <http://eacea.ec.europa.eu/education/eurydice/documents/thematic_reports/139EN.pdf>.

Successful reform also requires that we address the normative vacuum in which debate in Australia is customarily conducted. Debate on constitutional matters rarely proceeds from positions of principle – everything is addressed from a pragmatic perspective. Yet pragmatic approaches to constitutional questions are fraught with danger. To take one example, if one was to ask people whether they supported the concept of proportional representation with its attendant certainty that governments would always be formed by coalition, the response of most of them would in all likelihood be negative on the ground that they believe that coalition governments are unstable. Quite apart from the factual error underlying that argument,[94] the more disturbing aspect of it is that it demonstrates a failure to consider what 'democracy' means, what the 'right to a vote' means, and instead prioritises legislative efficiency at the expense of the right of each citizen to have an equal say in government. What is needed in Australia is a new mode of debate – one that determines principles first and only then looks at the relative costs, efficiencies and other pragmatic considerations – but always subordinate to the implementation of whatever teleological principle underlies the constitutional mechanism under consideration.

Coupled with inherent conservatism is the problem of voter apathy, as one researcher into civics expressed it:

> A 1999 issue of *The Economist*, for instance, cited statistics indicating that in the United States, Western Europe, Japan, North America and Australia, there had been a steady decline in people's opinion of the honesty of their leaders and the caring capacities of politicians. Since the mid-1970s, citizens in these countries have become more ready to distrust politicians, the judiciary, the armed services, the public service and the police. At the same time, they are passively dependant on authority, and unwilling to take responsibility as citizens; they do not see themselves as responsible for following political debate and monitoring the actions of government.[95]

This trend continues in Australia. Mistrust of public institutions and the lack of willingness to do something to improve the situation creates a paradox in which current institutions are maintained – to the benefit of the very politicians whom Australians distrust, and in whose interest it is to avoid any debate about constitutional reform. The focus in Australian politics remains relentlessly on bread and butter issues. This is to some extent understandable, but it also has an element of pettiness and selfishness about it, because it indicates that people are simply not interested in bigger and more important questions, such as what is the role of the individual vis-à-vis the government – which is precisely why the idea

94 For a comparative analysis of the relative stability of governments under different electoral systems see Vernon Bogdanor, *What is Proportional Representation?* (Martin Robertson, 1984) 149 and Farrell, above n 16, 194–6. The data indicates that there is no proven causative link between governmental instability and the use of proportional representation.

95 Kay Ferres and Denise Meredyth, *An Articulate Country: Re-inventing Citizenship in Australia* (University of Queensland Press, 2001) 8.

that democracy is all that is needed to protect human rights is incorrect. Unless people are willing to lift their gaze above the mundane, narrow perspective of their individual circumstances, our public institutions will never improve. To that extent, we have the politicians we deserve.

Another impediment to constitutional reform is the 'If it ain't broke, don't fix it' mentality – an argument for mediocrity if ever there was one, the appropriate response to which is another adage: 'The good is the enemy of the best'. Surely Australia should have a constitution which is the best that we can devise, rather than one which is merely serviceable? Can it really be true that the experience gained in operating the *Constitution* and observation of developments in constitutional theory, both here and abroad, over the past century have yielded no lessons as to how it could be improved?

Finally, academic lawyers need to in initiate discussion of broad constitutional reform from the perspective of principle, leaving aside, at least initially, questions of political attainability. Public resistance to reform is seen as being so ingrained that academic writers rarely venture into this area, presumably believing that any proposal that would be truly meaningful is doomed to failure. This approach subordinates principles to pragmatics and ignores the fact that meaningful reform rarely occurs by following public opinion. Radical reform is, by its nature, controversial, and so the role of the advocate must of necessity be that of leading, rather than following.

VIII Conclusion

This article has presented an alternate vision of an *Australian Constitution*, one which embodies true democracy because the legislature would accurately represent voter sentiment, true accountability because the executive would be under an enforceable duty to provide information requested by the legislature, and true freedom because the full range of rights mandated by the dignity of the individual would be protected by a justiciable Bill of Rights. The new model would also be one in which the otiose and wasteful federal system was abandoned and where the powers of the Governor-General (or President) would be codified.

The job of reforming the *Constitution* is multi-faceted and will be of long duration. Progress will take decades rather than years. Yet, we ought not to be daunted by the difficulty of the task confronting those of us seeking progressive constitutional change. I trust that the foregoing will have given food for thought and will scotch the idea propounded by former Prime Minister Tony Abbott that recognition of Indigenous Australians would mean that the *Commonwealth Constitution* was 'complete'.[96] In reality, work has only just begun.

96 Eliza Borrello, 'Prime Minister Wants Vote on Indigenous Constitutional Recognition on 50th Anniversary of 1967 Referendum' *ABC News* (online), 12 December 2014 <http://www.abc.net.au/news/2014-12-11/indigenous-recognition-vote-could-be-delayed,-pm-says/5962010>.