



Queensland Schools' Constitutional Convention

Tuesday 2 March 2004, 9am
Banco Court

Chief Justice Paul de Jersey AC

Onetime US President Franklin Roosevelt said that '[d]emocracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore is education'.¹ I am very pleased to welcome you to the Banco Court. I am encouraged you want to gain a greater understanding of a fundamental basis of democracy in our country, the Australian Constitution: and it is understanding that matters, not just information.

We are all diverted by the fascination of this computer age. Unfortunately the technology often tempts us to treat information as significant in itself. Information is but the first step towards knowledge. If we are to be productive, worthwhile citizens, we need to understand the system which governs you. We need to be able to distil, from information, the principles on which it is based. It is of great importance to understand not only the principal doctrines underlying our system of government, but also the constitutional history which spawned them.²

Another heroic world leader, Winston Churchill, observed that 'democracy is the worst form of government except all those other forms that have been tried from time to time'.³ I suppose when we acknowledge the many injustices which have been perpetrated in the name of democracy, his comment may be accepted. We are, however, fortunate to live in Australia, which we believe, as

¹ Franklin D Roosevelt in P and H Beilenson (eds), *The Wit and Wisdom of Franklin D Roosevelt, Government and Democracy* (1982, Peter Pauper Press) 29.

² The Hon P de Jersey AC, Chief Justice of Queensland, 'Why Civics Education Should be Compulsory', Annual General Meeting of Queensland Chapter, Wednesday 22 September 1999.

³ Winston Churchill, Hansard, November 11, 1947.



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do very many others, exhibits 'a unique combination of strong democratic institutions and constitutional, common law and statutory protections for human rights'.⁴ Yet some would disagree. Some people believe Australia requires major reforms to the manner in which rights are protected.⁵ Mr Lavarch and Senator Cherry will address you on the interesting issue of whether the Australian Parliament needs its house of review, the Senate. I wish for a few moments to talk about something a little different, also much debated – should Australia have a bill of rights, a constitutional charter guaranteeing things like freedom of speech, the right to privacy, freedom of religion, the right to a fair trial?

I hope as you arrived on the second floor this morning you looked at the replica of the smoking room of the steamship *Lucinda* where a large part of the Constitution was drafted. That happened in 1891, at Easter time, while the vessel – the Queensland government vessel - was moored in Refuge Bay on the Hawkesbury River near Sydney. The drafting party was led by the legendary Sir Samuel Griffith, Queensland's third Chief Justice and Australia's first. Apparently the bay was turbulent, and a little bit of whiskey was drunk – we have preserved the remnants in the crystal decanter on the table – though someone told me the other day it is only cold tea!

We installed the replica in 2001, the year of the centenary of federation: it celebrates the importance of that pivotal document the Constitution, and our great State's role in its drafting. If you stand inside the smoking room, you may sense movement: many people do. I think that is eerily symbolic: the constitutional law of our country, enshrined in that static document the Constitution, is an evolving thing. Some commentators feel it evolves too slowly.

⁴ Daryl Williams, 'Against constitutional cringe: the protection of human rights in Australia' (2003) 9(1) *Australian Journal of Human Rights* 1.

⁵ Megan Davis and George Williams, 'A Statutory Bill of Rights for Australia?' (2002) 22 *University of Queensland Law Journal* 1.



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While the United States Constitution inspired much of our Constitution, our drafters omitted something which has become a contentious issue in recent years, a bill of rights. They determined that the rights of Australian citizens were more than adequately protected by the common law 'in association with the doctrine of parliamentary supremacy'.⁶ The primary argument against the adoption of a bill of rights is the enshrining or entrenchment of rights which in the future may become obsolete or socially detrimental.⁷ I say 'enshrining' because it is notoriously difficult to amend, or change, our Constitution. Since 1901 only eight out of forty-four referendum proposals have been approved. One of the handful which did succeed was in 1967, with Aboriginal people first receiving the right to vote.

Those who do not favour a constitutionally enshrined bill of rights point to the apparent willingness of governments to enact legislation to protect rights, and anti-discrimination legislation provides a good example. An illustration of the advantage of proceeding by legislation, rather than entrenched constitutional guarantee, rests in the ability of the Australian Government to establish the National Firearms Buyback Scheme in the wake of the Port Arthur massacre. Such a scheme would not have been possible in the United States, because of the constraint of a right to bear arms entrenched by their Constitution's Bill of Rights.⁸

Another query about a constitutional 'bill of rights' is whether the courts of law should be invested with the immense power which usually comes with such things: it is the courts which then pass on matters of great social moment. Charters of rights tend to be expressed in fairly general terms. It is the application of general concepts to precise situations which spawns a lot of

⁶ Tony Blackshield, 'Bill of Rights' in *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 62; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, Mason CJ.

⁷ Blackshield, above n 6, 62.

⁸ Williams, above n 4, 5.



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detailed analysis. Some, many, believe those issues are better resolved by the people's elected representatives – those who have to face the ballot box if they are said to have got it wrong, unlike the independent, non-elected judiciary.

Arguments in favour of a bill of rights are also persuasive. Another US President, Thomas Jefferson, said: '[a] bill of rights is what the people are entitled to against every government on earth ... and what no just government should refuse'.⁹ Examples of rights which are protected in the US Bill of Rights are: freedom of religion; freedom of speech, of the press, petition and assembly; privacy; due process of law; and equality before the law. The many rights to which we are entitled, civil, cultural, economic, social and political are considered interdependent, and many believe adopting a bill of rights would reflect and promote this central assumption.¹⁰

The ability of the common law to protect people against infringement of their rights is limited by parliamentary supremacy, in that parliament may legislate to abrogate or do away with common law protections. Many provisions of our Constitution are of narrow scope, rendering the safeguarding of rights extremely difficult. Although Australia has signed many United Nations treaties supporting rights and eliminating discrimination, it is claimed these treaties are meaningless until Australia either enacts them into domestic legislation or preserves them by means of a constitutionally entrenched bill of rights.¹¹

⁹ Thomas Jefferson, 'Letter, December 20, 1787 to James Madison' in Julian Boyd (ed), *The Papers of Thomas Jefferson* (1950) Vol 12, 440.

¹⁰ George Williams, 'Introduction: A Bill of Rights for Australia?' (2003) 9(1) *Australian Journal of Human Rights* i.

¹¹ The Hon Mr Justice David Malcolm AC, Chief Justice of Western Australia, 'Does Australia Need a Bill of Rights?' *E Law – Murdoch University Electronic Journal of Law*
<www.murdoch.edu.au/elaw/issues/v5n3/malcolm53_text.html>



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Whether we should in this nation have a bill of rights as part of our Constitution is a major recurrent issue. I have mentioned these points this morning in the hope you may think about them. Regardless of whether Australia eventually adopts a bill of rights, it is vital to remember that although '[c]onstitutional guarantees may provide some protection to human liberties ... in the end freedom depends on the willingness of a community to defend it'.¹² In this country, the rule of law is alive and well, but we must not take it for granted.

You will shortly be addressed by two eminent speakers on another current issue: whether we should have a Senate, a 'house of review'. If you believe that the spirit of democracy is self-government by the people, then Australia's current system is exceedingly democratic, embracing as it does preferential voting for lower house elections, a house of review in the Senate, the need for referenda to amend the Constitution and compulsory voting for all citizens.¹³ But is a house of review necessary, or is it an expensive and unnecessary luxury? I leave that to Mr Lavarch and Senator Cherry.

The satirist Oscar Wilde once quipped, '[d]emocracy means simply the bludgeoning of the people, by the people, for the people'.¹⁴ As in many things, Wilde thereby went much too far but of course his object was to entertain. Our democracy is sound and measured. Part of its strength is our free capacity – or 'right' – to debate issues like whether we need a bill of rights, and even the apparently radical notion that we should do away with that house of which Senator Cherry is a distinguished member.

It is important to avoid being sententious on an occasion like this: the privilege of speaking seriously to the young is not to be sacrificed. I hope what I have

¹² Sir Harry Gibbs, 'Does Australia Need a Bill of Rights'

<www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm> 25 February 2004.

¹³ James Allen, 'Oh That I Were Made Judge in the Land' (2002) 30 *Federal Law Review* 575.

¹⁴ Oscar Wilde, 'The Soul of Man Under Socialism' (1891) *The Fortnightly Review*.



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said may have sparked some interest in your inquiring minds. I am confident of your lively participation today: it will reflect your determination to contribute enthusiastically to 'free, fair and just'¹⁵ democracy in this great nation. But remember, it is understanding, not mere information, you should seek. Question, debate, read, discuss and above all, think. But you will only effectively serve this nation, and yourselves, if you remember what Franklin Roosevelt said – 'the real safeguard of democracy is education'.

¹⁵ Williams, above n 4, 1.