Inspire me with a democratic republic!:

A submission to the Australian Senate Republic Enquiry on the matter of an Australian republic by Citizen Pat Coleman.
Hyde Park Qld

A moment from the current Townsville Free Speech Fight 1997-
The above picture was taken on 21/11/99 outside the Townsville Flinders Mall Police Beat. The protest is against the an unlawful arrest that happened exactly one week before at the same place for doing the same thing, an arrest that took place whilst I was conducting a radio interview on 4/11/99 on why we should vote no to force the issue of a bill of rights, the actions of the police in standing back and allowing Keith Williams thugs to beat up peaceful protesters on Oyster Point Cardwell 14/9/97 , the polices of The Labor Townsville City Council in suppressing free speech , and 33 charges laid by the council during the referendum campaign for speaking publicly on the issue urging a no vote –“without permission”

Contents:

Page
Introduction 8

Chapter 1: The State of the Australian State..9

Subheadings:
Is Australia a democracy?.. 9
Concrete decisions 16
Recommendation on s58 and s59...24
Conclusion to chapter 1...25
Bibliography 25

Chapter 2: Is our environment protected under our constitution
and do we need an environment power? 26

Subheadings:
Introduction...26
Argument 27
The precautionary principle...31
Friends of Hinchinbrook Society Inc v Minister -
for Environment (1997) 69FCR 28 32
Margurula v Minister for the Environment -
(1999) 92FCR 35 33
The National Interest clauses of the EPBC ACT...........................34
Ecologically sustainable development 35
Examples of alternatives..36
Conclusion to chapter 2...37
Should the constitution be amended to give the-
commonwealth the ultimate power to legislate -
"with respect to the environment"?...37
S44, The Proposed EARC Bill of Rights 1993-
(Qld) -Right to Environmental Protection and -
Conservation..38
S2, 24,39, of The South African Constitution.................................38
Recommended Environmental Rights Clause , "Protection-
of the environment and fundamental human rights"........................39
Bibliography..39

Chapter 3: The voting rights of prisoners and the validity of non state
detention and punishments...40

Subheadings:
Introduction...40
The Theory of the Social Contract..43
The alleged compact..45
Alleged Democracy and Parliamentary Supremacy..........................46
The Rule of Law, Role of Law and Coercive Apparatuses…………47
The Freedom of communication and -
"Westminster Accountability" 50

Access to Lawyers and Natural Justice 57
The denial of the right to vote in Australian prisons..........................58
Private Prisons 59
Legitimacy and accountability issues...60
Conclusion to Chapter 3..63
Bibliography..65
Statutes 66
Cases..67

Chapter 4: The effects of non-compulsory voting...68

Subheadings:
Is there any correlation between non-compulsory voting-
and aggressive militarism in the United States and the -
United Kingdom?...70

Chapter 5: Various principled questions:…………………………………………….81

Subheadings:

Oaths..81
The flag..81
The National Anthem…………………………………………………..81
Citizens Initiative...82
Draft Citizens initiative provision...82
Direct Election of the executive..82
The role of the senate...83
Draft provision for role of senate as house of review..........................84
The relationship between the executive, parliament-
and the judiciary...84
Method of election and removal of the parliamentarians,
Executive and governments..84
Draft optional preferential proportional representation
provisions...85
Draft direct presidential and method of election for -
Presidential ticket, general and local election timing provisions.........85
Control of the military...86
Draft control of military provisions..87
Presidential and parliamentary code of conduct....................................88
Draft code of conduct, removal criterion provisions for president,
presidential ticket, government and members of parliament 88
The judiciary..90
Draft judicial improvements..91
The states and territories and local government....................................91
Draft bi-cameral state and territory legislature provision....................91
Our representatives to the United Nations……………………………91
Transitional arrangements...91

Chapter 6: Draft Bill of rights with commentary and explanation-
of the need for and application and effect of such provisions..

Articles:

1. Preamble to bill....92
2. Application....93
3. Equality 94
4. Human dignity 95
5. Life 95
6. Freedom and security of the person 95
7. Slavery, servitude and forced labour 96
8. Privacy 97
9. Freedom of religion, belief and opinion....98
10. Freedom of expression....100
11. Assembly, demonstration, picket and petition....100
12. Freedom of association 102
13. Political rights including right to vote and stand for election 102
14. Citizenship 104
15. Freedom of movement and residence 105
16. Freedom of trade, occupation and profession 106
17. Labour relations 106
18. Environment 108
19. Property (merely a suggestion- as such a -.... section should be negotiated by and with - .... indigenous Australians). 108
20. Housing 109
21. Health care, food, water and social security 109
22. Children 110
23. Education 111
24. Language and culture 112
25. Cultural, religious and linguistic communities 113
26. Access to information 113
27. Just administrative action 114
28. Access to the seat of government, offices of the - state, courts , and the public ports airports and - railways. 115
29. Arrested, detained and accused persons....116
30. Limitation of rights....119
31. Enforcement of rights....120
32. Interpretation of Bill of Rights- including that trade- treaties in conflict with bill of rights and constitution can- be struck down by the people 121

Chapter 7: A suggestion for the amendment of the constitution with- link to existing provisions and dot points of major changes....123

Suggested Constitutional Amendment

The Federal Democratic Republic Of Australia Constitution Act....125

Suggestions for Preamble

The "Bill of Rights" , "Social Contract" ,"Compact"-

or "Bargain" 124
Sections:
1. The effect of this constitution...139

Chapter I. The Parliament. Part I.--General.

2. A president elected by the people..139
3.(2). ..... a department of the president and vice president.............................139
3.(4)(a). Transitional provision...140
3.(6). The remuneration of the president 140
5.(1). Sessions of parliament..140
5.(2). Dissolution..140

Part II.--The Senate.

9.(1). The method of choosing senators shall be by **optional preferential** -proportional representation 141
13 . Elections to fill vacant places..141
15(1). -(5). Party senators going independent and elections to- replace independent senators..143
Transition provisions (ss 15(6) to 15(9) 144
23.(2) The role of the senate in additions to its powers , is as a house of review and scrutiny of the actions- of government 144

Part III.--The House of Representatives.

25. Repeal of racial clause on voting, and replacement - of provision by enshrining prime minister..144
26. Repeal
29. States and territories are single electorates, optional - preferential proportional representation voting system...........................145
31. Uniform voting and nomination rights...145
32. The President ..... must cause writs to be issued for general elections, state and territory, and local elections........................145
34. Repeal

Part IV.--Both Houses of the Parliament.

41. Repeal
44. Public servants, service personnel, bankrupts, may stand, electoral officers or employees of an electoral body may not.................146
45.(1)(b) ,45.(1)(c): Bankrupts vacate office by may stand again............................147
46. It is compulsory to vote...147
50.(3) ,50.(4) Parliamentary "citizens initiative" joint standing committee.............147

Part V.--Powers of the Parliament.

51. - and **(xxxvi.)** Weapons of Mass destruction, nuclear power, uranium mining banned 148
51(xxiv) Parliament will have power over criminal, civil law, contracts, police and prisons...149
51(xxvi.) Power to nationalise..149

51 (xxix.) Treaties must be ratified by parliament..149
51. (xxx.) New powers over Local government, Education and the environment...149
51. (xxxii.) No WMD's may traverse Australian territory, No Nuclear - ships allowed in Australian territory except in dire emergency.............149
58 and 59. President has power to refuse assent to laws and treaties and to refer them to High Court..152

Chapter II. The Executive Government.

(61)(b) President to be elected on 4 person presidential ticket.........................153
(61)(c) One 6 year term, method of election of president- who replaces vacant presidential spot...153
65. repeal
68. President commands military with parliamentary and constitutional limitations to circumstances of deployment...................154
69. Presidential and Parliamentary code of conduct with: method of removal of presidential ticket and parliamentarians and government; and emergency election procedures..........................156

Chapter III. The Judicature.

70. (1) Integrated legal system..158
70.(3) Independence of judiciary guaranteed..158
70.(5) Legal aid in placed under judicial control...158
71. No less than 9 judges in high court...158
72. Grounds for removal of federal justices...158
74. repeal

Chapter IV. Finance And Trade.

84. Transferred departments under control of republic................................161
87. repeal
91. Aid for mining, affirmation of banning of uranium mining..............................162
92. Free trade among the states subject to constitution and bill of rights.....162
95. Repeal
100. Repealed in favour of environmental protection..163
101. repeal
102. repeal
103. repeal
104. repeal

Chapter V. The States.

106. State constitutions subject to new republican constitution......................164
116. Guarantees that the legislatures and assemblies of the states- and territories have an upper house...165
120. Repeal

Chapter VI. New States.

122. Territories power now subject to the constitution and - territories are no longer disjoined" from the commonwealth- or its protections..165

Chapter VII. Miscellaneous.

125. The parliament has power to legislate that Parliament - may be held outside Canberra, also an emergency power- to convene parliament outside Canberra in times of emergency- and to take votes of members on matters informally..............................166
126. Parliament cannot maliciously withhold supply of funds to- presidential ticket and department..166

Chapter 8: On the matter of the plebiscites and process of amendment- of the Australian Constitution...167

Some contentious issues:

The protection of Aboriginal Sacred sites...112
Abolishing all references to god and parliamentary prayers....................98
Nazis not protected by free speech..100
Enshrining the Nuremburg principles...98
The military to have a union..106
The military and security apparatuses to stay out of civil affairs............103
The military to keep colours and battle honours if flag changed................81
Fixed terms for federal and national local elections..................................85
Enshrining the ABC..113
Free trade agreements may be quashed by the people..............................121
Voting age dropped to 16...103
Secularism does not mean you cannot voluntarily wear headscarves…100

Inspire me with a democratic republic!:

Introduction

Given that national identity has been used to justify (quite rightly) a shift away from England and to a republic, we must ask what it actually is. What is it we want to say about ourselves? What do we believe in? Are we subjects or do we want to be citizens, what does it mean to be a citizen and what is the bargain?

It is all very well to convey an impression to the world that we believe in freedom, justice, secularism, peace and democracy. But what is freedom, justice, secularism, peace and democracy if it is not law and not enforceable against the government and others by the citizenry?

I argue that officially we are not a democracy , we are not secular , we aren't allowed rights and freedoms by the ruling class , the courts will enforce unjust laws and there is no way from stopping unjust governments from waging unjust wars in our name.

There are prerequisites for engaging in this debate that stem from our international obligations to incorporate worlds best practice democracy , protection of human rights and protection of the environment into our laws.

The issue of secularisation, democratisation, the role of the judiciary, the abolition of class based laws and a bill of rights cannot be left out of the republic debate and fall within the terms of reference of the committee relating to a republican model, because the model I argue for is a democratic republic under the rule of law. Where the rule of law is defined and has a purpose to bring about and to protect open and democratic society based on human dignity, equality, justice, freedom and protection of the environment and biodiversity. Where these principles are justiciable and enforceable.

On the issue of:
(i) The functions and powers of the Head of State
(ii) The method of selection and removal of the Head of State, and
(iii) The relationship of the Head of State with the executive, the parliament and the judiciary.

- I argue that these matters are inseparable from the other matters that would lead to a democratic republic.

Over the last couple of years I have written a number of essays and papers on these issues, in the main, submitted to James Cook University as part of assessments for a law and political science degree.. I have slightly amended them and have strung them together for this submission as they argue for constitutional change.

I have a number of proposals for constitutional change in a number of areas; however, I leave the matters of tax and finance to persons experts in that field.

Chapter 1 The State Of The Australian State

Is Australia a democracy ?

Is Australia a democracy or is Australia a plaything of the national and international power elite? How can the Australian people retrieve decisions made by their governments on behalf of unelected international trade organisations?

Using Robert Dahl's four *"assumptions justifying a democratic political order"* [1], I aim to examine the relevant Australian constitutional arrangements and come to a conclusion whether his *"criterion of final control",* that is, whether the demos (the people) have the final say, and can retrieve bad decisions that are made -[2]has been met. And whether as Colney and Wanna imply[3], *that* globalisation in the Australian context -is indeed reversible.

Australia is considered a democracy by most countries and most likely by a majority of its politicians. But many would argue that Australia is not actually a democracy and that the decisions that are made by those with control are made on behalf of a power elite. Dahl argued that one must distinguish between the potential for the system to be controlled in such a fashion and actual control[4]. He argued that such a state of affairs *"can only be shown to exist by examination of a series of concrete cases where key decisions are made"* [5]and *....." If it can then be shown that a minority has the power to decide such issues and overrule opposition to its policies, the existence of a power elite will have been established"* [6].

Dahl's' principles were -

(1)Effective participation - Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome They must have adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another.

(2)Voting equality at the decisive stage - At the decisive stage of collective decisions, each citizen must be ensured an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen. In determining outcomes at the decisive stage, these choices, and only these choices must be taken into account.

(3) Each citizen must have adequate and equal opportunities for discovering and validating (within the time permitted by the need for a decision) the choice on the matter to be decided that would best serve the citizens interests.

---

[1] Dahl, Robert A, Democracy And Its Critics, Yale University Press, New Haven, 1989, p 109-104
[2] ibid 113
[3] Colney, Tom and Wanna, John, Impacts of Globalisation and Australian Policy in Van Acker, Elizabeth and Curren, Giorel, Editors, Business Government and Globalisation, Longman 2002, p 55
[4] Dahl, Robert A, Who Governs ? Yale University Press, New Haven, 1973, p285, in Van Krieken, Robert Editor, Sociology Themes and Perspectives, 2nd Edition, Pearson Education Australia, Longman, Frenches Forest, 2000, p113
[5] Dahl p 290, ibid
[6] ibid, Van Krieken

(4) The demos must have the exclusive opportunity to decide how matters are to be placed on the agenda of matters that are to be decided by means of the democratic process" [7].

Where actual power lies in the Australian system is a combination of law and doctrine. This is because Australia has a written constitution that was an act of the English parliament. We have a Federal Westminster System, what Dahl would call, a 'stable polyarchy'[8]. A system of government that is not officially a democracy, as the neither the term nor its principles are enshrined in the constitution[9].

The high court of Australia has found that representative and responsible government is in itself only a practice, a doctrine, the court said that the government is composed of people who enjoy the confidence of the electors "*and the attitudes of the electors to the conduct of the executive may be a significant determinant of the contemporary practice of responsible government"* [10].It is also said that the parliament is representative of the people and the executive is responsible to the parliament.

Australia has a rigid constitution, meaning that although the constitution was originally and act of the English Parliament, it no longer is so, and, it may only be changed through a referendum[11]. All are bound by the constitution [12]

The Federal parliament is bound by the constitution because *"a legislature has no power to ignore the conditions of law making that are imposed by the instrument which itself regulates its power to make law"*[13]. Similarly the state governments in the federal system, although they previously owed their existence to English acts of parliament, - are now bound by the constitution [14].There are only procedural restraints on law making[15]. There are no statements in the constitution that state what the role of government is, nor about whom it governs for, on behalf of, or why. However, there are implications of free speech, which set out the standard for involving citizens in the political process.

It should be restated here that the role of a democratic state is to uphold the welfare of the people and to protect the citizenry against the arbitrary use of despotic power[16]. This is where the role of the state is openly contested by the people, the courts, the parliaments and international interlopers. It was argued forcefully by a former Judge of the High Court, Justice Toohey in 1993 -

"...it was considered that the commonwealth parliaments capacity to curtail common law liberty by legislation relating to the subjects of its legislative power was unlimited - it just had to do so unambiguously .yet it might be contended that the

---

[7] extracted from Democracy and its Critics, p 109-113
[8] Polyarchy, Participation and Opposition, Yale University Press, New Haven, 1971, p 8
[9] Australian Constitution Act 1901, CTH
[10] Lange v The ABC (1997) 189 CLR 520 at 559
[11] Australian Constitution s 128
[12] ibid, covering clause 1
[13] Victoria v The Cth and Connor (1975) 134 CLR 81
[14] Coleman v Power [2001] QCA 539 at [46] per Thomas JA, McGinty v Western Australia (1995-1996) 186 CLR 140 at 171 per Brennan CJ
[15] Australian Constitution s 57
[16] Foucault 1982:221 in Van Krieken 2000:136, Held (1993:19)

courts should take the issue one step higher and conclude, for instance , that where the people of Australia , in adopting a constitution , conferred power to legislate with respect to various subject matters upon a commonwealth parliament , it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties - a presumption only rebuttable by express authorisation in the constitutional document. Just as parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit parliament to enact such laws before the courts will hold those laws to be valid. If such an approach to constitutional adjudication were adopted, the courts would overtime articulate the contents of the limits on power arising from fundamental common law liberties .It would be then a matter for the Australian people whether they wished to amend their constitution to modify those limits. In that sense an implied bill of rights might be constructed"[17]

On the parliamentary side of the coin, it is argued, -that the parliament has sovereign '*uncontrollable despotic power'* to make and unmake laws as it choses[18]. The parliamentary supremacy argument has been used to deny the people of the states a bill of rights when such matters have come up for debate. For instance it was stated by the Queensland government that they would not initiate a bill of rights in any form as it would give too much political power to the judiciary to override the decisions of the parliament[19], it would override the doctrine of parliamentary supremacy, and it would be too hard to enforce against newly privatised entities[20].

The arguments were worthy of the totalitarian propaganda of so-called communist countries. It was claimed a bill of rights would have an adverse impact on the standing of the judiciary (in the eyes of the parliaments), the report stated -

"Experience in Canada has also shown that by judges making 'policy' decisions, there is greater potential for more 'controversial decisions', or decisions which have significant repercussions for society. (Examples of far-reaching Canadian court decisions are given in the next section under the heading 'The enormity and uncertainty of a bill of rights'.) Judicial appointments therefore might become a highly political issue, threatening the independence of the judiciary. The perception that judges are political appointees as opposed to impartial adjudicators can, in turn, impair public confidence in the judiciary. Thereby, the high regard in which the community holds the judiciary can be undermined. The Canadian judiciary has been characterised by some as being politicised [21] .

Further-

[17] "A Government of Laws and Not of Men" (1993) Public Law Review 158 at 170, Submission 143, p4 To Parliamentary Joint Committee on ASIO, ASIS and DSD Inquiry into the Australian Security Intelligence Organisation Legislation Amendment Terrorism) Bill 2002, Submission 406 To the Senate Legal and Constitutional Review Committee Security Legislation Inquiry May 2002

[18] Blackstone, Applied in Kartinyeri v CTH, 1998 HCA 22

[19] Preservation of Individual Rights And Freedoms, Should Queenslanders Have a Bill of Rights, Report no 12 1998, Parliament of Qld, Legal Constitutional and Administrative Review Committee, p iv

[20] Ibid v

[21] ibid,p36

"the committee is concerned about the erosion of parliamentary sovereignty. The committee believes that the legislature, consisting of parliamentarians as the elected representatives of the people, has the primary function of making laws for the State on all matters including rights. The legislature is directly accountable to the people for its decision making on rights matters via periodic elections." [22]

What they considered was that -

"Between 1982 and 1988, the Supreme Court of Canada nullified eight federal and 12 provincial statutes for violating the Charter. It upheld 16 federal and 15 provincial statutes during the same period. Provincial appellate courts, on the other hand, struck down 82 statutes, or statutory provisions for Charter violations between 1982 and 1988". [23]

The state of play at the moment is that our judiciary is highly politicised simply because there is no such document[24]. Judges are picked because they will either expand freedom, or because they will decide in favour of the power elite, and it was for this reason that the Qld government decided to keep things as they are. Documents such as bills of rights take away arguments about appointments simply because judges will be bound by the freedoms stated in the document. This presents a dilemma for the status quo, and blatantly the Qld government said that a bill of rights -

"would potentially have a significant-and the committee believes-inappropriate impact on the fundamental nature of the Queensland polity .Moreover, the committee is not convinced, for the reasons noted in this report, that the adoption of a bill of rights would achieve a real difference in the protection of the rights and liberties of Queenslanders. Substantial economic and social costs are also likely to result from any such move"[25].

The New South Wales Government in its 2001 Report gave the same answer[26]. In a cynical example of the exploitation of public trust and of the lack of democracy in a country that calls itself a democracy, the committee of the right wing Carr government said -

"A bill of rights would become a fundamental piece of legislation, which future governments would find difficult to amend. A bill of rights creates expectations, to back away from these expectations defeats the purpose of bringing in the bill" [27]

In other words, "We can't bring such a bill before the parliament, because we won't pass it and people will get angry". They also discussed a possible parliamentary override clause in the bill, the committee said -

---

[22] ibid p37

[23] K M Weiler, 'Of Courts and constitutional review' Criminal Law Quarterly, vol 31, 1988-89,p121, G Ferguson 'The impact of an entrenched bill of rights: The Canadian experience , Monash University Law review, vol 16 , no 2 1990 , pp211-227,225 in 'Should Qld adopt a bill of rights p 39

[24] Editorial: "Judges Need More Than Guidelines" -The Australian, 16/10/2001

[25] Should Qld Adopt A Bill Of Rights p79

[26] A NSW Bill of Rights? Parliament of NSW Standing Committee on Law and Justice, Report no 17, p 110-113

[27] Ibid, p112

"Rather than facilitating a "dialogue" between the parliament and the judiciary, the existence of an override sets up a potential conflict between these two arms of government. A possible scenario is one in which legislation is judged by court to be in breach of human rights as set out in the bill of rights, and subsequently parliament indicates its intention to let the incompatibility stand and exercise its power of override This process highlights the conflict when it arises. While there have always been circumstances where courts have questioned the validity of legislative action, the committee believes these differences should not be elevated to a prominence possible with an override provision"[28].

The height of cynicism and contempt for the people is illustrated by the fact that the judiciary is referred to as one of the arms of government, and by the fact that embarrassment for the status quo about rights is easiest avoided when there are no rights. There have been many other attempts at bill of rights proposals, for instance 1959 (Qld), 1973 (Australian), 1985 (Australian), 1985 (Australian Capital Territory), 1988 (Victorian) 1988 (Australian)[29]. And governments have consistently refused to cede power to those who've never surrendered it. The Australian Capital Territory has recently introduced a Human Rights Act that doesn't give any rights to the people. It is a class based legislative standards act that can be overridden or ignored. It is class based because impliedly it makes it law that the people cannot be trusted with enforcing their rights. They may wish to enforce these against the government. The government always consists of the new ruling class- the "politicracy". If rights were immediately enforceable the effect would be immediate if they are breached, momentum could build up very quickly against governments, however, leaving it governments to obey declarations of the courts and to pass amending legislation softens the blow.

Here it must be pointed out that article 2 of the International Covenant on Civil and Political Rights sets out :

(2) 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

[28] Ibid
[29] Ibid, p20-23

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

We are obligated to have rights and freedoms incorporated into Australian law through legislative and constitutional amendments.

But both the labor party and the coalition say that it is too hard to define what the rights of the people are[30]. This is a flawed argument , it was used by the so called founding fathers of the Australian Constitution applying the now centuries old views of America's James Madison, to say that Australia should not have a bill of rights [31]. However, in the years since maggots ate his eyes we have had wars and all manner of human rights abuses that has resulted in human rights abuses.

These abuses are the very reason why the Universal Declaration and the ICCPR and ICECSR were written and adopted by the UN.

The 1998 Qld Bill of Rights Report by the labor dominated committee said

"Parliamentary sovereignty also enables new governments, with approval of parliament , to implement their election commitments (approved , it must be remembered , by the electors) in a full and complete manner" [32] .

The Beattie government, it can be said, has a short memory. Beattie himself said in parliament [33] *"There is a parallel in philosophy between what Bjelke-Petersen was doing and what Stalin and the Eastern bloc countries were doing. They were both wrong, Mussolini and Hitler did the same thing"*

It must be remembered that Hitler, Mussolini and Bjelke-Petersen were elected and implemented their policies accordingly. And remembered also that in February 2000, the Qld Constitutional Review Commission [34] appointed by the Beattie government, said that it was correct to describe the Qld system as an "elective dictatorship". No one in that government or the opposition had anything bad to say about that and it passed without comment. Where there are express grants of power in the CTH Constitution to pass laws and there are no implied or express rights, the commonwealth situation is no different.

---

[30] BLF v Minister For Industrial Relations [1986] 7 NSWLR 372 at 406, Should Qld adopt a Bill Of Rights at 5, Kirby J : "The High Court- A Centenary Reflection" University of Western Australia Law Review [Vol 31] December 2003 at 192
[31] Kirby J : "The High Court- A Centenary Reflection" University of Western Australia Law Review [Vol 31] December 2003 at 192
[32] at p 28
[33] 17 June 1992
[34] Report on the possible reform and changes to the acts and laws that relate to the Qld constitution at p 22

With this claim on the part of governments to English parliamentary supremacy (which is only a doctrine like terra nullius), it is useful to note part of the full high court's unanimous *'Lange'* decision in 1997 [35]-

"*The constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature. It placed upon the federal judicature the responsibility of deciding the limits of the respective powers of state and commonwealth governments"*

There exist provisions in state and territory statutes and the federal court act for people to challenge decisions of governments under the law, and to seek orders. The power to seek orders is wide ranging and allows for legislation to be challenged, but mostly it is the procedures of making decisions that are challenged. In that case if the law says a minister or government can act in a particular way even if unjust, then that is the law. Such is Heyeks liberal procedural democracy[36]. Under the constitution, there are powers that exist under s58 and 59 of the constitution, whereby the governor general may assent to a law, refuse to assent, ask for amendments, or refer the law to the Queen.

And, under s59 the Queen may refuse Assent 1 year after the governor general has passed it into law. The provisions are set out below

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure. The Governor-General may return to the house in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

So far, the only discussion of these provisions have been in two cases in the high court, Joose [37]. In the first case the court said that only s 58 would be used, although there was still a constitutional provision, and in the other it was said that s 59 was valid but it was not certain whom the governor general would take his/her orders from. The Australia Acts render the decisions of the state governments irretrievable by the Queen or state governors [38].

The only other avenue available is that of an application to the high court by persons affected by invalid legislation. s 75 of the constitution sets out -

---

[35] Lange v The ABC (1997) 189 CLR at 563-564
[36] Pierson, Christopher, The modern State, Routledge NY, 1996, p 181
[37] Joosse v Australian Securities and Investment Commission (1998) 159 ALR 260 p 265 , Hayne J) and Sue v Hill (1999) 163 ALR, p665-667
[38] s1 , 7 ,8,9 Australia Acts CTH 1986

75. In all matters-- (i.) Arising under any treaty,(ii.) Affecting consuls or other representatives of other countries,(iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, (iv.) Between States, or between residents of different States, or between a State and a resident of another State, (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: the High Court shall have original jurisdiction.

The processes are set out in the judiciary act [39] and the rules of the High Court, just as the processes of access to state courts and the federal court are also set out in acts of parliament. It is not clear whether the parliaments, although they cannot abolish the high court , could abolish the courts of appeal of the states and territories . There has been one statement about this conundrum by a judge in the High Court case of Kable v DPP , there it was said that it is implied in Chapter 3 of the Federal Constitution that there must be a state supreme court [40] , but the parliaments can alter the manner in which people are able to access justice [41] .

Concrete decisions

Having set out the structure of the system of government, laws and doctrines, and the contests between institutions at a glance, Australia would appear to function as a democracy, if the existence of institutions alone were a guide. The question here is what actually occurs on the ground, as Dahl argued, if there is to be any evidence of the existence of a power elite and governmental decisions being made favourably towards them, by them, then there would have to be an examination of "concrete decisions made" on their behalf which may lead to such a conclusion.

It is also part of this, that Dahl's 4 criterions should be measured against the same decisions and outcomes. As for criterion 1. A provisional finding would be that person are equally able to compete to get issues on the agenda, however on the question of having adequate opportunities for expressing preferences, this can be altered by shortening timeframes for enquiries as happened recently with the security legislation inquiries, where only a short period of time was given for input into matter which would profoundly affect the liberty of citizens, and over public holidays[42].

Criterion 2 relating to voting equality is relatively complied with, that is with the exception of s25 of the constitution, it states -

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted..

---

[39] The Judiciary Act CTH 1903

[40] Kable v DPP (NSW) [1996] 189 CLR 51 at 139, Report on the possible reform and changes to the acts and laws that relate to the Qld constitution at 21

[41] s76 Constitution Act 1901

[42] Report of The Senate , Legal and Constitutional Committee into the Security and Terrorism Legislation, May 2 , 2002 p 2

This is clearly an unsatisfactory state of affairs [43] that the states should have this power, whether or not it would be used again, shows which way the balance in our system has leant from the beginning. In this respect I agree with the submissions of ATSIC.

But given that the rest of our electoral law is governed by statute both at state and territory level and federal level, though this power is mothballed, in the main the electoral law functions well, and meets the criterion. However Dahl Adds, *" The criterion would be violated, however, if the demos were no longer free to alter such arrangements whenever they failed to achieve their purposes or threatened to cause the demos to lose its final control over collective decisions"* [44] . This question will be answered with evidence to be provided, and in conjunction with the discussion on criterion 4.

Criterion 3 relates to being able to discover or validate a choice and having the means to do so.

This criterion not only has the *potential* to be abridged, it actually does get abridged .The withholding of information by government during election times is rife and has been recently demonstrated[45]. In combination with minimising the time given to conduct public inquiries the withholding of information and dissemination of false information by the current government may have caused persons to vote for its asylum seeker policy without expressing preferences, or making them clear in other areas.

Criterion 4 is the main thrust of this argument. Dahl argues that as long as the demos could retrieve any matter for decision made by it, criterion 4, and in turn all criterion would be met. It is here that concrete examples present themselves.

The government of the day claims the right to utilise absolute despotic power. Legislation can be passed good or bad with a parliamentary majority. Similarly a federal government may sign up to international treaties that adversely impact on the interests of the citizens.

If a bad law has been passed without protest by the governor general and the Queen, or, a treaty has been entered into which binds the people without their consent, then, it is up to the demos or the people to try to retrieve the decision. If bad decisions cannot be retrieved then the criterion for democracy and democratic processes is not fulfilled.

One of the first concrete examples of a bad law being passed by the governor general and being ignored by the Queen was the Hindmarsh Bridge Act. This Act legislated to allow a bridge to be built intruding into areas the Kartinyeri people of South Australia held sacred. A previous Act of parliament protected the land from development. The Kartinyeri people took the Howard government to court; the parliament claimed the

---

[43] Report of the Parliament of Australia Joint Select Committee On The Republic Referendum, 1999, p102

[44] Democracy and Its Critics, p 110

[45] Parliament of Australia, Select Committee for an inquiry into a certain maritime incident, http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/index.htm

right to exercise absolute despotic power and the power to legislate to the detriment of the aboriginal people. The decision was irretrievable.

In 1998, the Howard government used parliamentary supremacy to override the Racial Discrimination Act 1975, to amend the Native title Act 1993. The amendments stated that the new act was only subject to racial discrimination law in so far as, decisions made under the provisions of the act, must be done in a non racial way, in accordance with the provisions[46] , which were racially motivated. This was done to favour miners and mining companies, and pastoralists over native titleholders who may have proved their claims. It is the case that the 1967 referendum on the race power did not in the slightest way prevent the federal parliament from passing laws that oppress aboriginal people[47]

The process of actually trying to uphold the constitution in the courts can also be manipulated. In Australia there is no right to legal aid. There is a right to a fair trial, which means that a trial should be stopped if a person cannot get representation. The courts are precluded by the separation of powers from ordering the provision of aid. A court can recommend but it carries no weight. For instance it was said in the high court case of Dietrich [48] by justice Brennan-

"A society which secures its peace and good order by the administration of criminal justice should accept, as one of the costs of providing a civilised system of justice, the cost of providing legal representation where it is needed to guarantee the fairness of a criminal trial"

and -

"To accord the postulated entitlement to legal aid, public funds must be appropriated to pay for representation or counsel must be required to appear without fee. The Courts do not control the public purse strings; nor can they conscript the legal profession to compel the rendering of professional services without reward. The provision of adequate legal representation for persons charged with the commission of serious offences is a function which only the Legislature and the Executive can perform. No doubt, demands on the public purse other than legal aid limit the funds available. If the limitation is severe, the administration of justice suffers. The Courts can point out that the administration of justice is an inalienable function of the State and that the very security of the State depends on the fair and efficient administration of justice, but the Courts cannot compel the Legislature and the Executive Government to provide legal representation. Nor can this Court declare the existence of a common law entitlement to legal aid when the satisfaction of that entitlement depends on the actions of the political branches of government. In my opinion, to declare such an entitlement without power to compel its satisfaction amounts to an unwarranted intrusion into legislative and executive functions. The common law is the creature of the Courts alone and susceptible of enforcement by the Courts: the

---

[46] s 7 , Native Title Act 1993

[47] *Kartinyeri v The Commonwealth [1998] HCA 22 (1 April 1998) at pars [29]-[32]*
http://www.austlii.edu.au/au/cases/cth/HCA/1998/22.html

[48] Dietrich v The Queen (1992) 177 CLR 292 at 317

common law is never dependent for its effect on action to be taken by the Legislature in exercise of a legislative discretion or by the Executive in exercise of an executive discretion. If the Constitution conferred an entitlement to legal aid, the Courts would be empowered, if need be, to enforce the entitlement against the political branches of government. But we do not live under such a Constitution."

But when a person is trying to uphold the constitution against the federal government or a government of a state or territory, the government is a party to the litigation. Legal aid is under the control of the government, and, as a party the government then has the ability to deny you equality in the proceedings by denying you aid to uphold the law. Clearly such a state of affairs is undemocratic. Such a situation could be remedied by, either by constitutionally entrenching the right to legal representation at the expense of the state, or, by appropriating the money to the judiciary and placing legal aid under their control.

Thus, no breach of the separation of powers will occur because an appropriation has already taken place for that purpose and, like the day to day administration of the courts and its expenditure for such, the judiciary has proven itself already equipped for that task.

Another example is that of bilateral and multilateral treaty ratification. The federal government has the power under the constitution to enter into treaties. But, although human rights treaties benefit the people as whole, treaties such as the WTO General Agreement on Tariffs and Trade (1994), article 2.2 of "Agreement on Technical Barriers to Trade" of the WTO [49] where it says "*Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade*". Not to mention the threat of economic sanctions by WTO members for protecting our own industries, - clearly take away any power over decisions affecting the citizens from the citizens. The above example shows that outside influences can prevent laws being passed by governments.

Dahl insisted "*A countries economic life, physical environment* … are … *increasingly dependant on actors and actions that are outside the countries boundaries and not subject to its government. Thus the members of the demos cannot employ direct control external actors whose decisions bare so critically on their lives"*[50].

The decision to ratify a treaty is a matter totally removed from the hands of the people. It is an irretrievable decision within the current system. There are only common law mechanisms, which can be invoked if a treaty is ratified but wrongly implemented, but again, this a strictly procedural issue.

There is a situation where federal governments adhere to and implement economic treaties and consider themselves bound by them, in the sense that they consider sanctions imposed for non-compliance a threat. Yet, as discussed previously the same cannot be said for human rights treaties. Again, in the diplomatic language of the high

[49] WTO 14/4/1994
[50] Democracy and its critics, p 319

court this is a curious situation, which means in real speak, there is something hypocritical about it.

Quoting the Dietrich case again, two judges Chief Justice Mason and Justice McHugh were critical of Australian governments attitudes towards implementation of human rights covenants such as the International Covenant on civil and political rights, they said [51] -

"Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions .... No such legislation has been passed. This position is not altered by Australia's accession to the First Optional Protocol to the ICCPR, effective as of 25 December 1991, by which Australia recognizes the competence of the Human Rights Committee of the United Nations to receive and consider communications from individuals subject to Australia's jurisdiction who claim to be victims of a violation by Australia of their covenanted rights. On one view, it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the ICCPR are incorporated into domestic law, but such an approach is clearly permissible."

It was also said in MIMIA v Al Masri [52] on the worth of UN Committee decisions:

[149] Although the views of the Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects by performing functions that include reporting, receiving reports, conciliating and considering claims that a State Party is not fulfilling its obligations. The Committee's functions under the Optional Protocol to the International Covenant on Civil and Political Rights, to which Australia has acceded (effective as of 25 December 1991) are particularly relevant in this respect. They include receiving, considering and expressing a view about claims by individuals that a State Party to the Protocol has violated covenanted rights. The conclusion that it is appropriate for a court to have regard to the views of such a body concerning the construction of a treaty is also supported by the observations of Kirby J in Johnson v Johnson (2000) 201 CLR 488 at 501-502, and of Katz J in Commonwealth v Hamilton (2000) 108 FCR 378 at 387, citing some observations of Black CJ in Commonwealth v Bradley (1999) 95 FCR 218 at 237. See also The Queen v Sin Yau-Ming [1992] 1 HKCLR 127 at 141. It is appropriate, as well, to have regard to the opinions expressed in works of scholarship in the field of international law, including opinions based upon the jurisprudence developed within international bodies, such as the Committee.

The ICCPR sets out that a state may withdraw from the optional protocol or provide the UN with a reservation to any of the rights contained therein. No government has done so. Yet the Howard government for instance has shown itself willing to ignore the decisions of the UN Human Rights Committee, there have been at least 4

[51] Dietrich v The Queen at 304-305
[52] [2003] FCAFC 70 15 April 2003

decisions ignored, 2 relating to racial discrimination, 1 in relation to a gay man seeking access to government assistance, and condemnation of the arbitrary mandatory detention of refugees. The government has seen fit to ignore the reports of HEREOC in relation to treatment of refugees. Article 2 of the ICCPR also sets out that human rights should apply to all within the jurisdiction[53].

In a recent High Court case *Minister for Immigration, Multicultural and Indigenous Affairs v B* [54] - it was held that where there was an express grant of power under s51 "what the parliament wants, it gets". In other words, the lawful abuse of the human rights of refugees is lawful if that is what the law says. Hypothetically they could be hung.

A further constitutional solution to the situation, where, although there is a retrieval clause in s58-59 of the constitution, the governor general wont act against unjust or oppressive laws unless on orders of the government -is to amend those provisions.

The Irish constitution has a comparatively good provisions relating to the powers of their legislators, which prevent them from making law inconstant with their constitution [55] , and presidential powers, which would cure the republican dilemma of referring laws to a foreign monarch. Enacting similar provisions would the give repositor of executive power (either Governor General or - president) the power to retrieve bad laws in the people's name. In Ireland the president is directly elected by the people.

The two relevant provisions are articles 26 and 27, in these articles, the 'Dáil' is the lower house, and the 'Seanad' the upper house, the 'Oireachtas' is the entire parliament, and the 'Taoiseach' is the prime minister. The provisions provide -
Reference of Bills to the Supreme Court

Article 26
This Article applies to any Bill passed or deemed to have been passed by both Houses of the Oireachtas other than a Money Bill, or a Bill expressed to be a Bill containing a proposal to amend the Constitution, or a Bill the time for the consideration of which by Seanad Éireann shall have been abridged under Article 24 of this Constitution.

1.1 The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.

1.2 Every such reference shall be made not later than the seventh day after the date on which such Bill shall have been presented by the Taoiseach to the President for his signature.

1.3 The President shall not sign any Bill the subject of a reference to the Supreme Court under this Article pending the pronouncement of the decision of the Court.

---

[53] see also Al Masri at par [91] applying R v Home Secretary; Ex parte Khawaja [1984] AC 74 at 111
[54] [2004] HCA 20)
[55] Constitution of Ireland, article 15(4)

2.1 The Supreme Court consisting of not less than five judges shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.

2.2 The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.

3.1 In every case in which the Supreme Court decides that any provision of a Bill the subject of a reference to the Supreme Court under this Article is repugnant to this Constitution or to any provision thereof, the President shall decline to sign such Bill.

3.2 If, in the case of a Bill to which Article 27 of this Constitution applies, a petition has been addressed to the President under that Article, that Article shall be complied with.

3.3 In every other case the President shall sign the Bill, as soon as may be after the date on which the decision of the Supreme Court shall have been pronounced.

Reference of Bills to the People

Article 27

This Article applies to any Bill, other than a Bill expressed to be a Bill containing a proposal for the amendment of this Constitution, which shall have been deemed, by virtue of Article 23 hereof, to have been passed by both Houses of the Oireachtas.

1.A majority of the members of Seanad Éireann and not less than one-third of the members of Dáil Éireann may by a joint petition addressed to the President by them under this Article request the President to decline to sign and promulgate as a law any Bill to which this article applies on the ground that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained.

2.Every such petition shall be in writing and shall be signed by the petitioners whose signatures shall be verified in the manner prescribed by law.

3.Every such petition shall contain a statement of the particular ground or grounds on which the request is based, and shall be presented to the President not later than four days after the date on which the Bill shall have been deemed to have been passed by both Houses of the Oireachtas.

4.1 Upon receipt of a petition addressed to him under this Article, the President shall forthwith consider such petition and shall, after consultation with the Council of State, pronounce his decision thereon not later than ten days after the date on which the Bill to which such petition relates shall have been deemed to have been passed by both Houses of the Oireachtas.

4.2 If the Bill or any provision thereof is or has been referred to the Supreme Court under Article 26 of this Constitution, it shall not be obligatory on the President to consider the petition unless or until the Supreme Court has pronounced a decision on such reference to the effect that the said Bill or the said provision thereof is not repugnant to this Constitution or to any provision thereof, and, if a decision to that effect is pronounced by the Supreme Court, it shall not be obligatory on the President to pronounce his decision on the petition before the expiration of six days after the day on which the decision of the Supreme Court to the effect aforesaid is pronounced.

5.1 In every case in which the President decides that a Bill the subject of a petition under this Article contains a proposal of such national importance that the will of the people thereon ought to be ascertained, he shall inform the Taoiseach and the Chairman of each House of the Oireachtas accordingly in writing under his hand and Seal and shall decline to sign and promulgate such Bill as a law unless and until the proposal shall have been approved either-

i by the people at a Referendum in accordance with the provisions of section 2 of Article 47 of this Constitution within a period of eighteen months from the date of the President's decision, or

ii by a resolution of Dáil Éireann passed within the said period after a dissolution and re-assembly of Dáil Éireann.

5.2Whenever a proposal contained in a Bill the subject of a petition under this Article shall have been approved either by the people or by a resolution of Dáil Éireann in accordance with the foregoing provisions of this section, such Bill shall as soon as may be after such approval be presented to the President for his signature and promulgation by him as a law and the President shall thereupon sign the Bill and duly promulgate it as a law.

5.6.In every case in which the President decides that a Bill the subject of a petition under this Article does not contain a proposal of such national importance that the will of the people thereon ought to be ascertained, he shall inform the Taoiseach and the Chairman of each House of the Oireachtas accordingly in writing under his hand and Seal, and such Bill shall be signed by the President not later than eleven days after the date on which the Bill shall have been deemed to have been passed by both Houses of the Oireachtas and shall be duly promulgated by him as a law.

I would suggest that the above example is applicable to Australian conditions, with some simplifications. One of those would be to amend the constitution to provide (as it is currently governed by statute which can be amended for dodgy reasons) that every citizen shall be able to petition an Australian court, and ultimately the high court for relief if a law that has been passed is inconsistent with the constitution (including a future bill of rights), such a provision exists under the South African Bill of rights. That in itself would do away with the need for an article such as article 27 of the Irish Constitution, and would allow for the opposition to seek retrieval in the same manner as other citizens. However, a provision dealing with a reactive referendum on the subject should, I believe be left for later discussion.

Recommendation

Having assessed the Irish and South African Provisions[56] I would come to the conclusion that an applicable amendment to the Australian Constitution should look something like the following suggestion -

58(1) When a proposed law passed by both Houses of the Parliament is presented to the President for the assent, or a treaty (or like document) is proposed to be entered into by the federal government the President shall declare, according to the Presidents discretion, and subject to this Constitution, that the president assents in the peoples name, or -may reasonably refer any Bill or a treaty (or like document) to which this Article applies to the High Court for a decision on the question as to whether such Bill or treaty (or like document) or any specified provision or provisions of such Bill or treaty (or like document) is or are repugnant to this Constitution or to any provision thereof.

58(2) The President shall not sign any Bill or treaty (or like document) the subject of a reference to the High Court under this Article pending the pronouncement of the decision of the Court.

58(3) The Full Bench of the High Court shall consider every question referred to it by the President under this Article for a decision, and, having heard (or read) arguments by or on behalf of the Attorney General and by counsel assigned by the Court, and as the case may be - friends of the court and interested citizens, shall pronounce its decision on such question in open court as soon as possible, and in any case not later than sixty days after the date of such reference.

58(4) In every case in which the High Court decides that any provision of a Bill or treaty (or like document), the subject of a reference to the High Court under this Article, is repugnant to this Constitution or to any provision thereof, the President shall decline to sign such Bill or treaty (or like document).

59. The President may return to the house in which it originated any proposed law or treaty (or like document) held invalid, and may transmit therewith any amendments which the President may recommend, and the Houses may deal with the recommendation.

Such solutions as I have proposed would have to be debated, and further, their compatibility with s57 of the Australian Constitution would have to be adjusted in relation to removing the need for a joint sitting to pass bills, and instead that if a law is held invalid the government may if it wishes call a double dissolution election, in which, a specific question is put to the people at the same time (separate from the ballot papers). A government would of course have to draft such an amendment or law.

[56] South African Constitution ,Chapter 2, article 38, filed at http://www.gov.za/constitution/1996/96cons2.htm#34

Conclusion

The state of the Australian state is this-Australia does not stack up against Dahl's 4 criterions. Australia is not a democracy. It cannot be such until it is made clear in exact words that we are. It must be made clear that the system of government is in place to prevent to use of 'absolute uncontrollable despotic power'.

Laws that are bad, can, in a lot of cases, be out of reach of the citizen, through inability to take action, and lack of solid standards against which those laws can be compared in a manner demanding compliance by government.

International trade treaties can be entered into which are outside the control or ability to retrieve by citizens. The ability to be able to use "absolute uncontrollable despotic power" in situations where the creation of wealth on behalf of interests other than welfare of the citizens, and where ignorance of inalienable human rights "is clearly permissible" under the constitution, provides concrete evidence that our country actually is the plaything of a national and international power elite, which is also powerful evidence of the need for constitutional change.

Such an amendment as I have proposed, to the Australian constitution, along with the removal of racially exclusionary electoral clauses, a statement of inclusion, the ability of citizens to present submissions to the president calling for a referendum, and an amendment of the constitution allowing for the provisions of legal aid at state expense for criminal and constitutional matters (and some civil), even when the state is a party to proceedings, or placing the control of legal aid in the hands of the judiciary, and a complete and modern bill of rights, would enable citizens to be able to effectively retrieve bad law by being able to attack it on a number of fronts.

It would also enable a reversal of the effects of globalisation in the sense of liberalisation by treaty or convention ratification, which is not consented to by the citizenry, to be held up to scrutiny by the courts.

Bibliography

Dahl, Robert A, Democracy And Its Critics, Yale University Press, New Haven, 1989

Colney, Tom and Wanna, John, Impacts of Globalisation and Australian Policy in Van Acker, Elizabeth and Curren, Giorel, Editors, Business Government and Globalisation, Longman 2002, p 55)

Van Krieken, Robert Editor, Sociology Themes and Perspectives, 2nd Edition,

Pearson Education Australia, Longman, Frenches Forest, 2000

Polyarchy, Participation and Opposition, Yale University Press, New Haven, 1971

Held, David, Editor, Prospects For Democracy, North South East West, Polity Press Cambridge, 1993

Preservation of Individual Rights And Freedoms, Should Queenslanders Have a Bill of Rights, Report no 12 1998, Parliament of Qld, Legal Constitutional and Administrative Review Committee Nov 11 1998

A NSW Bill of Rights? Parliament of NSW Standing Committee on Law and Justice, Report no 17 2001

Pierson, Christopher, The modern State, Routledge NY, 1996

Report of The Senate, Legal and Constitutional Committee into the Security and Terrorism Legislation, May 2, 2002
Joint Select Committee on the Republic Referendum
Advisory Report on: Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999

The Constitution Of The Republic Of Ireland.

The Constitution Of The Republic Of South Africa.

Chapter 2

Is our environment protected under our constitution and do we need an environment power?

Introduction.

Should an express head of power for the federal parliament to legislate for the environment under s51 of The Australian Constitution be enacted?

I argue that authority points towards the federal government having massive powers to legislate for the environment. The myriad of powers are scattered throughout the constitution under various heads of power unrelated to protection of the environment leading to a situation where, in between the lines of the constitution, there are thousands of words which are never seen, nor can be applied by every day citizens making it by and large, irrelevant and uninspiring to most ordinary people.

I conclude that because of the penchant of Australian politicians to pay mere lip service to, ignore and override their own environmental legislation and international law and obligations, that, the question of a bill of rights and codification of constitutional common law aside, at minimum what is needed is in fact a constitutional change to "protect" the environment. An amendment to protect the environment would go much further than a simple power to legislate "with respect to", which is as will be evidenced a double edged sword.

It is concluded that such an amendment be an amalgam of *2, s24 and 39* of the *South African Constitution*, *s44* of the proposed *1993 EARC Bill of Rights for Qld*, and *s391 (2)* of the *Environment Protection and Biodiversity Conservation Act 1999 (CTH).*

It is also concluded that this would result in fundamental shift in the onus of proof which is currently on people attempting to protect the environment to prove serious or irreversible harm, to place it instead on government and profiteers to prove their actions would not cause serious or irreversible harm to the environment or the health of the people.

Argument

In formulating my argument I rely heavily the recent reports; *Commonwealth Environment Powers Inquiry (May 1999), Inquiry into the Jabiluka Uranium Mine Project (June 1999), Hinchinbrook Channel Inquiry (September 1999)* produced by the Australian Senate *(Senate Environment, Communications and the Arts References Committee, Parliament of Australia)* which represent a modern up to date and critical exposure of the inadequacies of Australian law, and a recent, proven potential for the power entrusted by the Australian people in their respective governments to be abused ,I argue, leading to abrogation of the human right[57] to have the Australian environment and its component ecosystems protected for current and future generations.

Simpson and Jackson argue applying the United Nations Committee for Human Rights -*"Draft Declaration of Principle on Human Rights and The Environment"* [58] *,* that environmental and human rights are indivisible [59]. These rights it is argued are *"multi dimensional rights to environmental protection, conservation and restoration"* Further they argue, that the commonwealth possesses undeniable power with regard to human rights issues [60] and;

"The linkage between human rights and environment issues would certainly consolidate the commonwealths powers, providing the political will also existed in relation to environmental conservation issues"[61].

In the case of the *Environment Powers Report*, the inquiry heard from many environmental and constitutional experts [62] on the state of the law and the need for change, it made many recommendations, I regard it as Authoritative.

The committee found applying, *Murphyores* [63] *that "So long as Commonwealth environmental legislation rests on some head of power--even not directly touching the environment -- the commonwealth is entitled to act for environmental reasons alone"*[64] .

They said at p 7

---

[57] Tony Simpson and Vennessa Jackson, Human Rights and The Environment (1997) 14 EPLJ 268 at 268, 269,270
[58] Ibid, 272, 279,280,281
[59] Ibid 271
[60] Ibid 277
[61] Ibid 277
[62] Ibid 109-116
[63] Ibid, p6, 7, Murphyores v CTH (1976) 136 CLR at 22
[64] Ibid

"Key commonwealth powers that have been used repeatedly to support legislation for environmental purposes include: the trade and commerce power (s51 (i), the taxation power (s51 (ii), the quarantine power (s51 (ix), the fisheries power (s51x), the corporations power (s51xx), the race power (s51xxvi), the external affairs power (s51xxix), the incidental power (s51xxxix), the power over commonwealth instrumentalities and public service (s52), the power over customs excise and bounties (s90), the financial assistance power (s96), and the territories power (s122) The commonwealth has also relied on the implied national power (nationhood power) which was recognised in the AAP case (Victoria v CTH 1975) 134 CLR 338)"

They also recognised at 12
"The single environmental issue expressly addressed by the constitution is the restriction on commonwealth power to pass a law limiting "the reasonable use of waters of rivers for conservation or irrigation"

They went on to add to this, that, implied in the section is a power to limit unreasonable use and they point out that the definition of conservation at the time of the enactment was merely to save for later use[65].

S100 states
"The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a state or the residents therein to the reasonable use of the waters of rivers for conservation or irrigation"

This does raise more questions about how much further any change to the constitution must go. I cannot go any further without addressing the need for this section to either be explained by national legislation according to modern standards as apposed to those of the past, or to be repealed completely. I am guided by a persuasive argument relating to a concept called " A Tragedy of the Commons" A definition of this is extracted from Marshall et al[66] .

" *A tragedy of the commons or open access occurs when there is a breakdown of a regime or if a regime lacks the incentive mechanism that gives the concept of property a meaning. As the physical nature of these resources makes controlling access by potential users impossible, each user is capable of subtracting from the welfare of others"*

Rivers and water are the common property of all Australians, and the constitution must reflect this. The protection of rivers must be done at the federal level, and the safest bet is to repeal this section and its "Pro wealth bias", and to rely on the proposed new section, which is discussed later.

---

[65] Applying also Crawford J, The constitution, in Bonyhandy T, ed, Environmental Protection and Legal Change (1992), p2-3

[66] Donald G Marshall et al, A Tragedy Of The Commons And The Neglect Of Science: Planning and Management In The Shark Bay World Heritage Area (2000) 17 EPLJ 126 at 127

Some argue that the myriad of powers that may be employed by the CTH may operate against each other to prevent for instance a national approach to water quality reforms[67].

It was argued by *Moeller et al* that -

"The greatest difficulty of any federal government wishing to introduce national water quality legislation, is the power of trade and commerce clause to control mining, industry and activities incidental to commerce. In the present climate, it would not be possible to legislate for clean water standards aimed at discharges, since production processes are not considered commerce. Whether the federal government can intrude into intra state trade processes linked to overseas and interstate trade is unclear and bewildering to decipher" [68] .

and

"The foremost difficulties inhibiting the introduction of national environmental legislation in Australia is the interpretation of 'trade and commerce' and 'trading corporation' in s51 (i) and (xx) respectively. Three major problems occur with the present interpretation of commerce. First, that commerce excludes production, mining and manufacturing. Second, that for activities to be incidental to commerce and therefore regulable they have to show a direct casual link, and third, s51 (i) does not occupy intra state trade, and this is reinforced by s92 that guarantees free trade among the states".[69] .

Further

"The trade and commerce power could not be utilized for legislation related to the control of pollutant discharges from manufacturing or production .The high court continually maintains the distinction that activities preparatory to the final barter exchange are not trade, and that only the selling and buying of produce is trade and commerce. This vastly reduces the scope of s51 (i)"[70].

The result of the senate environment powers inquiry was, that recommendations were made advocating increased vesting of environment powers in the commonwealth through *"binding national standards",*

that all legislation -

" include open standing provisions to allow for public access to the courts ...in order to restrain breaches of the law" and that there should be an "amendment to s51 of the constitution to provide an express head of .... power to legislate with respect to the environment" [71] .

---

[67] Anthony Moeller et al, Is there power in the Australian Constitution to Make Federal Law For Water Quality? (2000) 17 EPLJ 294
[68] Ibid 299
[69] At 306
[70] Ibid, 306-307
[71] Recommendations 24,27,30, ibid, p xvii, xviii

In relation to uncertainty about definitional problems, this would tilt the balance in favour of the amendment argued by the senate committee; however, the uncertainty discussed by the committee was that of legislative dominance of the field. Crawford argues, though, that these arguments are not so much about legislative dominance but fiscal matters[72] .

Would anything be achieved? The only argument in favour of the amendment by the senate committee was a perceived uncertainty created by claims from many governments that the lack of the express power denies the CTH ultimate power, and that the simple amendment would put it beyond doubt[73] . It can be inferred that this is a reference the states rights arguments and even local sovereignty issues[74] .

By the time of the environment powers inquiry, it had become beyond doubt that Queensland for instance could not be trusted with the administering of world heritage areas, the Queensland government was found to have a 'perverse' penchant for taking short cuts in approvals. [75]. This will be further discussed in the section dealing with ministerial discretion.

The CTH can bind itself by legislation to conform with certain manner and form requirements or procedures, however *"commonwealth statutes cannot prevail over the constitution "*[76]. In 1999 the federal government passed *The Environmental Protection and Conservation of Biodiversity Act*, it has open standing provisions, injunction provisions and in conjunction with s75 of the constitution a person has the ability to seek redress from the court for relief under the legislation which overrides all but concurrent state law and bilateral agreements with states, agreements are legally binding and any person can enforce breaches.[77]

It is clear that national environmental powers would not impair the ability of the states to function or wreck the federation. It is also clear that if the federal government expressly passes an act that is inconsistent with a state act, by the operation of s109 it will override that act[78] . There is therefore, no legal foundation for arguing that the commonwealth could not assume the entire responsibility of legislating for the environment (apart from the limitations discussed earlier in relation to intra state trade). The commonwealth has indeed done so with great effect on occasions using the external affairs power to enact the *World Heritage Properties Conservation Act (CTH 1983)* to conform with our obligations under the World Heritage Convention[79].

With all this power and national legislation such as *the World Heritage Properties Conservation Act (1983 CTH), Great Barrier Reef Marine Park Act (1975 CTH)* and the *Environment protection and Biodiversity Protection Act (1999 CTH)* and more recently the *Gene Technology Act*, one would expect that the environment would be

---

[72] J Crawford, The Constitution and the Environment (1991) 13 Sydney Law Review 11 at 30
[73] Ibid 10,11,87,88,89,90
[74] Hinchinbrook report at 4,5
[75] Hinchinbrook Channel Report pxvi, 18-33
[76] Gibbs CJ, University of Wollongong v Metwally (1984) 158 CLR 447 at 457
[77] See -Chris MCGrath, case note, Booth v Bosworth (2000) FCA 1878 23/12/2000, (2001) 18EPLJ23 at 24,25,26
[78] Ibid 478
[79] See Cth v Tasmania (1983) 158 CLR 1, Richardson v Forestry Commission (1988) 164 CLR 261, Qld v Cth (1989) 167 CLR 232, see also Commonwealth Environment Powers report at p 9

adequately protected from the detrimental effects of modern capitalism. This is simply not the case now and a simple amendment to include the words *"with respect to the environment"* in *s51*[80] . in the future will not compel a government to act.

It is useful to remember the *Kartinyeri* case[81] on the race power *in s 51(xxvi), -"with respect to - The people of any race for whom it is deemed necessary to make special laws "* can be used to legislate to the detriment of the aboriginal people of Australia.

The case was also a reversion to the doctrine of parliamentary supremacy; it was held that a law the parliament makes it can unmake with impunity and that any inconsistent provision impliedly repeals a previous provision or law.[82].

Common sense dictates that something more than *"with respect to the environment"* is required.

A short coming of the WHPC Act (CTH) has been found by the high court and the federal court, the actual convention requires that a state party do" all that it can" "to the utmost of its own resources" to protect world heritage areas, but this does not mean that the CTH in a federal system must be forced by international law to take upon itself the entire job although it can do so itself[83] .

Ministerial discretion and *"national interest"* clauses are commonly placed in environmental legislation as an escape route for capitalist ministers. Such clauses allow for ministers to take into account certain matters in making their decisions but don't force them to make the protection of the environment and the application of the precautionary principle the overriding, fundamental concern.

Judges, whilst bound to force a minister to abide by the manner and form procedural requirements of environmental legislation, nevertheless tend to treat a ministerial decision in the same light as a finding of fact of a judge in a lower court during an appeal and refuse to interfere with it unless it is manifestly unreasonable[84]. And even then ministerial discretion will not be found to be unlawful.

The precautionary principle

The precautionary principle is defined in the EPBC Act 1999 CTH *s391 (2)* as

"The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage."

There is much intellectual and scientific debate about the application of the precautionary principle, at the moment it is "enshrined" nationally, it appears, only in the above section in a manner, which is limited, as I will later explain.

---

[80] See recommendation 30 of the Commonwealth Environment Powers Report
[81] Kartinyeri v CTH (1998) 195 CLR 337
[82] See Brennan CJ and McHugh J at 356, applying Goodwin v Phillips (1908) 7 CLR 1 at 7
[83] See FOH v Minister for Environment (1997) 69 FCR 28 at 67 per Sackville J, applying Richardson v Forestry Commission at 289
[84] See generally Aitkin Transport Pty Ltd (1990) 1 QDR 510

It is argued that it must be enshrined in all legislation [85] , as it is only applicable to the decision of a federal environment minister in certain circumstances. Enshrining it in legislation would, it is argued by *Wyman*, avoid the possibility that decision makers would only pay lip service to it in their discretion[86].

It is a fundamental tenet of those arguing for the enshrining of the principle that it would shift the onus of proof in law, *"from the underlying freedom of exploitation to conservation"* [87]. At the moment the burden of proof falls on opponents of an activity to prove likely and unacceptable harm, *"The principle reverses the situation by mandating that a party cannot be permitted to act unless it is shown that the proposed activity will not adversely effect the environment "*[88] .

The common law before the introduction of the EPBC act was hindered in applying the precautionary principle due to the lack of an agreed applicable standard as to what it was [89], as it was not enshrined in legislation and as expressed in the *1992 Intergovernmental Agreement on the Environment*- it was found by Sackville J of the Federal Court- not to be binding on the courts [90].

Whilst it may be the case that the enactment of *s3A* and *s391 (2)* may have altered the common law in so far as providing a guiding legislative form of the principle,[91] it is only applicable to the decision of the federal minister concerned, it is time to make it binding, enforceable, applicable to all public and private decisions to the fullest extent. This would be achieved by, even if only by statute, making it applicable to court decisions or orders [92].This may involve a major conceptual "reorientation" for many judges trained and educated in the traditional notions of parliamentary supremacy[93] .

Friends of Hinchinbrook Society Inc v Minister for Environment (1997) 69FCR 28

In 1997 the Friends of Hinchinbrook Society brought an action in the federal court arguing among other things that the decision of the minister to grant an approval under *s 13(c) of the World Heritage Properties Conservation Act (1983 CTH)* to dredge an access channel to developer Keith Williams Port Hinchinbrook Marina at Cardwell Nth Queensland was a decision so unreasonable that no reasonable person could have made it and generally-

---

[85] Lisa Wyman, Acceptance of the Precautionary Principle- Australian Decision Makers v International Decision Makers (2001) 18 EPLJ 395 at 407
[86] Ibid
[87] Case note Booth v Bosworth (2000) FCA 1878 23/12/2000, Chris McGrath (2000) 18 EPLJ 23 at 21
[88] Warrick Gullett, Environmental Protection and The Precautionary Principle- A Response to Scientific Uncertainty in Environmental Management (1997) 14 EPLJ 52 at 59, Wyman at 396, Donald G Marshall et al, Tragedy of The Commons And The Neglect of Science: Planning and Management in The Shark Bay World Heritage Area (2000) 17 EPLJ 126 at 129-130
[89] FOH v Mnr for Env at 78-79
[90] Ibid
[91] See generally, Phillip. A Joseph, The NZ Bill of Right Experience, in Alston (ed), Promoting Human Rights Through Bills of Rights, Comparative Perspectives, Oxford University Press, New York, 1999 p 282,283,317
[92] Ibid 298
[93] See Andrew Byrnes, Hong Kong's Bill of Rights Experience, ibid 354

(1) The minister - took into account irrelevant matters when making his decision i.e., economic benefits as apposed to environmental effects and effects on world heritage values.

(2) -failed, to take into account the precautionary principle as stated in the 1992 Intergovernmental Agreement on the Environment, and breaches of the deed of agreement between the state, the federal government and the developer.

The court held dismissing the action that a deed does not have the same effect as a valid planning law, the court could not review the merits of the decision and-

" that the role of the court is not to determine the desirability or otherwise of the Port Hinchinbrook Development"[94] *"and that the ministers decision was lawful in the sense of being within power and procedurally correct".*
Also that the minister was not bound by the precautionary principle. [95] .

Margurula v Minister for the Environment (1999) 92FCR 35

This case concerned the Jabiluka Uranium mine in the Northern Territory. The history of it was that in 1982 an agreement was 'concluded ' by the mining company "pan continental" and the Mirrar Clan senior traditional owner of the lands in question. The so-called agreement was unconscionable and attained under duress[96] .

Legal actions were launched by Ms Margarula; the basis of the discussion concerns the delegation of ministerial discretion. The substance of the action is adequately dealt with in the senate report [97](The EPIP ACT 1974 was amended by the EPBC act 1999)

"*under the Environmental Protection Impact of Proposals Act (1974 CTH) and its administrative procedures, the requirements which the commonwealth environment minister wishes to be placed on the mine are forwarded to the action minister......The action minister must then insure that the suggestions or recommendations of the environment minister are taken into account in relation to the action"*

It was found by the committee that *"This obviously creates legal scope for the action minister to disregard or modify some or all of those recommendations"*

It was argued that what must be taken into account required that a public environment report must be done; this would have opened up the mine to unwelcome scrutiny.
Justice Sundberg of the Federal court held at p44 -

[94] (1999) 92 FCR 35 at 36
[95] See Hinchinbrook Channel Inquiry, Report of the Senate Environment, Communications, Information Technology and the Arts References Committee September 1999 at p38-39, see also- Lisa Wyman, Acceptance of the Precautionary Principle-Australian v International Decision makers (2001) 18 EPLJ 395 at 402, Rosemary Lyster, The Relevance of the Precautionary Principle (1997) EPLJ 390) (40) (Jabiluka: The Undermining of Process Senate Report June 1999 p 77
[96] Ibid 71
[97] Ibid 47

" The only conduct which is reviewable is the procedure which the decision maker engages in for the purposes of making the relevant decision" and applying the same decision again[98] .

"The question is whether the decision not to hold an inquiry is a decision within the meaning of the ADJR Act. In my view it is not .The decision not to hold an inquiry did not determine any issue of fact falling for consideration"

And at 48 on the failure to consult, applying the decision of Finn J in *Randwick City Council v MNR for Environment*[99] .

"The second decision, such as it was amounted to no more than a choice by the minister not to avail himself of a procedural step allowed to him by the procedures"

This case was one of a number of cases fought[100]. The senate committee found that the actions of the Australian government in relation to the treatment of the traditional owners was a disgraceful episode. It also found that the mine should not proceed.[101] .

Because of the concerns about the effect the mine would have on the Kakadu World Heritage area, the visiting mission of the World Heritage Committee found also that the mine should not proceed.[102] . But a later date the World heritage Bureau refused to list Kakadu as *world heritage in danger*. An agreement was reached however between the company and the Mirarr for an 18 month moratorium on mining. Jabliuka is now not to go ahead.

The National Interest clauses of the EPBC ACT

A federal environment minister can still ignore the precautionary principle and exempt proponents from environmental assessments. That is, a person wishing to take any action that is defined in *s523* as projects, developments, undertakings, and activities of any kind and alterations of each.

There are two explicit national interest sections in the act, being *s158* (Exemptions from environmental assessments and approvals) and *s303A* (exemptions from the application of provisions relating to the conservation of biodiversity and species and communities).

S43 allows a person to take an action without an approval in the Great Barrier Reef Marine Park if they have permission, authority, an approval or a permit. *S158 (4*) and *(5)* (which mirror *s303A (4)* and *(5))* state respectively on exemptions in the national interest-

(4) The minister may do so only if he or she is satisfied that it is in the national interest that the provision not apply in relation to the person or action.

[98] Unrep, Fed Ct 3/11/98
[99] See Northern Land Council v ERA (unreported) Supreme Court Northern Territory 24/23/95 extracted in Gullet at 65
[100] Report, p116
[101] Ibid
[102] FOH v Mnr for Env at 79 D-E

(5) In determining the national interest, the minister may consider Australia's defence or security or a national emergency. This does not limit the matters the minister may consider.

S391 (1) of the EPBC Act states that

"the minister must take account of the of the precautionary in making a decision listed in the table in subsection (3), to the extent that he or she can do so consistently with the other provisions of this Act."

The table in *ss (3)* sets out a list of sections to which the precautionary principle applies, *s43, 158,* and *303A* are not listed!

It is interesting to note the language of *s391 (1)* in this respect, -

"the minister must take account of the precautionary principle".

It does not state explicitly that it must be taken "into account" or that the minister "must apply the precautionary principle". It could be one of the considerations but still be payed lip service to, in other words ignored, just as in the Hinchinbrook case[103].

The Words- *"to the extent he or she can do so consistently with other provisions of this act"*- lend weight to that possibility.

Effectively, under those sections, a decision maker may chose to avail himself or herself of a procedure (which may or may not be justiciable see *Margarula*) or guiding principle but chose to give less weight to protective measures over economic considerations[104].

It was a fundamental tenet of Justice Sackville's decision[105] that if a matter is considered and put to one side, that is the end of the matter, and it is an issue of ministerial discretion that would not be interfered with by the court, whether or not somebody else would have made a different decision.

Ecologically sustainable development

There has been criticism of the notions of ecologically sustainable development, it was argued by *Marshall et al* in the case of marine ecosystems [106] that -

"Plans for sustainable use or sustainable development inevitably end with resources being over exploited to the point of collapse or extinction .The failure of these sustainability goals is primarily due to socio political pressure that wealth or the prospect of wealth provides "

---

[103] See Wyman at 401

[104] FOH v Mnr for Env at 63 G, 65A, 66E-F-G, 72C-F-G, 74D, 76 F-G, 77A-G, 78B

[105] Tragedy Of The Commons And The Neglect Of Science: Planning And Development In The Shark Bay World Heritage Area (200) 17 EPLJ 126 at 129

[106] (Ibid),

Further that there was already an economic rationalist approach -*"inherent in the principles of sustainability"*[107] leading to a situation where -

"Property rights could be allocated such that the reserves are no longer managed for conservation using the multiple use strategy. Rather they have the potential to become areas of common property that have been enclosed by government for the purpose of providing security for resource extraction"

Examples of alternatives.

S44 of the 1993 EARC Bill of rights[108] was proposed in a statutory form under the heading "Right to Environmental Protection and Conservation"- which could be overridden by subsequent legislation. The Queensland government though, is against any enforceable provisions whether statutory or not, they argue that the judiciary-

"will potentially find itself in a position where it is making far more controversial decisions of a policy nature; decisions affecting the entire community as to competing social and economic objectives"[109] .

Sections *2,24* and *39* of the *South African Constitution* , however are constitutionally entrenched, it treats the protection of the environment as a free standing right.

I would argue that in any provision, protection of the environment be the enforcement provision and that, the conduct of development be left to the will of parliament and the common law and that *"everybody is free to do anything subject only to the provisions of the law"*[110] .

A self executing provision such as *s39* of the *South African Constitution* would greatly assist in keeping Australia's environmental and human rights standards modern effective and relevant.

Under the American constitution, this could lead to unfortunate results if the same self-executory mechanism was applied to economic agreements which can detrimentally effect the environment such as the now defunct MAI, its offspring - the GAT and GATS, any treaty would therefore become law.

---

[107] (Electoral and Administrative Review Committee of the Legislative Assembly of Queensland (1993) Draft Bill of Rights www.parliament.qld.gov.au/comdocs/legalrev/DraftQldBOR.PDF

[108] Report no. 12 of the Legal Constitutional and Administrative Review Committee (November 1998) The preservation and enhancement of individuals rights and freedoms in Queensland: Should Queensland adopt a bill of rights, www.parliament.qld.gov.au/comdocs/legalrev/Bill%20of%20Rights%20report%20-%20Report%20No%2012.PDF Chairs foreword piv

[109] http://www.gov.za/constitution/1996/96cons2.htm

[110] See Lange v The ABC (1997) 189 CLR 520 ay 564

This was discussed by Mason J in *Koowartha* [111] *"Australian law differs from that of the United States where treaties are self executing and create rights and liabilities without the need for legislation by congress"*

It therefore seems clear why the yanks want nothing to do with the Kyoto agreement. In Australia, such a mechanism could be qualified to reflect that protection of the ecosystem and fundamental human rights will not take second place to the creation of profit for a select few.

I propose therefore that any amendment to the constitution at minimum take these matters into account.

Any amendment would have to explicitly deal with firstly, making environmental rights free standing and also to give the commonwealth the power to deal with any environmental concerns involving intra-state trade and commerce. The environmental matters must amend all other sections of the constitution.

Conclusion.

Should a power to pass laws with respect to the environment be enacted?
In explaining my answer I refer to the examples of abuse of ministerial discretion and power. I conclude that what is needed is a coercive power [112] in the constitution to enforce the protecting of the environment and inflict punishment at the hands of the people either through a free standing constitutional power of suit or injunction on environmental grounds.

I argue, contrary to the Queensland government [113]that the argument that the costs of repairing successfully challenged regulatory regimes if it comes to it, is an argument in favour of enforceable rights provisions. How else will governments and developers learn that the price they have to pay for infringing rights will be a metaphorical rubbing of the political proboscis in a nice big metaphorical puddle of urine?

I argue that government cannot be trusted to protect the environment or human rights, and cannot be trusted not to override legislation enacted to protect either - and most definitely and historically with discretion. For this reason one must go further than simply proposing a power to enact, and enact a power to coerce.

Should the constitution be amended to give the commonwealth the ultimate power to legislate "with respect to the environment"?

The answer to this question requires another question. I would also ask (and answer) "should the precautionary principle be enacted into the constitution in addition to environmental rights?" and answer that question in the affirmative.

---

[111] Koowartha v Bielke Peterson (1982) 153 CLR 168 at 224 ,Foster v Neilson (1829) 2 Pet 253 at 314, - 27 US164 at 202 - 7 Law Ed 415 at 436
[112] Hinchinbrook Channel report at 30,38,90, see also Gullett at 65
[113]Should Queensland Have Bill Of Rights, pv

This qualifies the answer to the set question if it is answered in the affirmative, but can stand alone, for it would ensure that government could not legislate to the detriment of the health and well being of the people and the environment.

I propose that an amalgam of *s2, 24,* and *39* of the *South African Constitution*, *s44* of the proposed *1993 EARC Bill of Rights (QLD)* and *s391 (2)* of the *EPBC Act 1999 (CTH)* be enacted by referendum.

Excluding the EPBC act, those provisions state:

S44, The Proposed EARC Bill of Rights 1993 (Qld)
Right to Environmental Protection and Conservation.

44. (1) a person has the right to have the environment of Queensland-
(a) Protected by government from excessive, undue or unreasonable human interference; and
(b) reasonably conserved by government for its own intrinsic value.
(2) a person has the right to object if the right in this section is not observed and to expect that government will accept and act on a reasonable objection.

S2, 24,39, of The South African Constitution

2. This Constitution is the supreme law of the
Republic; law or conduct inconsistent with it is
invalid, and the obligations imposed by it must be fulfilled.

24. Everyone has the right -
a. to an environment that is not harmful to their health or well-being; and
b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
c. i. prevent pollution and ecological degradation;
ii. promote conservation; and
iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social
development.

S39 -Interpretation
(1) When interpreting the bill of rights, a court, tribunal or forum -

(a) must promote the values that underlie an open democratic society based on human dignity, equality and freedom
(b) must consider international law, and
(c) may consider foreign law

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the bill of rights

(3) The bill of rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law-customary law or legislation to the extent that they are consistent with the bill

This proposed amendment is drafted as if there were no bill of rights or no other provision relating to the interpretation of international law what is proposed is as follows:

Protection of the environment and fundamental human rights.

1. *Everyone has the right -*
a. *to an environment that is not harmful to their health or well-being; and*
b. *to have the environment protected by the federal government, for the benefit of present and future generations, and reasonably conserved for its own intrinsic value, through legislative and other measures that -*
c. ***i.*** *prevent pollution and ecological degradation and loss of biodiversity;*
ii. *promote conservation*
iii. *promote justifiable economic and social development. consistent with this section.*

2. *Any person has the right to object if the right in this section is not observed and to expect that government will accept and act on a reasonable objection.*

3. *The actions or decisions of -*
(i) *government; or*
(ii) *the agents or bodies of government; or*
(iii) *any court, tribunal or forum in the commonwealth*

- must be done or made in accordance with the precautionary principle.

4. *The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental or ecological damage.*

Such an amendment would be readily enforced by the courts, it would" *turn soft law into hard law"* [114]*(58)* and, if the high court and federal courts interpretation of international conventions in spite of government hostility is anything to go by, our judiciary is mature enough to enforce the constitution with gusto and interpret Australian law in line with environmental and human rights standards to the fullest possible extent.

Bibliography

Promoting Human Rights Through Bills of Rights, Comparative Perspectives, Oxford University Press, New York, 1999

Senate, Environment, Communications and the Arts References Committee, Parliament of Australia-Reports

Commonwealth Environment Powers Inquiry (May 1999),

---

[114] Stein J Leatch v Director -General of National Parks and Wildlife Service and Shoalhaven City Council (1993) 81LGERA 270 -extracted from Wyman at 408, see also Simpson and Jackson at 270

Inquiry into the Jabiluka Uranium Mine Project (June 1999)-
Entitled- "An Undermining of Process"

Hinchinbrook Channel Inquiry (September 1999)

Report no. 12 of -The Legal Constitutional and Administrative Review Committee Of The legislative Assembly of QLD (November 1998) The preservation and enhancement of individuals rights and freedoms in Queensland: Should Queensland adopt a bill of rights?

Chapter 3

The voting rights of prisoners and the validity of non state detention and punishments.

This chapter is derived from a paper on a research question for a political policy and management subject at JCU in 2002. The statistics used obviously, will have changed in the 2 years since. The points running through this chapter are that there is no such thing as a social contract in Australia, and the right to change the system may be taken from you if you are gaoled for breaking class based laws you may not have consented to.

Additions have been made to this paper but the research question remains the same.

A question is also thrown up about who may administer the punishments of the laws and whether the punitive power of the state should be allowed to be delegated. This is a fundamental question and goes to the heart of respect for the rule of law.

The relevance of this chapter to the terms of reference and my conclusions on the need to enshrine the right to vote and the need to enshrine a bill of rights can be drawn out of the issues addressed in this chapter -by analogy.

....

Research Question

"Do the policies of denying prisoners the right to vote and of incarcerating prisoners in private prisons in Australia - offend against the Australian Constitutional Common law, and the Westminster system of "accountability"?

Introduction

In a climate where it is increasingly obvious in the view of the powers that be, that social justice outcomes take second place when it comes to the making of profit -and the thoroughgoing implementation of neoliberal ideology, in state institutions and agencies and the way they interact with "citizens", adherence to the "rule of law" is

essential to ensure the liberty of the individual against the state or its agents or functionaries.

Many state functions and apparatuses are being privatised including prisons and other aspects of the justice system. Empirical evidence tends to show the “state” is shrinking so fast that it may soon cease to be.

A reading of the literature points out that the people who are most affected by privatisation of the administration of justice (prisoners) are in many cases precluded from having any impact on decisions that effect their liberty through restrictions on their right to vote, to exercise the most basic of the rights of citizenship.

The proposition has been tentatively advanced that the policy of denying the right to vote for prisoners may be inconsistent with the implied right of freedom of communication between the Australian people on governmental and political matters[115].

In this paper, I will go further than a tentative advancement of the proposition.

I will explain that it is arguable that the policy informing the statutes both federally and at state and territory level is fundamentally flawed and behind the development and expansion of fundamental freedoms by the judiciary.

The argument will also be advanced that the policies bringing about the incarceration of Australian citizens in private prisons have exposed those same citizens to potential human rights abuses and neglect.

Further, this paper will set out an argument grounded in constitutional theory - why the results of the policies are unlawful, that they deprive person of their citizenship rights in the process of their “comodification”.

…………………………..

The literature on this topic in most cases delves into the historical and theoretical nature and role of imprisonment and social contract theory. It is correct that one must look into the history or the reception of English laws and norms into Australian law and society[116].

It is fundamentally important, that it if is claimed that society has the right to inflict punishment, we must ask where that right derives from[117] .

---

[115] Jerome Davidson, “Resurrecting The Civil Dead : Challenging the Constitutional Validity Prisoner, Disenfranchisement , unpublished document , referred to in Ridley Smith, Melinda and Redman, Ronnit, “Prisoners And The Right To Vote, Brown, David, and Wilkie , Meridith eds , Prisoners as Citizens, Human Rights In Australia’s Prisons , The Federation Press Sydney 2002, p 301

[116] Moyle Profiting from punishment p 156, Lange v The ABC [1997] 189 CLR 520 at 564, Cheatle v The Queen [1993] 177 CLR 541 at 552, Theophanous v Herald and Weekly Times [1994] 182 CLR 104 at 141-142, Duff,Anthony and Garland, David, A Reader on Punishments , Oxford University Press, NY,1994

[117] .Duff and Garland, p33

I argue there are contradictions between conservative (neoliberal) thinking on the role of the state, the belief in the existence of a social compact or contract, the role of imprisonment and the state of the law, and international human rights norms.

In times past, those who have offended against laws have in English law died a "civil death", they became "base", forfeited all rights and, they and their families bore a "stain" showing them of the basest origin [118].This was the case in NSW until legislation was passed in 1991 [119].

The clearest statement comes from what was held by Sir Edward Coke to be the ancient law of England (Circa 1628, in original spelling)-

> *"It is to be observed, that the judgement against a man for felonie is, that he be hanged by the neck untill he be dead; but implicative, (as hath beene said) he is punished first in his wife, that she shall lose her dower. Secondly, in his children, that they shall become base and ignoble; as hath beene said. Thirdly, that he shall lose his posteritie, for his bloud is stained and corrupted, that they cannot inherit unto him or any other ancestor. Fourthly, that he shall forfeit all his lands and tenements which he hath in fee, and which he hath in taile, for terme of his life. And fifthly, all his goods and chattels. And thus severe it was at the common law; and the reason hereof was, that men should feare to commit felonies: Ut poena ad paucos, metus ad omnes perveniat."*[120]

Another opinion is -

> *"Prisoners are déclassé -they are the outcasts of society, exercising virtually no suasion upon public policy"* [121]

Judicial criticism of it is expressed by the late Lionel Murphy-

> *"The main objection to recognising the civil death principles as existing common law principles is that treating persons as non-persons, that is, dehumanising them, the principles violate the fundamental standards of human rights and are inconsistent with the rehabilitative aims of our justice system"* [122]

In a way, this way of thinking is making a comeback through the implementation of Thatcherite Neoliberal Social Darwinian norms, adherents to this ideology "seek to discipline society to their own ends" with [123]. Their warped concept of citizenship

---

[118] Brown, Prisoners as Citizens , Human Rights In Australian Prisons , The Federation Press Sydney 2002 p 312-3
[119] ibid
[120] The First Part of the Institutes of the Laws of England by Sir Edward Coke (his commentary upon Littleton) ,From a facsimile of the 1823 edition produced by Legal Classics Library, a Division of Gryphon Editions, of New York, New York. The first edition of Coke's work was published in 1628. filed at http://www.commonlaw.com/Coke.html
[121] Shicor p72
[122] Dugan v Mirror Newspapers Ltd (1978) ALJR 166 at 177
[123] Foley, Michael, The rise of the British presidency, Manchester University Press , New York, 1993, p172-174

revolves around the notion that only those with the brains (in the liberal sense- to seek enrichment) and ability to achieve wealth have the right to govern or participate in building society.

The Theory of the Social Contract.

The theoretical beginning of the social contract began with Rousseau during the enlightenment, not to mention Locke, and Kant among others.[124]

Rousseau's view -

> *"each one of us puts into the community his or her person and all his powers under the supreme direction of the general will ; and as a body , we incorporate every member as an inadvisable part of the whole…this act of association creates a corporate body composed of as many members as there are voters in the assembly , and by this same act that body acquires its unity , its common ego , its life and its will".* [125]

Lockes view -

> *"Political Power is that power which every man having in the state of nature, have given up into the hands of the society …it can have no other ends or measure when in the hands of the magistrates but to preserve the members of that society in their lives, liberties, and possessions … and this power has its original only from compact and agreement and the mutual consent of those who make up the community"* [126]

And Kant's view -

> *"The contract, which is called contractus originarius, or pactum social ..need not be assumed to be a fact indeed it is not[even possible as such .To suppose that would be like insisting] that before anyone would be bound to respect such a civic constitution , it be proved first of all from history that a people whose rights and obligations we have entered into as their descendants , had once upon a time executed such an act and had left a reliable document or instrument , either orally or in writing , concerning this contract . Instead, this contract is a mere idea of reason which has undoubted practical reality; namely to oblige every legislator to give us laws in such a manner that the laws could have originated from the united will of the entire people and to regard every subject in so far as he is a citizen as though he has consented to such [an expression of the general] will. This is the testing stone of the rightness of every publicly known law, for if a law was such*

[124] Moyle , Paul Pluto Press 2000, Profiting from Punishment p156-6-8 , Shicor, David ,Punishment For Profit Private Prisons Public Concerns Sage Publications California , 1995,p 47, Murphy J.G Marxisim And Retribution, in Duff. R.A and Garland. David , A Reader on Punishment, Oxford University Press NY, 1994, p53

[125] Shichor ibid

[126] Shicor p 47

that it was impossible for an entire people to give assent to it (for instance a law for a certain class of subjects, by inheritance, should have the privilege of the status of lords), then such a law is unjust. On the other hand, if there is a mere possibility that a people might consent to a (certain) law, then it is the duty to consider that the law is just even though at the moment the people might be in such a position or have a point of view that would result in their refusing to give there consent if asked."[127]

... "The problem of organising a state, however hard it may seem, can be solved even for a race of devils, if only they are intelligent. The problem is: Given a multiple of rational beings requiring universal laws for their preservation, but each of whom is secretly inclined to exempt himself from them, to establish a constitution in such a way that, although their private intentions conflict, they check each other, with the result that their public conduct is the same as if they had no such intentions." [128]

"The concept [of justice] applies only to the relationship of a will to another persons will, not to his wishes or desires (or even just his needs) which are the concern of acts of benevolence and charity...In applying the concept of justice we take into consideration only the form of the relationship between the wills insofar as they are regarded as free, and whether the action of one of them can be conjoined with the freedom of the other in accordance with universal law. Justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom" [129]

It has been argued that the theory of the social contract "underlines our concept of parliamentary democracy today" [130] .

I will focus on this argument and highlight its failings. In the current legal climate in Australia, it would be impossible to rely on a social contract, a compact, or an assertion that we actually have a parliamentary democracy.

J.G. Murphy [131] argues that if the theory of the social contract is false and materially defective, as I believe recourse to it is in the Australian context, then, it renders its application immoral.

[127] Kant, Immanuel, "Concerning the Common Saying: This May Be True In Theory But Does Not Apply In Practice (1793), In, The Philosophy Of Kant, ed and translated by Carl J. Friedrich, NY, Random House, 1949, p421-22
[128] Ibid Kant, Perpetual Peace(1795), translated by Lewis White Beck, in the Kant Anthology - On History Indianapolis: Bobbs Merrill, 1963, p112
[129] Ibid Kant, The Metaphysical Elements Of Justice, p34
[130] Moyle- McCarthy ,p158
[131] Marxism and retribution p52-54

A critical analysis will evidence that in the Australian context, mutual consent has never been fully given, that the issue of whether the rule of law exists to preserve the liberties of members of society is hotly contested by neoliberals and right thinking person alike. The true focus, taking true aim, must be on citizenship and the "nature of society" [132] and of the international meaning of the rule of law. This would have to prove that the powers that be are not only behind in theory, they are behind international society.

The alleged compact

The only reference to anything resembling a compact that can be found in the Australian Constitution are the words which appear in the preamble before it is stated that the constitution is enacted-

> *"Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland,"*

One look at this statement permits the view that it is an expression of exclusion; it is an expression of Christian ideology, which has no place in the Australian Constitution.

Judicial Opinion in the high court -to a large extent, has come around to the view, so far, on paper only, that the people of Australia are Sovereign because it is only they who can change the Australian Constitution, yet this line of theory based on a contemporary view of constitutional theory is quite often contradicted by the same court.

The view that the above statement of "federal compact" is a compact of "the people" does have "conceptual and historical difficulties" [133]

That is because at the time of federation many men under 21, and most men without property, most women and all aboriginals, were "denied the right to vote in national elections". [134]

In fact, the states could restrict the right to vote for aboriginal people up until 1967. The state may still have the power to deny the right to vote on the grounds of race via s25 of the constitution where it states -

> *"25. .... if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the*

---

[132] Murphy J , McGraw Hinds v Smith (1979) 144 CLR 633 at 670, BLF v Minister For Industrial Relations (1986) 7 NSWLR at 404

[133] Kirby J , Levy v The State of Victoria and ors [1997] 189 CLR 189 at [146] McGinty v Western Australia (1996) 186 CLR 140 at 237 per McHugh J; at 274-275 per Gummow J; Zines, The High Court and the Constitution, 4th ed (1997) at 395-396; Aroney, "The Gestative Propensity of Constitutional Implications" [Autumn 1997] Policy 26 at 28

[134] ibid

people of the State or of the Commonwealth, persons of the race resident in that State shall not be counted."

A further argument against a compact being one of consent is the assertion by parliamentary supremacists that because the history of our law is one inherited from England there are no liberties left.

> *"In earlier times many learned lawyers seem to have believed that an act of parliament could be disregarded in so far as it was contrary to the law of god or the law of nature or natural justice, but since the supremacy of parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete"*[135]

Reference to the law of "god" aside, this line of constitutional reasoning holds that rights belonging to citizens were abolished by history.

The theoretical explanation of a compact asserts that people have "surrendered" or subjugated themselves to the state. To explain what this would mean in the context of Australian Constitutional theory, it is necessary to explain that we are not a democracy, and just what it is that we have been expected to surrender to.

Alleged Democracy and Parliamentary Supremacy

The Australian Constitution does not contain a mention of the term "democracy", nor "representative democracy", it has been found to be implied that it contains and implication of a requirement of representative and responsible government, [136]which falls short of a complete democracy.

Representative and responsible government was defined by the unanimous high court as -

> *"that the actual government of the state is conducted by officers who enjoy the confidence of the people. That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of the electors to the conduct of the executive may be a significant determinant of the contemporary practice of responsible government".* [137]

Again, another argument against the assertion that our system is one that fits into the category of democracy is the "doctrine of parliamentary supremacy". This can be described as the "dark side" , or the 'down side" of our system [138].

---

[135] British Railway Board v Pickin [1974] AC 765 at 782, BLF v Minister for Industrial Relations [1986] 7 NSWLR372 at 404-405

[136] McGinty v CTH per Brennan J [12] , Lange v The ABC [1997] 189 CLR 520 at [560]

[137] Lange p559

[138] Foley:1993: ibid, Preservation of Individual Rights And Freedoms, Should Queenslanders Have a Bill of Rights, Report no 12 1998, Parliament of Qld, Legal Constitutional and Administrative Review Committee, p 28

This doctrine, was recently applied by the high court, the doctrine is only confined by the constitution and any limitations it imposes, the high court applied Blackstone of Terra Nullius fame where he said -

> *" The power and jurisdiction of parliament, says Sir Edward Coke* ***is so transcendent and absolute****, that it* ***cannot be confined****, either for causes or persons,* ***within any bounds****. ...* ***It hath*** *sovereign and* ***uncontrollable authority*** *in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that* ***absolute despotic power****, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms."* [139]

<u>The Rule of Law, Role of Law and Coercive Apparatuses</u>.

The rule of law, whatever it is, is guaranteed by the "independence of the judiciary" The nature of judicial power is that proceedings must be conducted within the minimum standards of criminal or civil procedure to guarantee a fair hearing.

Judicial power inso-far as it is implied or entrenched in the constitution may not be usurped by the parliaments. But whether the rule of law belongs to the people, or whether it belongs to the interests of capital is hotly disputed.

The neoliberal view is that *"Justice..is strictly procedural and can only refer to the proper enforcement of general rules of universal application without regard to its particular results"* [140]

The extremist economic liberal view is quite clearly stated by Friedrich Hayek -

> *"The Mirage of Social Justice which socialists pursue is, at best, a nonsense and, at worst, pernicious and itself unjust. It means undermining the justice of the market, confiscating the wealth of the more successful, prolonging the dependency of the needy, entrenching the special powers organised interests and overriding individual freedom. Indeed, it is irreconcilable with the rule of law and in seeking to press state intervention beyond its legitimate minimum, the socialists have been the principle offenders in giving democracy a bad name".* [141]

Australia's system of Administrative law exists along these lines, that, the courts are not concerned with the justice of the rules, but whether decisions made as a consequence of them where merely procedurally correct.[142]

---

[139] Kartinyeri v CTH [1998] HCA 22 at [12] [13] per Brennan and McHugh JJ

[140] Christopher Pearson , Democracy Markets and Capital , in Held, David Prospects For Democracy, Polity Press , London 1993, p181 applying Hayek

[141] ibid

[142] Friends of Hinchinbrook Society v Minister For the Environment (1999) (1997) 69FCR 28 at 36,, Margurula v Minister for the Environment (1999) 92FCR 35 at 44

The internationalist view of the rule of law is quite different and quite the opposite and is stated quite succinctly in the preamble to the Universal Declaration of Human Rights 1948

> *"Whereas it is essential if mankind is not to have recourse as a last resort to rebellion against tyranny and oppression that human rights be protected by the rule of law"*

There are rumblings in the judiciary which may come to the fore with a democratic majority, for instance Justice Kirby has held [143] -

"*Where there is an ambiguity in the meaning of the Constitution, as there is here, it should be resolved in favour of upholding such fundamental and universal rights. The Australian Constitution should not be interpreted so as to condone an unnecessary withdrawal of the protection of such rights".*

It has been evidenced that at the time of federation persons were denied the right to vote on the basis that they have no property, at the outset this proves that our system of government was a facilitator of capitalism, it has also been stated by the high court :

> *"It is clear that an objective of the movement to federation was inter colonial free trade on the basis of a uniform tariff"* [144]

The history of policing and of coercion in Australia can be stated quite simply as an example of whom the rule of law was to protect. The police of this nation historically were not used to maintain public order, but to maintain the social order and the status, quo. [145]

The prisons too, have hidden social functions, such as being repositories for dissenters so that they may not pose a threat to the social order, diverting attention away from the crimes of the powerful, to *"maintain a clear cut division between the respectable and disreputable poor, and the concentration of criminality in a closely monitored criminal class"*[146]

Those who are imprisoned, in theory, are said to have broken the liberal social contract, and must therefore forgo the rights of "free citizens" [147] .This has been used to justify why prisoners may be denied the right to vote. As to the right to vote, this will be discussed later, however, I argue the reliance on social contract theory in the Australian context is misplaced. There is no such contract; there never has been a social contract, only acquiescence with the only system we have, which remains resistant to change.

---

[143] Newcrest Mining (WA) v The CTH (1997) 147 ALR 42 at 147, 148, 149
[144] Ngo Ngo Ha (1997) 146 ALR 355 at 364
[145] McCulloch , Jude , Blue Army Paramilitary Policing in Australia: Melbourne University Press, 2001. Cunnen, Chris, Conflict Politics and Crime, Aboriginal Communities And The Police Allen and Unwin Sydney 2002.
[146] Foucault, quoted in Duff and Garland p 33
[147] Brown et al, p284,285

In fact, the evidence is, that the status quo has refused to bring about a social contract in the form of a bill of rights; such a contract was refused by the Qld government in 1998, by the NSW government in 2001, by the ACT government, and even by the current Prime Minister John Howard.

What are the people supposed to think of this situation? J.G. Murphy poses the devastating question -

> *"…they would be hard pressed to name the benefits for which they are supposed to show obedience. If justice as both Rawls and Kant argue, is based on reciprocity, it is hard to see what these persons are supposed to reciprocate for"*[148]

Murphy argues, and again I agree with him that in relation to punishment in such a situation-

> *"If we think that institutions of punishment are necessary or desirable, and if we are sensitive enough to be sure that we have the moral right to punish, before we inflict it, then, we had better make sure that we have a restructured society"*[149]

Ignorance of the nature of what a true social contract is- is no excuse!

Laws are imposed from above, and we as a people have surrendered [150] nothing if we have resisted the assertion of "absolute despotic power". Surrender to neoliberal conceptions of the rule of law is surrender to an ideology alien to the true nature of a democracy and internationally accepted norms [151]

The following passage from Duff and Garland [152]sums up the question of legitimacy very well -

> *"..one problem here concerns the very authority of the criminal law. It presents itself as the legitimate embodiment of the communities fundamental values, as if these values are shared by the whole community (as if there were general allegiance to such values): but that claim to normative authority is questionable in societies which exhibit no such consensus on fundamental values, or in which large sectors of the population are so marginalised from the mainstream of social life that they cannot be expected to recognise the law as theirs"*

The American Supreme Court once made a powerful statement, which relates to this point-

> *"a government cannot mandate by fiat a feeling of unity in its citizens. Therefore the very same government cannot carve out a*

[148] Marxism and retribution p 62-63
[149] Marxism and retribution p 65

[150] Moyle p 395
[151] Funnel, p3
[152] 1994:29

symbol of unity and prescribe a set of approved messages to be associated with the symbol when it cannot mandate the status or feeling the symbol purports to represent" [153] *"*

A government cannot legislate that everyone will be proud of the flag, neither, to say what is not on ones mind. So, what is needed, as J.G Murphy points out[154] is a political theory which makes the states decision to punish .. *"in a sense the persons own decision"* . That a person has consented to, agreed to.

The answer lies in the fact that a government can legislate for justice and freedom [155]. They can do this through initiating a referendum on a social contract called a bill of rights. People can be united in their belief in freedom, as long as they know it belongs to them both individually and as the aggregate of everyone else's freedom.

There is a link between citizen and state, through the ballot box at least, in the matter of accountability, and this is supposed to be because it is citizens who are the basis of the legitimacy of a so-called democracy.[156]

> *"the Australian federation was and is a union of people, and that whatever be their immediate operation, the provision of the constitution **should** properly be viewed as ultimately concerned with the governance and protection of the people[,] from whom the artificial entities called the commonwealth and states derive their authority"* [157]

The state of law is that it is a citizen's right to shape government and to "attempt to challenge the prevailing order", peacefully .If this was not so, it is recognised by law that it may allow a criterion for violent change. So much was conceded by two judges of the high court in 1992, one of whom Bill Deane, became a Governor General of Australia- [158].

> *"Suppression of such criticism of government and public officials removes an important safeguard of the legitimate claims of individuals to live peacefully and with dignity in an ordered and democratic society. Indeed if that suppression be institutionalised, it constitutes a threat to the very existence of such a society in that it reduces the possibility of peaceful change and removes an essential restraint upon the excess or misuse of government power"*

The Freedom of communication and "Westminster Accountability"

Under a system of government that hasn't been consented to by all under its domination, which was set up to benefit the ruling class, that just is, and is the only

---

[153] Texas v Johnson (1989) 491 US 397 at 351
[154] Marixism and Retribution at p 51-52
[155] Murphy p53-54, Kant p67
[156] per McHugh J, Ridgeway v R (1995) 69 ALJR 484 at 525) (see also Nationwide News v Wills at 74 per Deane and Toohey JJ
[157] Deane J, University of Wollongong v Metwally (1984) 158 CLR 447 at 476- 477
[158] De Jong v Oregon (1936) 299 U.S. 353 at 365, Nationwide News v Wills (1992) 177 CLR 1 at 79 per Deane and Toohey J

one we have, with no bill of rights, that which is supposed to benefit the people is merely implied in the constitution.

The freedoms we have are implied from voting rights, from the nature of the term "Representative and Responsible". [159]

Warwick Funnel's critique of this doctrine is enlightening and useful, he argues -

> *"As accountability is hollowed out in the neoliberal state to a point where becomes a convenient rhetorical tool for government in exercises of self justification, so citizenship is gutted of its true nature. Once this happens, the way is open for government to dilute the attributes of citizenship, to have the new arrangements accepted as the natural order of things and, thereby, to weaken the common memory….In its most fundamental form , accountability is not to be equated with efficiency or satisfactory experience of public services by parent , patient , passenger traveller or whatever. It has a deeper meaning in expressing the fundamental relationship between individual, community or collectivity and government".* [160]

The law's definition of constitutional [161]accountability is somewhat longwinded. It comes from a long line of precedent or application of constitutional theory, again, the recent unanimous high court case of Lange is where this theory culminated in a statement about access to information, the right to criticise, to impart and receive such information. The court said that a question must be asked about the validity of legislation "What do the terms and structure of the constitution prohibit authorise or require" [162], and it is what the "***common convenience and welfare of society now requires***" [163]. It was held applying Stephens v West Australian News Papers -[164]

> " *In the last decade of the 20th century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public monies, how when and why and where those functions and powers are or are not exercised are matters that are of real importance to every member of the community. Information concerning the exercise of those functions and powers is of VITAL concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion the that the general public has a legitimate interest in relieving information concerning matters relevant to the*

[159] Ibid
[160] Funnel , Warwick, Government By Fiat The Retreat From Responsibility , UNSW Press Sydney , 2001 p19
[161] Funnel, p4
[162] Lange v The ABC (1997) 189 CLR 520 at 567
[163] ibid 570
[164] (1994) 182 CLR 211 at 264 per McHugh J) see also John Fairfax Publications v AG NSW (2000) 158 FLR 81 at 95-96 per Spigelman CJ

exercise of public functions and powers vested in public officials. More over the narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life in Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally."

They declared at 571 -

"Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters."

At p 567-8

"When law is of a state or federal parliament or a territory legislature is alleged to infringe the freedom of communication imposed by ss 7, 24, 64, or 128 of the constitution two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about governmental or political matters either in its terms operation or effect (see Cunliffe v The CTH (1994) 182 CLR 272 at 337)? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s128 for submitting a proposed amendment of the constitution to the informed decision of the people (hereafter collectively the system of government prescribed by the constitution)(see Cunliffe v The Cth at 300, 324, 339 , 387 , 388,)

" if the first question is answered yes and the second id answered no, the law is invalid. In ACTV, for example the majority of this court held that a law seriously impeding discussion during a federal election was invalid because there were less drastic means by which the objectives of the law could be achieved. And the common law rules, as they have traditionally been understood, must be examined by reference to the same considerations. If it is necessary they must be developed to ensure that the protection given to personal reputation does not unnecessarily or un

> *reasonably impair the freedom of communication about government and political matters which the constitution requires"*

It has been held that the matters that are necessary and protected as in the public interest extend to all levels of government, local, state, and federal, it even extends to the United Nations, whether or not it bears on the federal level.

The court held at 571

> *"the discussion of matters at state , territory or local level might bear on that the choice that people have to make in federal election or in voting to amend the constitution , and on their evaluation of the performance of federal ministers and their departments"*

And in John Fairfax v AG NSW, [165]where a state contempt of court law was held to be invalid because it required a closed court even if the person who had been acquitted of contempt, which in that case being a paper, was found to be not guilty - it was held that though the majority did not believe that matters of merely state concern were protected in themselves that-

> *[85].... It is true, as the Attorney submitted, that these functions are performed in a particular capacity as First Law Officer. But this is not inconsistent with the subject matter being governmental or political. The conduct of the Attorney in this respect is capable of giving rise to political issues about the performance by him of his official duties.*
> *[86]Insofar as this second basis focuses on the responsibility of a State Minister to a State Parliament and her or his accountability to a State electorate, I do not understand the line of authority in the High Court to go that far. There are references, including in the passages from Lange which I have quoted above, which envisage the possibility that State legislation may impinge upon the scope of the Constitutional immunity, but that is because of the impact that State legislation restrictive of freedom of expression may have upon the ability to communicate with respect to matters of actual or potential concern within the system of representative and responsible government established by the Constitution for the Commonwealth.*

There, the matters were, "the activity of both state and federal law enforcement with respect to the drug trade", budgetary cuts and casinos among other issues of public significance [166].

It was held -

---

[165] John Fairfax Publications v A-G NSW (2000) 158 FLR 81
[166] ibid [97], [98]

" There is no doubt that the solicitor generals submission is correct in the sense that one characterisation of the articles is that they concern "the drug trade". However, the Lange test does not require the subject matter of the communication be capable of characterisation in only one way, that is, as "governmental or political communications". If the communications can be characterised in that way, as a matter of substance, then, irrespective of any other characterisation which may also be accurate, they fall within the constitutional immunity" [167]

This applied Nationwide News v Wills, which held that the courts and federal Industrial relations Commission could not be allowed to "hide behind a false veneer of good repute" if condemnation is warranted. In a later case it was held that matters concerning police corruption also fell within the definition. [168].

The rule appears to be extremely flexible and has many applications, for instance, since 1912, access to the seat of government has been a right in Australia, and this right has the potential to be expanded upon by those fighting for social justice. It derives from American law and was imported into Australian law through judicial precedent, it is explained that a citizen -

"has the right to come to the seat of government, or to transact any business he may have with it ; to seek its protection , to share its offices , to engage in administering its functions . He has a right to free access to its sea ports, through which all the operations of foreign trade and commerce are conducted, to the sub treasuries, the land offices, the revenue offices, and the courts of justice in the several states, and this right is in its nature independent of the will of any state over whose soil he must pass in the exercise of it" [169]

Barton J also held at p 109-110 -

"This reasoning shows that the creation of the federal union with one government and legislature in respect of national affairs assures every free citizen the right of access to the institutions, and of due participation in the activities of the nation. In my opinion the reasons for the decision are conclusive as to all parts of Australia"

That case is a great example of the merit of the so-called social compact, it concerned a man, who, because he had no lawful means of support, he was poor; he fell foul of a law of one state which made that illegal and worth imprisonment. Having served his time 12 months, for the heinous crime and he made to cross over the border of another state to look for work. There he was arrested and locked up in that state for 12 months for not waiting 3 years before he did so. The case turned not on whether it was wrong to gaol people who were poor, but whether it was illegal to prevent him from crossing the border. He won, yet it was on that issue alone. It proves that just a

---

[167]Ibid 98

[168] Coleman v Power and ors, [2001] QCA 439 [6]

[169] Crandall v The State of Nevada 6 Wall, 35 at p44 per Miller J, Rex v Smithers ex parte Benson 1912 16 CLR 99 at 108 per Griffith CJ

decade after the 1901; punishment had the hallmarks of a social institution where it was "not related to criminal guilt but economic status or membership of a social class". [170]. *Fine defaulters are in the same class[171].*

This is evidenced by the report of the royal commission into aboriginal deaths in custody, aboriginal people are targeted for arrest for minor offences such as insulting language or drunkenness, and this may result in further charges for resisting and may lead to imprisonment for non payment of fines .But what happens as a result is also across the board and across the community[172] .

Increasingly, state and territory governments and political parties are resorting to law and order politics to get elected or to stay in power. The homeless, unemployed, young people and people with drug problems are commonly targeted. And although the deaths in custody report criticised the use of arrest for minor offences or slights against police or authority, and some states made an effort to decriminalise some activities, the use of "move on powers" and "public nuisance" issues as election policies is making a comeback, especially in North Queensland in labor party dominated local government areas. It is blatantly class based politics as many young people under 18 and homeless people cannot be registered on the electoral rolls and cannot defend themselves, or access the so-called democratic processes through the ballot box.

The right to open justice is also part of the constitutional policy. It was recently stated by majority in the NSW Court of Appeal [173]that -

> *"[52] There can be no doubt that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. It informs and vitalises numerous specific rules and practices. (See my address to the 31st Australian Legal Convention "Seen to Be Done: The Principle of Open Justice" (2000) 74 ALJ 290 and 378).*
> *[53] The principle of open justice is so fundamental as to be of constitutional significance. As Lord Shaw described the principle in Scott v Scott [1913] AC 417 at 473, it is: "... a sound and very sacred part of the constitution of the country and the administration of justice".*
> *[54] In Scott v Scott, the House of Lords held that there was no inherent power of the Court to exclude the public. This principle was immediately applied by a unanimous High Court. (See Dickason v Dickason (1913) 17 CLR 50 at 54).*
> *[55] In Dickason supra at 51, the High Court unanimously recognised that: "... one of the normal attributes of a Court is publicity."*
> *[56] In Daubney v Cooper (1829) 109 ER 438 at 440, proceeding in public was described as: "... one of the essential qualities of a*

[170] Duff and Garland, 1994, p 23 quoting Foucault
[171] Ibid 27
[172] Qld Criminal Justice Commission Report: Reducing Police- Civilian Conflict: An Analysis of Assault Complaints Against Qld Police, March 1997 p 46
[173] John Fairfax v Attorney General of NSW [2000] 158 FLR 81 per Spigelman CJ

Court of Justice." (See also Richmond Newspapers Inc v Virginia (1980) 448 US 555 at 523).
[57] In addition to her Honour's observations in Kable, to which I have referred above, Gaudron J has emphasised on a number of occasions that certain aspects of judicial process are essential characteristics of judicial power. (See Harris v Caladine (1990-1991) 172 CLR 84 at 150; ReNolan; Ex parte Young (1991) 172 CLR 460 at 496; Polyukhovich supra at 703-4; Nicholas supra at [72]-[73]). Her Honour has identified "open and public inquiry (subject to limited exceptions)" as one of the "essential features" of judicial process and, therefore, of judicial power. (Harris v Caladine ibid and Re Nolan; Ex Parte Young ibid)."

Judicial process does not stop with sentencing, there can be no distinction because of the judicially entrenched rule that not only should justice be done, it should be seen to be done. Open justice also extends to access to court documents [174] .

This relates to what is known in judicial policy as "High Public Policy", which is expressed as a need to maintain public confidence "in the administration of criminal justice" [175].

The High Court has held-

[19] …"Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them."

Justice as fairness has also been imported into judicial theory; it is to avoid oppression and injustice and extends throughout the "whole course of the criminal process" [176]

In *Jago v The District Court of NSW*, Chief Justice Mason applied a New Zealand decision -*Moevao v Department of Labour*[177] where it was held by Richardson J

"It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And

[174] Ebner v Official Trustee [2000] HCA 63, see also [200]1 51 NSWLR 399
[175] Ridgeway v The Queen (1995) (1995) 129 ALR 41 , (1995) 69 ALJR 484 at [15] per Mason CJ, Deane and Dawson JJ
[176] Jago v The District Court of NSW and ors (1989) 41 ACRIMR 307 per Mason CJ, Criminal law in Qld and WA 2nd Ed. E. Colvin et al, Butterworths 1998, p474-475
[177] Ibid, 475, [1980] 1 NZLR 464 at 470-1,473-6,478-82

the due administration of justice is a continuous process, not confined to the determination of the particular case."

It can clearly be seen that there is a contradiction between the fine words of the judges on some issues and their subservience to the English doctrine of absolute despotic power.

Access to Lawyers and Natural Justice

The freedom of communication has been expanded to include the right to communicate with lawyers through the courts. The recent Tampa case was illustrative of how far the theory has developed. Eric Vadarlis was a lawyer seeking to have refugees given the right to habeas corpus, he also argued that he as a lawyer and an Australian citizen was entitled to have access to potential clients, the following paragraphs show how this is supossed to work-

> *"[165].....Mr Vadarlis also rested this claim on his own freedom of political communication. Mr Bennett appeared to accept that Mr Vadarlis, as a lawyer seeking to provide immigration advice and assistance, is entitled to the benefit of the implied freedom of political communication. This is consistent with the views of Mason CJ at 298-9, Deane J at 335-7 and 341, Toohey J at 378-9 and 384 and Gaudron J at 387-9 in Cunliffe that the implied freedom of political communication applies to a lawyer giving advice on migration matters to aliens.*
> *[166] Mr Bennett, however, submitted that the freedom is not a right to require the respondents to facilitate communication. In this he is correct: McClure v Australian Electoral Commission (1999) 163 ALR 734 at 740-1. The relief sought by Mr Vadarlis included orders requiring the respondents to facilitate his communication with the rescuees. For instance, at one stage he sought to be permitted to land a helicopter on the HMAS Manoora for the purpose of disembarking and providing legal advice to the rescuees. Such an order would not be within the scope of the vindication of the implied constitutional freedom.*
> *[167] However, Mr Vadarlis also seeks orders for the removal by the respondents of some of the obstacles placed in the way of his communication with the rescuees. For instance, the closure of the port at Flying Fish Cove prevents him from seeking access to the MV Tampa. My tentative view is that Mr Vadarlis has standing to agitate this aspect of the claim. However, no detailed argument was addressed on this question."*

In ABC v Lenah Game Meats[178] it was held by Justice Kirby that the rule, as a principle of policy goes through all law, all orders of courts must conform to the constitution.[179]

[178] [2001] HCA 63
[179] par[204]-[221]

In Kalifeh v District Court Judge Job[180]it was held that where an unrepresented man had large number of counts to face, with a potential large penalty, and he had been denied access to a transcript, and where he was found guilty, the court of appeal would allow his appeal because he was denied a fair trial. The right to procedural fairness is also implied in the constitution [181].

All of this, does not lessen the argument about the lack of rights, for these "freedoms" are not said to be rights as such, they can be ignored by government, they can be ignored by courts of 1st , 2nd, 3rd instance, until such time as the high court rules on a matter. That is because they are mere doctrines, social constructs in themselves, reliant on judges familiar and conversant in such matters.

This leads the argument into a practical application of the theory of "Westminster accountability" to the policies informing legislation that prohibits prisoners in Australian gaols from voting, and having access to legal advice, documents, and the issue of the lawfulness of private prisons per se.

The denial of the right to vote in Australian prisons.

The denial of the right to vote appears to be based on liberal social contract theory. In fact, The Joint Standing Committee on Electoral matters of the Commonwealth Parliament, inspite of protests from the international commission of jurists, that the right to vote must be accorded to all prisoners, recommended in its 1997 Report on the 1996 Election, that all prisoners be denied the right to vote[182] . The Liberal majority argued -

> *"Those who disregard Commonwealth or State laws to a sufficient degree to warrant imprisonment should not expect to retain the franchise" and in regards to those only serving a few days "in committing the minor offence the prisoner has still made his or her decision to risk the loss of certain privileges".*

The Commonwealth disenfranchises prisoners who are serving 5 years or more for offences against any law [183]. In Victoria, s48 (2)(a) and (b) of The Constitution Act 1975 prevent persons imprisoned for 5 years or more and persons found guilty of treason or treachery from being eligible. In Tasmania no prisoner has the right to vote[184]. In Western Australia provisions operate against persons serving indefinite sentences and person attained of treason, aswell as persons serving 1 year [185], In NSW [186]and Qld [187]persons serving 5 years or more, or people attained of treason cannot be enrolled to vote.

---

[180] (1996) 85 ACRIMR 68 at 69
[181] WA v Ward (1997) 145 ALR 512
[182] http://www.aph.gov.au/house/committee/em/ie/ie.pdf (Report Of The Inquiry Into The Conduct Of The 1996 Federal Election And Matters Related Thereto June 1997, p 48-49)
[183] s93 (8)(b) Commonwealth Electoral Act 1992
[184] s14 (2) Constitution Act 1934
[185] s18 (a) and (b) Electoral Act 1907
[186] Parliamentary Electorates and Elections Act 1912 s20 (1)(ii))
[187] Electoral Act 1992 s64 (a)(i)

Those who are of unsound mind or have been "attained of treason or treachery" have no right to vote. It can be argued that those who do not understand the process and will never be able to could be legitimately, it is said, be prevented from voting or standing for office.

Whilst it may be arguable, that those who have to serve long sentences such as life, or indefinite life sentences are there for a reason, and the nature of the sanction is to punish, it is also arguable, that if life is only 14 years and a person is still eligible to leave prison, then the denial of the right to shape that world that the person must enter, and, the denial of the franchise to prisoners per se is arguably unlawful.

It has been suggested even that a court could order the release of a prisoner for the purposes of voting in an action for habeas corpus[188]..

This argument also proceeds on historical evidence.

Before the fall of Qld's fascist Premier Joh Bjeilke Peterson, the prison system was openly corrupt and oppressive.

Brisbane's Boggo Road Gaol was one of the worst in the state. It had a number of underground cells (dungeons), which were built in the 19th century for solitary confinement and sensory deprivation punishment. Prisoners attempted to escape and to destroy the prison to be rid of the mischief. At the trial of escapee's, prisoners complained of the conditions and claimed that the escapes were acting in self-defence, that they had no choice. The issue became such a public relations disaster for the National Party government that a process of reform was instituted beginning with the abolition of the underground cells. The government later fell. [189]

The agitation of prisoners was necessary to bring the issue of human rights issues to the attention of the public and the government.

<u>Private Prisons</u>

The first private prison in Australia was Borrallen (MTC) in Qld which was opened in 1990, Qld, and its other private prion is Arthur Gorrie Correction Centre (ACM). NSW has Junee (ACM) (Profiting from Prisons p 16-17, 70), South Australia has Mt Gambier (group 4), and Victoria has The Metropolitan Women's Correction Centre, Fulham Prison (ACM) and Port Phillip Prison (Group 4). Western Australia has Acacia (CCA/AIMS).[190]

- ACM = Australian Correctional Management
- MTC= Management and Training Corporation
- CCA= Corrections Corporation of Australia
- Australian Integrated Management Services Corporation [191]

Table 1. [192]

---

[188] Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs [2001] FCA 1297-The Tampa Case par [94]
[189] Moyle, p50-55
[190] Rynne- Brown et al p 133
[191] ibid 132

	NSW	QLD	VIC	WA	SA	NT	TAS	ACT	ACT In NSW	Total Prisoners
Total Prisoners ABS 2001	8,846	4,517	3,391	1,389	3,170	717	346	82	129	22,458
Capacity of Private Prisons Rynne. 2000	600	1202	1315	750	110					7667
Percentage of State Prison Population, Rynne 2000	8.72	23.83	69.58	27.93	7.95					

Legitimacy and accountability issues

The legitimacy issues rightly, revolve around the assertion (inspite of the lack of a social contract) that the infliction of punishment is the sole preserve of the state. It must be recognised that personal liberty under the law is one of the most fundamental freedoms" [193] In this vein the socially constructed and clearly groundless social contract argument can be avoided in place of citizenship theory. Punishment should only exist to prevent the loss of freedoms and liberties of other citizens who are equal in rights. [194]

The lack of agreed national standards on the treatment of prisoners in Australia [195]places them in differing situations from state to state.

This, in my view is an argument in favour of one national standard of criminal procedure through a national criminal code, sentancing act and prisons legislation. This may entail a constitutional amendment to give the Commonwealth the power to make laws with respect to those matters. It would also simplify the teaching of law throughout the commonwealth and the enforcement of law by the state and citizens alike. For regional issues, the matter of discrimination on the basis of state residence arises but can be dealt with in drafting. A national standard would also reduce duplication of enforcement processes and may have a positive impact on budgetary matters leaving money spare for other uses beneficial to the people.

Increasingly the state is being reinterpreted in accordance with a new bastardised version of 19th century laizee faire capitalism[196], neoliberalism. Through privatisation -the state is shrinking and soon it may cease to be[197]. It is the function (in theory) of the state to administer punishment on behalf of the people, and this power cannot, and

---

[192] Numbers Of Prisoners In Australia 2001, And Proportion In Private Prisons As of 2000. Source ABS 2002 "Prisoners in Australia" 26/3/2002 –Prisoners by State And Territories, Rynne, John, Protection of Prisoners Rights in Australian Private Prisons p133 - http://www.abs.gov.au/ausstats/abs%40.nsf/b06660592430724fca2568b5007b8619/8d5807d8074a7a5bca256a6800811054!OpenDocument

[193] Trobridge v Hardy (1955) 94 CLR 147 at 152

[194] Moyle p 151,Marx, Karl "Capital Punishment" New York Daily Tribune, 18 Febuary 1853,in Murphy , Marxism and Retribution,1994

[195] ABS , Discussion paper , Experimental Output Measures For The Australian Justice Sector July 2001, p 45 , Kristen Northwood , Christopher Hinchcliffe , Leigh Henderson , Terry Rawnsley filed at http://www.abs.gov.au/websitedbs/D3110122.NSF/0/8c504d10f674be21ca256aaf008245f5/$FILE/ATTZ1HKI/Justice%20paper.pdf

[196] Shicor p73, Funnel,p11.12

[197] Shicor, p 57, Moyle p179

should not be delegated[198]. Punishment can only be administered and accepted if its is at the hands of the state.[199]

Another criticism is that running gaols is the continuance of the dispensation of justice under the law, it is not "service delivery" in the same vein as public transport or such like, as the neoliberal "Public Choice Theory" is inapplicable to those who have been deprived of their liberty against their will [200] . The notion of "service delivery as apposed to administration of justice impinges on human rights [201] . There is no room in the market for compassion or social justice; neoliberal theory is at odds with the ideals of a civilised society[202]. International trade agreements such as the General Agreement on Trade and services have the potential to see all government responsibilities privatised.

Profit motives are at odds with justice.[203] When profit is the aim, there must, as a matter of course be costs savings and "efficiencies"[204]. Capital needs to reproduce the mode of production in order to maintain its profits; therefore they seek to "create a market for corrective services"[205]. "Privatisation could drive incarceration policies"[206].

As it is, their ABS data shows there has been a %50 increase on the number of prisoners in Australian gaols since 1991[207].

It has been argued that reduced staffing levels in some places have led to situation where people have been locked down in cells for excessive periods of time[208]. This is quite clearly an abuse of human rights. It may be regarded as further punishment in contravention of the double jeopardy principle. [209]

The power of private administrators to administer punishment for breaches of prison rules also raises a question of legitimacy; -

> *"..the private sector has neither the sociopolitical nor legal authority to allocate punishment . It follows from this that when private companies do so .....they create a profound and irreparable fissure in the balance of ...the state and in the corresponding fealty which it could expect of its citizens ."*[210]

---

[198] Shicor p57,64, Moyle ibid
[199] Moyle p69
[200] Funnel p 8
[201] Funnel, p1,2Rynne, p132, Shicor p73
[202] Funnel, p12, 13,14
[203] Funnel, p2,7
[204] Funnel p8
[205] Moyle p 86,90,95
[206] ibid 120-121, 216-217
[207] "Prisoners in Australia , ABS 2002, filed at http://www.abs.gov.au/ausstats/abs@.nsf/0/8D5807D8074A7A5BCA256A6800811054?Open&Highlight=0,imprisonment)
[208] Moyle p 80
[209] Rynne , John, Protection of Prisoners Rights in Private Prisons, Brown et al, p 132,141-3
[210] Harding 1997 in Moyle p 189

Prison rules are a regime[211], an ideology, or an attempt at re-socialisation. Prisons are a place where people may cause themselves to consider the nature of their actions for a long time; they may be places where education and training programs are undertaken. A concern is that

> *"...the aims with which they are administered have a decisive impact upon the kind of social practice imprisonment turns out to be"[212]*

Given, as Durkhiem argues, that the rituals of punishment may reflect the core beliefs of society[213] - or in the case when society is not carrying out the incarceration, where prisoners may still be influenced by their experiences after their release-[214] it is right to ask, whether it is legitimate to impose a neoliberal ideology on prisoners.

In some prisons, prisoners work whilst making profits for corporations which are neither passed on to the people through the consolidated revenue fund, nor the prisoners themselves. This is an issue of slavery, of commodification of human beings, the transfer of property in a person like livestock. [215]

Another reason to have doubts about the desire to be accountable lies in the refusal of the federal government (as apposed to the states) to ratify the UN Convention For the Prevention of Torture, on the grounds that it would allow unannounced visits to Australian Prisons. This is hardly an act that inspires confidence in government.

Prisoner's records are in the hands of private corporations and not the state. Access to documents by prisoners is restricted in many cases. Private prisons are reluctant to give up documents that may tend to prove they have not complied with, or, are diverting from government reform policies[216]

Prison rules generally cannot be appealed from unless a prisoner is denied natural justice during the decision making process. That makes it justiciable, yet if prisoners and the public are denied access to information, a case may not be brought to bear against the mischief, because the prisoner is in a special position of vulnerability, from which they are unable to withdraw, with no ability to independently corroborate their side of the story [217] .

It may lead to loss of privileges or solitary confinement[218].

Where a prisoner is unlawfully detained, even within the walls of a prison[219] a court may order the persons release, though they may still be given up into another form of

---

[211] Moyle p 41-42
[212] Lacey , Nicola , Criminal Justice, Oxford University Press,NY. 1994, p19
[213] Durkhiem: 1984, in Duff and Garland 1994, p32
[214] Duff and Garland p 33
[215] Moyle p 29-30
[216] Moyle, p214-215 , see also Funnel , p13-15
[217] Foster v The Queen (1993) 113 ALR 1 (1993) 67 ALJR 550 (1993) 65 A Crim R 112 at par[12] [16] Per Mason CJ, Deane, Dawson , Toohey and Gaudron JJ
[218] Moyle, p166-73,182-183
[219] Tampa case at [83] applying Jones v Cunningham 371 US 236 (1963) at 243

custody. Again, the reasoning of Justice North in the *Tampa* case is worthy of repeating-

> *"[96] The ..... circumstance, namely that release will expose the detainee to a different form of detention, has similarities to the situation which arose in Re Gregory (1899) 25 VLR 539. Mr Gregory, an alleged lunatic, had been detained on the basis of a medical certificate which the court found did not comply with statutory requirements. The detention was held to be unlawful and habeas corpus was granted in respect of that detention. However, the court was concerned that Mr Gregory was a dangerous lunatic and ordered that he be remanded in custody pending the holding of an inquiry under the Lunacy Act 1890. The court did not refuse to discharge Mr Gregory from the unlawful custody on the ground that it was about to order him into a different, but lawful, form of custody. In Re Esperalta [1987] VR 236 Gobbo J held that the detention of the applicant under the Extradition (Foreign States) Act 1966 (Cth) was unlawful. In consequence of an application for habeas corpus his Honour ordered that the applicant be discharged from that detention even though the applicant thereafter was held in detention under the Migration Act. See also Clark & McCoy, supra, at 232."*

A person unlawfully detained in solitary with no privileges, and potentially no contact with the outside world, may not even have access to habeas corpus.

Public access to documents relating to the administration of justice by private prisons is denied in many cases on grounds of commercial in-confidence[220]. These are matters concerning human rights and the carrying out of laws and duties, and are therefore matters, which fall within the purview of political and governmental matters.

Commercial in-confidence is a retreat from responsibility[221], It destroys so-called Westminster accountability[222].

Denial of access to such matters cannot be held to be valid, as it is denial of open justice, and to information concerning the administration of justice. This in turn may lead to a loss in public confidence in the administration of justice.

Punishment and the administration of justice must be placed back into the control of the state as "Clear government control means ministers can be held accountable for abuses of human rights" [223]

Conclusion to Chapter 3

As a matter of fact, the Australian parliament, should, and may pass laws in conformity, or in relation to international human rights instruments, including

[220] Moyle , 194-243 , particularly ,224-227
[221] Funnel p20
[222] ibid
[223] Dawes John , Institutional Perspectives And Constraints , Brown ed, p128

minimum standards of criminal procedure under the International Convention on Civil and Political Rights and the minimum standards rule for prisoners, and, they must be concerned with the implementation of all united nations covenants relating to human rights, as they are obligated to observe all rights and freedoms. Prisoners do not cease to have rights and freedoms because they are prisoners

Federally, there is a human rights and equal opportunities commission, which can investigate breaches of international law and covenants to which Australia is a party, however, it has been recently found, although the commission demanded to enter Boggo Road in the 80's, that they have no power over the way state prisons are run. [224]

Given that this denies prisoners sentenced under state and territory laws the benefit of human rights protection, apart from the operation of state law itself where it exists on the subject, it is necessary that prisoners should have a means of communicating dissent on matters relating to them to a state or federal government. Whilst it may be said that the provision of an ombudsman may allow for some form of oversight, it is no substitute for change.

Prisoners are citizens; the social contract is a useless argument as persons who have offended in some cases (apart from common sense exceptions) may have offended against moral norms of the ruling class, which exist to protect their own interests. It would be a common occurrence for many prisoners to be persons who have produced, for instance, amounts of marijuana for personal use and have "re-offended". Such "crimes" are not seen as a threat to the functioning of society by the majority of citizens though they may be to the religiously minded Christian status quo.

The common convenience and welfare of society (which exists under international norms) dictates that as citizens they have an interest in the giving and receiving of information concerning the functioning of prisons, being the administration of justice.

The state and territory parliaments may pass laws, which may impinge on such matters as discussed above, these matters fall within the ambit of political communications. A Police Minister or Minister for Corrections, or an Attorney General may introduce such laws, and they may directly impact on the administration of justice. So too argument around the allocation of funds and budgetary matters, which is part of the normal cut and thrust of public debate. This may be denied by commercial in confidence agreements, and citizens may not be able to assess whether funds are adequate or not. Prisoners may wish to vote for a government that would bring about royal commissions and other inquiries into criminal justice issues.

It is not inconceivable that a future referendum may be initiated in relation to justice issues, a bill of rights including minimum standards of criminal procedure and treatment of prisoners, or even the decriminalisation of marijuana - i.e. the formation of an "actual social contract", which is in the interests of all.

The only limitation would be that as they are not "free citizens" they may not have free access to the seat of government and its offices. Although as Justice North has

---

[224] Minogue v HEREOC [1998] 54 ALD 389) (Ridley Smith and Redman p301

stated a court may order it. Open justice means access to the courts, and to have equal access to the rule of law, this may require access to legal advisers and court documents, and the law itself.

The nature of access to government is to share in its administration. Whilst it may be argued that this may be impossible from inside a prison, the Universal Declaration of Human Rights states[225] all are equal before the law, and are entitled to the equal protection of it [226]

Laws preventing the right to vote on behalf of prisoners have to be revaluated in light of the development of the common law. Arguably, as the various pieces of legislation stand now, a strong case may be made against them as being disproportionate and beyond power, as being not reasonably appropriate and adapted to serve a legitimate aim.

Arguably, commercial in confidence arrangements in relation to private prisons are a barrier to open justice and Westminster Accountability, and may have the potential to deny access to information concerning the administration of justice and the protection of, or lack of protection of human rights in the implementation of sentencing.

The question of whether the state can delegate its power to punish and administer punishment must be settled in this debate, and must be settled in favour of the argument that the power to punish is the sole preserve of the state on behalf of the people.

There should be one national system of criminal law, punishment, sentencing and imprisonment which includes the minimum standards for treatment of prisoners.

But laws relating to punishment must be legitimate, as must be the state. This can only be achieved in my view, through implementing our international obligations in an Australian Bill of Rights.

Bibliography

Moyle, Paul, Profiting From Punishment, Private Prisons in Australia, Reform or Regression, Pluto Press, Sydney 2000

Shicor, David, Punishments for Profit, Private Prisons Public Concerns, Sage Publications, NY 1995

Funnel, Warwick, Government by Fiat, the Retreat From Responsibility, UNSW Press, Sydney 2001

Brown, David and Wilkie Meredith, eds, Prisoners as Citizens, The Federation Press, Sydney 2002

Lacey Nicola, A Reader on Criminal Justice Oxford University Press, NY 1994

[225] art 6
[226] art 7

Foley, Michael, The Rise of The British Presidency, Manchester University Press, NY, 1993

Colvin E. ed, Criminal Law in Qld and WA 2nd Ed Butterworths Sydney, 1998

Logan , Charles , Private Prisons , Cons and Pros , Oxford University Press NY, 1990

Mitford Jessica, The American Prison Business Allen and Unwin, London 1974

Cunnen, Chris, Conflict Politics and Crime, Aboriginal Communities And The Police Allen and Unwin Sydney 2002.

Duff, Anthony and Garland David , A Reader on Punishment , Oxford University Press, NY , 1994

Website Australian Legal Information Institute filed at , www.austlii.edu.au last accessed 4pm Friday 18/10/2002

Parliament of Australia Website, filed at www.aph.gov.au , last accessed 4pm 18/10/2002

Statutes

The Australian Constitution, filed at
http://www.aph.gov.au/senate/general/constitution/index.htm

Commonwealth Electoral Act 1992, filed at
http://scaleplus.law.gov.au/html/pasteact/0/57/pdf/CEA18.pdf

Victorian- Constitution Act 1975, filed at
http://www.austlii.edu.au/au/legis/vic/consol_act/ca1975188/

Tasmanian- Constitution Act 1934, filed at
http://www.austlii.edu.au/au/legis/tas/consol_act/ca1934188/

NSW - Parliamentary Electorates and Elections Act 1912, filed at
http://www.austlii.edu.au/au/legis/nsw/consol_act/peaea1912382/

WA- Electoral Act 1907, filed at
http://www.austlii.edu.au/au/legis/wa/consol_act/ea1907103/

WA- Criminal Code, filed at
http://www.austlii.edu.au/au/legis/wa/consol_act/cc94/

QLD- Electoral Act 1992, filed at
http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/ElectoralA92_005_020705.pdf

Cases

Lange v The ABC [1997] 189 CLR 520 , filed at
http://www.austlii.edu.au/au/cases/cth/high_ct/unrep324.html

DUGAN v. MIRROR NEWSPAPERS LTD. (1978) 142 CLR 583, filed at
http://www.austlii.edu.au/au/cases/cth/high_ct/142clr583.html

McGRAW-HINDS (AUST.) PTY. LTD. v. SMITH (1979) 144 CLR 633, filed at
http://www.austlii.edu.au/au/cases/cth/high_ct/144clr633.html

Levy v The State of Victoria and ors (1997) 189 CLR 589, filed at
http://www.austlii.edu.au/au/cases/cth/high_ct/unrep327.html

McGinty v CTH (1996) 186 CLR 140
http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/unrep245.html?query=title+%28+%22mcginty%22+%29

Kartinyeri v CTH [1998]HCA 22 , filed at
http://www.austlii.edu.au/au/cases/cth/high_ct/1998/22.html

Friends of Hinchinbrook Society v Minister for Environment (1999) 92 FCR 35, filed at
http://www.austlii.edu.au/au/cases/cth/federal_ct/1997/55.html

Margurula v Minister for the Environment (1999) 92FCR 35, filed at
http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/730.html

Nationwide News v Wills (1992) 177 CLR 1 , Filed at
http://www.austlii.edu.au/au/cases/cth/high_ct/177clr1.html

STEPHENS AND OTHERS v WEST AUSTRALIAN NEWSPAPERS LIMITED (1994) 182 CLR 211 (1994) 124 ALR 80 (1994) Aust Torts Reports 81-298 , filed at
http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/182clr211.html?query=title+%28+%22stephen%22+%29

Newcrest Mining (WA) v The CTH) (1997) (147 ALR 42), filed at
http://www.austlii.edu.au/au/cases/cth/high_ct/unrep339.html

Ngo Ngo Ha (1997) 146 ALR 355 , filed at
http://www.austlii.edu.au/au/cases/cth/high_ct/unrep268.html

THE UNIVERSITY OF WOLLONGONG v. MOHAMED NAGUIB FAWZI AHMED METWALLY and others (1984) 158 CLR 447, filed at
http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/158clr447.html?query=%7e+metwally

Ebner v Official Trustee [2000] HCA 63 , filed at
http://www.austlii.edu.au/au/cases/cth/high_ct/2000/63.html

Ridgeway v R (1995) 69 ALJR 484 , filed at
http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/unrep210.html?query=%7e+ridgeway

John Fairfax Publications v AG NSW (2000) 158 FLR 81, filed at
http://www.austlii.edu.au/au/cases/nsw/NSWCA/2000/198.html

Jago v The District Court of NSW and ors (1989) 41 ACRIMR 307 , filed at
http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/168clr23.html?query=%7e+jago

WA v Ward (1997) 145 ALR 512, filed at
http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2000/191.html?query=%7e+ward

ABC v Lenah Game Meats ([2001] HCA 63)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/2001/63.html?query=title+%28+%22lenah%22+%29

Foster v The Queen 1993) 113 ALR 1 (1993) 67 ALJR 550 (1993) 65 A Crim R 112, filed at
http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/unrep167.html?query=title+%28+%22stephen%22+%29

Minogue v HEREOC [1998] 54 ALD 389, filed at
http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/85.html

Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs [2001] FCA 1297, filed at
http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1297.html

---

Chapter 4

The effects of non-compulsory voting

As with the preceding chapter, how this chapter relates to the terms of reference and my conclusions about an enshrined voting right at age 16- and the need for compulsory voting can be drawn out of this paper by analogy. Together with this and the preceding chapter, one should also refer to the comments on the bill of rights provisions in chapter 5 that relate to voting rights.

What happened in the 2000 American Presidential election, due to the different voting processes of the many jurisdictions was absurd. I say that the traditional voting

method of one system of paper ballots in which voters place a number in a box or a tick or yes or no on a plebiscite, is more secure and reliable than electronic voting or any of the American systems that are different to this.

I argue that if the voting age was dropped to 16, this would create another constituency and most probably an idealist one. The age of Australia's Population in getting older [227], and as a result of this the major parties are making a pitch to older Australians or "The Aspirational Classes". More often than not this is a conservative pitch, this is a broad generalisation, but I believe that young Australia is more concerned with the protection of the environment, peace and the protection of human rights.

In this respect, I hope dropping the voting age will either exclude the old guard conservative parties from government or make them change tack for the benefit of the protection of the environment, peace and the protection of human rights.

In believe that forcing people to distribute preferences to people they don't like, is making them say what is not on their minds. They should be allowed to exhaust their choice. All voting should be of the optional preferential kind.

For the purposes of the plebiscites any referendum, I believe it is imperative that the voting age be dropped to 16 to get the maximum possible consent for any change.

My reasons for supporting compulsory voting can be drawn out of the following paper I wrote on October 2002.

"Is there any correlation between non-compulsory voting and aggressive militarism in the United States and the United Kingdom?"

[227] Peter McDonald and Rebecca Kippen , Report: The Impact of Immigration on the Ageing of Australia's Population, 11 August 1999, filed at http://www.immi.gov.au/population/ageing.htm

PL2153 Preliminary report

Student: Pat Coleman
Lecturer: Surin Maisrikrod

Research question : Is there any correlation between non-compulsory voting and aggressive militarism in the United States and the United Kingdom?

15 OCT 2002

1

Is there any correlation between non-compulsory voting and aggressive militarism in the United States and the United Kingdom?

Introduction

In both the United States of America and the United Kingdom (or Great Britain), voting is not compulsory. This preliminary report will discuss a possible "crisis of legitimacy or consent" arising from lowering levels of citizen participation in selecting the executive power in control of the military power in the US and UK, and pose the question whether aggressive militarism – 'war' as a "security policy" in international relations may be as *Holsti* suggests (1)- a tool to garner popular consent, and avoid internal challenges to the international and national order.

Although there are differences in the structure of the repository of executive power in the US and UK, a focus can be undertaken on the US Presidency (in which the executive power resides and the election to the parliament of the UK in which a Prime Minister in which (in reality) the executive power resides, using voting patterns over a number of years. In this case at the beginning of the 1980's to the present.

The United States Figures.

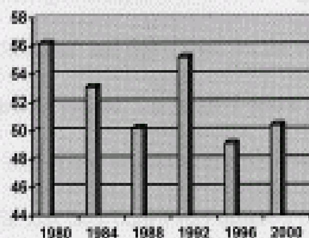
For a country as large in regards to population as the US with 283 230 000 m people (2) the percentage of people who chose to decide on who gets to rule the world with one finger is surprisingly low, as the table 1.and Figures 1. And 2. show.

(1) (Holsti Kalevi J. The State, war, and the state of war, Cambridge University Press, 1996,p95)
(2) (United Nations Population Figures , UN Website , filed at http://www.un.org/esa/population/publications/wpp2000/annex-tables.pdf).

Table 1. Percentage of eligible voters who turned out for American Presidential Elections since 1980, Source: Dave Leip's Atlas of U.S. Presidential Elections (3)

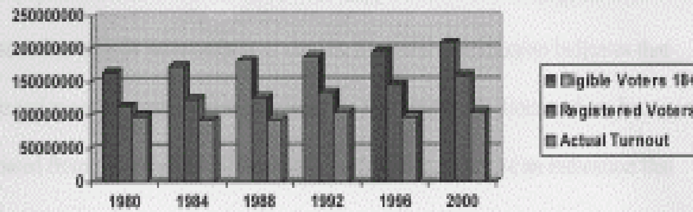
Presidential Year	1980	1984	1988	1992	1996	2000
Persons 18 or Over	164597000	174468000	182630000	189044500	196511000	209128094
Persons registered to vote	113036958	124184647	126381202	133821178	146211960	159725715
Actual voter turnout	86515221	92652680	91595721	104405155	96456345	105411587
Percentage of electorate	52.6 %	53.1%	50.2	55.2%	49.1%	50.41%

Fig 1. Percentage of eligible voters who turned out for American Presidential Elections since 1980



(3) Dave Leips Atlas Of US Elections, website, filed at http://www.uselectionatlas.org/USPRESIDENT/frametextj.html

Fig.2 18+ Eligible Voters, Registered Voters, Actual Turnout since 1980



Rarely in the last 20 years has more than 53% of the electorate even participated in choosing their all-powerful leader? In fact, a situation has even come about as a result of the 2000 election, where Al Gore, the unsuccessful Democrat candidate gained more of the popular vote than did George Bush, with 48.38% to Gore and 47.87% to Bush (4) Bush's vote comes from a mere 17.81% of the whole population.

1998 figures also show that 2- 2.3% or 4.7 million of the eligible voting population has been disenfranchised through laws that preclude people with convictions from exercising their right to vote. (5) It is argued that "this has profound political implications" and that if were not the case the current Republican President would not have been elected. The massive prison population in Florida alone, and even those just imprisoned for minor offences would have gotten Al Gore over the line. The world may have been a very different place if the criminals were allowed to vote as well us running presidential campaigns. This is different from the position in Canada for instance, where a person is only restricted on grounds that they are either an electoral officer or they are serving more than two years in prison.

(4)(ibid)
(5) (Human Rights watch http://www.hrw.org/reports98/vote/ , Article "Billed at birth, scarred for life" The Weekend Australian 28-29 September 2002 p24).

The United Kingdom Figures

The population of the UK is 58 654 500 (6), approx 75.7% of the population are registered to vote. A recent report of the UK Electoral Commission indicates that more and more young people are declining to take part in elections and are becoming alienated from the system of government (7). Whilst this may be an indication that there may only be higher turnouts during Tory governments which seems to be a trend on the figures, it may not indicate content or satisfaction.

Below are figures from 1983 onwards, the percentage of population who voted is calculated on the actual population at the time of that particular election.

Fig. 3 United Kingdom, size of electorate, actual turnout by election year

Source: David Boothroyd, Andrew Teale 2002 (8) United Kingdom Government-Statistics Online

Election Year	1983	1987	1992	1997	2001
Registered Voters	42192999	43180753	43275316	43784559	44403768
Actual Turnout	72.69%	75.33%	77.67%	71.46%	59.38%
Percentage of population who voted	54.42%	57.7%	58.36%	53.75%	44.95%

(6) (http://www.statistics.gov.uk/STATBASE/xsdataset.asp?vlnk=5823)
(7) (http://www.electoral-commission.co.uk/publications_pdfs/Publicopinion02elections_ftgs.pdf)
(8) (http://www.election.demon.co.uk/), (http://www.statistics.gov.uk/CCI/nscl.asp?ID=7362)

What these figures show is a disengagement from national elections per se. Only 44.95 % of the population took part in choosing the executive (via electing a party) and the Prime Minister was elected by 21.15% of the vote going to his party alone, although the Labour party won the majority of seats. That 21.15% represents only 18.28% of the population.

As with America the executive can destroy a significant part of the world with one finger, or at the very least cause a lot of blood to be shed in military engagements.

Democratic Security Implications

A useful dissertation on the anti democratic nature of war and conflict without consent was given by Robert C. Johansen In 1993 (9) we must ask whether *"on the most far reaching decisions over life and death and the future of civilisation itself, people have been alienated from authority:"* ... and if *"they have not delegated it"*

We must ask whether those holding the reins– or the "whip hand" without full consent of the citizenry have the moral right to "make the basic moral decisions for the masses of the people" (10).

Johansen argues forcefully that *"War or collective violence is a profoundly undemocratic act, because the people to be killed have not given their consent to be killed* ....it *..is an extreme and more deadly example of taxation without representation: those people who are most affected ..are the ones least represented in strategic decisions that threaten their lives"* (11)

(9) (Johansen, Robert C., Military Policies And The State System As Impediments To Democracy, in Held, David, Editor, Prospects For Democracy, North South East West, Polity Press Cambridge, 1993 :217),
(10) (Ibid 218)
(11) (Ibid 229)

Johansen wrote - *" No individual, no matter how wise, no matter how righteous, no matter how popular, should ever be allowed to hold in his or her hands the power to make what are the most crucial and irretrievable decision in the history of humanity. Such power cannot be considered legitimate in a democracy"* (12)

He was of course making that statement in the context of the control over nuclear weapons; yet, the same decision can be made to go to war using conventional weapons.

Legitimacy

"Legitimacy is precisely the belief in the rightfulness of a state, in its authority – to issue commands, so that those commands are obeyed not simply out of fear or self interest, but because they are believed in some sense to have moral authority" (13)

Just why the internal electoral matters of the US and UK are important is because where once it was "international peace and security …which provided and environment in which domestic policies and politics could unfold untroubled by external influences" (14) the situation may become quite the opposite, Holsti argues that future problems may be problems of internal domestic politics (15). That is not to say that American or British domestic matters may descend into a Balkan or African Scenario, but history does point out that things may take a turn for the worse with the examples of Northern Ireland and various domestic military call outs in the US.

(12) (Ibid226)

(13) (Rodney Barker: 1991:11, in Holsti: 1998:87)

(14) (Ibid15)

(15) (Ibid 16)

The point is that the decisions the American and British people do or omit to make, affect the entire planet.

War as policy – the armament culture in absence of mass consent.

It has become increasingly obvious that war and international conflict has been used as a tool for drawing attention away from domestic problems or lack of legitimacy. This has been the case from time immemorial; it may even be an ingrained animal instinct particular to human beings. War is many things but it seems to be viewed as a function (16)

Classical war no longer takes place it is argued by Shaw, we are apparently in a "post military society". War preparation and militarism, he writes, "*has become separated from the areas of social life which involve the majority of society .So it has become more politically isolated from mass involvement…although retaining an abstract ideological potency*" (17). We have now seen the emergence of Liberal technological militarism in his view.

Civilian values have intruded into military institutions causing them to become "civilianised" (18) in turn causing a "crisis of legitimacy" as military institutions are transformed. This he argues flows on to other institutions.

The ruling ideologies of the status quo appear to maintain an "armament culture" (19) because "only in times of war does a military dictatorship have some reasonable prospect of generating popular consent" (20)

(16) (Vayd, Andrew, Hypothesis About the Functions Of War in, Fried, Morton Ed, War – The Anthropology Of Armed Conflict And Aggression, The Natural History Press, NY, 1968 1968:85- 91).
(17) (Shaw, Martin, Post Military Society- Militarism, Demilitarisation And War At The End Of The 20th Century, Polity Press Cambridge 1991 ,p 21)
(18) (Ibid 108,116,121)
(19) (Shaw:87, Holst: 10)
(20) (Holst: 95).

Whilst it might be a long bow to draw to label the American president and British prime minister dictators, the same principle applies to the militaristic ideologies of the status quo. Going to war, participating in large-scale conflict or threatening war requires a state to be able to mobilise resources and its economy (21) and its society "in the cultural, political and ideological senses" (22)

"Armament culture informs the ideology of the ruling classes, because it is implicit in the international state-system by which their own claims to govern are recognised. (23)

Strong states must have a fixed personality (24)

What is developing in lew of consent is "spectator militarism" (25) an indoctrinated or semi convinced electorate is asked by the executive to come along for the ride and wave the flag, whilst the blood of its citizens is purchased on credit.

Active citizenship in the US and UK

Shaw argues that it is the breaking down of military institutions upon which it may depend if there is to be a peaceful world (26) Instead of a duty to the state, active citizenship is a duty to international peace (27) Human rights exist "precariously" even in the west (28) and therefore it is the duty of citizens "to transform culture so that a demilitarised democratic structure can exist" within the state. (29)

In states where voting is voluntary, only those with an "interest" have control, those who are party members, or those with a financial or military interest. Parties have to "get out their own vote" (30)

(21) (Shaw: 31)
(22) (Ibid).
(23) (Shaw: 82,88, Holsti: 16,17))
(24) (Holsti p91)
(25) (Shaw) (Ibid 83).
(26) (Ibid 186-7).
(27) (Ibid).
(28) (Ibid 188)
(29) (Ibid)
(30) (Jim Cleven, The Centre is Mine, Tony Blair, New Labour and the future of electoral politics, Pluto Press, Annandale 2000, p91).

This translates into money politics where only those with wealth are able to get out their own vote during elections as in the US.

Preliminary Conclusion

It would appear that the fall in, or lack of majority voter participation would have an affect on foreign relations and the waging of war or conflict. Pressure may be brought to bear on the streets, but it is more effective at the ballot box.

In the US, disenfranchisement has actually had an impact on the presidential election, where prisoners may have determined the outcome of the election in Florida.

In the UK, the participation rate is dropping off dramatically amongst young people and the population in general.

In the absence of compulsory voting -if the only way to garner support for office is to wage war, and the only way to maintain the attention of the voting public is to maintain a culture of spectator militarism, then international peace may be affected by the internal dynamics of the two major powers. It appears therefore that a possible crisis of legitimacy or consent that may be inferred from the situation.

Bibliography

Holsti, Kalevi J. The State, war, and the state of war, Cambridge University Press, 1998

Shaw, Martin, Post Military Society- Militarism , Demilitarisation And War At The End Of The 20th Century, Polity Press Cambridge 1991.

Fried, Morton Ed, War – The Anthropology Of Armed Conflict And Aggression, The Natural History Press, NY, 1968

Claven, Jim, The Centre is Mine, Tony Blair, New Labour And The Future Of Electoral Politics, Pluto Press, Annandale 2000

Brodie, Bernard, War and Politics, Cassell and CO London 1973.

Childers, Thomas, The Nazi Voter- The Social Foundation of Fascism In Germany 1919-33, University of North Carolina Press, Chapel Hill, 1983

Patrick, John J. Ed, The Young Voter , A Guide To Instruction About Voter Behaviour And Elections, National Council For The Social Studies, Washington DC 1972

Israel, Shleslinger, History of American Presidential Elections Volume IV 1940-1968, Chelsea House , New York , 1971

Websites

Dave Leips Atlas Of US Elections, website, filed at http://www.uselectionatlas.org/USPRESIDENT/frametextj.html14 Oct. 02

United Nations Website, Population Figures By Sex, Filed at http://www.un.org/esa/population/publications/wpp2000/annex-tables.pdf 14 Oct. 02

United Kingdom Government Website, National Statistics Online, Filed at http://www.statistics.gov.uk/STATBASE/ssdataset.asp?vlnk=582314 Oct. 02

Electoral Commission of The United Kingdom -, Summary of Report, Public Opinion And The 2002 Local Elections, filed at http://www.electoral-commission.co.uk/publications_pdfs/Publicopinion02elections_fdgs.pdf14 Oct. 02

Website Of David Boothroyd, United Kingdom Election Results, filed at http://www.election.demon.co.uk/ 14 Oct. 02

United States Of America Government Website, http://www.house.gov/ , http://www.senate.gov/ , 14 Oct. 02

University of Michigan, Website, Documents Centre, filed at http://www.lib.umich.edu/govdocs/psusp.html 14 Oct. 02

Tony Roza, Webmaster, Website, http://www.thegreenpapers.com/ , 14 Oct. 02

Department Of The Parliamentary Library, Australian Government Website, Report The United States Elections 2000- Implications For The Asia Pacific, Current Issues Brief No 7 2000-2001 Filed at http://www.aph.gov.au/library/pubs/cib/2000-01/01cib07.pdf 14 Oct. 02

Website, Project Underground, Volume 5, Number 16, September 30, 2000, VITAL STATISTICS: Financial Contributions to United States Elections from the US Mining Industry, 1999-2000, filed at http://www.moles.org/ProjectUnderground/drillbits/5_16/vs.html14 Oct. 02

Chapter 5

Various principled questions

Oaths

Given that the state must be secular, oaths taken must also be secular but have the effect as they would have, given the law of perjury and perverting the course of justice, and the nature of any office or position of trust under the republic.

The oaths of justices and lawyers and parliamentarians must be democratic oaths, to do justice and to uphold the constitution. In this respect no oath may be taken to a monarch but the effect of such an oath is to maintain an open and democratic society.

New Citizens must first consent to being bound by our constitution and to uphold it before they can become citizens, thus by analogy with social contract theory they have consented to any punishments under our laws if they are then treated as equal citizens who may have the right to vote and stand in elections and to attempt to change the structure and system with the same rights of others.

The flag

My personal belief and preference in relation to the flag, is that all vestiges to colonialism and imperialism must be removed from it and that it should be replaced. My suggestion based on suggestions that I have seen and agree with, is that the flag should consist of the Eureka flag, in the colours of the well known aboriginal flag, with the symbol of the Torres Straight Islanders which appears on their well known flag, in the general position of the small "offset" star of the southern cross that appears in the constellation (but not necessarily represented on the flag as small).

Personally, I would never burn such a flag.

As a former soldier and member of the 1st Battalion RAR, I would suggest that the colours and battle honours of the various Australian Military Units should continue, and continue to be used, and that new colours be presented to them upon which any new honours must be placed. That any new colours be used alongside of or in conjunction with their old colours. All colours must have the same protection under the law and the conventions and military discipline of the military forces.

The National Anthem

My personal opinion is that the current national Anthem sucks severely, and I make a point of sitting on the ground or turning my back when the hypocritical and uninspiring rag and dirge is played, even at what may be called ceremonial gatherings. What it says in the line *"For those who've come across the seas, we've boundless plains to share"* has been shown to be crap .It represents another age , imperialism and the exploitation and wrongful destruction of the environment for

profit and wealth. It says nothing about freedom, democracy, peace, opportunity and hope.

My personal opinion is that an Anthem must be inspirational and moving. In this respect I find 2 songs as fitting such a description. They are the song written by Eric Bogle called "Shelter" and in the way it is sung by John Williamson (no offence to Eric).And the song written by Peter Allen called "I still call Australia Home".

An Anthem should be relevant to current and future generations and express our beliefs; it should be relevant to those who may join our community after any referendum constituting Australia as a Democratic republic.

CIR

The Swiss example and the example of the state of Nevada in the USA (where the right to equality has been overturned) show that CIR can lead to extraordinary consequences. Freedom could in fact by legislated away by the tyranny of the majority. It is my belief that CIR should take the form of proposals to the parliament that may or may not be passed into law. However, once 100 000 signatures of voters have been achieved, an enquiry must be convened and the matter reported on. I have proposed a joint standing committee on "citizen's initiative" which is modelled on the Queensland Petitions Committee. From my own experience, the act of petitioning increases communication between citizens and the spread of ideas and the beginning of debate. Competing petitions would also lead to a healthy increase in the participation in the democratic process. See proposed section 50(3) and 50(4).

Citizens initiative

50.(3) *There shall be a parliamentary "citizens initiative" joint standing committee , which shall accept petitions signed by not less than 100 000 persons enrolled to vote , which calls for any form of constitutional change or of legislative or policy change or like change in state practices.*

50.(4) *The committee shall consider all such petitions and shall convene an enquiry into such matters. A petition or an enquiry under this provision, shall not lapse merely because an election has taken place since the presentation of the petition or the convening of such an enquiry. The committee must report on its findings to the parliament and may draft such changes. The committee may recommend such changes by submitting a bill to parliament .A bill submitted to the parliament shall be treated as any other bill. This provision does not affect the right of citizens to present any other petitions , and of the parliament to accept and to consider them in the normal way.*

Direct Election of the executive.

The method of election for the presidential ticket and the powers of the president and the parliamentary and presidential codes of conduct are contained in s61 to 69 of the proposed amendments.

I helped campaign against, and vote down the last so-called republican model because direct election is more democratic, and because I wanted to force the issue of a bill of rights onto the agenda.

I believe I have devised a simple method of direct election. There is a 4 person presidential ticket, president, vice president, and a secretary to each. They are nominated and elected as a team.

There is an open nominations process with the only proviso being that the team has to secure 5000 signatures or nominations from voters before they can stand.

There is a 2 stage voting process. First , all local government elections in the republic shall be held on the same day , every 3 years, 1 year before the fixed date for the federal general election .There shall be a first round election , voting as one electorate using the optional preferential voting system, to elect the top 5 tickets, who shall then stand at the general election. Then, the team with the most votes is elected for a 6 year term. if necessary, the vice president replaces the president , the presidents secretary the vice president, and the vice presidents secretary becomes the presidents secretary, and the position are filled in order of seniority in that way again if need be.

If 4 year terms are to be kept for local government, or it be a national policy, or if there are to be 4 year House of Representative terms, then, I believe the system I have devised can cope with that. I would suggest then, 4 year terms for the house of reps and local government on a national basis, either 4 year terms for senators, or 8 year terms, and either one with the right to stand again for one more, or an 8 year term for the president.

The office of prime minister is defined as being the leader of the majority on the floor of the House of Representatives.

The role of the senate

By convention evolving overtime and through the standing orders of the parliament, the senate has become, and has been expected to exercise its powers in a manner which reviews the actions of government. This has evolved mainly because if a government cannot get the numbers in the upper house, this fact will readily be taken advantage of by the opposition.

However, although the senate has the power to subpoena persons, the opposition has been reluctant to do so, lest it set a precedent and begin a convention which may be used against it when in power.

The proposed s23 (2) would enshrine the role of the senate as a house of review with such powers. Constitutional powers would be expected to be used for the benefit of the people. However, such a straight forward defining of the senate as a house of review might unintentionally exclude the existing powers of enquiry of the House of Representatives, and of both houses through joint committees, so a proviso has been added.

Draft provision s23(2):

23.(2) *The role of the senate , in additions to its powers of enquiry into any other matter, is as a house of review and scrutiny of the actions of government and the parliament on behalf of the people. The senate may conduct inquiry and compel the production of documents and attendance of persons in the exercise of its powers of review. This section does not prevent enquiries and review by the House of Representatives or joint enquiries of both houses.*

The relationship between the executive, parliament and the judiciary.

As suggested in Chapter 1, the president may refuse to assent to a law and pass it to the judiciary to have its validity tested. The presidential and parliamentary code of conduct means that the president can check the power of the government, and the parliament and the people may check the power of the presidential ticket. The Chief justice may administer the republic if there is no person who can be a president.

The president's powers over the military is limited to specific circumstances with the consent and power of review of the parliament.

The powers of the parliament are contained in s 51 still, with limitations being the bill of rights, and that the parliament may not allow uranium mining, nuclear power, nuclear or biological weapons, or the transport of those weapons in Australian territory. The passage of nuclear ships through our territory is banned unless there is a dire emergency.

The parliament gets the power over the environment, education, criminal law civil law, nationalisation and the creation of state monopolies. It has the power over local government and police. This in conjunction with the power to pass criminal law will allow for a national criminal code and national enforcement. There is also a power over imprisonment, to allow for one national minimum standard of imprisonment.

The president must be provided with a funded department and the means to carry out the functions of office.

Method of election and removal of the parliamentarians , executive and governments.

The House of Representatives and senate is to be elected by voting as one state or territory electorate using the optional preferential proportional representation method. This gives a chance for minor parties and independents who may have support across a state or territory in the case of the house of reps elections, to be elected. It is wrong to tell people they must pass their preferences on to people on the ballot paper they don't like. A person elected on forced preferences cannot have much claim to the consent of the electorate in my view. At the moment, in senate elections, hundreds of people may run causing a massive ballot paper. There is a space for persons to simply vote 1 for parties, but if they chose an independent below the line they are required to number every box with a preference, even if they have no idea of the candidate. This is a ridiculous situation. And I propose the following amendments:

9. (1)*The method of choosing senators shall be by optional preferential -proportional representation , which electors shall be free to place a number in order of preference , in one , or a consecutive number of places on the ballot paper , provided for that purpose , and shall be free to exhaust preferences as the elector so desires.*

29. *Each State and territory shall be one electorate, and the method of election of members of the house of representatives shall be by the optional preferential - proportional representation system.*

As for the direct election of the president, I propose the following nomination and 2 stage voting process, simplicity is the mother of invention in my view:

(61)(c) *The qualification for voting for and election to, and the holding of, the offices of President and Vice President of the republic is the same as that for the House of Representatives and the senate. The president and vice president, and the secretary to the president vice president-shall serve a term of 6 years. Subject to this constitution, a person who has been president of the republic shall not be entitled to run on a presidential ticket again. A vice president may run for president. A secretary to the president or vice president may either run for vice president or president, or to retain office. They shall be directly chosen by the people of the republic voting as one electorate in the following manner -*

- ***(i)*** *The general parliamentary election shall be held every three years;*
- ***(ii)*** *There shall be local government elections held every 3 years, and they shall be held 1 year before the general election;*
- ***(iii)*** *There shall be a preliminary election for the offices of President and Vice President of the Republic, secretary to the president and vice president, which shall take place at the same time as local government elections, and voting booths are to serve that dual purpose. A nomination for a team on a presidential ticket shall not be accepted unless 5000 persons who are entitled to vote at that election have nominated that ticket;*
- ***(iv)*** *The tickets short listed for the presidential election shall be entitled to run for election in that team at the federal general election which shall be held 1 year after that local government election;*
- ***(v)*** *The five Presidential election tickets with the most number of votes of the people who have voted in that election, shall be short-listed for the presidential/vice presidential election;*
- ***(vi)*** *However, if the presidential candidate on that ticket is disqualified from obtaining office or being chosen between that time, or dies, or choses not to stand, then, the vice presidential candidate is taken to be the presidential candidate, the secretary to the president candidate is taken to be the vice presidential candidate, and the secretary to the vice president candidate is taken to be the secretary to the president candidate. If elected, the president of the republic shall appoint a new secretary to the vice president.*
- ***(vii)*** *The presidential ticket, will be chosen at the general election by optional preferential vote. The ticket with the most votes is to be sworn (hereafter a secular oath) in as president and vice president of the republic, and secretary to the president and secretary to the vice president by the Chief justice of the high court of Australia. Immediately upon the outcome of the*

vote being declared, and the President and vice president shall immediately assume their duties as mandated and required by this constitution.

(viii) *If the president dies in office, resigns from office, or is otherwise removed from office according to this constitution, the vice president shall be sworn in as president of the republic, the secretary to the president shall be sworn in as the vice president and the secretary to the vice president shall be sworn in as secretary to the president. The new president shall appoint a new secretary to the vice president of the presidents choosing.*

(ix) *If the vice president of the republic dies in office, resigns from office, or is otherwise removed from office according to this constitution, the secretary to the president shall be sworn in as the vice president and the secretary to the vice president shall be sworn in as secretary to the president. The new president shall appoint a new secretary to the vice president of the presidents choosing.*

(x) *A secretary to the president and secretary to the vice president appointed under this process other than being elected by the people shall not be entitled to be the president or vice president of the republic.*

Control of the military

There are good questions about what the role of, and what powers the president or the executive or the parliament should have over the military. History is the guide that should be used, both Australian and international. The political rights provision of the proposed bill of rights prohibits the military and security intelligence apparatuses from interfering in civil affairs (see comment on article 13). The security and defence of the republic must be carried out in a democratic manner. In this respect, their must be checks and balances on the control of the military forces to avoid "adventurous behaviour". There should be powers in emergency or war and to tackle imminent threats. There should also be debate and compromise, and again I believe simplicity is the mother of invention. I propose the following draft provisions:

68. (1)*The command in chief of the naval and military forces of the republic is vested in the President of the republic.*

68.(2) However , the president of the republic shall not authorise the deployment of Australia's military forces or part thereof , unless it is-

(i) For a peaceful unarmed purpose; or

(ii) Peacekeeping operation or other lawful military action authorised by the United Nations and in the Republics interest; or

(iii) To defend the Republic against an imminent attack; or

(iv) To defend an ally of Australia against imminent attack upon application of that ally; or

(v) A goodwill visit or military exercise in another country or countries; or any military exercise within Australian territory; or

(vi) Peaceful defence force aid to the civil community during times of natural disaster, famine or epidemic or other like natural dangers, whether in Australian territory or without; or

(vii) All other peaceful non aggressive aid which the community would reasonably expect the forces of the republic to provide to the people , including such matters as : charity work , logistical assistance , building assistance , medical assistance , provision of foods, eradication of pest animals and plants and fire fighting.

(viii) Upon the application of a state or territory which has declared a state of emergency either for part of that state or territory or in whole to defend the republic state or territory against domestic violence or international terrorism within its jurisdiction.

(ix) If the president seeks deployment of the military forces of the republic in accordance with s68(2)(ii),(iii),(iv) or (viii) , the president , supervised by the chief justice (or the person who may exercise the powers of the chief justice in the chief justices stead) of Australia shall recall parliament if time permits;

(x) If the parliament cannot be recalled the president must seek providing reasons, the consent of the majority of the parliament as if it was sitting as one house using all means of technology in an informal manner and the chief justice (or the person who may exercise the powers of the chief justice in the chief justices stead) must certify the answer of the members of parliament as a vote in favour or against;

(xi) If time does not permit the taking of the actions referred to in sub paras (ix) and (x), the president may deploy the military forces of the republic, if that is a foreign deployment , that action may only be taken in accordance with international law. The president of the republic must as soon as possible and as the security and safety of the military forces permits, inform the people of the actions taken and why.

(xii) If the majority of the parliament has voted informally and has said yes or no parliament must still be recalled and the matter must still be debated and the actions of the president must be ratified, ratified with conditions, censured, or otherwise disagreed with.

(xiii) If the parliament in a joint sitting, have taken a vote in accordance with the constitutional process and have ratified with conditions, censured, or otherwise disagreed with the actions of the president under s68 , the president must, subject to international law and the law of the republic act in accordance with any resolution of the parliament.

(xiv) If the president has abused the power invested in the office under s68, the president shall be subject to the sanctions of the laws of the republic and international law.

Presidential and parliamentary code of conduct

Parliamentarians may be removed or stood down for the same reasons as the president and the ticket. A government may be stood down for oppressive or illegal conduct.

There is an emergency electoral process for a new government and new presidential ticket.

The president and/or the ticket can be stood down pending the outcome of proceedings and appeals and can be reinstated. I propose these draft provisions:

The parliamentary and presidential code of conduct

69. (1) *The president of the republic , vice president , secretary to the president and secretary to the vice president and the parliament, shall not intentionally derogate from or attempt to abrogate any part of this constitution .*

69.(2) *There shall be freedom of speech in parliamentary debates and proceedings of the parliaments and legislatures of the republic .Subject to s69(3) , things said and done in accordance with parliamentary debates and proceedings shall not be questioned in any court of law. The parliaments and legislatures of the republic shall have the powers as they assign themselves as from time to time to provide sanctions for the abuse of this privilege by parliamentarians. Removal from office in accordance with s69(3) does not constitute a matter to be taken into account by a court considering the issue of double jeopardy.*

69.(3) *Subject to this constitution, a court may have regard to and admit into evidence , matters said and done in parliament or during any of its proceedings if it is evidence of an indictable offence according to the laws of the republic (excluding defamation) . If the president of the republic , vice president , secretary to the president or the secretary to the vice president , or member of parliament is found to have maliciously or intentionally engaged in conduct in contravention of this constitution, or conduct which is an indictable offence or an offence of dishonesty and a gaol sentence has been ordered by a court of competent jurisdiction , or if a gaol sentence has not been ordered and the conduct is of such a nature as to be a high disgrace to the office -*

(i) *That person shall be removed from office by the parliament in a joint sitting on the 30th day after that conviction, and the persons office shall be filled in the manner set out in this constitution;*

(ii) *However, if the matter is appealed to a higher court within those 30 days, the person is to step aside pending the outcome, and if the conviction is overturned by a higher court, that person must be reinstated to that office. Each time the conviction is affirmed that person must step aside;*

(iii) *A person mentioned in s69. (3) may appeal to each higher court as any other citizen can , but must abide by the final decision of the high court of Australia.*

(iv) *If the person is the president of the republic, vice president, secretary to the president or the secretary to the vice president, or all of those people, the parliament shall convene in a joint sitting to consider the removal of any of those persons from office according to this constitution;*

(v) *If the person is a member of the parliament, the president shall order that the parliament shall convene in a joint sitting to consider the removal of that person from office according to this constitution;*

(vi) *A person, who is to be removed from office according to this constitution, shall be summoned to parliament to plead and answer the charge or charges before such vote of removal can be undertaken. A person who is in gaol as a result of the last affirmed conviction by the high court has no answer to removal.*

(vii) *A simple majority of all parliamentarians present, excluding those who may be subject to removal, shall pass a motion of removal. A member of the presidential ticket or a member of parliament may be removed on grounds of incapacity.*

(viii) *If an entire presidential ticket, or such part of the presidential ticket that is elected by the people is removed in accordance with this constitution , and the president's office or the vice president office is vacant as a result, then, the parliament shall call an immediate 1st round presidential election, which shall take place 30 days after close of nominations and be within 40 days of removal, and then a second round election of 5 tickets which shall take place within 30 days of declaration of the first round result . The presidential ticket that is elected by the people shall be sworn in and shall serve for the period of time that would have remained as the term of office for the removed persons. If however, that term would have been less than 6 months after this emergency process, then, an early general election shall be held at the same time, and the general election which was due in that 6 months, according to this constitution, shall not be held on the date it was due. Those elected to office at this election shall hold office for the period of time until the next due date for re-election. Thereafter, the constitutionally required election process shall continue as normal.*

(ix) *If a part of a government is removed in accordance with this constitution, the president shall call an emergency election for the offices that are vacant subject to the process outlined in s69 (3)(viii). And, if such removal removes the government majority on the floor of the House of Representatives, the president shall invite the remaining members of that house to form a government and elect a prime minister. If such a government is formed, that government shall continue until the next election in accordance with this constitution, however, if upon the new members being elected, a new majority wishes to form government, or if at any time the parliament passes a motion of no confidence in the government, that new majority may form a new government and elect a*

prime minister, and shall continue until the next election due, or in accordance with this constitution.

(x) *No law shall be assented to unless by the president of the republic.*

(xi) *The chief justice of the high court (or the person who may exercise the powers of the chief justice in the chief justices stead) shall administer the republic if there is person who can be president in accordance with this constitution.*

<u>The judiciary.</u>

As a result of the previous discussions including previously discussed High Court cases of Dietrich v R and Kable v The DPP, I propose the amendment of the constitution as it relates to the judiciary to give effect to democratic statements and suggestion made in those decisions, by enshrining the separation of powers and the independence of the judiciary at all levels, placing legal aid under the control of the judiciary.
"70. (1) *The legal system in the republic is an integrated legal system.*

70.(2) *In this legal system , there must be a court of appeal in the several states, and territories, or in any new state or territory or any self governing region, from which an appeal may reasonably be brought to the High Court of Australia on any matter in which the High Court has jurisdiction.*

70.(3) *In this legal system , courts tribunals or forums exercising judicial power are independent from the legislature. They must exercise their powers in accordance with the rule of law recognising that human dignity, justice, freedom and democracy are included in the underlying principles of the rule of law and the nature of the exercise of judicial power in the community of nations. All justices have the right of dissenting opinion in decision making.*

70.(4) *No justice or arbiter may act oppressively or sit when interested.*

70.(5) *The provision of legal aid to poor persons, and the appointment of representatives for those persons is the preserve of the judiciary .It is a fundamental obligation on the state, which makes the criminal laws, and imprisons persons, brings persons accused before the courts and tribunals and forums of the republic, to avoid undue delay , and unfair trials and other proceedings and to avoid injustice.*

70.(6) *The parliament of the republic must enact legislation to provide the judiciaries of the republic with adequate funds to provide legal services to the people in accordance with their rights.*

71. *The ultimate repository of judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than 9 in total, as the Parliament prescribes. There shall be established and maintained -state and territory supreme courts.*

The rule of law exists to protect the constitution and all rights contained within it. Judicial power must be exercised in a manner consistent with the principles underlying this constitution."

<u>The states and territories and local government</u>

The role of the states within the federation is maintained, however, I believe the states and territories should lose their powers over police, and we should have one system of criminal law with one police force.

The states, territories and local government would still be able to create offences within their powers. And if gaol sentences result, or as a result of punishment a person must go to gaol, then the commonwealth (the republic) must make provision for them to be imprisoned in its gaols.

Because of the statement of the QLD constitutional commission about the assumed legitimacy of the "elective dictatorship", and the lack of an upper house there, and in other jurisdictions, I find it to be a general principle that there should be an upper house in all jurisdictions which exercises the power of review in the same sort way the senate does. For this reason I have drafted a new s116:

"***116.*** *The parliaments of the states and of the territories shall be by bi-cameral legislatures."*

<u>Our Representatives to the United Nations</u>

I think that the issue of whether delegates or ambassadors to the United Nations should be elected by the people of Australia, and who they should answer to, is a very important one, and should be put to the people in a plebiscite.

<u>Transitional arrangements</u>

In accordance with the transfers of powers from the states and territories, there would need to be a national criminal code or act of law, national prisons, police, environmental, health, hospitals, education and local government legislation, and legislation to help in the transfer of such bodies and their jurisdictions to the federal jurisdiction on the date of proclamation of the republic.

Chapter 6

Draft Bill of rights with commentary and explanation of the need for such provisions

Taking into account the previous chapters, this chapter proposes a suggested draft bill of rights to be entrenched in the constitution. It provides a draft text of a provision, then a short explanation of the need for such a change and discusses possible implications.

Proposed Bill of Rights

Rights

1. (1) This Bill of Rights is a cornerstone of democracy and the rule of law in the Democratic Republic of Australia. It is a recognition of past racially discriminatory laws and practices and human rights abuses in Australia's history. It is a fundamental rejection of the validity of such laws practices and actions that have adversely impacted on people's rights and freedoms in Australia. It recognises that our community has been shaped and influenced by many cultures and will continue to be shaped and influenced by the peaceful interaction of peoples and cultures from all over the planet. It recognises that the protection of fundamental rights and freedoms is of paramount importance, and that without them the security of our republic is in danger from within and without. It enshrines the rights of all people in our country, provides for the protection from abuse of human rights of all within our jurisdiction, affirms the need to protect the ecosystems within our jurisdiction for current and future generations, and affirms the democratic values of human dignity, equality and freedom.
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in the Bill.

Comment on the above provision

The above provision is an adaptation of article 7 of the South African Bill of Rights, the preambles to the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, right of women, and those against all forms of discrimination.

It is a suggestion based on the history of the lack of protection of human rights and the lack of protection of the environment in Australia. The reference to "all within our jurisdiction" is an adaptation of article 2(1) of the ICCPR and the decision of the Full Bench of the Federal Court in Minister for Immigration & Multicultural & Indigenous Affairsv Al Masri [228]

[228] ([2003] FCAFC 70 (15 April 2003) BLACK CJ, SUNDBERG AND WEINBERG JJ at par [91] applying R v Home Secretary; Ex parte Khawaja [1984] AC 74 at 111).

In our country, it is sometimes said that the application of s122 of the current constitution is that the territories of Australia are "disjoined" from the commonwealth, and that as long as a federal parliament passes laws for the territories, whether they are good or bad, then they are law. This can lead to abuse. The Northern territory's former mandatory detention regime is an example of what can happen if there are no enforceable rights attaching to persons in the NT.

The federal parliament could also remove parts of Australia from the Migration zone and detain refugees entering the country via the seas on site. Under our laws, the high court has found they then have no rights when detained. Thus persons within the Australian jurisdiction can have no rights.

These are reasons for such a provision.

The rights suggested below are an adaptation of the South African Bill of Rights and lists them in order that they appear in that bill. Much of recent Australian history mirrors what has happened in South Africa. That bill is an adaptation of international human rights instruments and are also similar to those listed in the European Convention on the Protection of Human Rights, Canadian Charter of rights and Freedoms, and other like documents. Much of it also codifies constitutional doctrines applied in newly independent British common law countries. There are additions and omissions given some differences in the experiences of the South African People, and the preference given to adapting and codifying Australian and English common law rights that have survived in judicial culture in some cases, through the application of precedent. An example can be found in favour of such rights to challenge any assertion that they are unnecessary and well protected by statute, the common law or culture.

Application

2. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. The actions or decisions of -
(i) government; or
(ii) the agents or bodies of government; or
(iii) any court, tribunal or forum in the republic , must be done or made in accordance with natural justice and in accordance with the bill of rights and other provisions of the constitution.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with the Bill
(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Comment on the above provision

The above provision would enable the bill of rights to be applied by the courts in any controversy. This is different to other documents such as the NZ statutory bill of rights which only applies to government actions. It would enable a court to avoid a conclusion such as that made by the Canadian Supreme Court in Dolphin Delivery [229], the bill would apply to all litigation and the common law.

Only relying on the common law and the loyal application of precedent and doctrines increases the costs of defending a charge or conducting litigation. This is because courts of first instance are usually presided over by persons who are not experts on many topics like the judges of higher courts.

Many acting magistrates and stipendiary magistrates only handle simple summary offences, simple civil matters and small claims. Human rights which can only be found by careful study of thousands of pages of high court and supreme court precedents and textbooks as they apply to statute or ambiguous constitutional law can be ignored , especially by red nosed , horse haired , sherry quaffing half blind – career orientated Queensland Judges, or overlooked leading to expensive appeals to higher courts. Many poor persons are then faced with trying to pay for advice and representation and temperamental public servants in legal aid, and governments who control that aid and don't like to have their conduct challenged. Simplifying the law by saying what needs to be said in fewer words will simplify a person's defence if they are poor, and the ability to articulate an action for recovery of damages. The costs of defence and litigation may actually be reduced.

Equality

3. (1) Everyone is equal before and under the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair; for instance ,
(a) the state may make laws that discriminate on the grounds of sex if it is in the best interests of a child involved in a custody dispute.

Comment on the above provision

[229] [1986] 2 SCR 573

There have been judicial statements made by judges of the courts on the matter of an implied right to equality before the law applying the decision of Deane J in Leeth v The Commonwealth, however in Australia[230] there is no national constitutional provision or statutory provision protecting the right to be equal before the laws. The example of the overriding of the Racial Discrimination Act in the cases of the Hindmarsh Bridge Act and the 1998 Amendments to the Native Title Act 1993 (s7) show that equality can be legislated away.

There is an example of where the right to equality before the law (blind equal parenting rights) might not be applied in the case of custody disputes where the rights of the child should be given precedence.

Human dignity

4. Everyone has inherent dignity and the right to have their dignity respected and protected.

Comment on the above provision

The above provision is self evident; it is recognised in the law of tort but can be overridden by legislation.

Life

5.(1) Everyone has the right to life.
(2) The crime of suicide is abolished.

Comment on the above provision

This provision would be subject to article 6(2)(a) in respect of the right of women to have control over whether they wish to have an abortion. It would however give constitutional meaning to the abolition of the death penalty. No legal system is perfect and persons who may be subject to a revived push for the death penalty may be innocent. This provision would also be subject to article 6 in that a person would have the right to defend their own right to life by taking the life of another if necessary.

Freedom and security of the person

6. (1) Everyone has the right to freedom and security of the person, which includes the right -

(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of unlawful violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.

---

[230] LEETH v. THE COMMONWEALTH OF AUSTRALIA [1992] HCA 29; (1992) 174 CLR 455 F.C. 92/022 (25 June 1992), http://www.austlii.edu.au/au/cases/cth/HCA/1992/29.html

(2) Everyone has the right to bodily and psychological integrity, which includes the right -

(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.

Comment on the above provision

As the constitutional doctrinal law stands, whether or not statute law provides for the rights listed above, these can be legislated away as long as the parliament make it explicitly clear that that is their intention.

The rights are recognised in the law of tort, however, one has to quote large numbers of cases and text books to prove the rights exist. In many cases the police of this country have arbitrarily attacked persons and have deprived them of their liberty. And in many cases the state will not even bother to consider claims against those police, or proceed against them in the criminal process. They have also stood by and allowed persons to be attacked in the case of the Port Hinchinbrook environmental conflict.

The treatment of refugees in detention centres in this country also mitigates in favour of the rights listed above as the Howard government has shown that the HEREOC and UN bodies can be ignored.

The use of Australian soldiers in WW2 mustard gas experiments, the treatment of aboriginal persons throughout Australia's history, and the Ward 10B and Chelmsford scandals are reason enough for a provision on the matter of medical experimentation[231].

There has been a decision in the matter of Melchior v Cattanach [232], in which the judgements were in favour of the right of woman to chose whether they should have children, this case was a suit for wrongful diagnosis leading to pregnancy and birth, the statements there provide a basis for enshrining the right not to give birth in 6(2) (a) and (b) .

Slavery, servitude and forced labour

7.(1) No one may be subjected to slavery, servitude or forced labour.

(2) However, this provision does not affect the ability of the republic to reasonably require its citizens to take part in the defence of the republic from invasion, or to become members of the military forces or civilian labour forces in times of dire emergency.

(3) If citizens are required for the purposes of ss(2) to take part in such service, they shall be adequately recognised for their sacrifice and , renumerated and compensated for such time in service .

---

[231] Chris Richards Pty Ltd – for the Townsville Community Legal Service, "Grave Concerns-Institutionalised Death in Qld" – A Review of the Coroners Act 1958 Qld.

[232] [2001] QCA 246

Comment on the above provision

Slavery has been evident throughout Australian history, the examples of "Blackbirding" south sea islanders, to work in Australia, the forced labour of aboriginal persons, and exploitation without pay right up the 1960's and 1970's, and the refusal by some state governments such as Qld and NSW to adequately compensate the victims of this practice, clearly show the need for such a provision.

However, the example of the threat against our country during WW2 shows that in times of dire emergency conscription may have to be brought into effect to preserve the future republic in a similar circumstance. Civilian labour can be an alternative to military service for legitimate conscientious objectors to any military service.

The reference to dire emergency would preclude conscription as a general principle, and the high court has had experience in applying the defence power which "waxes and wanes". It codifies to some extent the common law doctrines that have been tested. Judges of the High Court have held that the defence power and the doctrines that lay behind it may allow a dictatorship in times of war or widespread conflict. However, the bill of rights abolishes the power to become a dictatorship in wartime or any other time.

Privacy

8. Everyone has the right to privacy, which includes the reasonable right not to have -
   (a) their person or home unlawfully searched;
   (b) their property unlawfully searched;
   (c) their possessions unlawfully seized; or
   (d) the privacy of their communications unlawfully infringed.

Comment on the above provision

The above provision at first glance places a limitation on the right to privacy and does not say much about the attacks on privacy by private sources. The high court has found so far that there is no tort of invasion of privacy in Australia**.**

The statement that there is a right to privacy should begin to allow for a new tort of invasion of privacy which would be similar to stalking laws and the law of defamation. It would allow for the development of the law in this regard by the application of precedent to new facts.

Whilst there are some federal and state laws on the matter of privacy, these take the form of legislation regarding postal and telephone services, personal information held by government and private service providers and businesses. However, there are difficulties in getting compensation for a breach of privacy rights and concerns about what can happen to information about person's private lives, medical and genetic information in an increasingly small world, given the advance of internet technology

and the power of corporations. As with all rights, they can at the moment be legislated away.

The provision limits state power to unlawfully interfere with privacy by unlawfully searching a person, their home or property, and from the taking of property.

The high court and supreme courts have had much experience in dealing with such breaches at common law, for instance Coco v R[233], Halliday v Neville[234].

The common law courts also have experience in applications for the lawful seizure of property and assets and in ordering the return of property unlawfully held by others, the damages might be limited to pecuniary loss or damage to the property. The criminal process may allow for the return of property and small criminal compensation. But such a provision as above would provide for the enshrining of a common law tort relating to the taking of property which the courts have much experience in dealing with.

Freedom of religion, belief and opinion

9(1) (a)Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(b) Everyone has the right to manifest their religion;

(c) The state may not impose any religion or any religious observance on the people.

(d) Every person has the moral right, obligation and duty to disobey manifestly unlawful commands.

(2) Religious observances or teachings may not be imposed or conducted at state institutions unless, for instance , a patient who cannot leave a health care institution or a prisoner or prisoners wish of their own accord to observe and manifest their own religion ;

(a) Religious observances or teachings may not be conducted at state-aided institutions, unless; it is an institution that is provided with grants or subsidies , to improve the rights of Aboriginal (including Ethnic Torres Straight Islander) Australians to maintain and teach their original languages and culture; and,

(b) they are conducted on an equitable basis; and

(c) attendance at them is free and voluntary; or

(d) the aid to that institution is for the provision of basic , state required curriculum.

(e) Religious observances or teachings may not be conducted in the parliaments, local governments or the courts , tribunals or forums of the commonwealth , states , territories and/or regions unless:

---

[233] COCO v THE QUEEN [1994] HCA 15; (1994) 179 CLR 427, (1994) 120 ALR 415, (1994) Aust Torts Reports 81-270, (1994) 68 ALJR 401, (1994) 72 A Crim R 32 F.C. 94/017 (13 April 1994) , http://www.austlii.edu.au/au/cases/cth/HCA/1994/15.html

[234] ADRIAN ROBERT HALLIDAY v. STEWART NEVILL & ANOTHER [1984] HCA 80; (1984) 155 CLR 1 (6 December 1984) , http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/1984/80.html?query=title+%28+%22halliday%22+%29

(i) it is , an elected aboriginal or Torres Straight Islander representative body observing its pre-colonial customs and religions, or for (2)(e), to recognise an Aboriginal Australian (including Ethnic Torres Straight Islander) custom before beginning a proceeding or at its end;

(3) This article does not prevent legislation recognising -

(a) marriages concluded under any tradition, or a system of religious, personal or family law; or

(b) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion;or

(e) State funerals that are conducted in accordance with the beliefs or known wishes of the deceased; or if this is not known-

(i) in accordance with the beliefs or known wishes of the deceased family or if this is not known;

(ii) a non dominational service; however

(iii) a state or community, service , observance or remembrance, or day of observance or remembrance for fallen military personnel , or for the recognition of military veterans – must be non dominational.

(d) Men and women of marriageable age have the right to marry and to found a family, provided that marriage is freely entered into by consent and without intimidation or coercion of any kind;and

(i) Persons who no longer wish to be married have the right to divorce.

(e) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Comment on the above provision

At the moment Australia is not fully secular. The Christian religions are give precedence and are imposed by the covering clause of the Australian Constitution. s 116 does not preclude the states or territories from imposing religion, observances and religious practices. And whilst the commonwealth may have a power to override state laws that do this, Christian observances are imposed in all parliaments through prayers during parliamentary proceedings.

I proposed then, that god be abolished or privatised. And that all references this non existent thing be removed from the constitution.

The manifestation of religion is a private matter and government must allow its free exercise and enforce the separation between church and state. The state should not fund the teaching of religion, but can fund schools that do to the extent that it will achieve the object of providing the curriculum which the state thinks is necessary for the benefit of the republic and the full development of the human personality and of the ability to form ones own informed opinions and make free choices about ones own future.

As a result of past and present polices and practices, the aboriginal peoples of Australia have lost much culture through genocide and assimilation and have been prevented through laws and practices from marrying.

Cohabitation laws have also prevented persons of different races and cultures from marrying in Australian history.

It would be lawful to assist in the maintenance of many existing aboriginal cultures and peaceful non violent practices and in their re-establishment where possible, until it is no longer required.

This provision also enshrines the *Nuremburg Principles* into Australian Constitutional law.

Freedom of expression

10. (1) Subject to the lawful exercise of powers to control military discipline, everyone has the
right to freedom of expression, which includes -
(a) freedom of the press and other media;
(b) freedom to criticise , receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(e) freedom to advocate for the taking of industrial action.
(f) subject to public safety , the reasonable and lawful requirements of personal identification in each circumstance, workplace safety laws and regulations , and public hygiene , freedom to wear religious icons and wear clothing appropriate to the free manifestation of ones religion .
(2) The right in subsection (1) does not extend to -
(a) propaganda for war;
(b) incitement of imminent unlawful violence; or
(c) advocacy of hatred that is based on nationality , race, ethnicity, gender or religion, and that constitutes incitement to cause harm; and
(d) unlawful attacks on a persons reputation.

Assembly, demonstration, picket and petition

11. (1) Everyone has the right to present petitions.
(2) Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to solicit signatures in a public place.
(3) A "public place" includes:
(a) a road;
(b) a place normally open to the public;
(c) a place for the time being open to or used by the public, whether or not-
(i) the place is ordinarily open to the public;
(ii) by the express or implied consent of the owner or occupier; or
(iii) on the payment of money

Comment on the above provisions

The high court has incorporated article 19 of the ICCPR into Australian law in its full bench Lange decision. However, the right to receive and impart information is limited to governmental and political matters.

It does not apply to artistic matters that are not related to political or governmental matters and artistic freedom can be legislated away through oppressive censorship and religiously conservative obscenity laws.

Academic freedom has been infringed on many occasions with persons who take part in public affairs being put in fear of their jobs and livelihoods, by developers and interested governments . The Hinchinbrook environmental dispute has thrown up enough examples of this[235].

They courts are loathe to say a person has a right to be free from arrest or prosecution and much submission must be made on the many different decisions on the right to be free from arrest if the peace has not been breached or there has been no disorderly behaviour. Many courts err on the side of the state and powerful private interests, for instance see the cases concerning the Chapman family against environmental activists in South Australia.

Freedom of expression includes the right to manifest ones religion by the wearing of icons and clothing. For instance, the voluntary wearing of Muslim headscarves, stars of David, crucifixes, budda's and other icons are matters which fall within such a protection. Secularism does not mean the oppression of religious expression; it means there is a separation between church and state, and that the state does not involve itself in creating or imposing any religious observances. The decisions the state makes are based on justice and equality and not on religion. Thus all of the people can be represented by and be protected by the state.

The compulsory observance of the wearing of religious apparel, and the customs of omission of items of clothing such as footwear in religious places of worship and persons homes would fall under the normal conditions of entry of private premises and to property in the way it has been treated by law and convention in the past. The Bill does not seek to abolish this.

There have been many instances where advocating for strike or other industrial action has lead to gaoling, fines or other sanctions even if it is peaceful. In Western Australia in the Liang decision [236], the supreme court said that peaceful picketing, even if it did not beset a workplace, and was directed to protesting against unjust laws and policies of government, was unlawful. Thus the nature of contradictory judicial reasoning is apparent.

Move on laws and bad police can adversely affect the right to peacefully picket and the right to peacefully petition. Recently The Qld Supreme court awarded $ 2000 for an unlawful arrest relating to a political petition[237]. The magistrates court had handed

---

[235] ABC Radio National , with Chris Richards , Tuesday 28/11/2000 , Courting Agitation and Freedom of Speech , http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s217433.htm

[236] (Communications, Electrical, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Commissioner Laing of the Australian Industrial Relations Commission & Anor [1998] FCA 1410 (4 November 1998)

[237] Coleman v. Greenland & Ors [2004] QSC 037 , http://www.courts.qld.gov.au/qjudgment/QSC%202004/QSC04-037.pdf

down a decision on another arrest prior to that saying the arrest was lawful in the same circumstances which meant civil action could not be taken .If the precondition for nomination to office or future CIR legislation relates to the obtaining of the signatures of citizens, then they should be free to do this in peace. The websites of the parliaments say that petitioning is an ancient right, it is the preferred course of action and communication between citizens and the state because it does not involve the gaining of political momentum or the creation of an active support base that can challenge the status quo.

Consistent with the common law relating to a breach of the peace, if protesting peacefully is lawful, it cannot be a breach of the peace and a person must remain free.

The right to freedom of speech and expression does not extend to advocating for Nazism and fascism and the like. Freedom and justice can only evolve in an environment free of fear.

The definition of a public place comes from the Peaceful Assembly Act Qld 1992 which in turn codified some common law decisions.

The high court is experienced in dealing with matters concerning implied right of entry. And shall have no problem with the interpretation and application of this provision.

It can take years to enforce freedom of expression under current laws.

Freedom of association

12.(1) Everyone has the right to freedom of association.

(2) This right is subject to laws allowing for compulsory membership of university student organisations and allowance for legitimate conscientious objection to membership of such an orgaisation.

Comment on the above provision

This provision is self evident. However, the public and senate debates on the issue of voluntary student unionism and its adverse effect on university life, academic life and civil society are a reason for the limitation of the effect of this provision.

Political rights

13. (1) Every citizen is free to make political choices, which includes the right -

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for justice, a political party or cause; and

(d) to take part in the conduct of public affairs.

(e) The military forces, and security intelligence apparatuses of the republic shall not interfere in the civil affairs of the people.

(2) Every citizen has the right to free, fair and regular elections for any legislative body of the states and as established in terms of the Constitution.

(3) For the purpose of protecting the integrity of the republic , and keeping the legislative bodies accountable, registration on the voting rolls and voting in any election for a legislative body, which includes local government, is compulsory for those obtained of the age of 16.

(4) Every citizen who has obtained the age of 16 years has the right -

(a) to vote in elections for the president , and the parliaments of the commonwealth, states, territories, and local and/or regional governments, and to do so in secret; and

(b) if the person has obtained the age of 18 years , to stand for public office in such bodies or to stand for president of the republic, and, if elected, to hold office;

(c) a citizen must be given adequate time and opportunity to be able cast a vote in any ballot or plebiscite or other vote in which a vote of the citizen is required, and to be nominated to stand in any legislative election stated in article 4(a) , or the or presidential election , or any other body in which citizens shall be entitled to be elected to as the governments provide for as from time to time subject to article 3(2).

(d) the parliaments of the republic , states and territories may provide that other classes of persons have the right, if they have obtained the age of 16 years , to vote in any ballot in which they have the powers to pass laws in respect of ;

(e) however, persons with dual citizenship, an electoral officer or employee of an electoral body ; and

(f) persons in prison who will not be released before the nomination process for an election, or a person who is precluded by s44 of the Constitution from standing for office in the parliament of the republic or from being elected to such office, may not stand or be elected to such legislative bodies.

(g) The principle of one vote- one value is guaranteed.

Comment on the above provision

The current provisions of the constitution do not protect the right to vote, and in fact provide for the withdrawal of such rights on the basis of race.

There is no current right of citizenship that gives any idea of what can be called a birth right of citizenship of Australia.

The current system is class based and protects the status quo by the maintenance of a system of government which can itself abolish the rights of those who elect it.

The current constitutional system does not speak of the position of parties in the political system or the rights of individuals to influence the political process. The educational standards of young people have improved since federation and young people can make choices and form opinions about many complex matters. However, young people may join the military forces before they can vote, and may lose their lives before they can chose the government who will control where they may be sent

or before they can attempt to change the system and world in which they will live - through the political process. It has been said that this is a form of taxation without representation.

The mass enrolment of young persons on the electoral rolls will add a new constituency in the political process and a new dynamic. It may inject a healthy dose of idealism back into the political process through politicians pitching to people thinking about the future.

The pitiful voting attendances in the USA and UK when those countries are so militarily powerful and imposing on the world, leading to powerful interests controlling the political processes , and the exclusion and disenfranchisement from the political processes of large proportions of their populations, are an example of why compulsory voting must be maintained.

Compulsory enrolment and voting is not saying that citizen should as the Americans say -"say what is not on one's mind”. A person may cast an unmarked ballot paper and the secrecy of the vote shall protect that choice.

It is evident from the right to stand provisions that freed prisoners and persons in the public service, the military, and persons who have been bankrupted should be given the right to stand for office. Those in positions where they are paid by the state would be taken to have resigned on the day of election. The electoral process is the court of public opinion and if a freed prisoner or a bankrupt is elected it is an example of a new start and a fair go. One of the only exceptions to public servants standing should be that persons employed to conduct elections or be a part of that process should be voluntarily excluded by virtue of their choice of occupation. This happens in Canada.

This provision should be read along with the proposed amendments to s44 of the constitution (below).

There is a safeguard in 13(1)(e) which prevents the military forces, and the security intelligence apparatuses from interfering in the civil affairs of the people. This should not interfere in their ability to protect the republic. There can be no security without democracy; hence our security principles must be based on “democratic security".

The guarantee of one vote one value puts to rest the "weighting" of votes in favour of different segments of the community.

Citizenship

14. No citizen may be deprived of citizenship of the republic, unless;
(a) that person has obtained citizenship through fraud or illegality; or
(b) a person who no longer wishes to be a citizen of this republic may give up their citizenship and adopt a new one , but remains a citizen of the republic until foreign citizenship is official.
(c) The parliament must enact legislation providing for reasonable exceptions to the deprivation of citizenship based on the international law relating to non refoulment and the gravity of any illegality.
(d) A person born in the republic is a Citizen of the republic.

Comment on the above provision

There have been cases in Australia where war criminals have obtained Australian Citizenship. In America such people can be stripped of such citizenship.

There may be cases where persons obtain citizenship by providing a false identity to cover such crimes.

It is reasonable that there may be less grave breaches of our trust that do not require the stripping of citizenship.

It is reasonable that a person who is born in our jurisdiction may have citizenship. America has no problem with this. However, merely coming to our shores to give birth might not qualify that person who does it to qualify (subject to reasonable exceptions) for citizenship[238].

Freedom of movement and residence

15. (1) Everyone has the right to freedom of movement.
(2) Everyone has the right to leave the Republic.
(3) Every citizen has the right to enter, to remain in and to reside anywhere in the Republic.
(4) Every citizen has the right to a passport, unless it is necessary in the interests of justice to prevent a person obtaining or holding a passport;
(a) for the purposes of ensuring a persons attendance in a court of law; and
(b) for the purposes of ensuring that a person who is about to be sentenced , or who has been sentenced and gaoled - does not flee justice.

Comment on the above provision

The right to freedom of movement has at times been interfered with by the states and the commonwealth; there have been instances when high court judges have had cause to seek to imply it in the constitution[239].

There are examples of laws made by the parliaments which have bound aboriginal persons to reside in a particular place under pain of punishment in recent history. There are no provisions of the current constitution preventing such laws being re-enacted.

It means that the people have the right to communicate with each other. It applies to protest and expression in this sense that it allows for processions and other protest that aren't static.

[238] see the rights of the child and precedent relating to support persons, Teoh v Minister for Immigration
[239] See for instance Justice Gaudron in Kruger[239], and her decision in Levy v Victoria (1997) 189 CLR 579 , and the decision of Deane and Toohey JJ in Nationwide News v Wills (1992) 177 CLR 1 at 73-4 applying R v Smithers Ex parte Benson (1912) 16 CLR 99 at 108 and Crandal v Nevada (1867) 73 US 35 at 44.

It would allow for persons not to be placed under any detriment by government for choosing to live in a particular place, which can happen under current social security policy. The right to freedom of residence would at all times be subject to the right to property, for instance in areas where indigenous Australians own land or have dominion over it a person could be excluded from residing there.

Freedom of trade, occupation and profession

16. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Comment on the above provision

There are examples of practices which have precluded aboriginal persons from particular professions.

Persons could be denied this right by economic policy and educational policy. Class based laws can stop persons from advancing themselves. This right above enables freedom of choice.

Labour relations

17. (1) Subject to the rights of citizens to join and be a member of a trade union and not to be unreasonably and unlawfully deprived of their employment- everyone has the right to work; and the right;

(a) to free choice of employment
(b) to fair labour practices: and
(c) to just and favourable conditions of work and to protection against unemployment and;
(d) subject to the common law in relation to voluntary assumption of risk , to a safe workplace and work environment; and
(e) to equal pay for equal work and otherwise to just and fair remuneration for skill, work and labour provided ; and
(f) to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay; and
(g) to procedural fairness in matters affecting their employment , and termination of that employment.

(2) Every worker has the right -
(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and
(c) subject to the lawful exercise of powers to control military discipline, to strike
(d) It is expected by the people, that members of the military forces of the republic will peacefully and lawfully collectively bargain with the parliament of the republic through submissions to parliament.

(3) Every employer has the right -
(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation.
(c) The people of Australia are the employers of the military forces of the republic: and

(d) The remuneration of the members of the military forces of the republic shall be fair and just and shall be as determined by the parliament of the republic.
(e) Subject to article 2(c) and (d) and 3(c) and (d) the parliament shall have regard to, and in a fair and just manner take account of the submissions of the members of the military and the people on the matter of remuneration , and working conditions of the members of the military forces of the republic.

(4) Every trade union and every employers' organisation has the right -
(a) subject to article 2(c) and (d) , to determine its own administration, programmes and activities; and
(b) to organise; and
(c) to form and join a federation, however , any trade union comprising of members of the military forces of the republic, shall only have the right to join a national federation that advocates only for the members of the military forces of the republic .

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining.
(6) National legislation may recognise union security arrangements contained in collective agreements.

Comment on the above provision

There have been many examples of the denial of the right to be a member of a trade union and to take part in industrial action. Given that many of the rights of workers have only come about by struggle in the face of such denials of rights, it is imperative that the right to strike, be a member of a union and to organise be entrenched.

In Europe there are some military representative organisations that represent the interests of military employees (soldier's sailor's airmen etc).The military should not interfere in civilian affairs but there must be fair working conditions given the dangerous nature of the employment. Voluntary assumption of risk applies where persons chose dangerous professions in a free and informed way. The courts have ruled on such issues at common law.

There have been numerous instances of collusion between capital and government to unfairly dismiss workers. And many examples of exploitative practices.

The current constitution has shown itself unable to deal with protection of workers rights and the federal government may even legislate away awards made according to arbitration legislation and under the arbitration power[240].

---

[240] see Pacific Coal v CFMEU (2000) 74 ALJR 1034

Environment

18. (1) Everyone has the right -
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected by the federal government, for the benefit of present and future generations, and reasonably conserved for its own intrinsic value, through legislative and other measures that -
(c) (i) prevent pollution and ecological degradation and loss of biodiversity;
(ii)promote conservation
(iii) promote justifiable economic and social development. consistent with this section.
(2) Any person has the right to object if the right in this section is not observed and the right to expect that government will accept and act on a reasonable objection.
(3) The actions or decisions of -
(i) government; or
(ii) the agents or bodies of government; or
(iii) any court, tribunal or forum in republic , must be done or made in accordance with the precautionary principle.
(4) The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental or ecological damage.

Comment on the above provision

The reason for this provision is adequately dealt with in chapter 2.

Property (merely a suggestion- as such a section should be negotiated by and with indigenous Australians)

19.(1) Everyone has the right to own property alone or in association with others.
(2) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
(3) Property may be expropriated only in terms of law of general application -
(a) for a public purpose or in the public interest; and
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
(4) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) purpose of the expropriation.
(5) However, if the state wishes to acquire lands or interests that are subject to native title, or reasonably under native title claim , or allow others to acquire such lands, the state must engage in negotiation with native title holders or claimants and cannot acquire or allow to be acquired such lands or interests unless there has been a negotiated settlement or, failing this, a court order.

Comment on the above provision

This provision merely codifies the common law as it has been interpreted. As with the effect of s116, the right to just terms only applies currently to federal acquisitions and not to state acquisitions[241]. There are numerous statutory provisions relating to the acquisition of property, however, such acquisitions in the case of native title take the form of extinguishment of rights. This has been done in a racist manner using doctrines, white interests may override indigenous interests.

A provision on the right to property and its acquisition must be negotiated with indigenous Australia in the manner of a treaty negotiation along with the other proposed provisions. The above is not a solid suggestion but an adaptation of the South African provision given the shared history.

Housing

20. (1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, except in accordance with national legislation regarding fair and reasonable tenancy arrangements.
(4) No legislation may permit arbitrary evictions.

Comment on the above provision

This provision is self evident. No one should be homeless and without shelter. It would also turn dodgy law and order elections on the matter of persons sleeping in public places and the visibility of homeless and itinerant persons back into social justice issues that need to be solved.

Health care, food, water and social security

21. (1) Every citizen has the right to have free access to -
   (a) adequate health care services, including elective surgery, medicines ,dental, reproductive and mental health care, if the person is a person under the protection of, or is imprisoned by the state , adequate health care services, including elective surgery, medicines ,dental, reproductive and mental health care; and
   (b) sufficient food and water; and
   (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
   (d) Everyone has the right to a standard of life, and of living, adequate for the health and well-being of themselves and of their families.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

[241] Durham Holdings Pty Ltd v The State of New South Wales [2001] HCA 7 (15 February 2001)

(3) No one may be refused emergency medical treatment.

Comment on the above provision

If the purpose of the state is to protect the welfare of the people, then their taxes should be employed in this regard. In a time of increasing privatisation and casualisation and rationalisation and retrenchments it is necessary for the rights to access an adequate standard of living to be entrenched.

History has shown people may be forced to turn to crime if they have no way of supporting themselves and their families.

No one should have to pay for necessary medical treatment.

The right to water would also be subject to article 18 of the bill of rights in the case of irrigation disputes and calls for dam building.

Children

22. (1) Every child has the right -
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to nutrition, shelter, reasonable health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that -
(i)are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or , moral or social development;
(iii) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under provisions of this bill , the child may be detained only for the shortest appropriate period of time, and has the right to be -
(iv) kept separately from detained persons over the age of 18 years; and
(v) treated in a manner, and kept in conditions, that take account of the child's age;
(vi) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(vii) not to be used directly in armed conflict, and to be protected in times of armed conflict.
(2) A child's best interests are of paramount importance in every matter concerning the child.
(3) In this section "child" means a person under the age of 18 years.

Comment on the above provision

There have been numerous instances of abuses of children in state care and state aided institutions and church institutions. In many instances where the only redress has been to seek government help it has been denied or ignored. Children refugees here through no fault of their own have been imprisoned leading to traumatisation. The high court

has found that if the government passes such laws under the migration power then there is no answer to it.

The rights of children should be paramount in marital disputes.

A provision such as above would mean that persons acting for children or the children themselves do not have to rely on government intervention which is subject to political imperatives and voter backlashes, to protect them from abuse and may if necessary go to courts for protection.

Education

23. (1) Everyone who is an Australian citizen or who is under the protection of the state has the right -

(a) to a free education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that -

(a) do not discriminate on the basis of race, unless , that institution has been set up by , and for indigenous Australians for the purposes of teaching and maintaining Australian indigenous languages and culture;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(d) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. As well as providing a basis for employment, it shall promote understanding, tolerance and friendship among all nations and racial or religious groups, and shall further the maintenance of peace the protection of the environment.

(4) Subsection (2) does not preclude state subsidies or grants for independent educational institutions.

Comment on the above provision

Many international agreements such as the universal declaration, ICCPR, covenant on economic social and cultural rights provide that a person has the right to education. Article 7 of the German Constitution and the South African Bill of Rights enshrine the right.

Persons can only enforce their rights if they know what they are, and they can only know how to enforce them through education. Education is required if people are to reach their full potential and be able to make free choices.

Education is necessary to promote understanding between peoples and cultures and to maintain peace. It must therefore be compulsory and free at all levels. It must be accessible if people are able to make a free choice about whether to continue in further education.

Language and culture

24.(1) Everyone has the right to use the language and to participate in the cultural life of their choice, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author. This right may be waived.
(3) The Indigenous peoples of Australia have the right;
(a) to have their ancient grave sites , where those places are, and whether or not native title has been extinguished over those places: and
(b) rock paintings, rock drawings and rock art and carvings and other types of such things attached to the earth and/or its flora, where those places are, and whether or not native title has been extinguished over those places in the republic; protected from unnatural damages by the state and for them to be respected and preserved, and for the state to provide for severe punishment including a prison term for such damage, unless those people or peoples have consented to such damage or interference with such things; and
(c) to have artefacts including, relics, bones , body parts and icons and other such things of cultural significance that have been wrongfully taken from them , returned to them without further damage and for the state to assist in the return of such things.
(4) No one exercising the rights in 24(1) , (2) and 3(c) may do so in a manner inconsistent with any provision of the Bill of Rights:-
(a) for instance, a state educational institution must teach in English unless another language is part of the state curriculum ,and, that extra language is complementary to the teaching of English.

Comment on the above provision

The suppression of indigenous languages has been a policy which has manifested itself in many colonial situations. This was especially evident in Australia.

Indigenous cultural practices and art have been exploited for profit by many persons in Australia and elsewhere. This provision would give constitutional protection to intellectual property rights.

It also protects the right to waive intellectual property rights if a person wants to, for instance , a person may wish information to be freely available and for it to be freely copied.

Indigenous art and graves have consistently been destroyed , robbed , stolen since settlement , many artefacts and body parts have been taken oversees without the consent of those peoples.

Many mining companies have maliciously destroyed sites of significance. The Franklin Dam dispute is an example of why there is a need for constitutional protection. Waiting for a world heritage listing may take years and court cases years more.

This above provision gives a positive right to have sites which are still in place on lands that may or may not have had native title over them- protected and respected, and the right to have artefacts and body parts returned to them and for the state to assist. The state must also provide for stiff penalties for any transgression of this right.

The return of property must be done in accordance with the bill of rights given however that the bill is to be read in conjunction with the provisions. The protection of sites may require self help in their defence, which defence would naturally fall within the bill of rights, the criminal law and common law, in relation to what measures may be taken and be approved of by the courts.

Such a provision would rapidly bring matters to a head and lead to compromise.

Cultural, religious and linguistic communities

25. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community -

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Comment on the above provision

This provision is self evident. Australian history shows that genocide has been practiced to attempt to wipe out indigenous culture.

New Australians and persons resident in Australia should not be prohibited in any way from exercising these rights. In times of crisis communities of different cultures and languages have been unfairly targeted in ideological and propaganda campaigns.

Access to information

26. (1) Everyone has the right of access to -

(a) to any information held by the state;

(b) concerning themself without charge; and

(c) any information that is held by another person and that is required for the exercise or protection of any rights.

(d) any proceeding against a state official or officials in which such officials are being proceeded against , or are being disciplined, and for the abrogation of any constitutional or statutory rights, or for any offence.

(e) news and current local, state, territory , regional and international affairs that may affect a choice to stand or chose a representative in the electoral process , through a public owned, run and funded national broadcaster .

(f) the proceedings, debates, minutes and all other records of the proceedings of the legislatures and governments, and laws and regulations at all levels free of charge.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Comment on the above provision

Whilst there are freedom of information laws in effect in Australia in different jurisdictions, these differ widely, and in Tasmania for instance, information is withheld from the public on matters affecting the protection of public forests and relationships between government and corporations.

A person must always be entitled to access any information about themselves for free. The protection of rights is paramount and persons or governments should not be allowed to hide such information if it would lead to a breach of this bill of rights.

State officials including police hold a special position of trust in the community; they therefore must be accountable to the people. Many jurisdictions do not allow the public access to disciplinary proceedings against police. The public may not then be able to collate information about patterns of abuse of rights and misconduct with sufficient clarity to propose policy changes and to form opinions about political policy promises on issues such as reform.

The public may not be able to make an informed choice that may affect elections if all media is commercialised and run on commercial and consumer imperatives. That is why it must be law that there must always be a public broadcasting service to inform the people about important events and issues and current affairs at local and international levels. Only then can they begin to attempt to assess the conduct of governments.

Whilst state, territory and federal governments give access to all debates and proceedings; this is not done at the local level. The addition of "free of charge" gives precedence to the importance of the need to make sure every individual may be able to scrutinise the actions of state and take part in changing its policies.

If ignorance of the laws is no excuse, persons must also be allowed free access to the laws of the republic.

Just administrative action

27. (1) Everyone has the right to administrative action that is lawful, reasonable, just, and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must -
- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote a just administration.

Comment on the above provision

This provision is self evident and the reason for it is adequately discussed in chapters 1, 2 and 3

Access to the seat of government, offices of the state, courts , and the public ports airports and railways.

28.(1) All citizens have the reasonable right of access to the seats of government of the republic , states, territories, and local and/or regional governments , through attendance in the public galleries when parliamentary or legislative or committee proceedings are taking place.
(2) All citizens have the reasonable right of access to, and the right to communicate with, and to receive available services from the offices of the state normally open to the public, and, to conduct their business with the organs of the state and its administrative bureaucracy.
(3) All citizens shall have equal and reasonable access, and employment in the public service of the republic at all levels of government.
(4) All citizens have the reasonable right to access the public ports airports and railways for the purposes of travel throughout the republic, and to enter and leave it.
(5) Everyone has the reasonable right to access justice, and to have any dispute that can be resolved by the application of law decided in an independent, fair and impartial public hearing before a court or, where appropriate, another independent, fair and impartial tribunal or forum.
(6)A party or witness in any proceeding who does not understand or speak the language in which the proceedings are conducted or who is deaf or blind or impaired has the right to the assistance of an interpreter or to the means with which to express themselves to give evidence.
(7) Subject to the interests of justice, public safety and common law procedures and customs, everyone has a reasonable right to be present and watch the proceedings and see justice done in any court, tribunal or forum exercising judicial power.
(8) Article 28. is subject to reasonable restrictions relating to normal opening times ,public safety and national security .

Comment on the above provision

This right is derived from the decision of Deane and Toohey JJ in Nationwide News[242] .

Persons must be able to access the legislature and public service .The wishes of foreign visitors should not disrupt the ability of the citizenry to view the working of parliament from the public galleries.

[242] (1992) 177 CLR 1 at 73-4.

Persons involved in proceedings in the judicial process and persons detained must be able the access the courts to give full effect to their rights under this proposed constitution.

Citizens must also be able to see justice done, but this may be limited by the suppression of identities in sexual assault cases and attendances of witnesses via other means without being in court. This has been adequately handled by legislation and the common law in many instances, however many jurisdictions mean the rights in this bill may be given different effect in different parts of the republic. This may be avoided by a solid enforceable right, whilst leaving scope for the protection of persons from the public in the interests of justice.

Arrested, detained and accused persons

29. (1) Everyone who is arrested for allegedly committing an offence has the right -
    (a) to remain silent ;
    (b) not to be compelled to make any confession or admission that could be used in evidence against that person; and
    (c) to be informed promptly -
    (d) at the time of arrest , in substance , of the true reason for the arrest and or detention; and
    (e) of the right to remain silent of the right to contact a friend and/or to obtain a legal representative and to be provided with the means to do so without undue delay; and
    (f) of the consequences of not remaining silent;
    (g) if that person is a foreign national or under the protection of another country, of the right to contact that persons consulate or embassy and to be provided with the means to do so without undue delay;
    (h) to be brought before a court without undue delay; and
    (i) at the first court appearance after being arrested, to be formally charged or to be informed of the reason for the detention to continue, or to be released; and
    (j) to be released from detention if the interests of justice permit, subject to reasonable conditions.
    (k) No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.
(2) Everyone who is detained, including every sentenced prisoner, has the right -
    (a) to be informed promptly of the true reason for being detained;
    (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
    (c) to have a legal practitioner of the persons choice assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
    (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to seek habeas corpus, to be released and to be reasonably compensated;
    (e) not to be held in detention as a result of the criminal process by any organisation but the state, and , the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at

state expense, of healthy, adequate hygienic accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's -

(g) spouse or partner;

(h) next of kin;

(i) chosen religious counsellor; and

(j) chosen medical practitioner; or

(k) a person or organisation or body that serves or is purported to serve as an accountability or complaints mechanism (which includes non government organisations)for persons detained, and has the reasonable right have any complaint about the persons detention investigated and dealt with promptly and fairly.

(3) Every accused person has a right to a fair trial, which includes the right -

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary court;

(d) to a reasonable right to a trial before a jury (except in the case of an offence under military law tried before a military tribunal) for a matter that has traditionally been known as an indictable offence, but has the right to waive this right.

(e) to have their trial begin and conclude without unreasonable delay;

(f) to be present when being tried;

(g) to choose, and be represented by, a legal practitioner, or by themselves and to be informed of this right promptly; and

- if the person wishes to represent or defend themselves, to reasonably have a friend present in the court to take notes and give quiet advice to the person in order to assist.

(h) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(j) to adduce and challenge evidence , knowing that there is no presumption operating in favour of evidence given by state officials over that of other citizens;

(k) not to be compelled to give self-incriminating evidence;

(l) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(m) to have a transcript of evidence provided free of charge if the person is poor, before the final submissions in the case;

(n) not to be detained or convicted for an act or omission that was not an offence under either national , state, territory, local or regional laws within the republic or international law at the time it was committed or omitted;

(o) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted , meaning, that a person must not be subjected to the detriment of what is known as double jeopardy;

(p) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) of reasonable appeal to, or review by, a higher court.
(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
(5) (1) Evidence obtained in a manner that violates any right in the Bill of Rights may be excluded;
(2) The discretion to refuse to admit evidence extends to:
(i) real evidence of facts and things obtained as a result of unlawful conduct on the part of the state (non confessional evidence) ; and
(ii) confessional evidence ; and
(iii) the elements of the alleged offence.
(3) The matters to be taken into account in determining whether the discretion to exclude such evidence should be exercised include;
(a) the common law prior to the coming into force of this bill of rights, which remains in force- to the extent that it is not in conflict with the bill; and
(b) whether that evidence may have been obtained at too high a price to the administration of criminal justice and the protection of the rights of the people; and
(c) the desirability of bringing wrongdoers to justice ; and
(d) the undesirability of the effect of giving curial approval or encouragement to the state and its agents or officials to act unlawfully; and
(e) whether the commission of any offence itself has been procured by the unlawful acts of the state or its agents or officials; and
(f) whether the considerations of high public policy that protect the fair and just administration of criminal justice , on balance , outweigh the public interest in the conviction of an accused.
(g) The judiciary must set its face against the unlawful actions of state officials.
(4) Evidence obtained in breach of:
(i) legal professional privilege; or
(i) in breach of article 29 (1) (a) to (f) : must be excluded.
(5) Evidence that has been obtained in a manner which violates constitutional rights or any statutory safeguard may be admitted into evidence if the accused deems it to be beneficial to the accused defence.

Comment on the above provision

This provisions is consistent with the UN convention on minimum standards for the treatment of prisoners, the ICCPR, Universal declaration, and is an adaption of the south African provision and Australian Common law. The courts have adjudicated on nearly every right apart from 2.(e) to (k).

With reference to chapter 1, which describes the attempt of the QLD government to refuses to have a bill of rights, based on the experience of the Canadian courts which stayed thousands of cases because of undue delay, the courts here are well suited to apply any such provision[243].

[243] For instance see the cases of R v David Peter Cain (No.1) [2001] NSWSC 116 (1 March 2001)http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme%5fct/2001/116.html?query=title+%28+%22cain%22+%29 and EDGAR MICHAELS v. THE QUEEN F.C. 95/028 [1995] HCA 8; (1995) 130 ALR 581 (1995) 69 ALJR 686 (19 February 1995)http://www.austlii.edu.au/au/cases/cth/HCA/1995/8.html

An added provision is that of courts not being allowed to give more weight to evidence from state officials over that of other citizens. That is because there have been numerous instances where the courts of Australia and Canada for instance, have had to say that there should be no such presumption that police would not lie[244] .

The courts have shown that they are able to deal with the issue of illegally obtained evidence and its admittance in proceedings[245] . The courts must set their face against the illegal behaviour of state officials and entrapment. However, there has been an example in Australia where evidence that was obtained in breach of a statutory safeguard was not admitted even when the accused submitted that it would be beneficial to the defence[246].

Whilst privileged communications can be intercepted by the state to protect the safety of the people the evidence must be excluded[247] .

Generally, where people have given confessions whilst they are in custody in absence of a legal representative that evidence will not be excluded as long as it can be proved that it was voluntary. If a person is not allowed to contact their embassy generally that evidence will be excluded [248].Chapter 3 adequately discusses the need for such protections.

29(3) (g) refers to the issue of the assistance of a non lawyer in certain circumstances during a trial. Such a friend is commonly known as a “McKenzie Friend”[249]

Limitation of rights

30. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;

---

[244] See R v RDS [1997] 3SCR 484 ,“Judicial Impartiality and Judicial Neutrality” [2000] Australian Bar Review 212 at 215 and 218 , John Dennis Tegg (1982) 7ACRIMR 188 applying Cook v Russell .

[245] *see such cases as R v Ireland [1970] 126 CLR 321, Bunning v Cross (1978) 141 CLR 54 , The Queen v Stafford [1976] SASR at 400-402, Foster v The Queen [1993) 67 ALJR 550, Ridgeway v The Queen [1995] 69 ALJR 484 and Nicholas v The Queen [1998] HCA 9 (2 February 1998) http://www.austlii.edu.au/au/cases/cth/HCA/1998/9.html*

[246] R v Byster [2001] SASC 343.
[247] Carmody v Mackellar [1997] 148 ALR 210 at 212.
[248] Tan Seng Kia v R [2001] 160 FLR 26

[249] *Pat Coleman: Info sheet on "McKenzie Friends" for unrepresented litigants , filed at http://melbourne.indymedia.org/news/2004/05/69862.php*

(d) the relation between the limitation and its purpose;
(e) less restrictive means to achieve the purpose; and
(f) that the right can only be subject to such reasonable limits prescribed by law .
.
(2) Except as provided in subsection (1) no law may limit any right entrenched in the Bill of Rights.

Comment on the above provision

This provision where it refers to laws relating to "laws of general application" would abolish "ad hominem" legislation directed at one person, and bill of pains or penalties.

There have been many instances where governments have attempted to make such laws and they have been struck down at common law due to the underlying principles of Chapter 3 of the current constitution.

The matters to be taken into account are a codification of the judicial method of characterisation of laws as legitimate or disproportionate. The courts will have no problem with such provisions.

Enforcement of rights

31.(1) Anyone listed in this section has the reasonable right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
(a) any adult reasonably acting in their own interest;
(b) anyone reasonably acting on behalf of another person who cannot act in their own name;
(c) anyone reasonably acting as a member of, or in the interest of, a group or class of persons;
(d) anyone reasonably acting in the public interest; and
(e) an association reasonably acting in the interest of its members.
(f) It is reasonable to expect that persons should first take measures within their means and resources to seek legal representation and advice before approaching a court for any remedy.
(2) Any person who has been detained or has been violated in a manner which violates this bill of rights or the common law has an enforceable right to reasonable compensation.

Comment on the above provision

The above provision is a reflection of the powers of all courts to allow actions properly bought by self represented persons and persons with an interest or right to enforce. Together with s75 of the constitution it gives open standing to persons to enforce the constitution without the rigmarole of reciting precedent after precedent.

The emphasis on "reasonably acting" leaves open the common law and statutory means for courts to prevent abuses of process and cases brought without prospect of success. Vexatious litigants will find no comfort in the discretion.

This provision in conjunction with article 18 provides a national open standing provision to protect the environment.

There is an onus on self represented person to first seek aid and act for themselves only in a last resort. The courts have dealt with such matters for more than a century and will have no trouble with such a provision.

Interpretation of Bill of Rights

32. (1) When interpreting the Bill of Rights, a court, tribunal or forum -
   (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
   (b) must, if necessary, consider international law; and
   (c) may consider foreign law;
   (d) however, international trade agreements, whether multilateral or bi-lateral may not impinge on the rights and freedoms enshrined in this constitution.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Comment on the above provision

As has been discussed in this submission , there have been many criticisms by labor and coalition figures of any form of a bill of rights on the basis that it provides for a shift away from parliamentary supremacy (which means absolute uncontrollable despotic power) , and transfers too much political power to the judiciary.

That suggestion has no legs. It provides for a shift in political power to the people who have become more and more educated since federation and are supposed to be the basis of the legitimacy of any democratic state.

The argument of the status quo is that it is parliaments that make policy decisions and that the judiciary is ill suited to deal with any policy matters. If the bill of rights is enacted and entrenched, it will be because that is the way the people wanted it.

The courts in the negligence cases already discuss and weigh up policy and operational distinctions and imply duties on the state, and then through the civil

process, fine it. This is an expropriation of state funds for a public purpose, compensation and punishment[250] .

The Administrative Appeals courts can order the government to grant persons pensions for instance. The judiciary's job is to determine rights and resolve controversies.

And in Lamb v Cotongno [251], and Mengel v the Northern Territory[252] it was discussed whether exemplary damages could be awarded for unconstitutional actions by the state and whether there is such a thing as a constitutional tort. See also James v CTH [253] , and Lange v The ABC, where the issue of whether people have rights is discussed. There it is said that we have negative freedoms but no positive right, even where a right was expressed in a positive sense in s92 in the case of James, it was held to be negative, but that is a result of judicial culture, and judicial culture required that that old doctrine be repeated by the application of precedent. It is said that the operation of the constitution would strike down claimed justification for acts, and leave the tortfeasor subject to the normal operation of the common law penalties, for instance false imprisonment.

At the very least, a bill of rights would define the limits of power of officials and force them to know and observe them[254]. Whether or not new areas of torts are developed for breach of constitutional rights, a bill of rights would remove any claimed lawful justification and then leave open the normal torts for harm, damage or pecuniary losses.

This bill would clearly express rights positively; however, it is hard to see how the courts would act any differently in implying duties to persons and determining civil guilt.

The flood gates should not open unless it is the intention of the ruling classes to ignore punishments metered out to the state by the courts.

---

[250] See Such High Court cases as Pyrenees Shire Council v Day [1998] 192 CLR 330 and Brodie v Singleton Shire Council [2001] 206 CLR 512
[251] [1987] 164 CLR 1 at 7-8

[252] *NORTHERN TERRITORY OF AUSTRALIA AND OTHERS v. ARTHUR JOHN MENGEL AND OTHERS F.C. No.95/017 (1995) 129 ALR 1 at 22,23,39, http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/unrep209.html?query=%7e+mengel+v+northern+territory*

[253] [1938] 62 CLR at 362 , [1997] 189 CLR 520
[254] Mengel - ibid

Chapter 7

A suggestion for the amendment of the constitution .

A copy of the current constitution can be found at this website address:
http://www.aph.gov.au/senate/general/constitution/index.htm

Below is a draft Australian Democratic Republic Constitution which seeks to improve on the current constitution by providing for:

- A democratic republic;
- Criterion for a preamble;
- An entrenched and enforceable bill of rights;
- Privatising god by creating a secular republic with a separation of church and state;
- Replacing references to the monarch and the governor general with that of the president;
- Changing the way the members of the House of Representatives and Senate are chosen to elect the members of the house of representatives by optional preferential proportional representation , voting in the states and territories as one electorate, and voting for senators using the optional preferential system;
- Enshrining the role of the senate and its powers to compel attendance and production of documents;
- Enshrining compulsory voting and changing the persons who may be excluded from standing to allow public servants to stand;
- Creating a presidential department;
- Repealing the racist provisions of the constitution;
- Enshrining parliamentary privilege and free speech, but providing for evidence of offences (except defamation) that have been unearthed in parliamentary proceedings to be admitted into evidence in courts of law;
- Providing for a CIR Standing Committee to enquire into petitions of no less than 100 000;
- Providing for the retrieval of bad laws through refusal of assent by the president and referral to the high court for testing of validity;
- Providing for a directly elected president, vice president, presidential and vice presidential secretaries as a presidential ticket , and for the method of nomination, and then an election in a 2 stage process;
- Enshrining the prime minister as the leader of the majority of the house of reps;
- Providing for a presidential and parliamentary code of conduct with limitation of power distributed;
- Providing for the removal of the president and the presidential ticket, and governments and members of parliaments for unlawful conduct;
- Providing for emergency elections of new governments, members of parliament and the presidential ticket;
- Providing for the limitation of the power of the president to deploy the military and the power of review by the parliament;
- Providing the federal parliament with powers over criminal , civil and contract law, prisons, police, education, healthcare;

- Providing for the banning of nuclear, chemical and biological weapons and banning the bringing of them into Australian territory;
- Banning uranium mining and nuclear power and banning the visit of nuclear ships or other vessels unless in time of dire emergency;
- Enshrining the independence of the judiciary , the position of the high court , that Australia has an integrated legal system (different to the American system) , that there must be state and territory courts of appeal that cannot be abolished, that legal aid is transferred to the judiciary to administer.

The Federal Democratic Republic Of Australia Constitution Act

(Preamble)
An Act to amend the Constitution of Australia Act and to entrench and re - constitute the Commonwealth of Australia as a federal democratic republic .

(delete preamble and covering clauses 1-4)
Insert a new preamble which states that this constitution and bill of rights is necessary to proclaim

- An "Emphatic renunciation of the past" (see Brink v Kitsoff NO (1996) 3 SA 197 at 201H and par [39] at p216G-J and 217 A-F per O'Reagan J- South African Reports)
- A recognition of the human right abuses that litter our history
- The reason of state being to unite , with the consent of the people of Australia , as a secular federal commonwealth called "The Democratic Republic of Australia" , to protect and advance to the true welfare of all within the Australian jurisdiction, and that this can only be done by protecting the environment and human rights for all within our jurisdiction for the benefit of current and future generations.
- A recognition of the fact that Native Title survived invasion and settlement and is a burden on the radical title of the commonwealth and states and territories
- That the people are sovereign and that the republic is constituted as a democracy by the consent of the 1st people and the people who came after, and that we the people are the basis of the legitimacy of the state. That this preamble and the bill of rights is part of the constitution.
- After this preamble , the "Bill of Rights" , "Social Contract", "Compact" or "Bargain" should take its place before Chapter 1, to show the importance of the value of the rights and freedoms contained therein .
- ---

<u>The "Bill of Rights" , "Social Contract" ,"Compact" or "Bargain"</u>

<u>Rights</u>

1. (1) This Bill of Rights is a cornerstone of democracy and the rule of law in the Democratic Republic of Australia. It is a recognition of past racially discriminatory

laws and practices and human rights abuses in Australia's history. It is a fundamental rejection of the validity of such laws practices and actions that have adversely impacted on people's rights and freedoms in Australia. It recognises that our community has been shaped and influenced by many cultures and will continue to be shaped and influenced by the peaceful interaction of peoples and cultures from all over the planet. It recognises that the protection of fundamental rights and freedoms is of paramount importance, and that without them the security of our republic is in danger from within and without. It enshrines the rights of all people in our country, provides for the protection from abuse of human rights of all within our jurisdiction, affirms the need to protect the ecosystems within our jurisdiction for current and future generations, and affirms the democratic values of human dignity, equality and freedom.
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in the Bill.

Application

2. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. The actions or decisions of -
(i) government; or
(ii) the agents or bodies of government; or
(iii) any court, tribunal or forum in the republic , must be done or made in accordance with natural justice and in accordance with the bill of rights and other provisions of the constitution.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with the Bill
(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Equality
3. (1) Everyone is equal before and under the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair; for instance ,
(a) the state may make laws that discriminate on the grounds of sex if it is in the best interests of a child involved in a custody dispute.

Human dignity
4. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life
5.(1) Everyone has the right to life.
(2) The crime of suicide is abolished.

Freedom and security of the person

6. (1) Everyone has the right to freedom and security of the person, which includes the right -
- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of unlawful violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right -
- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.

Slavery, servitude and forced labour
7.(1) No one may be subjected to slavery, servitude or forced labour.
(2) However, this provision does not affect the ability of the republic to reasonably require its citizens to take part in the defence of the republic from invasion, or to become members of the military forces or civilian labour forces in times of dire emergency.
(3) If citizens are required for the purposes of ss(2) to take part in such service, they shall be adequately recognised for their sacrifice and , renumerated and compensated for such time in service .

Privacy

8. Everyone has the right to privacy, which includes the reasonable right not to have -
- (a) their person or home unlawfully searched;
- (b) their property unlawfully searched;
- (c) their possessions unlawfully seized; or
- (d) the privacy of their communications unlawfully infringed.

Freedom of religion, belief and opinion

9(1) (a)Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(b) Everyone has the right to manifest their religion;

(c) The state may not impose any religion or any religious observance on the people.

(d) Every person has the moral right, obligation and duty to disobey manifestly unlawful commands.

(2) Religious observances or teachings may not be imposed or conducted at state institutions unless, for instance , a patient who cannot leave a health care institution or a prisoner or prisoners wish of their own accord to observe and manifest their own religion ;

(a) Religious observances or teachings may not be conducted at state-aided institutions, unless; it is an institution that is provided with grants or subsidies , to improve the rights of Aboriginal (including Ethnic Torres Straight Islander) Australians to maintain and teach their original languages and culture; and,

(b) they are conducted on an equitable basis; and

(c) attendance at them is free and voluntary; or

(d) the aid to that institution is for the provision of basic , state required curriculum.

(e) Religious observances or teachings may not be conducted in the parliaments, local governments or the courts , tribunals or forums of the commonwealth , states , territories and/or regions unless:

(i) it is , an elected aboriginal or Torres Straight Islander representative body observing its pre-colonial customs and religions, or for (2)(e), to recognise an Aboriginal Australian (including Ethnic Torres Straight Islander) custom before beginning a proceeding or at its end;

(3) This article does not prevent legislation recognising -

(a) marriages concluded under any tradition, or a system of religious, personal or family law; or

(b) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion;or

(e) State funerals that are conducted in accordance with the beliefs or known wishes of the deceased; or if this is not known-

(i) in accordance with the beliefs or known wishes of the deceased family or if this is not known;

(ii) a non dominational service; however

(iii) a state or community, service , observance or remembrance, or day of observance or remembrance for fallen military personnel , or for the recognition of military veterans – must be non dominational.

(d) Men and women of marriageable age have the right to marry and to found a family, provided that marriage is freely entered into by consent and without intimidation or coercion of any kind;and

(i) Persons who no longer wish to be married have the right to divorce.

(e) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Freedom of expression

10. (1) Subject to the lawful exercise of powers to control military discipline, everyone has the
right to freedom of expression, which includes -
(a) freedom of the press and other media;
(b) freedom to criticise , receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(e) freedom to advocate for the taking of industrial action.
(f) subject to public safety , the reasonable and lawful requirements of personal identification in each circumstance, workplace safety laws and regulations , and public hygiene , freedom to wear religious icons and wear clothing appropriate to the free manifestation of ones religion .

(2) The right in subsection (1) does not extend to -
(a) propaganda for war;
(b) incitement of imminent unlawful violence; or
(c) advocacy of hatred that is based on nationality , race, ethnicity, gender or religion, and that constitutes incitement to cause harm; and
(d) unlawful attacks on a persons reputation.

Assembly, demonstration, picket and petition

11. (1) Everyone has the right to present petitions .
(2) Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to solicit signatures in a public place.
(3) A "public place" includes:
(a) a road;
(b) a place normally open to the public;
(c) a place for the time being open to or used by the public, whether or not-
(i) the place is ordinarily open to the public;
(ii) by the express or implied consent of the owner or occupier; or
(iii) on the payment of money

Freedom of association

12.(1) Everyone has the right to freedom of association.
(2) This right is subject to laws allowing for compulsory membership of university student organisations and allowance for legitimate conscientious objection to membership of such an orgaisation.

Political rights

13. (1) Every citizen is free to make political choices, which includes the right -
(a) to form a political party;
(b) to participate in the activities of, or recruit members for, a political party; and
(c) to campaign for justice, a political party or cause; and
(d) to take part in the conduct of public affairs.
(e) The military forces, and security intelligence apparatuses of the republic shall not interfere in the civil affairs of the people.

(2) Every citizen has the right to free, fair and regular elections for any legislative body of the states and as established in terms of the Constitution.
(3) For the purpose of protecting the integrity of the republic , and keeping the legislative bodies accountable, registration on the voting rolls and voting in any election for a legislative body, which includes local government, is compulsory for those obtained of the age of 16.
(4) Every citizen who has obtained the age of 16 years has the right -
(a) to vote in elections for the president , and the parliaments of the commonwealth, states, territories, and local and/or regional governments, and to do so in secret; and
(b) if the person has obtained the age of 18 years , to stand for public office in such bodies or to stand for president of the republic, and, if elected, to hold office;
(c) a citizen must be given adequate time and opportunity to be able cast a vote in any ballot or plebiscite or other vote in which a vote of the citizen is required, and to be nominated to stand in any legislative election stated in article 4(a) , or the or presidential election , or any other body in which citizens shall be entitled to be elected to as the governments provide for as from time to time subject to article 3(2).
(d) the parliaments of the republic , states and territories may provide that other classes of persons have the right, if they have obtained the age of 16 years , to vote in any ballot in which they have the powers to pass laws in respect of ;
(e) however, persons with dual citizenship, an electoral officer or employee of an electoral body ; and
(f) persons in prison who will not be released before the nomination process for an election, or a person who is precluded by s44 of the Constitution from standing for office in the parliament of the republic or from being elected to such office, may not stand or be elected to such legislative bodies.
(g) The principle of one vote- one value is guaranteed.

Citizenship

14. No citizen may be deprived of citizenship of the republic, unless;
(a) that person has obtained citizenship through fraud or illegality; or
(b) a person who no longer wishes to be a citizen of this republic may give up their citizenship and adopt a new one , but remains a citizen of the republic until foreign citizenship is official.
(c) The parliament must enact legislation providing for reasonable exceptions to the deprivation of citizenship based on the international law relating to non re-foulment and the gravity of any illegality.
(d) A person born in the republic is a Citizen of the republic.

Freedom of movement and residence

15. (1) Everyone has the right to freedom of movement.
(2) Everyone has the right to leave the Republic.
(3) Every citizen has the right to enter, to remain in and to reside anywhere in the Republic.
(4) Every citizen has the right to a passport, unless it is necessary in the interests of justice to prevent a person obtaining or holding a passport;
(a) for the purposes of ensuring a persons attendance in a court of law; and

(b) for the purposes of ensuring that a person who is about to be sentenced , or who has been sentenced and gaoled - does not flee justice.

Freedom of trade, occupation and profession

16. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Labour relations

17. (1) Subject to the rights of citizens to join and be a member of a trade union and not to be unreasonably and unlawfully deprived of their employment- everyone has the right to work; and the right;

(a) to free choice of employment
(b) to fair labour practices: and
(c) to just and favourable conditions of work and to protection against unemployment and;
(d) subject to the common law in relation to voluntary assumption of risk , to a safe workplace and work environment; and
(e) to equal pay for equal work and otherwise to just and fair remuneration for skill, work and labour provided ; and
(f) to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay; and
(g) to procedural fairness in matters affecting their employment , and termination of that employment.

(2) Every worker has the right -
(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and
(c) subject to the lawful exercise of powers to control military discipline, to strike
(d) It is expected by the people, that members of the military forces of the republic will peacefully and lawfully collectively bargain with the parliament of the republic through submissions to parliament.

(3) Every employer has the right -
(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation.
(c) The people of Australia are the employers of the military forces of the republic: and
(d) The remuneration of the members of the military forces of the republic shall be fair and just and shall be as determined by the parliament of the republic.
(e) Subject to article 2(c) and (d) and 3(c) and (d) the parliament shall have regard to, and in a fair and just manner take account of the submissions of the members of the military and the people on the matter of remuneration , and working conditions of the members of the military forces of the republic.

(4) Every trade union and every employers' organisation has the right -
(a) subject to article 2(c) and (d) , to determine its own administration, programmes and activities; and
(b) to organise; and
(c) to form and join a federation, however , any trade union comprising of members of the military forces of the republic, shall only have the right to join

a national federation that advocates only for the members of the military forces of the republic .

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining.

(6) National legislation may recognise union security arrangements contained in collective agreements.

Environment

18. (1) Everyone has the right -

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected by the federal government, for the benefit of present and future generations, and reasonably conserved for its own intrinsic value, through legislative and other measures that -

(c) (i) prevent pollution and ecological degradation and loss of biodiversity;

(ii)promote conservation

(iii) promote justifiable economic and social development. consistent with this section.

(2) Any person has the right to object if the right in this section is not observed and the right to expect that government will accept and act on a reasonable objection.

(3) The actions or decisions of -

(i) government; or

(ii) the agents or bodies of government; or

(iii) any court, tribunal or forum in republic , must be done or made in accordance with the precautionary principle.

(4) The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental or ecological damage.

Property (merely a suggestion- as such a section should be negotiated by and with indigenous Australians)

19.(1) Everyone has the right to own property alone or in association with others.

(2) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(3) Property may be expropriated only in terms of law of general application -

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(4) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) purpose of the expropriation.

(5) However, if the state wishes to acquire lands or interests that are subject to native title, or reasonably under native title claim , or allow others to acquire such lands,

the state must engage in negotiation with native title holders or claimants and cannot acquire or allow to be acquired such lands or interests unless there has been a negotiated settlement or, failing this, a court order.

Housing

20. (1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, except in accordance with national legislation regarding fair and reasonable tenancy arrangements .
(4) No legislation may permit arbitrary evictions.

Health care, food, water and social security

21. (1) Every citizen has the right to have free access to -
(a) adequate health care services, including elective surgery, medicines ,dental, reproductive and mental health care, if the person is a person under the protection of, or is imprisoned by the state , adequate health care services, including elective surgery, medicines ,dental, reproductive and mental health care; and
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(d) Everyone has the right to a standard of life, and of living, adequate for the health and well-being of themselves and of their families.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.

Children

22. (1) Every child has the right -
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to nutrition, shelter, reasonable health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that -
(i)are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or , moral or social development;
(iii) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under provisions of this bill , the child may be detained only for the shortest appropriate period of time, and has the right to be -
(iv) kept separately from detained persons over the age of 18 years; and
(v) treated in a manner, and kept in conditions, that take account of the child's age;
(vi) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(vii) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

Education

23. (1) Everyone who is an Australian citizen or who is under the protection of the state has the right -

(a) to a free education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that -

(a) do not discriminate on the basis of race, unless , that institution has been set up by , and for indigenous Australians for the purposes of teaching and maintaining Australian indigenous languages and culture;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(d) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. As well as providing a basis for employment, it shall promote understanding, tolerance and friendship among all nations and racial or religious groups, and shall further the maintenance of peace the protection of the environment.

(4) Subsection (2) does not preclude state subsidies or grants for independent educational institutions.

Language and culture

24.(1) Everyone has the right to use the language and to participate in the cultural life of their choice, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author. This right may be waived.

(3) The Indigenous peoples of Australia have the right;

(a) to have their ancient grave sites , where those places are, and whether or not native title has been extinguished over those places: and

(b) rock paintings, rock drawings and rock art and carvings and other types of such things attached to the earth and/or its flora, where those places are, and whether or not native title has been extinguished over those places in the republic; protected from unnatural damages by the state and for them to be respected and preserved, and for the state to provide for severe punishment including a prison term for such damage, unless those people or peoples have consented to such damage or interference with such things; and

(c) to have artefacts including, relics, bones , body parts and icons and other such things of cultural significance that have been wrongfully taken from them , returned to them without further damage and for the state to assist in the return of such things.

(4) No one exercising the rights in 24(1) , (2) and 3(c) may do so in a manner inconsistent with any provision of the Bill of Rights:-
(a) for instance, a state educational institution must teach in English unless another language is part of the state curriculum ,and, that extra language is complementary to the teaching of English.

Cultural, religious and linguistic communities

25. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community -
- (a) to enjoy their culture, practise their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Access to information

26. (1) Everyone has the right of access to -
- (a) to any information held by the state;
- (b) concerning themself without charge; and
- (c) any information that is held by another person and that is required for the exercise or protection of any rights.
- (d) any proceeding against a state official or officials in which such officials are being proceeded against , or are being disciplined, and for the abrogation of any constitutional or statutory rights, or for any offence.
- (e) news and current local, state, territory , regional and international affairs that may affect a choice to stand or chose a representative in the electoral process , through a public owned, run and funded national broadcaster .
- (f) the proceedings, debates, minutes and all other records of the proceedings of the legislatures and governments, and laws and regulations at all levels free of charge.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Just administrative action

27. (1) Everyone has the right to administrative action that is lawful, reasonable, just, and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must -
- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote a just administration.

Access to the seat of government, offices of the state, courts , and the public ports airports and railways.

28.(1) All citizens have the reasonable right of access to the seats of government of the republic , states, territories, and local and/or regional governments , through attendance in the public galleries when parliamentary or legislative or committee proceedings are taking place.
(2) All citizens have the reasonable right of access to, and the right to communicate with, and to receive available services from the offices of the state normally open to the public, and, to conduct their business with the organs of the state and its administrative bureaucracy.
(3) All citizens shall have equal and reasonable access, and employment in the public service of the republic at all levels of government.
(4) All citizens have the reasonable right to access the public ports airports and railways for the purposes of travel throughout the republic, and to enter and leave it.
(5) Everyone has the reasonable right to access justice, and to have any dispute that can be resolved by the application of law decided in an independent, fair and impartial public hearing before a court or, where appropriate, another independent , fair and impartial tribunal or forum.
(6)A party or witness in any proceeding who does not understand or speak the language in which the proceedings are conducted or who is deaf or blind or impaired has the right to the assistance of an interpreter or to the means with which to express themselves to give evidence.
(7) Subject to the interests of justice, public safety and common law procedures and customs, everyone has a reasonable right to be present and watch the proceedings and see justice done in any court, tribunal or forum exercising judicial power.
(8) Article 28. is subject to reasonable restrictions relating to normal opening times ,public safety and national security .

Arrested, detained and accused persons

29. (1) Everyone who is arrested for allegedly committing an offence has the right -
(a) to remain silent ;
(b) not to be compelled to make any confession or admission that could be used in evidence against that person; and
(c) to be informed promptly -
(d) at the time of arrest , in substance , of the true reason for the arrest and or detention; and
(e) of the right to remain silent of the right to contact a friend and/or to obtain a legal representative and to be provided with the means to do so without undue delay; and
(f) of the consequences of not remaining silent;
(g) if that person is a foreign national or under the protection of another country, of the right to contact that persons consulate or embassy and to be provided with the means to do so without undue delay;
(h) to be brought before a court without undue delay; and
(i) at the first court appearance after being arrested, to be formally charged or to be informed of the reason for the detention to continue, or to be released; and
(j) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(k) No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

(2) Everyone who is detained, including every sentenced prisoner, has the right -

(a) to be informed promptly of the true reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner of the persons choice assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to seek habeas corpus, to be released and to be reasonably compensated;

(e) not to be held in detention as a result of the criminal process by any organisation but the state, and , the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of healthy, adequate hygienic accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's -

(g) spouse or partner;

(h) next of kin;

(i) chosen religious counsellor; and

(j) chosen medical practitioner; or

(k) a person or organisation or body that serves or is purported to serve as an accountability or complaints mechanism (which includes non government organisations)for persons detained, and has the reasonable right have any complaint about the persons detention investigated and dealt with promptly and fairly.

(3) Every accused person has a right to a fair trial, which includes the right -

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary court;

(d) to a reasonable right to a trial before a jury (except in the case of an offence under military law tried before a military tribunal) for a matter that has traditionally been known as an indictable offence, but has the right to waive this right.

(e) to have their trial begin and conclude without unreasonable delay;

(f) to be present when being tried;

(g) to choose, and be represented by, a legal practitioner, or by themselves and to be informed of this right promptly; and

- if the person wishes to represent or defend themselves, to reasonably have a friend present in the court to take notes and give quiet advice to the person in order to assist.

(h) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(j) to adduce and challenge evidence , knowing that there is no presumption operating in favour of evidence given by state officials over that of other citizens;

(k) not to be compelled to give self-incriminating evidence;

(l) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(m) to have a transcript of evidence provided free of charge if the person is poor, before the final submissions in the case;

(n) not to be detained or convicted for an act or omission that was not an offence under either national , state, territory, local or regional laws within the republic or international law at the time it was committed or omitted;

(o) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted , meaning, that a person must not be subjected to the detriment of what is known as double jeopardy;

(p) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) of reasonable appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) (1) Evidence obtained in a manner that violates any right in the Bill of Rights may be excluded;

(2) The discretion to refuse to admit evidence extends to:

(i) real evidence of facts and things obtained as a result of unlawful conduct on the part of the state (non confessional evidence) ; and

(ii) confessional evidence ; and

(iii) the elements of the alleged offence.

(3) The matters to be taken into account in determining whether the discretion to exclude such evidence should be exercised include;

(a) the common law prior to the coming into force of this bill of rights, which remains in force- to the extent that it is not in conflict with the bill; and

(b) whether that evidence may have been obtained at too high a price to the administration of criminal justice and the protection of the rights of the people; and

(c) the desirability of bringing wrongdoers to justice ; and

(d) the undesirability of the effect of giving curial approval or encouragement to the state and its agents or officials to act unlawfully; and

(e) whether the commission of any offence itself has been procured by the unlawful acts of the state or its agents or officials; and

(f) whether the considerations of high public policy that protect the fair and just administration of criminal justice , on balance , outweigh the public interest in the conviction of an accused.

(g) The judiciary must set its face against the unlawful actions of state officials.

(4) Evidence obtained in breach of:

(i) legal professional privilege; or

(i) in breach of article 29 (1) (a) to (f) : must be excluded.

(5) Evidence that has been obtained in a manner which violates constitutional rights or any statutory safeguard may be admitted into evidence if the accused deems it to be beneficial to the accused defence.

Limitation of rights

30. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose;
(e) less restrictive means to achieve the purpose; and
(f) that the right can only be subject to such reasonable limits prescribed by law .

(2) Except as provided in subsection (1) no law may limit any right entrenched in the Bill of Rights.

Enforcement of rights

31.(1) Anyone listed in this section has the reasonable right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

(a) any adult reasonably acting in their own interest;
(b) anyone reasonably acting on behalf of another person who cannot act in their own name;
(c) anyone reasonably acting as a member of, or in the interest of, a group or class of persons;
(d) anyone reasonably acting in the public interest; and
(e) an association reasonably acting in the interest of its members.
(f) It is reasonable to expect that persons should first take measures within their means and resources to seek legal representation and advice before approaching a court for a any remedy.

(2) Any person who has been detained or has been violated in a manner which violates this bill of rights or the common law has an enforceable right to reasonable compensation.

Interpretation of Bill of Rights

32. (1) When interpreting the Bill of Rights, a court, tribunal or forum -

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must, if necessary, consider international law; and
(c) may consider foreign law;
(d) however, international trade agreements, whether multilateral or bi-lateral may not impinge on the rights and freedoms enshrined in this constitution.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The effect of this constitution

(1) This Act, and all laws lawfully enacted by the Parliament of the Republic subject to this Constitution, shall be binding on the courts, judges, and people of every State, territory, and of every part of the Republic and its jurisdiction, notwithstanding anything in the laws of any State; and the laws of the Republic shall be in force on all Australian ships and aircraft.
(2)"The Republic" shall mean the Federal Democratic Republic of Australia as established under this Constitution.
(3)(a) "The States" shall mean New South Wales, Queensland, Tasmania, Victoria, Western Australia, South Australia and the Northern Territory and such territories as may be admitted into or established by the Republic as States; and each of such parts of the Republic shall be called "a State".
(3)(b) All areas that were a part of the commonwealth of Australia, or were under its jurisdiction prior to the coming into force of this constitution, are a part of, continue to be a part of the republic, or continue to be under its jurisdiction as the case may be.
(4) "Original States" shall mean such States, as are parts of the Republic at its establishment.

The Constitution of the Republic shall be as follows:--

Chapter I. The Parliament.

Part I.--General.

1. The legislative power of the Republic shall be vested in a Federal Parliament elected by the people, which shall consist of a Senate, and a House of Representatives, and which is herein-after called "The Parliament," or "The Parliament of the Republic."

2. A **president** elected **by the people** shall be the leader of the Republic. There shall be a vice president, secretary to the president and a secretary to the vice president who shall have and may exercise in the Republic - subject to this Constitution, such powers and functions as the people and the parliament may assign.

3.(1) There shall be payable to the president out of the consolidated Revenue fund of the Republic, for the salary of the president, an annual sum which shall be as the Parliament provides. The salary of the president shall not be altered during the president's continuance in office.

3.(2) There shall be established , a department of the president and vice president.

3.(3) This department shall be adequately funded by a reasonable appropriation or appropriations as required , from the consolidated revenue fund of the republic by the elected president. Any such appropriation shall be subject to the normal scrutiny and review by the parliament on behalf of the people. To put it beyond doubt, subject to the laws relating to official secrets and national security, the presidential ticket and department must be accountable to the people

3.(4) It shall have such staff and resources as required and appointed by the presidential ticket for the efficient functioning of the department and the carrying out of its constitutional functions according to law .

3.(4) (a) **Transitional provision.** This provision **(s3.(4) (a))** shall expire after the election and the taking of office of the first presidential ticket. There shall be an appropriation by the parliament equal to one and one third of the appropriation or funding for the functioning of the last department of the prime minister and cabinet or (like body), to the department of the president and vice president for its future functions and for the remuneration of the incoming presidential ticket. The funding for an incoming elected parliament shall continue to be raised in the manner it has been before the coming into force of this constitution.

3.(6) The remuneration of the president of the republic shall be determined by the normal remuneration mechanisms of the parliament according to law , but shall be no less than the prime minister of the government of the republic .The remuneration of the vice president of the republic shall be determined by the normal remuneration mechanisms of the parliament according to law but shall be no less than the deputy prime minister. The remuneration of the secretaries to the president and vice president of the republic shall be determined by the normal remuneration mechanisms of the parliament according to law but shall be no less than a cabinet minister in the government.

4. The provisions of this Constitution relating to the president of the republic extend and apply to the president and vice president of the republic, as this constitution requires.

5.(1) The president in consultation with and on the advice of leader of the majority of the house of representatives (The Prime Minister of the Government of the Republic), may appoint such times for holding the sessions of the Parliament as is necessary to adequately conduct the business of the parliament . And may also from time to time in consultation with, and on the advice of the leader of the majority of the house of representatives and in accordance with this constitution, by Proclamation or otherwise, prorogue the Parliament.

5.(2) The House of Representatives, and the half of the Senate which is due for re-election, is taken to have been dissolved one calendar month before the date for the federal general election required by this constitution. It is the duty of the electoral bodies responsible for the conduct of elections to be ready for any election conducted in accordance with this constitution to be ready for such election one calendar month before the last possible time for the dissolution of the parliament (due to be dissolved).

5.(3) The Parliament shall be summoned to meet not later than six months after the establishment of the Republic.

6. There shall be a session of the Parliament at least once in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

Part II.--The Senate.

7. (1) The Senate shall be composed of senators for each State and territory , directly chosen by the people of the State and/or territory, voting, until the Parliament otherwise provides, as one electorate.

7.(2) The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor of each state, and the chief minister of each territory to the president of the Republic

8. The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

9. (1) The method of choosing senators shall be by optional preferential -proportional representation , which electors shall be free to place a number in order of preference , in one , or a consecutive number of places on the ballot paper , provided for that purpose , and shall be free to exhaust preferences as the elector so desires.

9.(2) Subject to this constitution, the Parliament of a State may make laws for determining places of elections of senators for the State.

10. Repeal

11. Subject to this constitution, the Senate may not vote on any bill unless and until all senate vacancies are filled.

12. The Governor of any State or Chief Minister of any territory must cause writs to be issued for elections of senators for the State, subject to this constitution, as required by the president of the republic.

13. For the purpose of this section, the term of service of a senator shall be taken to begin one day after any election in which the senator was elected, even if the vote was not declared until later and shall cease at 1159 pm on the day before the senator's 3 or 6 year term is expired. Where a senator gives notice of an intent to leave office on a specific date, an election shall be called for that office immediately but the elected person shall take office only when that office has been vacated.

14. Whenever the number of senators for a State is increased or diminished, the Parliament of the republic may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

15. (1) If the place of a senator becomes vacant before the expiration of the senator's term of service, the Houses of Parliament of the State or Territory for which the senator was chosen, sitting and voting together, shall choose a person to hold the place until the expiration of the term as a matter of urgency, unless that person was an independent senator. Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State or Territory , and, at the time when the senator was so chosen, the senator was publicly recognised by a particular political party as being an endorsed candidate of that party, and publicly represented her/himself to be such a candidate, a person chosen or appointed under this section in consequence of

that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

15.(2) Where--in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and

15.(3) Where--before taking the senator's seat the senator ceases to be a member of that party (otherwise than by reason of the party having ceased to exist), the person shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with section twenty-one of this Constitution. A person elected or appointed to the senate on a party ticket, who resigns from that party whilst still holding office as a senator shall be taken to have vacated the office of senator on the day of that resignation,.

15.(4) The name of a senator chosen or appointed under this section shall be certified by the Governor or chief minister of the State or territory to the president immediately.

15.(5) Where- the person who has vacated the persons senate place, by death or resignation, was not a member of a political party and was an independent senator, then, the president of the republic shall cause a by-election to be held in the state or territory in which the senator who has vacated the seat was elected - no less then 40 days after the seat is vacated and no less than 30 days after the close of nominations. The term of the senator elected at such election shall expire at the time it would have if that senator had been the previous senator. If that senators term would have expired within that 30 days and the electoral nominations process for a normal election has closed, then, a by- election must be held 30 days after that ballot , and the senator elected for that state or territory is taken to have begun the senators term at the time of the general election. That senator shall hold office for 3 years or 6 years conditional on how much of the previous senator's term was unfulfilled,

Transition provisions (ss 15(6) to 15(9) shall expire after its conditions have been met)

15.(6) Within 6 months of the coming into force of this constitution, there shall be internal parliamentary ballots held in accordance with this constitution (and as the parliament provides in respect of a federal act for local or regional government) in which half of the senators to be chosen for each state or territory, shall be elected for a 3 year term , and half for a 6 year term .

15.(7) If, the number of senators to be chosen for each or any territory is lower than that of a state, then, one half of the senators to be elected for that territory shall be elected for 3 years, and the other half shall be elected for 6 years, and then, there shall be an equal distribution (or as close as practicable) of the numbers of senators to be chosen in each state who will be elected for a term of 3 years, and equal number (or as close as practicable) to be chosen for 6 years. A territory which is entitled to have representation in the House of Representatives shall have no less than one senator.

15.(8) At the first election, the political party in each state, with the most votes in the quota shall be numbered "GROUP A", and the political party with the 2nd and 3rd and 4th (Etc - consecutively as the case requires) shall be numbered "GROUP B" AND "C" -(ETC consecutively as the case requires). Independent's shall be placed in a group called "independent's". They shall be placed on a list with those 1st on their party's ticket 1st and 2nd (Etc - consecutively as the case requires). The independents shall be listed after the party's in order of the highest number of votes obtained by each, an independant shall be placed before a party if the person has obtained more votes than the party, and if a number be equal between 1 or a number of them for a position on the list , their names shall be chosen by chance and they shall be accorded a place on the list (for that position) according to that chance. Then, the first person in "group A" shall be taken to have been elected for 6 years and every second person thereafter throughout the list for 3 years.

15.(9) At the next election as mandated by this constitution, those who have be chosen by the parliament for 3 years shall be due to stand election again (if they so chose to stand), and those who have been chosen by the people of the states and territories at the next election shall be chosen for 6 years . Thereafter, the terms for senators shall be fixed for 6 years and no less. Thereafter, subject to this constitution, the method of election for senators shall continue in the "staggered" manner as it had before the coming into force of this constitution. **(note- an experiment on the numbers should be undertaken to see if this system works, if it doesn't , another system should be devised)** The number of members to be chosen in each State and territory at the first election shall be as the numbers of senators were at the time of the coming into force of this constitution.

16. The qualification of a senator shall be the same as those of a member of the House of Representatives.

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the office of Senate President becomes vacant the Senate shall again choose a senator to be the Senate President. The Senate President shall cease to hold office if the Senate President ceases to be a senator. The Senate President may be removed from office by a vote of the Senate, or may resign the office or senators seat by writing addressed to the President of the Republic.

18. Before or during any absence of the Senate President, the Senate may choose a senator to perform the Senate Presidents duties in the Senate Presidents absence.

19. A senator may by writing addressed to the Senate President, or to the President of the Republic if there is no Senate President, or if the Senate President is absent from the Commonwealth, resign the senator's place, which thereupon shall become vacant.

20. The place of a senator shall become vacant if for two consecutive months of any session of the Parliament the senator, without the permission of the Senate, fails to attend the Senate.

21. Subject to this constitution, whenever a vacancy happens in the Senate, the Senate President, or if there is no Senate President or if the Senate President is absent from

the Commonwealth the President of the Republic, shall notify the same to the Governor of the State or territory as the case may be in the representation of which the vacancy has happened.

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers, unless there is a senate vacancy, which must then be filled before any vote can be undertaken.

23.(1) Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The Senate President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

23.(2) The role of the senate , in additions to its powers of enquiry into any other matter, is as a house of review and scrutiny of the actions of government and the parliament on behalf of the people. The senate may conduct inquiry and compel the production of documents and attendance of persons in the exercise of its powers of review. This section does not prevent enquiries and review by the House of Representatives or joint enquiries of both houses.

Part III.--The House of Representatives.

24.(1) The House of Representatives shall be composed of members directly chosen by the people of the Republic and the number of such members shall be, as nearly as practicable, twice the number of senators. The number of members chosen in the several States or territories shall be in proportion to the respective members of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:--

24.(2) A quota shall be ascertained by dividing the number of the people of the Republic, as shown by the latest statistics of the Republic, by twice the number of senators:

24.(3) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

Repeal and enact a new s25.
25. The prime minister of the government of the republic shall be the member of the house who has the support of the majority of the house for that position.

26. Repeal

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the President of the republic in accordance with this constitution.

29. Each State and territory shall be one electorate, and the method of election of members of the House of Representatives shall be by the optional preferential - proportional representation system.

30. Repeal

31. The right of citizens and of other persons to vote (as provided by the parliament) and stand for election subject to this constitution shall be uniform for federal general, state or territory, or local and regional elections within the republic.

32. The President of the Republic in Council (the presidential ticket) must cause writs to be issued for general elections, and local elections, 6 months before the due date for the general elections or otherwise as required by this constitution. The houses of government (excluding senators with 3 years left to serve) are taken to have been dissolved 1 calendar month before the due date for an election. In the month before any election, the President of the republic (supervised by the Chief Justice of the high court of Australia) is the administrator of the republic, and the governor of each state and chief minister of each territory is the administrator of that state or territory with the administrator of local governments as the parliament of the republic provides.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue a writ for the election of a new member, or if there is no Speaker or if the speaker is absent from the Republic, the President of the Republic in Council must issue the writ for an election to be held as soon as possible no less then 40 days after the seat is vacated and no less than 30 days after the close of nominations. If that member has vacated the office, and the electoral nominations process has closed for a normal election , then, a by- election must be held after that ballot , one calendar month after the close of nominations for that by-election. The member elected is taken to have begun the member's term at the time of the general election. That member shall hold office for 3 years conditional on how much of the previous member's term was unfulfilled, or till the next general election as the case may be.

34. Repeal

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker. The Speaker shall cease to hold office if the person ceases to be a member. The speaker may be removed from office by a vote of the House, or may resign from the office or seat in writing addressed to the President of the Republic.

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform the speaker's duties in the speaker's absence.

37. A member may by writing addressed to the Speaker, or to the President of the Republic if there is no Speaker or if the Speaker is absent from the Republic, resign their place, which thereupon shall become vacant.

38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament the member, without the permission of the House, fails to attend the House.

39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers, however, for the passing of any bill, no less than a simple majority of the members of the house is required.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then the speaker shall have a casting vote.

Part IV.--Both Houses of the Parliament.

<u>41. Repeal</u>

42. Every senator and every member of the House of Representatives shall before taking office make and subscribe before the President of the Republic, or the Vice President, an affirmation of allegiance in the form set forth in the schedule to this Constitution.

43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

44.(1) Any person who is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power; or

44.(1)(a) Is attained of treason, is an electoral officer or employee of an electoral body, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the republic or of a State by imprisonment : or

44.(1)(b) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the republic otherwise than as a member and in common with the other members of an incorporated company ;

44.(1)(c) Has not obtained the age of 18 full years;

44.(1)(d) shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

44.(1)(e) A person who holds an office of profit under the republic shall be taken to have vacated that office on the day of election as a member of either house. This does not apply to the office of any of the Ministers of State for the Republic.

44.(1) (f) If a person elected is a member of the military forces of the republic , or is a military forces reservist , that person must be granted a honourable discharge from the military forces effective as at the time of the person's election.

45.(1) If a senator or member of the House of Representatives--

45.(1)(a) Becomes subject to any of the disabilities mentioned in the last preceding section: or

45.(1)(b) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

45.(1)(c) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Republic, or for services rendered in the Parliament to any person or State: the persons place shall thereupon become vacant. That person shall then be permitted to stand for re-election and to be re-elected if the people wish it.

46. It is compulsory for Australian citizens not disqualified from voting to attend a voting booth and place a ballot paper in a box provided, at presidential, federal, state or territory and local government election. Voting in these elections shall be by secret ballot.

47. Subject to this constitution ,until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House or Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

48. Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance as provided by the parliament, to be reckoned from the time the person is elected.

49. Subject to this constitution the powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament.

50. Subject to this constitution, each House of the Parliament may make rules and orders with respect to;

50. (1) The mode in which its powers, privileges, and immunities may be exercised and upheld; and

50. (2) The order and conduct of its business and proceedings either separately or jointly with the other House.

Citizens Initiative.

50.(3) There shall be a parliamentary "citizens initiative" joint standing committee , which shall accept petitions signed by not less than 100 000 persons enrolled to vote , which calls for any form of constitutional change or of legislative or policy change or like change in state practices.

50.(4) The committee shall consider all such petitions and shall convene an enquiry into such matters. A petition or an enquiry under this provision, shall not lapse merely

because an election has taken place since the presentation of the petition or the convening of such an enquiry. The committee must report on its findings to the parliament and may draft such changes. The committee may recommend such changes by submitting a bill to parliament .A bill submitted to the parliament shall be treated as any other bill. This provision does not affect the right of citizens to present any other petitions, and of the parliament to accept and to consider them in the normal way.

Part V.--Powers of the Parliament.

51. Subject to this constitution , but not so as to authorise uranium mining, nuclear power, the purchase, manufacture of or testing of nuclear, chemical or biological weapons - the Parliament shall have power to make laws for the peace, order, and good government of the Republic with respect to:

(i.) Trade and commerce with other countries, and among the States:

(ii.) Taxation; but so as not to discriminate between States or parts of States:

(iii.) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Republic:

(iv.) Borrowing money on the public credit of the Republic:

(v.) Postal, telegraphic, telephonic, and other like services:

(vi.) The naval and military defence of the several States and territories, and the control of the forces to execute and maintain the laws of the Republic, and deployment of the military forces of the republic and:

(vii.) Lighthouses, lightships, beacons and buoys:

(viii.) Astronomical and meteorological observations:

(ix.) Quarantine:

(x.) Fisheries in Australian waters beyond territorial limits:

(xi.) Census and statistics:

(xii.) Currency, coinage, and legal tender:

(xiii.) Banking, also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of Australian currency:

(xiv.) Insurance, also State insurance extending beyond the limits of the State concerned:

(xv.) Weights and measures:

(xvi.) Bills of exchanging and promissory notes:

(xvii.) Bankruptcy and insolvency:

(xviii.) Copyrights, patents of inventions and designs, and trade marks:

(xix.) Naturalisation and aliens:

(xx.) Foreign corporations, and trading or financial corporations formed within, and outside(but operating within, the limits of the republic):

(xxi.) Marriage:

(xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

(xxiii.) Invalid and old-age pensions:

(xxiiiA.) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances:

(xxiv.) Criminal, civil law, contracts, police, prisons and service and execution throughout the Republic of the civil and criminal process and the judgments of the courts of the States and territories, and; the republic must make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the state, territory and local governments of the republic, and for the punishment of person convicted of such offences;

(xxv.) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States and territories:

(xxvi.) The establishment, and/or, acquisition, nationalisation and maintenance of public monopolies or industries;

(xxvii.) Immigration and emigration:

(xxviii.) The influx of criminals:

(xxix.) External Affairs including treaties, however, treaties must be ratified by the parliament:

(xxx.) (amend)Local government , Education and the environment;

(xxxi.) The acquisition of property on just terms from any State territory or person for any purpose in respect of which the Parliament has power to make laws:

(xxxii.) The control of transport with respect to transport for the naval and military purposes of the Republic, and the movements of foreign military personnel and

equipment throughout the republic, but not so as to authorise the transportation of chemical, biological or nuclear weapons, the components of those weapons and the movements of foreign military nuclear powered vessels through, on, or over Australian territory (including the Australian Antarctic territory) except for the purposes of their decommissioning or destruction (that may not take place on , in or over the Australian Antarctic territory), however , in time of dire emergency , the parliament may allow the movements of foreign military nuclear powered vessels through, on, or over Australian territory

(xxxiii.) The acquisition, with the consent of a State or territory, of any railways of the State or territory on terms arranged between the Republic and the State or territory:

(xxxiv.) Railway construction and extension in any State or territory with the consent of that State or territory:

(xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

(xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides; including the enhancement of the environment and human rights, but not so as to authorise uranium mining;

(xxxvii.) Matters referred to the Parliament of the Republic by the Parliament or Parliaments of any State or States or territory, but so that the law shall extend only to States or territories by whose Parliaments the matter is referred, or which afterwards adopt the law:

(xxxviii.) The exercise within the Republic, at the request or with the concurrence of the Parliaments of all the States or territories directly concerned, of any power;

(xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Republic, or in the Judicature, or in any department or officer of the Republic,.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Republic with respect to--

(i) The seat of the government of the Republic, and all places acquired by the Republic for public purposes:

(ii.) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government or the Republic:

(iii.) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or

payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

56. A vote, resolution, proposed law the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the President of the republic to the House in which the proposal originated and that purpose is constitutional.

57. If the House of representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the president may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the

Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the president for assent.

58. (1) When a proposed law passed by both Houses of the Parliament is presented to the President for the assent, or a treaty (or like document) is proposed to be entered into by the federal government the President of the republic shall declare, according to the Presidents discretion, and subject to this Constitution, that the president assents in the peoples name, or -the President of the republic in council may reasonably refer any Bill or a treaty (or like document) to which this section applies to the High Court for a decision on the question as to whether such Bill or treaty (or like document) or any specified provision or provisions of such Bill or treaty (or like document) is or are repugnant to this Constitution or to any provision thereof.

58(2) The President of the republic shall not sign any Bill or treaty (or like document) the subject of a reference to the High Court under this section pending the pronouncement of the decision of the Court.

58(3) The Full Bench of the High Court shall consider every question referred to it by the President of the republic under this section for a decision, and, having heard (or read) arguments by or on behalf of the Attorney General and by counsel assigned by the Court, and as the case may be - friends of the court and interested citizens (as the court allows), shall pronounce its decision on such question in open court as soon as possible, and in any case not later than sixty days after the date of such reference. However, if that 60 days is within 59 days of the end of term of government, the bill or treaty or like document lapses, yet the court may still rule on its validity, however, for the bill treaty or like document to be passed, it must go through the parliamentary (meaning constitutional) process again.

58(4) In every case in which the High Court decides that any provision of a Bill or treaty (or like document), the subject of a reference to the High Court under this Article, is repugnant to this Constitution or to any provision thereof, the President of the republic shall decline to sign such Bill or treaty or like document, and such document shall be taken never to have been assented to and shall be of no effect.

59. The President may return to the house in which it originated any proposed law or treaty (or like document) held invalid, and may transmit therewith any amendments which the President may recommend, and the Houses may deal with the recommendation.

60. A proposed law shall not have any force unless and the president of the republic makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it the president of the republic has assented.

Chapter II. The Executive Government.

61.(a) The executive power of the Commonwealth is vested in the President of the republic and is exercisable by the Vice president in the presidents stead, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

(61)(b) There shall be a secretary to the president and a secretary to the vice president- directly elected on what shall be known as the presidential election ticket.

(61)(c) The qualification for voting for and election to, and the holding of, the offices of President and Vice President of the republic is the same as that for the House of Representatives and the senate. The president and vice president, and the secretary to the president vice president-shall serve a term of 6 years. Subject to this constitution, a person who has been president of the republic shall not be entitled to run on a presidential ticket again. A vice president may run for president. A secretary to the president or vice president may either run for vice president or president, or to retain office . They shall be directly chosen by the people of the republic voting as one electorate in the following manner -

- **(i)** The general parliamentary election shall be held every three years;
- **(ii)** There shall be local government elections held every 3 years, and they shall be held 1 year before the general election;
- **(iii)** There shall be a preliminary election for the offices of President and Vice President of the Republic, secretary to the president and vice president, which shall take place at the same time as local government elections, and voting booths are to serve that dual purpose. A nomination for a team on a presidential ticket shall not be accepted unless 5000 persons who are entitled to vote at that election have nominated that ticket;
- **(iv)** The tickets short listed for the presidential election shall be entitled to run for election in that team at the federal general election which shall be held 1 year after that local government election;
- **(v)** The five Presidential election tickets with the most number of votes of the people who have voted in that election, shall be short-listed for the presidential/vice presidential election;
- **(vi)** However, if the presidential candidate on that ticket is disqualified from obtaining office or being chosen between that time, or dies, or choses not to stand, then, the vice presidential candidate is taken to be the presidential candidate, the secretary to the president candidate is taken to be the vice presidential candidate, and the secretary to the vice president candidate is taken to be the secretary to the president candidate. If elected, the president of the republic shall appoint a new secretary to the vice president.
- **(vii)** The presidential ticket, will be chosen at the general election by optional preferential vote. The ticket with the most votes is to be sworn (hereafter a secular oath) in as president and vice president of the republic, and secretary to the president and secretary to the vice president by the Chief justice of the high court of Australia. Immediately upon the outcome of the vote being declared, and the President and vice president shall immediately assume their duties as mandated and required by this constitution.
- **(viii)** If the president dies in office, resigns from office, or is otherwise removed from office according to this constitution, the vice president shall be sworn in as president of the republic, the secretary to the president shall be sworn in as the vice president and the secretary to the vice president shall be sworn in as secretary to the president. The new president shall appoint a new secretary to the vice president of the presidents choosing.

(ix) If the vice president of the republic dies in office, resigns from office, or is otherwise removed from office according to this constitution, the secretary to the president shall be sworn in as the vice president and the secretary to the vice president shall be sworn in as secretary to the president. The new president shall appoint a new secretary to the vice president of the presidents choosing.

(x) A secretary to the president and secretary to the vice president appointed under this process other than being elected by the people shall not be entitled to be the president or vice president of the republic.

62. There shall be a Federal Executive Council of members of the parliament to advise the President of the republic in the government of the republic, and the members of the Council shall be chosen and summoned by the president on advice of the Prime Minister and sworn as Executive Councillors, and shall hold office as ministers , until this constitution provides otherwise.

63. The provisions of this Constitution referring to the President of the Republic in Council shall be construed as referring to the President, the vice president , the secretary to the president and secretary to the vice president , who at the presidents discretion and according to this constitution, may act with the advice of the Federal Executive Council.

64.(1) Subject to this constitution , the President of the republic may appoint officers to administer such departments of State -of the republic as the President of the republic in Council may establish on advice of the prime minister of the republic, provided that those persons are members of the parliament.

64(2) Such officers shall hold office according to this constitution. They shall be members of the Federal Executive Council.

65. repeal

66. There shall be payable out of the Consolidated Revenue Fund of the republic, for the salaries of the Ministers of State and members of the parliament an annual sum or salary which shall be as the Parliamentary remuneration mechanisms provide.

67. Subject to this constitution, the appointment and removal of all other officers of the Government of the Republic shall be vested in the President of the republic in Council.

68. (1) The command in chief of the naval and military forces of the republic is vested in the President of the republic.

68.(2) However , the president of the republic shall not authorise the deployment of Australia's military forces or part thereof , unless it is-

(i) For a peaceful unarmed purpose; or

(ii) Peacekeeping operation or other lawful military action authorised by the United Nations and in the Republics interest; or

(iii) To defend the Republic against an imminent attack; or

(iv) To defend an ally of Australia against imminent attack upon application of that ally; or

(v) A goodwill visit or military exercise in another country or countries; or any military exercise within Australian territory; or

(vi) Peaceful defence force aid to the civil community during times of natural disaster, famine or epidemic or other like natural dangers, whether in Australian territory or without; or

(vii) All other peaceful non aggressive aid which the community would reasonably expect the forces of the republic to provide to the people , including such matters as : charity work , logistical assistance , building assistance , medical assistance , provision of foods, eradication of pest animals and plants and fire fighting.

(viii) Upon the application of a state or territory which has declared a state of emergency either for part of that state or territory or in whole to defend the republic state or territory against domestic violence or international terrorism within its jurisdiction.

(ix) If the president seeks deployment of the military forces of the republic in accordance with s68(2)(ii),(iii),(iv) or (viii) , the president , supervised by the chief justice (or the person who may exercise the powers of the chief justice in the chief justices stead) of Australia shall recall parliament if time permits;

(x) If the parliament cannot be recalled the president must seek providing reasons, the consent of the majority of the parliament as if it was sitting as one house using all means of technology in an informal manner and the chief justice (or the person who may exercise the powers of the chief justice in the chief justices stead) must certify the answer of the members of parliament as a vote in favour or against;

(xi) If time does not permit the taking of the actions referred to in sub paras (ix) and (x), the president may deploy the military forces of the republic, if that is a foreign deployment , that action may only be taken in accordance with international law. The president of the republic must as soon as possible and as the security and safety of the military forces permits, inform the people of the actions taken and why.

(xii) If the majority of the parliament has voted informally and has said yes or no parliament must still be recalled and the matter must still be debated and the actions of the president must be ratified, ratified with conditions, censured, or otherwise disagreed with.

(xiii) If the parliament in a joint sitting, have taken a vote in accordance with the constitutional process and have ratified with conditions, censured, or otherwise disagreed with the actions of the president under s68 , the president must,

subject to international law and the law of the republic act in accordance with any resolution of the parliament.

(xiv) If the president has abused the power invested in the office under s68, the president shall be subject to the sanctions of the laws of the republic and international law.

The parliamentary and presidential code of conduct

69. (1) The president of the republic , vice president , secretary to the president and secretary to the vice president and the parliament, shall not intentionally derogate from or attempt to abrogate any part of this constitution .

69.(2) There shall be freedom of speech in parliamentary debates and proceedings of the parliaments and legislatures of the republic .Subject to s69(3) , things said and done in accordance with parliamentary debates and proceedings shall not be questioned in any court of law. The parliaments and legislatures of the republic shall have the powers as they assign themselves as from time to time to provide sanctions for the abuse of this privilege by parliamentarians. Removal from office in accordance with s69(3) does not constitute a matter to be taken into account by a court considering the issue of double jeopardy.

69.(3) Subject to this constitution, a court may have regard to and admit into evidence , matters said and done in parliament or during any of its proceedings if it is evidence of an indictable offence according to the laws of the republic (excluding defamation) . If the president of the republic , vice president , secretary to the president or the secretary to the vice president , or member of parliament is found to have maliciously or intentionally engaged in conduct in contravention of this constitution, or conduct which is an indictable offence or an offence of dishonesty and a gaol sentence has been ordered by a court of competent jurisdiction , or if a gaol sentence has not been ordered and the conduct is of such a nature as to be a high disgrace to the office-

(i) That person shall be removed from office by the parliament in a joint sitting on the 30th day after that conviction, and the persons office shall be filled in the manner set out in this constitution;

(ii) However, if the matter is appealed to a higher court within those 30 days, the person is to step aside pending the outcome, and if the conviction is overturned by a higher court, that person must be reinstated to that office. Each time the conviction is affirmed that person must step aside;

(iii) A person mentioned in s69. (3) may appeal to each higher court as any other citizen can , but must abide by the final decision of the high court of Australia.

(iv) If the person is the president of the republic, vice president, secretary to the president or the secretary to the vice president, or all of those people, the parliament shall convene in a joint sitting to consider the removal of any of those persons from office according to this constitution;

(v) If the person is a member of the parliament, the president shall order that the parliament shall convene in a joint sitting to consider the removal of that person from office according to this constitution;

(vi) A person, who is to be removed from office according to this constitution, shall be summoned to parliament to plead and answer the charge or charges before such vote of removal can be undertaken. A person who is in gaol as a result of the last affirmed conviction by the high court has no answer to removal.

(vii) A simple majority of all parliamentarians present, excluding those who may be subject to removal, shall pass a motion of removal. A member of the presidential ticket or a member of parliament may be removed on grounds of incapacity.

(viii) If an entire presidential ticket, or such part of the presidential ticket that is elected by the people is removed in accordance with this constitution , and the president's office or the vice president office is vacant as a result, then, the parliament shall call an immediate 1st round presidential election, which shall take place 30 days after close of nominations and be within 40 days of removal, and then a second round election of 5 tickets which shall take place within 30 days of declaration of the first round result . The presidential ticket that is elected by the people shall be sworn in and shall serve for the period of time that would have remained as the term of office for the removed persons. If however, that term would have been less than 6 months after this emergency process, then, an early general election shall be held at the same time, and the general election which was due in that 6 months, according to this constitution, shall not be held on the date it was due. Those elected to office at this election shall hold office for the period of time until the next due date for re-election. Thereafter, the constitutionally required election process shall continue as normal.

(ix) If a part of a government is removed in accordance with this constitution, the president shall call an emergency election for the offices that are vacant subject to the process outlined in s69 (3)(viii). And, if such removal removes the government majority on the floor of the House of Representatives, the president shall invite the remaining members of that house to form a government and elect a prime minister. If such a government is formed, that government shall continue until the next election in accordance with this constitution, however, if upon the new members being elected, a new majority wishes to form government, or if at any time the parliament passes a motion of no confidence in the government, that new majority may form a new government and elect a prime minister, and shall continue until the next election due, or in accordance with this constitution.

(x) No law shall be assented to unless by the president of the republic.

(xi) The chief justice of the high court (or the person who may exercise the powers of the chief justice in the chief justices stead) shall administer the republic if there is person who can be president in accordance with this constitution.

Chapter III. The Judicature.

70. (1) The legal system in the republic is an integrated legal system.

70.(2) In this legal system , there must be a court of appeal in the several states, and territories, or in any new state or territory or any self governing region, from which an appeal may reasonably be brought to the High Court of Australia on any matter in which the High Court has jurisdiction.

70.(3) In this legal system , courts tribunals or forums exercising judicial power are independent from the legislature. They must exercise their powers in accordance with the rule of law recognising that human dignity, justice, freedom and democracy are included in the underlying principles of the rule of law and the nature of the exercise of judicial power in the community of nations. All justices have the right of dissenting opinion in decision making.

70.(4) No justice or arbiter may act oppressively or sit when interested.

70.(5) The provision of legal aid to poor persons, and the appointment of representatives for those persons is the preserve of the judiciary .It is a fundamental obligation on the state, which makes the criminal laws, and imprisons persons, brings persons accused before the courts and tribunals and forums of the republic, to avoid undue delay , and unfair trials and other proceedings and to avoid injustice.

70.(6) The parliament of the republic must enact legislation to provide the judiciaries of the republic with adequate funds to provide legal services to the people in accordance with their rights.

71. The ultimate repository of judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than 9 in total, as the Parliament prescribes. There shall be established and maintained -state and territory supreme courts.

The rule of law exists to protect the constitution and all rights contained within it. Judicial power must be exercised in a manner consistent with the principles under-lying this constitution.

72. The Justices of the High Court and of the other courts created by the Parliament--

> **(i.)** Shall be appointed by the President of the republic in Council:
>
> **(ii.)** Shall not be removed except by the President of the republic in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity. Subject

to this constitution such removal shall be on the same grounds as the grounds for removal for parliamentarians and the presidential ticket set out in s 68 of this constitution.

(iii.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon the obtaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if they have obtained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon their obtaining the age that is, at the time of appointment, the maximum age for Justices.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign the office by writing under their own hand delivered to the president of the republic.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences--

(i.) Of any Justice or Justices exercising the original jurisdiction of the High Court:

(ii.) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State or Territory;

-and the judgment of the High Court in all such cases shall be final and conclusive.

74. repeal

75. In all matters--

(i.) Arising under any treaty:

(ii.) Affecting consuls or other representatives of other countries:

(iii.) In which the republic, or a person suing or being sued on behalf of the republic, is a party:
(iv.) Between States or territories, or between residents of different States or territories, or between a State or territory and a resident of another State or territory:
(v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the republic: the High Court shall have original jurisdiction.

76. Subject to this constitution the Parliament may make laws conferring original jurisdiction on the High Court in any matter--
(i.) Arising under this Constitution, or involving its interpretation:
(ii.) Arising under any laws made by the Parliament:
(iii.) Of Admiralty and maritime jurisdiction:
(iv.) Relating to the same subject-matter claimed under the laws of different States.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws--
(i.) Defining the jurisdiction of any federal court other than the High Court:
(ii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:
(iii.) Investing any court of a State with federal jurisdiction.

78. Subject to this constitution the Parliament may make laws conferring rights to proceed against the Republic or a State or territory in respect of matters within the limits of the judicial power.

79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

80. The trial of any offence against any law of the Republic shall be held in the State or territory where the offence was committed, and if the offence was not committed within any State or territory the trial shall be held at such place or places as the Parliament prescribes.

Chapter IV. Finance And Trade.

81. All revenues or moneys raised or received by the Government of the Republic shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Republic in the manner and subject to the charges and liabilities imposed by this Constitution.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Republic shall in the first instance be applied to the payment of the expenditure of the Republic.

83. No money shall be drawn from the Treasury of the Republic except under appropriation made by law.

But until the expiration of one month after the first meeting of the Parliament the President in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the republic and for the holding of the first elections for the Parliamentary, state, territory, presidential and local government elections. Thereafter, subject to the processes set out in this constitution, the parliament is authorised to appropriate and expend monies for the purposes of the republic. **??????????????????**

84. When any department of the public service of a State or territory becomes transferred to the Republic, all officers of the department shall become subject to the control of the Government of the Republic.

Any such officer who is not retained in the service of the Republic shall, unless appointed to some other office of equal emolument in the public service of the State or territory, shall be entitled to receive from the State or territory any pension, gratuity, or other compensation, payable under the law of the State or territory on the abolition of that office.

Any such officer who is retained in the service of the Republic shall preserve all existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State or territory if the persons service with the Republic were a continuation of the persons service with the State or territory. Such pension or retiring allowance shall be paid to the person by the Republic; but the State or territory shall pay to the Republic a part thereof, to be calculated on the proportion which the person term of service with the State or territory bears to the person whole term of service, and for the purpose of the calculation the persons salary shall be taken to be that paid to the person by the State or territory at the time of the transfer.

Any officer who is, at the establishment of the Republic, in the public service of a State or territory, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Republic, shall have the same rights as if the person had been an officer of a department transferred to the Republic and were retained in the service of the Republic.

85. When any departments of the public service of a State or territory is transferred to the Republic --

> **(i.)** All property of the State or territory of any kind, used exclusively in connexion with the department, shall become vested in the Republic; but, in the case of the departments controlling customs and excise and bounties, for such time only as the president of the republic in Council may declare to be necessary:
>
> **(ii.)** The Republic may acquire any property of the State or territory, of any kind used, but not exclusively used in connection with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State or territory for public purposes is ascertained under the law of the State or territory in force at the establishment of the Republic:

(iii.) The Republic shall compensate the State or territory for the value of any property passing to the Republic under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament:
(iv.) The Republic shall, at the date of the transfer, assume the current obligations of the State or territory in respect of the department transferred.

86. On the establishment of the Republic, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Government of the Republic.

87. repeal

88. Uniform duties of customs shall be imposed within two years after the establishment of the Republic.

89. Until the imposition of uniform duties of custom--
(i.) The Republic shall credit to each State or territory the revenues collected therein by the Republic.
(ii.) The Republic shall debit to each State or territory --
(*a*) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State or territory to the Republic;
(*b*) The proportion of the State or territory, according to the number of its people, in the other expenditure of the Republic.
(iii.) The Republic shall pay to each State or territory month by month the balance (if any) in favour of the State.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

91. Subject to this constitution, nothing prohibits a State or territory from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Republic expressed by resolution, any aid to or bounty on the production or export of goods. However, uranium mining is prohibited.

92. Subject to this constitution, on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.
But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Republic, less any duty paid in respect of the goods on their importation.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides--

(i.) The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State:
(ii.) Subject to the last subsection, the Republic shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Republic.

95. Repeal

96. The Parliament may grant financial assistance to any State or territory on such terms and conditions as the Parliament thinks fit.

97. Until the Parliament otherwise provides, the laws in force in any territory which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the territory, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Republic in the State in the same manner as if the Republic, or the Government or an officer of the Republic were mentioned whenever the territory, or the Government or an officer of the territory, is mentioned.

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

99. The Republic shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

100. Repeal
101. repeal
102. repeal
103. repeal
104. repeal

105. The Parliament may take over from the States their public debts, or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Republic, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Republic in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Republic payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

105A.(1.) The Republic may make agreements with the States with respect to the public debts of the States, including--
(a) the taking over of such debts by the Republic;

(b) the management of such debts;
(c) the payment of interest and the provision and management of sinking funds in respect of such debts;
(d) the consolidation, renewal, conversion, and redemption of such debts;
(e) the indemnification of the Republic by the States in respect of debts taken over by the Republic; and
(f) the borrowing of money by the States or by the Republic, or by the Republic for the States.

105A.(2.) The Parliament may make laws for validating any such agreement made before the commencement of this section.

105A.(3.) The Parliament may make laws for the carrying out by the parties of any such agreement.

105A.(4.) Any such agreement may be varied or rescinded by the parties thereto.

105A.(5) Every such agreement and any such variation thereof shall be binding upon the Republic and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Republic or of any State.

105A.(6.) The powers conferred by this section shall not be construed as being limited in any way by the provision of section one hundred and five of this Constitution.

Chapter V. The States.

106. The Constitution of each State of the Republic shall, subject to this Constitution, continue as at the establishment of the Republic, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament or assembly of a territory which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Republic or withdrawn from the Parliament of the State, continue as at the establishment of the Republic, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a territory which has become or becomes a State, and relating to any matter within the powers of the Parliament or assembly of the state or territory, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Republic, the Parliament of the State or assembly of the territory shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the State or assembly of the territory had until the territory became a State.

109. When a law of a State or territory is inconsistent with a law of the Republic, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State or territory, or other chief executive officer or administrator of the government of the State or territory.

111. The Parliament of a State may surrender any part of the State to the Republic; and upon such surrender, and the acceptance thereof by the Republic, such part of the State shall become subject to the exclusive jurisdiction of the Republic.

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Republic; and any such inspection laws may be annulled by the Parliament of the Republic.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

114. A State shall not, without the consent of the Parliament of the Republic, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Republic, nor shall the Republic impose any tax on property of any kind belonging to a State.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

116. The parliaments of the states and of the territories shall be by bi-cameral legislatures.

117. A citizen or other person as prescribed by the parliament of Australia, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to the person if the person were a resident in such other State.

118. Full faith and credit shall be given, throughout the Republic to the laws, the public Acts and records, and the judicial proceedings of every State and territory.

119. Subject to this constitution, the Republic shall protect every State and territory against invasion and, on the application of the Executive Government of the State or territory, against domestic violence.

120. Repeal

Chapter VI. New States.

121. The Parliament may admit to the Republic or establish new States, and may upon such admission The Parliament or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.
122. Subject to this constitution the Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Republic, or of any territory placed under the authority of and accepted by the Republic, and may allow

the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

123. The Parliament of the Republic may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected

Chapter VII. Miscellaneous.

125. The seat of Government of the Republic shall be Canberra in the Australian Capital Territory. The parliament may also make provision for the parliament to travel to other parts of the republic for the benefit of the citizens at all times proceedings must be held in accordance with this constitution. However, in a time of national emergency it may be necessary to hold parliament in a place other than Canberra for security reasons, and the president of the republic on advice from the executive council may authorise parliament to be held elsewhere, and for votes and proceedings to be conducted in the manner described in the examples of s68(2) (x), (xi), (xii), (xiii) and (xiv).

126. The parliament must not unreasonably or maliciously withhold funding or salaries from the presidential staff, the president, the vice president, the secretary to the president or the secretary to the vice president .

Chapter VIII. Alteration Of The Constitution.

128. This Constitution shall not be altered except in the following manner:--
The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.
But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the President of the republic may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Republic, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.
And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the president of the republic for assent.
No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.
In this section, "Territory" means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

Chapter 8

On the matter of the plebiscites and process of amendment of the Australian Constitution.

In my view, the process which has at least been suggested in this round of republican debate is a vast improvement on the last process.

I agree with the suggestion that the opinion of the people on whether they wish Australia to become a republic should be sought through a plebiscite.

I also agree that the general issue of what sort of model of republic and, whether the president should be directly elected should be decided by plebiscite.

Even if the answer to the republic question is no, much can be achieved in one plebiscite to modernise our constitutional arrangements and seek the opinion of Australians on many controversial issues that need to be resolved.

This should be done in a number of rounds, with the questions being explained on paper and given to every voter.

I would like the following process to be engaged in:

The following yes/ no questions should be put to the people through a plebiscite:

---

(1) (a) Do you want Australia to be totally independent from the United Kingdom?; or

(b) Do you want to have an Australian head of state who is not a member of the English Royal Family?; and

(c) Do you want Australia to be a republic?;

If your answer to (1)(a) and/or (b) is no go to Q7
if your answer to (a), (b) or (c) is yes go to Q2

---

(2) (a) Do you want a head of state that is freely and democratically elected by the Australian people ?;or

(b) Do you want a head of state that is elected by the federal parliament?; or

(c) Do you want a head of state that is appointed by the government in some way?; and

---

(3)(a) Do you want that head of state to be called a "president" ?;or

(b) retain the title of "governor general"?; and

---

(4)(a)Do you want the head of state to have powers; or

(b) do you want the head of state to be a ceremonial figure head?; and

---

(5) (a) If your answer to Q (4)(a) is yes , do you agree that there should be a deputy head of state , in the way a prime minister has a deputy?; and

(b) should the head of state have been the commander in chief if the military forces?;

(c) if your answer to (b) is yes, do you agree that any such power should be limited?; and

(d) if your answer to (c) is yes, do you agree that such power should be limited by the constitution and the parliament?

---

(6)(a) Should the head of state be able to refuse to assent to unjust laws?; and

(b) should there be a power to remove the head of state for misbehaviour?;

(c) should the head of state be able to have more than one term in that office?;

---

(7)(a) Should the racist parts of the current constitution be repealed?; and

(b) Do you agree that the human rights of Australians must be protected from governments and politicians in the constitution?; and

(c)Do you agree that the environment should be protected by the constitution?; and

(d) Do you agree that the constitution should protect Australians human rights from the bad effects of trade treaties?; and

(e) Do you agree that the constitution should protect the Australian environment from the bad effects of trade treaties?; and

(f) Do you want to ban Australia from having nuclear weapons?; and

(g) Do you want to ban Australia from having chemical or biological weapons?; and

(h) Do you want Australia to ban nuclear power?; and

(i) Do you want Australia to ban the bringing of nuclear weapons into our territory?; and

(j)Do you want Australia to ban the bringing of chemical or biological weapons into our territory?; and

(k) Do you want to ban nuclear powered ships or other vessels from our territory?; and

(l) Do you want to ban uranium mining?; and

(m) do you want to legalise small amounts of personal use marijuana?; and

(n) do you want Australia to be secular with a separation between church and state?; and

(o) do you want to stop old growth logging?; and

(p) do think that we should elect our representatives to the United Nations if they are going to act on our behalf?; and

(q) do you think we should change the Australian Flag to remove the Union Jack?; and

(r) do you agree that we need a new national anthem?.

Once the first plebiscite has been conducted and the answers of the people have been collated, and the answer is yes to a republic, and the nature of the election process for head of state and what the general wishes about the powers of such an officer has been decided , a national commission of enquiry should be convened chaired by Australian justices and experts in Constitutional law and law reform, which would take evidence from Australian experts , citizens and representative and advocacy bodies. It should report to parliament, and recommend and draft any suggested changes to Australian Constitutional law that seems necessary and further plebiscite questions on different models.

The enquiry should have specific terms of reference relating to the issues. Its whole task should be to deal with the issues arising from a yes vote that also relate to the other questions not relating to the republic from the monarchist perspective(Q7). If need be it should run for years. I do not believe that the senate has the capacity to do this work given its workload and political imperatives and the possible interruptions of elections.

The enquiry should continue in existence until all plebiscite questions have been answered in all rounds, and it has made its final report to parliament with suggested choices of changes and models to be put to a referendum of the people.

Even if the answer is no, the enquiry should still be convened to report and recommend any changes suggested by the people in their answers to the other questions in the 1st plebiscite.

The process of modernisation of Australia and creating an official democracy will take years .

My view , because I have said that any assertion that there has been or that there is some form of compact or social contract existing is false and that many did not have a chance to consent or assent or influence what sort of country Australia would be after federation - is , that voting in the plebiscites must be compulsory. This is because all must have the chance to influence the process and any changes, to consent or to refuse consent, or , as the saying goes…..forever hold their peace.

These are my views and suggestions, and I give them to the Australian People in good faith.

Pat Coleman -"Citizen Coleman"

15 Ethel st Hyde Park Qld 4812
Ph: 0439839121
email: howardsafreak@hotmail.com

....