CEF-A

Educating for Democracy

Constitution Education Fund - Australia
2004/2005 Annual Report

Photo on Front Cover:

Front Row - Justice Dyson Heydon, Mrs Kerry Jones, Wendy Nowland, Her Excellency Mrs Marlena Jeffery, His Excellency Major-General Michael Jeffery, Ben Davies, Dame Leonie Kramer, Damien Freeman

Back Row – Professor George Winterton, Monique McHardy, Tamara Vu, Lit Hau Ran, Fiona Spencer, Em. Professor David Flint, Scott Kerr

Primary Sponsor of the Governor-General's Prize Undergraduate Programme for 2004, Mr Ted Sent of 'People First Retirement Living and Mrs. Grace Sent talk with the Governor-General at the Inaugural prize giving ceremony January 28, 2005.

CEF-A's Honorary Fundraising Coordinator, Mr Philip L. Gibson with guests at the inaugural 2005 prize giving ceremony

Educating for Democracy

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Leadership for Democracy

"I firmly believe that all Australians, young and old, those born here and those who have come from other lands, should have a broad understanding of the system of government that has made our country one of the most successful democracies in the world.

I am therefore delighted to accept the role of Patron in Chief of CEF-A and to be associated with such a worthy endeavour. I commend this initiative to you and I feel sure that many Australians will benefit from it.

I hope that you too will consider either participating in, or supporting this cause. By doing so you will be helping to give all Australians – especially our leaders of tomorrow – a greater appreciation of a system of government and a Constitution that has played a vital part in making Australia a country of which we can all be rightly proud."

Major General Michael Jeffery

Acknowledgements

The Constitution Education Fund – Australia proudly acknowledges the following people who have helped educate for democracy:

Sponsor of the Governor-General's Prize Undergraduate Programme

- People First Retirement Living

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- Mr Ross Gibson
- Mr Eric Hawley
- The Hon. Jamie Irwin
- Dame Leonie Kramer AC DBE
- Dame Elisabeth Murdoch AC DBE
- The Hon. Peter Philips AM
- Lady Potter AC

In-kind and Professional Support

- Mr Lee Jabara
- Nancarrow Marketing Company

Leaders of CEF-A

His Excellency Major General Michael Jeffery AC CVO MC (Retd) is the Governor-General of the Commonwealth of Australia and Patron in Chief of CEF-A.

Kerry Jones BMus DipEd MEdAdmin is the Executive Director of CEF-A. She was a teacher and consultant with the New South Wales Department of Education for ten years and was a delegate to the 1998 Constitutional Convention before chairing the government-funded No Case campaign committee during the 1999 referendum.

Damien Freeman MA LLB (Hons) LTCL is the Director of the Governor-General's Prize Programme. He is a legal practitioner of the Supreme Court of New South Wales and is studying for an MPhil at the University of Sydney.

Scott Kerr BA BComm DipEd is the Coordinator for the Governor-General's Prize Programme. He has taught history at secondary schools in Queensland and England and is studying for an MA at the University of New South Wales.

Trustees

Emeritus Professor David Flint AM is a former Dean of Law at the University of Technology Sydney and Chairman of the Australian Broadcasting Authority.

The Hon. Sir Guy Green AC KBE CVO is a former Chief Justice and Governor of Tasmania and Administrator of the Commonwealth. He is President of the Order of Australia Association and was a member of the judging panel in 2004.

Emeritus Professor Dame Leonie Kramer AC DBE FACE FAHA is a former Chancellor of the University of Sydney and member of the New South Wales Secondary Schools Board. She was a Delegate to the 1998 Constitutional Convention. She is the Chairman of the CEF-A Foundation Council and a Trustee.

The Hon. Barry O'Keefe AM QC is a former Commissioner of the Independent Commission Against Corruption, Judge of the Supreme Court of New South Wales and Mayor of the Municipality of Mosman. He is President of the National Trust.

Professor George Winterton is Professor of Constitutional Law at the University of Sydney and an Emeritus Professor of the University of New South Wales. He was a member of the Republic Advisory Committee and a Delegate at the 1998 Constitutional Convention. He was a member of the judging panel in 2004.

Foundation Council

Emeritus Professor Geoffrey Blainey AC is a noted author and historian who has been an Emeritus Professor of the University of Melbourne since 1988. He was a Delegate at the 1998 Constitutional Convention.

Emeritus Professor Geoffrey Bolton AO is the Chancellor of Murdoch University.

Kym Bonython AC DFC AFC is a prominent figure in the arts, sport and broadcasting in South Australia. He was a Delegate at the 1998 Constitutional Convention.

Professor Greg Craven is Chair in Government and Constitutional Law at Curtin University of Technology. He was a Delegate at the 1998 Constitutional Convention.

The Rt Hon. Sir Harry Gibbs GCMG AC KBE CR is a former Chief Justice of Australia.

The Hon. Justice Dyson Heydon AC is a Justice of the High Court of Australia. He was the chairman of the 2004 judging panel.

Dr John Hirst is Reader in the School of Historical and European Studies at La Trobe University. He was Chair of the Civics Education Group and was a significant contributor to the Discovering Democracy programme.

Major General 'Digger' James AC MBE MC (Retd) is a former Chairman of the National War Memorial and President of the RSL. He was a Delegate at the 1998 Constitutional Convention.

Associate Professor Gregory Melleuish is Head of the School of History, Politics and Australian Studies at the University of Wollongong.

Mr Hugh Morgan AC is a company director and Chairman of the Order of Australia Association Foundation.

Dame Elisabeth Murdoch AC DBE is a noted philanthropist.

Sir David Smith KCVO AO is a former Official Secretary to the Governor-General and currently a visiting scholar in the Faculty of Law at the Australian National University. He was a Delegate at the 1998 Constitutional Convention.

The Hon. Sir Laurence Street AC KCMG KSTJ is a former Chief Justice of New South Wales.

The Hon. Justice Lloyd Waddy RFD is a Judge of the Family Court of Australia. He was a Delegate at the 1998 Constitutional Convention.

Professor George Williams is Anthony Mason Professor and Director of the Gilbert + Tobin Centre of Public Law at the University of New South Wales.

Trustees are ex officio members of the Foundation Council.

Educating for Democracy

"In my travels playing cricket for Australia, I saw a number of countries without the freedoms we enjoy. These experiences brought home to me the importance of the Australian Constitution.
The more Australians understand the important role played by our Constitution, the stronger we will be as a community."

Steve Waugh

Back Row
Monique McHardy, Tamara Vu,
Lit Hau Tan, Fiona Spencer
Front Row
Wendy Nowland,
Her Excellency Mrs. Marlena Jeffery,
His Excellency Major-General
Michael Jeffery, Ben Davies

Mr. Julian Leeser,
Associate Professor Gregory
Melleuish and Professor George
Winterton

Students from the University
of Western Sydney

Chairman's Report

I am pleased to report a year of notable achievement as we continue to develop CEF-A's structure and activities.

CEF-A's mission is to strengthen the Australian community's understanding of the history and operation of the Australian Constitution. As the Prime Minister said in a message of support for CEF-A, "Educational initiatives that raise awareness and improve understanding about Australia's system of government and how it operates play a vital part in making us as a nation better equipped to determine our future."

During the 1990s Australians witnessed a significant debate about Australia's constitutional arrangements. The debate served the most useful purpose of causing all of us to ask ourselves one significant question – what is the nature of our present system of government? The debate highlighted a profound lack of understanding of our Constitution amongst Australians of every background. At the heart of such debates lies the need to strengthen our education on these matters.

CEF-A is committed to developing new educational initiatives. The first of these, the Governor-General's Prize Programme, was launched this year. There can be no doubt that there is a need for such initiatives. The following section of this report, The Need to Know, brings together a remarkable collection of authors, each of whom has given deep consideration to the need for greater awareness about our democracy and the system of government that has provided us with continuing political stability. They are a diverse group of writers whose approaches and perspectives differ. They are united, however, in a common purpose. They all agree that educating for democracy is vital. CEF-A will continue to develop new programmes that promote this common purpose in the coming year.

I should like to record CEF-A's thanks to its Patron in Chief, the Governor-General. He has demonstrated strong leadership in supporting this – and other – new educational initiatives. During the period under review, Commissioner Gareth Grainger and Mr John Paul retired as Trustees. I thank them for their service to CEF-A since its inception. I further thank all who have contributed to CEF-A as Trustees, Foundation Councillors and benefactors. Finally, I thank and acknowledge the good work of CEF-A's Executive Director, Kerry Jones, throughout a very busy year, and Damien Freeman, our superb inaugural Governor-General's Prize Director.

The success of the CEF-A project will demonstrate our faith in the Constitution and our commitment to passing on a solid understanding of it to our successors.

Leonie Kramer

Dame Leonie Kramer

Chairman, CEF-A Foundation Council

Executive Director's Report

This year CEF-A adopted a new logo consisting of the Commonwealth Star, the Scrolls of Education and the Circle of Diversity. It symbolises perfectly what CEF-A is about. The seven-pointed Commonwealth Star is a significant feature of the Australian flag and represents the States and the Territories. The red banners that overlay the star are an abstract representation of a scroll as a traditional symbol of education and of a constitution. The Circle behind the Commonwealth Star has a number of beams of light radiating from its centre which depict the diversity of Australia's landscape, culture, racial composition, religious traditions and the lifestyles of its citizens. The Star overlaid by the Scroll represents the unifying power of education and constitutional government that endure the harmony of our diversity. This is only a symbol. But it is a powerful symbol of what CEF-A stands for.

The past year has witnessed much more than merely symbolic achievement. There were many notable achievements both in terms of CEF-A's structure and its activities. We have now established a Foundation Council of eminent Australians who together demonstrate the breadth of support CEF-A has received from all sections of the community across all States and Territories.

By far our most significant achievement, however, was the launch of the inaugural Governor-General's Prize Undergraduate Programme. This culminated with a wonderful reception at Government House Canberra at which the awards were presented. The young Australians who were awarded our inaugural prizes were all outstanding. I was delighted by the way the Governor-General and Mrs Jeffery made them feel so special.

In the coming year we will build on this success through new programmes within the Governor-General's Prize targeting primary and secondary school students. The viability of these exciting initiatives is always subject to funding arrangements. Our fundraising possibilities have been significantly enhanced by obtaining tax-deductible gift recipient status from the Australian Parliament. I am grateful to the Assistant Treasurer, Senator the Hon. Helen Coonan, for her efforts in achieving this during the last parliamentary session. On the topic of fundraising, I must also pay tribute to the tireless efforts of Philip Gibson, our honorary fundraising co-ordinator for his sterling work.

This year Lee Jabara became our National Treasurer and together with Richard Jabara, Assistant Treasurer, has stimulated philanthropic interest throughout Australia and in our expatriate communities abroad.

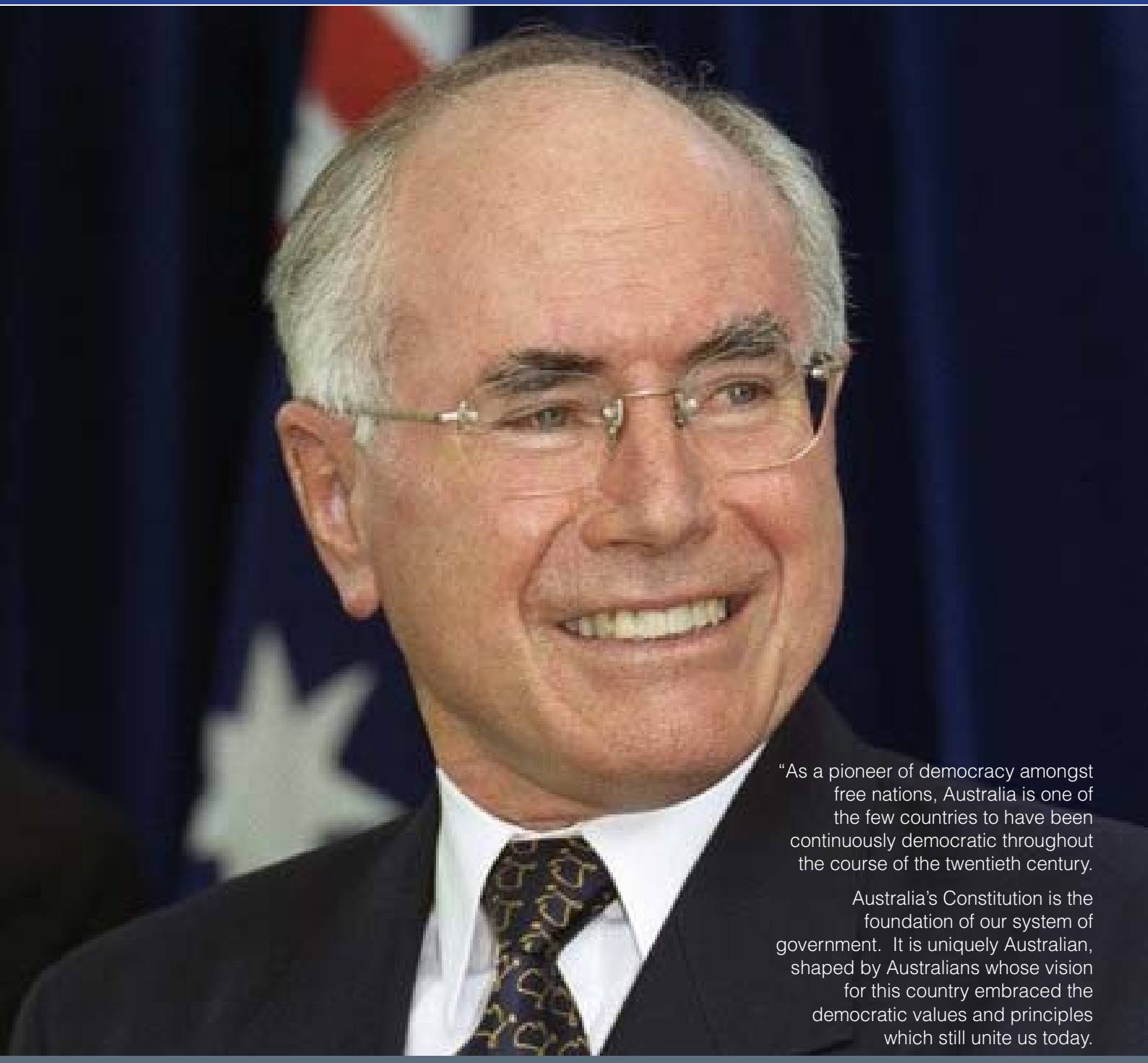
Over the next twelve months, CEF-A will also be working to establish a national constitution centre similar to that already servicing Western Australia so well. To support the extensive fundraising required for this we are also establishing a national business council.

All funds being raised for CEF-A 2003-2005 are clearly designated for specific operational projects which meet the objectives of the trust which are being expanded as appropriate funding is contributed. It is intended that an ongoing investment trust will be established in the future to ensure the CEF-A activities will be underwritten in perpetuity. Donors can be assured that administration expenses are kept to the necessary minimum. Their generosity remains vital if CEF-A is to continue educating for democracy

Finally, I should like to acknowledge the outstanding efforts of CEF-A's staff, in particular my deputy, Phuong Van. Our administrative work could not be achieved without their outstanding efforts. The employed staff has been assisted by a number of volunteers, in particular David Hull, and CEF-A is grateful for their contribution.

Kerry Jones
Executive Director

The Need to Know



"As a pioneer of democracy amongst free nations, Australia is one of the few countries to have been continuously democratic throughout the course of the twentieth century.

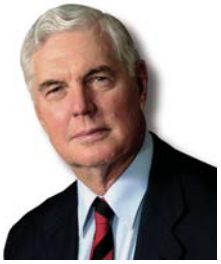
Australia's Constitution is the foundation of our system of government. It is uniquely Australian, shaped by Australians whose vision for this country embraced the democratic values and principles which still unite us today.

Educational initiatives that raise awareness and improve understanding about Australia's system of government and how it operates play a vital part in making us as a nation better informed about our constitutional heritage and better equipped to determine our future.

I commend CEF-A for encouraging Australians to learn more about the Constitution."

John Howard

Advancing Australia to Assemble Its Future



His Excellency Major General Michael Jeffery AC CVO MC is the Governor-General of the Commonwealth of Australia. This is an edited version of his Address to the Nation on Australia Day, 2005.

Major General Michael Jeffery

South Australian poet, Ian Mudie's poem "They'll tell you about me" includes the line: "Yesterday I was rumour, today I am legend, tomorrow history."

On this Australia Day, I see our nation excitingly poised between legend and history – history we create every day as innovators and achievers, and through the events that mark our place in time.

In a sense that's why I'm at Melbourne's magnificent Royal Exhibition Building. Led by Dame Nellie Melba's father, builders completed construction in time for the grand international exhibition of 1880. The building epitomises just one of many aspects of Australian excellence, as we strive to be the best in all that we undertake. This was the setting for the opening of Australia's first federal Parliament in 1901.

And, last year this building became the first in Australia to be granted World Heritage Listing. Just as we achieved global excellence here 125 years ago, so we must embrace new challenges and set new benchmarks this year.

- Scientists working on Australia's Antarctic program are among many examples of Australians currently doing great things. We lay claim to 42 percent of the Antarctic – almost another Australia in area. Our experts' work is revealing the history of global climate and trends that will affect the planet's natural resources and environment.

- Our highly motivated and well led Police, Army, Navy and Air Force men and women are serving in trouble spots around the world. They continue to earn widespread praise for the high calibre of their skill and common-sense know-how, and for their enthusiasm and compassion.

- Amongst our many brilliant scientists and researchers, those working at the Queensland Institute of Medical Research using tiny micro-crustaceans have, in a world-first, successfully eliminated the breeding of dengue fever-carrying mosquitos in 42 Vietnamese communities.

Advancing Australia as a nation of excellence rests easily with us. Yet in some areas we've become too complacent, for example our democracy. Too few of us really understand how we are governed.

We know what the structures are – our parliaments, courts and the public service institutions. But we should know more about our Australian Constitution – our legacy from Federation:

- it lays down the foundations for our society;

- and sets out the checks and balances that have made Australia such a stable nation for more than 100 years.

Yet, for all it is worth, it's largely taken for granted. And there is a worrying trend of disengagement from our democratic process particularly amongst younger Australians. The issues that interest them are often overshadowed by the rough and tumble of politics, however justified that may be in a robust democracy. If we cannot find ways to spark their interest and involvement, we risk the consequences of more young Australians simply turning away.

So how can we prevent this? I am not advocating changes to our existing system of government, nor am I supporting the status quo – these are decisions for the community and Parliament. There is scope however, through our schools, to engage students by placing more emphasis on the informed teaching of civics and citizenship. Learning about voting is just one aspect – there is far more. The Constitutional Centre of Western Australia is a superb educational model where students and visitors learn how our political system evolved and works now, its relevance to them and the influence on governance they can have. We do need to understand our past and how our democracy has developed, for without that, our nation won't be fully prepared to assemble its future.

Indeed, education is the key to unlocking opportunity. More and more, society is relying on hard-working teachers to help guide our children. Mentoring, with emphasis on literacy and numeracy, is one way we can help support young Australians during their schooling years. There are excellent volunteer schemes already operating in schools where older Australians as mentors are showing the way forward; helping children learn to read and write and generally supporting the development of academic and social skills, regardless of a student's ability. But we have the potential to do more; to develop in conjunction with governments and the community, a national mentoring program – where selected mentors on invitation, can volunteer their knowledge and experience to help children avoid adolescent problems, to open doors to choice, independence and a better life.

Recent tragic events in our region and at home have shown the extraordinary contribution of volunteers; how richly they've entered the lives of thousands of victims and whole communities. Their chief concern is the well-being of humanity – helping overcome loss, poverty and lack of opportunity. I would encourage all Australians who can, to undertake some form of voluntary community service – whether it

Advancing Australia as a nation of excellence rests easily with us. Yet in some areas we've become too complacent, for example our democracy. Too few of us really understand how we are governed.

be in service clubs, emergency organisations, support groups, or as mentors. The Australian community already benefits daily from the efforts of some 4.3 million volunteers, but we need more. Please think about what you can do – how you might help your community.

Already this year we've shown what our nation united can achieve. We will continue assisting our neighbours, and at home the pursuit of excellence will help create an even better place in which to live and work – our legacy for future generations.

From Marlena and me, a very happy Australia Day to you all.

Promoting Awareness Prevents Embarrassment

The Hon. Murray Gleeson AC is the Chief Justice of Australia. He launched the Governor-General's Prize on 20 August, 2004, at Parliament House, Sydney. This is an edited version of his remarks.

Chief Justice Murray Gleeson

It is an honour and a pleasure to launch the inaugural Governor-General's Prize. The idea of promoting awareness of and interest in our Constitution, especially among undergraduate students, is excellent.

It seems almost to be a source of embarrassment to some people that our Constitution is not the result of a clash of arms, of force or of revolution. It was the result of the political progress achieved through negotiation and popular participation in what were then self-governing British colonies. It was their response to a compelling need for national unity. The distinguishing feature of, and the whole reason for, our Constitution is federation. The word "federation" takes its meaning from a Latin term for a treaty or an agreement.

At the end of the nineteenth century, there were very few models of federalism. Federalism is now a fashionable form of government. There are many federations. We can see Europe developing towards a federal system. But at the end of the nineteenth century there were only three models – the United States, Canada and Switzerland. Switzerland was not of particular interest to our founding parents, and they focused their attention on the United States and Canada. We forget very easily that when the United States federation was formed, the federating political entities occupied only a very narrow strip of land on the eastern seaboard of the continent of North America. The population of the United States at that time was four million; by coincidence about the same population of the Australian colonies at the time of our federation.

The essence of federalism is a division of power – legislative, executive and judicial – between the political entities that form the federation. The essence of any division of power expressed in a written constitution is the rule of law. There are many aspects of federalism that attract interest: economic relations between the States and the Commonwealth for example. But the one that attracts my interest is that concept of the rule of law. The whole idea of federation was that power would be divided according to the terms of a written constitution. That necessarily carried with it a commitment to the rule of law, and important consequences about the role of, and the need for the independence of, the judiciary.

Federation is government according to the law that embodies the terms of the federal agreement. Those terms may be the subject of dispute. Disputes are resolved by an independent judiciary.

The Governor-General's Prize and the conscious promotion in the community of an interest in the Constitution is a very worthy project, and I am delighted to participate in it.

A.V. Dicey said in the nineteenth century that federal government is weak government. He did not mean that to be a compliment. He said it in the context of opposing Home Rule for Ireland. But what constitutes weak government is a relative thing. Weak by comparison with what?

A competition and prize such as this and the conscious promotion in the community - and in particular in universities - of an interest in, and understanding of, the Constitution is a very worthy project, and I am delighted to participate in it. I congratulate all who have participated in the project.

Popular Sovereignty Requires Informed Voters

George Winterton

Professor George Winterton is Professor of Constitutional Law at the University of Sydney. He was a member of the 2004 Governor-General's Prize judging panel.

Australia was only the second nation, after Switzerland (1874), to require approval by the electors for the adoption and amendment of its constitution. Australians have rightly taken pride in the popular sovereignty upon which their polity is founded. But if a nation is to thrive and adapt in a changing world, political power entails the responsibility to exercise it wisely and with considered judgement. A corollary of vesting the power to reform and update the Commonwealth Constitution in Australia's electors is that they have a responsibility periodically to evaluate the state of their Constitution and alter it when necessary. As Quick and Garran noted in the year of the Commonwealth's founding,

It is not in the nature of a living organism to remain monotonously the same from year to year and from age to age. As with individual units, so with nations, change is one of the laws of life.

Periodic surveys of public knowledge of Australia's governmental system which reveal abysmal ignorance are, therefore, very troubling for they suggest that Australia's electors are failing in their constitutional duty. It is frequently asserted that Australia has adapted well to the crises of war and economic depression and the other social, economic and military exigencies it has faced in its century of nationhood. But we should be wary of self-congratulation and complacency, especially regarding our Constitution. While it may or may not be necessary that the Constitution be amended, it is critical that Constitution alteration at least be considered. Yet the difficulty of altering the Constitution (36 of the 44 proposals having failed) has led to a torpor regarding constitutional reform which, in the long term, will stultify our national progress.

One has only to list some of the constitutional issues which ought to have been addressed long ago, but are not even on the current national agenda, to see the need for public consideration of constitutional reform:

- Is the federal division of legislative and financial power satisfactory? Is it healthy for Australia's vertical fiscal imbalance to be so extreme that half of all State financial resources is derived from Commonwealth grants, with consequent State dependence on Commonwealth whim and lack of transparency and accountability of State expenditure? Is it constitutionally satisfactory that every cent of the $35 billion the States receive from Commonwealth-levied GST could come with Commonwealth "strings" attached? Constitutionally, the Commonwealth could draw up a code of legislation covering the entire field of State law and make payment of the GST proceeds conditional upon its enactment by State Parliaments. Is this satisfactory in a "federal" polity?

- Even if there is no need for an entire Bill of Rights to be inserted in the Constitution, is the current meagre list of constitutional rights satisfactory? Should not every adult citizen's right to vote at least be guaranteed by the Constitution?

- Should constitutional protection of free expression continue to be derived solely by High Court implication (essentially from representative government), with all its uncertainties – such as what communication is "political", and whether the implied freedom extends to communication regarding State and local government?

- Should trial by jury for serious federal and/or State offences be constitutionally guaranteed?

- Should limits on Commonwealth and State preventive and other forms of detention be confined to those which a majority of the High Court can derive by implication from Chapter III of the Commonwealth Constitution?

- Should the system for electing members of the Commonwealth Parliament continue to be governed solely by Commonwealth legislation, especially when it is in the interest of both major political parties to abolish proportional representation for Senate elections?

- Should the term of the House of Representatives be fixed, as it is in NSW and Victoria, thereby denying the Prime Minister the power to choose the date for a general election? What effect should this have on the terms of senators?

These issues should at least be debated by the Australian public and their political leaders. But many are considered too complex to be understood by the public which has never been educated even in basic civics – not at school, and certainly not subsequently.

- Is it satisfactory in the twenty-first century for the Commonwealth to have a legislative power based upon "race" (section 51(xxvi))? Should the apparent "racist" section 25 of the Constitution (whatever its original purpose) be retained in a nation which rightly advocates racial equality and tolerance, and reconciliation with its indigenous citizens?

- Should Australian citizens with dual nationality remain ineligible to be elected to the Commonwealth Parliament (Constitution section 44(i))?

- Is the current state of the State Constitutions satisfactory? The various States entrench different aspects of their governments in different ways, but the validity of many of these provisions are uncertain since a High Court decision of 2003.[2] Is it satisfactory that State judicial power could be exercised by the State Parliament or a body or person authorized by it?

These and other issues, including the only one on the current political agenda – the republic – should at least be debated by the Australian public and their political leaders. But many are considered too complex to be understood by the public which has never been educated even in basic civics – not at school, and certainly not subsequently. Other developed, democratic and liberal nations, including those of Europe, the United States and Canada, debate constitutional issues. Can we realistically afford not to?

These considerations make the advent of the Constitution Education Fund -Australia (CEF-A) a propitious development. While the tertiary-level Governor-General's Prize promotes the advanced study of Australian government and law, and sends an important symbolic message regarding their importance, CEF-A's principal potential for advancing community knowledge of Australian civics lies at the primary and secondary levels. Here, I respectfully suggest, the following considerations should be borne in mind:

- While competition for monetary and other rewards is a necessary incentive, emphasis should be placed on many smaller prizes rather than a few grand prizes.

- Competitions should be adapted to the interests of the relevant age group (on the advice of school teachers and child psychologists) and employ media which will encourage learning and participation, even if unorthodox – such as quiz competitions, computer games, plays and production of short films.

- It is important to secure the participation and support of school teachers, but they must not be expected to bear extra workload. If necessary, CEF-A should provide financial support to enable schools to employ extra staff to teach civics and promoted civics education through extra-curricular activities.

CEF-A should also promote civics education in the wider community through production of both documentary and feature television films.

These activities will, of course, require substantial funds, but the project is so important to Australia's future that governments and the public should have little difficulty in seeing its benefits. Those responsible for establishing CEF-A deserve our gratitude and support for undertaking this long-overdue initiative.

Understanding our Greatest Asset

Professor Greg Craven is Chair in Government and Constitutional Law at Curtin University of Technology. His interest in promoting public awareness of the Constitution resulted in the publication of his recent book, *Conversations with the Constitution.*

Greg Craven

In many ways, the Australian Constitution suffers from more undeserved negative publicity than any concept since the invention of spinach.

To read much of the popular press, the Constitution was written by colonial hacks; is impossibly convoluted; poorly expressed; badly drafted; and out of date. People seem genuinely to believe that every second word of the Constitution is “wheretofore”, and that the document is an object of international ridicule.

None of these things is true. The fact that Australians genuinely disagree about particular important aspects of the Constitution – for example, whether it should embody a republican form of government – in no way undermines the genuine quality of the document as a whole.

Thus, as a constitutional lawyer who deeply believes in an Australian republic, I also passionately believe in the Australian Constitution. While I work diligently towards a republic, I will defend the Constitution itself to the last, and will never sacrifice its integrity to any other consideration.

My commitment to the Constitution arises out of an understanding that, far from being an embarrassing colonial relic, it is one of the great democratic documents of the modern world. Of course, I believe it can be improved, but we are starting from a very high point of achievement.

The Australian Constitution always has been an exceptional document. Whereas other comparable Constitutions – the American and Canadian examples come to mind - were essentially the products of politicians, the Australian Constitution alone was ratified by its people. Its status as “the People’s Constitution” is maintained by the fact that, even today, only they can alter it.

The ultimate proof of the Constitution’s quality has been its fundamental success. Constitutions are meant to provide safe, stable, democratic government. The Australian Constitution has done precisely this for over one hundred years. How many other constitutions can claim as much?

Again, this does not mean that the Constitution is perfect: personally, I would prefer a Constitution that provided a stronger federalism, a more independent parliament, and a republic. But these are goals to be worked toward carefully in the recognition that our existing constitutional framework is fundamentally sound.

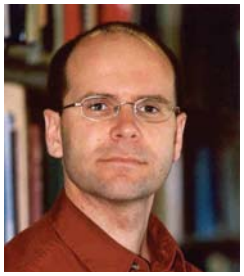
Consistent with this approach, I am delighted to be a Foundation Councillor of the Constitution Education Fund - Australia. It is my belief that the Fund will work in a strongly non-partisan way to enrich the understanding of Australians of their greatest asset: their Constitution.

This is not too bold a claim. At the end of the day, a nation may have endless resources, a brilliant people and splendid technology, but in the absence of a stable system of government will fail utterly. Bigger than the Big Australian and more lasting than any economic boom, the Constitution is the greatest asset we have.

The more we can engage in civilized conversation about it, the better.

CEF-A will work in a strongly non-partisan way to enrich the understanding of Australians of their greatest asset: their Constitution.

Education Required Despite Success



George Williams is the Anthony Mason Professor and Director of the Gilbert + Tobin Centre of Public Law at the University of New South Wales.

George Williams

There is much to celebrate about the Australian Constitution and the fact that it continues to underpin one of the oldest and most successful democracies in the world.

Despite this, the statistics show a nation that does not understand many of the basic features of its constitutional system. A 1987 survey conducted for the Constitutional Commission found that 47 per cent of Australians were even unaware that Australia has a written Constitution. Similarly, the 1994 report of the Civics Expert Group found that only 18 per cent of Australians have some understanding of what their Constitution contains. Significantly, only one in three people felt reasonably well informed about their rights and responsibilities as Australian citizens.

Might this lack of knowledge about such issues be a strength of our system? Perhaps our easy-going attitude to our system of government is the secret of its longevity. Over more than a century the Constitution has only infrequently been the subject of intense debate and has usually been accepted without division or discontent.

Unfortunately, the deficit of knowledge and interest in such issues masks a lack of engagement of many Australians with their political life and institutions. Rather than signifying a healthy democracy, it suggests a people alienated from their elected representatives and democratic processes. It demonstrates a need for education and even reform, including a revitalisation of our political institutions. Ways should be found of reinvigorating popular participation.

As part of this process, the Constitution should be a subject of ongoing reflection. It is true that the nation has survived one hundred years, including two world wars and an ongoing technological revolution, but this should not allow us to be complacent. The framers did not seek to establish a Constitution that would set the ground rules for all time, but a document that could evolve. They created a Constitution that would be interpreted and reinterpreted by the High Court and its text amended by the Australian people to reflect their changing aspirations and values.

The deficit of knowledge and interest masks a lack of engagement of many Australians with their political life and institutions.

Section 128 of the Constitution enables the document to be changed at a referendum supported by a majority of the people as a whole, and by a majority of the people in a majority of the States (that is, in at least four of the six States). In this regard, the Australian Constitution has been praised as a model of democracy because it gives the people a direct say in the structure of their government, as opposed to the normal model in other nations where constitutional change is left to a special majority of Parliament.

Since 1901, the referendum process has been invoked 44 times, with only eight proposals succeeding. Instead, where there has been a significant updating of the Constitution, this has been by the judges of the High Court through their judgments expressing new views about the meaning of the text.

The judges of the High Court have generally been willing to reinterpret the Constitution to meet their own perceptions of the needs of Australian society. However, this is a second best solution to that of Australians undertaking the task themselves. It risks further alienation of the people from their government by suggesting that the task of renewal is not their responsibility but only that of the High Court. A challenge for the future will be to ensure that, where change is needed, a leading role is taken by the Australian people voting at a referendum.

Past's Colourful Lesson for the Future

Dame Leonie Kramer AC DBE has served as Chairman of the Australian Broadcasting Corporation, Professor of Australian literature at Sydney University and later as its Chancellor, and Professor of Australian Studies at Harvard.

Dame Leonie Kramer

I shall not begin by asking an invidious question - how many of us have read the Constitution, and if we have, how many of us could give a brief account of it? For the sake of discussion, I'll take the pessimistic view, and assume that it would not be the kind of writing that we would prefer to a novel, detective story, a favourite gardening book or romance. Many of us belong to organizations of various kinds. Most have articles of association, or other documents which state the aims and objectives of the organization, and the rules by which it is governed. I suspect that it is only if something goes wrong that we refer to the rules, which are there to guarantee the proper running of the enterprise, and to deal with problems that might arise in its management. So it is with the Constitution.

So how do we teach young people about it? By young I mean no later than the beginning of secondary school, preferably even earlier. And why should we? Because it is the founding document of Australian democracy, and in a time of uncertainty its integrity is paramount. I believe that it is through history that we need to approach the educational problem. Disraeli, speaking in the House of Commons in 1874, said "Upon the education of the people of this country the fate of this country depends," and so it is today. So how do we go about our most important task? Difficult though it is, I think the best approach is through history. The past has a colourful, dramatic, and sometimes horrifying story to tell us about how we came to inherit freedom and stability instead of tyranny, political violence and persecution.

If we look back at the past, first at Britain and then at Australia, we can identify some major events and themes which are accessible to young people and will excite their imaginations. In today's schools, history is not trapped in the pages of text books, though the written word is still essential to full understanding. There are many TV, multimedia and IT programs which give students a feel for the living past. British history, unlike ours, is full of drama, bloodshed and conflict, from which democracy and constitutional monarchy have emerged triumphant. Remote though it now is in time, we owe our way of life to those who over centuries persevered in their struggle to live their lives as they wished, and for freedom to think and speak their minds.

To be fully understood, however, it needs to begin in Britain even as far back as Magna Carta (1215), a charter of liberties accepted by King John under threat of civil war. It influenced the state and federal constitutions of the United States. Then there were the struggles between church and state and Henry VIII's autocratic cruelty. Later the struggle between Charles I and parliament led to civil war in 1640, and it was during this period that the Pilgrim Fathers, persecuted for their religious beliefs, set sail for America and founded a settlement there. From this point it would be helpful to students to skip to the middle of the eighteenth century, to the story of James Cook whose extraordinary voyages links the English story with our own. Given the size of Australia and the fragility of its early settlement, it's astonishing that by 1901 we had achieved Federation, thanks to a remarkable group of eminent citizens who drafted the Constitution, and to a public which finally voted it into law.

The past has a colourful, dramatic, and sometimes horrifying story to tell us about how we came to inherit freedom and stability instead of tyranny, political violence and persecution.

This is no more than a sketch of the possibilities that we need to consider as we plan our educational enterprise. It is a challenge that I'm sure you'll all want to help us to meet. Our reward will be to know that we have done our best to secure a sound future for our successors.

Inspiring Pride in National Identity

The Hon. Sir Laurence Street AC KCMG KSTJ is a former Chief Justice of New South Wales and is a member of CEF-A's Foundation Council. This is an edited version of his remarks at the launch of the Governor-General's Prize Programme.

Sir Laurence Street

I believe we can take special pride in our Constitution because it is the manifestation of a sense of national identity. It was a spontaneous manifestation of a sense of national pride and national identity, a sense of unity that our leaders saw required the federation of the colonies in order to bring them together into a nation which throughout the twentieth century established itself so prominently on the world stage.

We did Australian history. We learnt where all the explorers went, Burke and Wills, we had to draw squiggly lines on ill drawn maps of Australia. But the Constitution as such was a word that was never mentioned in those days. I think it is very heartening to recognise that the Governor-General's Prize Programme in due course is going to be available to primary and secondary school students. I think that will enhance an awareness of the document to which we owe our existence as a nation – enhance that awareness at the impressionable stage of young people. I know how impressionable they can be. I have a twelve-year old daughter. I tell you she makes an impression on me. It is an impressionable age and I think that it is very desirable that our primary and secondary students are inspired with an awareness of what was given to us in the year 1900.

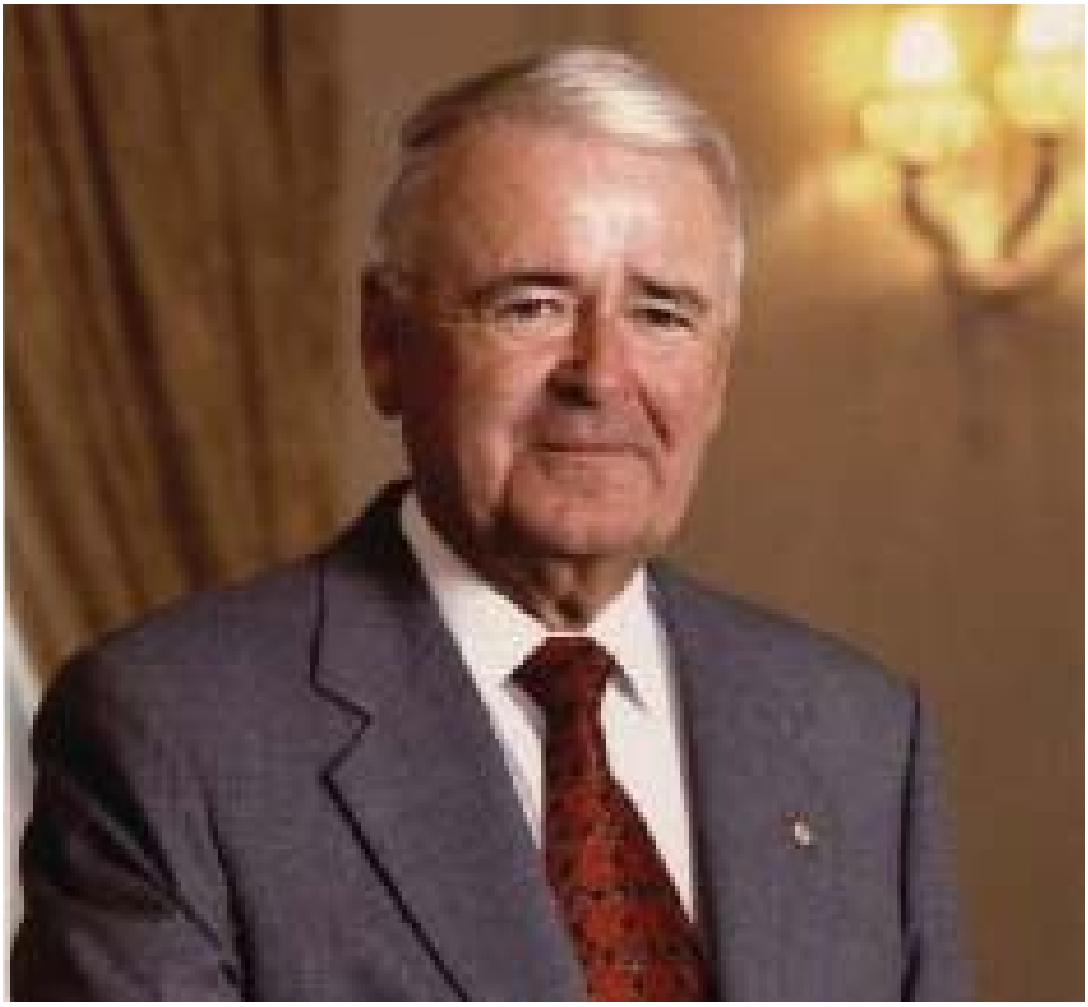
It is very heartening to recognise that the Governor-General's Prize Programme in due course is going to be available to primary and secondary school students. I think that will enhance an awareness of the document to which we owe our existence as a nation – enhance that awareness at the impressionable stage of young people.

There are times, of course, for us to look occasionally at amendments to our Constitution. The Constitution is a living document. It is kept alive by the Justices of the High Court, the ultimate custodians of the rule of law in our country. In this way it is kept relevant to our developing society and sense of values in Australia.

The existence of it as a living document tends to be overlooked at times because we don't really come to grips with it – most of us – until we are tertiary students or when we become law makers and administrators. A particularly inspiring aspect from my point of view of the establishing of CEF-A is that it is going to carry back to the primary and secondary schools an awareness of the Constitution.

When I was doing my secondary studies we did not know anything about the Constitution.

Creating Opportunities to Understand



"The Governor-General's Prize Programme is an outstanding initiative. It will make a significant contribution to Australia's awareness and understanding of our Constitution, our system of government and their history and working. By doing that, the Programme will serve the interests of the Australian people generally."

Sir William Deane

Governor-General's Prize Programme Director's Report

CEF-A's commitment to educating for democracy was made tangible this year with the establishment of the Governor-General's Prize Programme.

The Undergraduate Programme in the Governor-General's Prize was launched by the Hon. Murray Gleeson, Chief Justice of Australia, at a reception at Parliament House, Sydney, on 20 August, 2004. The Programme was indeed lucky to benefit from the support and involvement of such a distinguished Australian. But it is more than luck. It is testimony to the fundamental value and significance of the project.

In the Programme's inaugural year, students from tertiary institutions in all States and Territories participated in the Programme. Participating institutions included the following:

- Australian National University
- Charles Darwin University
- Griffith University
- La Trobe University
- Macquarie University
- Monash University
- Murdoch University
- Notre Dame University
- University of Melbourne
- University of New South Wales
- University of Newcastle
- University of South Australia
- University of Sydney
- University of Tasmania
- University of Technology, Sydney
- University of Western Australia
- University of Western Sydney
- University of Wollongong

Participation involved a preliminary stage requiring electronic submissions and a final stage in which selected participants were interviewed by the judging panel. I should like to thank and commend Justice Dyson Heydon who chaired the judging panel for his support, and also Sir Guy Green and Professor George Winterton who were members of it. They were supported by a team of people who helped assess the entries in the first instance. In this regard I should like to thank Gim Del Villar, Ian Jordan and Malcolm Mackerras for their contribution.

I congratulate all participants for seizing the opportunity to learn more about Australia's system of government. Details of the finalists and the medalists' written submissions are reproduced in this report. I should particularly like to thank Professor Winterton for his responsibilities in editing the medalists' essays for publication. The Governor-General's Prize has benefited from his counsel and enthusiasm at each stage of its development over the last year.

The Undergraduate Programme now has a principal sponsor in the form of People First Retirement Living. This generous corporate sponsorship means that the Programme will be funded for the next three years. In 2005, the Programme will build on its previous achievement, this time with a judging panel chaired by Justice Ian Callinan of the High Court of Australia.

The Governor-General's Prize will expand in the coming year with the announcement of new Programmes creating opportunities for primary and secondary school students to engage with themes concerning democracy.

Finally, I should like to pay tribute to Scott Kerr who has assisted me in developing and managing the Governor-General's Prize this year. Scott has taught in secondary schools for a number of years and this experience together with his enthusiasm for the cause has contributed significantly to the success of our mission of educating for democracy. Towards the end of the period under review, we were joined by Alexandra Mills. Her efficiency and resourcefulness have also made a valuable contribution to CEF-A's operations.

Damien Freeman
Director, Governor-General's Prize Programme

Education:
The Safeguard of Democracy

His Excellency Major General Michael Jeffery AC CVO MC is the Governor-General of the Commonwealth of Australia. He presented the inaugural Governor-General's Prize awards on 28 January, 2005, at Government House, Canberra. This is an edited version of his remarks.

Major General Michael Jeffery
I warmly congratulate the recipients of awards, and I understand that they presented thoughtful, well crafted papers in response to the five questions posed by the Fund, which I look forward to reading. I commend you all for your special interest in the Australian Constitution, our structures of responsible government and the principles of Australian democracy. Marlena and I also warmly congratulate Lit Hau who became an Australian citizen yesterday. Welcome to full participation in our Australian way of life.

A former US President, Franklin Roosevelt said that "democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education." That declaration is so true. Indeed, as I said in my recent Australia Day Address to the Nation, it is imperative for the survival of Australian democracy. Our citizens, especially young Australians, should be well informed about their system of government and should feel encouraged to play an active role in civic life.

So why should we be prompted to promote constitutional education? As far back as 1988, in the final report of the Constitutional Commission, established to inquire into the Australian Constitution, the Commission stated that "we are most concerned at the widespread ignorance of the Constitution and of the major impact it has on life in Australia. We believe there is a real need to educate people in at least its basic scheme and provision. Education in these matters will greatly assist in improving the general appreciation of how our system of democratic government operates."

Fifteen years later, the results of a survey, sponsored by the Commonwealth Department of Education, Science and Training, posed a question based on the statement, "Australia is a democratic country." Fewer than 55 percent of young Australians, sampled in the survey, agreed. And just 3.2 percent of them felt they had the power to greatly affect decisions made by a federal government. Fewer than 2 percent felt they would be able to influence a state or territory government. One positive note; more than 91 percent of those surveyed felt that they should be taught about Australia's legal and political system.

Six months ago, the Senate Legal and Constitutional References Committee, after a twelve-month inquiry, received a "considerable amount of evidence of a general lack of understanding in the Australian community of our Constitution and system of government." The Committee noted too, recent findings by a Consultative Group on Constitutional Change that, "in a substantial segment of our society, there is a lack of knowledge and confidence to express informed views on constitutional questions."

Last December, The Youth Electoral Study was released by researchers from the University of Sydney and the Australian National University, working in conjunction with the Australian Electoral Commission. Their report was Part One of a four-year nationwide project investigating young people's voting behaviour. The study involved a national survey of more than 4,600 senior secondary students. Among its conclusions; about half the respondents felt they lacked sufficient knowledge about political parties and voting. Once again education was identified as a key solution. The report says "schools and the media have the opportunity to perform a more prominent role in preparing Australia's youth to be engaged citizens."

As a result of legislation passed by the federal Parliament last December, civics and citizenship will rank, for the first time, alongside numeracy, literacy, science and information technology.

Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education.

Certainly efforts are being made. Considerable work has been done by the Education Office at Parliament House, here in Canberra. And around the country, the state electoral commissions have educational programs. In Perth, the Constitutional Centre of Western Australia is a superb model where students and visitors learn how our political system evolved and works now, its relevance to them and the influence on governance they can have. Students actually play all the appropriate roles to enact and amend legislation on matters that they see as important.

It seems to me that our nation, with its magnificent history of developing and safeguarding democracy should not become, potentially, as a result of complacency, the unwitting architect of its own civic decline. Maybe it's an Australian characteristic – maybe it's a universal thing – but most people simply take their Constitution for granted. In a way, you can see why. After all, many would ask: "what does this worthy but long, legalistic, century-old document have to do with my day-to-day life in 2005." Indeed, we might say that, superficially, the answer is: "not much." But the fact is that the Constitution represents the foundation stone of civil society. It explains the structure and roles of the key institutions in our system of government – including that of the Governor-General – and the relationships between them.

I have always said that, like life, one should feel encouraged to regularly examine the way we do things. And this holds true for the way we are governed. Our present system has worked very well for over 100 years giving us stability of government that is the envy of many other nations. But having said that, if people want to examine change, then it's perfectly within their rights to explore that. But in so doing I think it would be wise to have a clear understanding as to why our present system has worked so well; and what have been the mechanisms, including the checks and balances to ensure that.

To conclude, I am delighted to be patron-in-chief of the Constitutional Education Fund, Australia; in support of its worthy objectives:

- to educate Australians of all ages about the workings of the Australian Constitution and the Australian system of government;
- to develop educational materials to support this process; and
- to train Australians to act as spokespersons for the Constitution.

With your assistance, I will continue to do what I can to raise greater awareness and understanding of governance and citizenship in the Australian community.

Our nation, with its magnificent history of developing and safeguarding democracy should not become, potentially, as a result of complacency, the unwitting architect of its own civic decline.

Inaugural Award Recipients

Benjamin Davies

Ben has just finished his studies at Monash University. The judging panel considered he should be awarded the Gold Medal and Governor-General's Scholarship for an essay demonstrating a well considered, thoughtful and clear analysis of the Governor-General's reserve powers in a constitutional crisis. He emphasized the importance of vice-regal officers encouraging political resolution of the choice of Prime Minister and minimizing the need for the exercise of the reserve powers.

Monique McHardy

Monique is a student at the University of Sydney. She was awarded the joint silver medal for an essay in which she provides a thoughtful analysis of the similarities and differences between Canadian and Australian federalism. She noted that "economic concerns were particularly important in Australia, whereas regional diversity and external pressure influenced Canadian federalism" and concluded that both federal systems have adapted well.

Tamara Vu

Tamara is a student from Queensland currently studying at the University of Melbourne. She was awarded the joint silver medal for a well structured essay demonstrating strong views against the preventive detention of persons who pose a danger to the community, whilst conceding that "there are ... convincing reasons to allow for a cautious and limited version of preventive detention." At interview, she demonstrated well chosen language and tenacity in her assessment of the High Court's decision in Fardon, in particular when criticizing the view of one member of the Court who also happened to be a member of the Governor-General's Prize judging panel.

Wendy Nowland

Wendy is a student at the University of Newcastle. As a finalist, the judging panel considered she provided a good discussion of the utility of the referendum in Australian history, arguing that "it facilitates ... public involvement and is the ultimate gauge of the will of the people" and is thus "an indispensable tool of democracy."

Fiona Spencer

Fiona, from Tasmania, is a student at the University of Melbourne. As a finalist, the judging panel considered she defended preventive detention as "a legitimate response to the need to protect the community from ... terrorist and criminal acts," but stressed the need for "safeguards against arbitrary and unfettered powers."

Tan Lit Hau

Lit Hau is a student at the University of New South Wales who recently took his pledge as an Australian citizen. As a finalist, he argued that the referendum provisions in the Australian Constitution "represented a compromise between competing interests," intended to make constitutional amendment "difficult to achieve." His essay views the referendum as conferring legitimacy on the system by "allow[ing] for expression of the popular will."

2004 Questions for Undergraduates

1. Describe the differences between the Australian and Canadian experience of federation.
Were these structures well suited to the particular circumstances which preceded federation in each country? Have they served the countries well in the period since federation? What can each learn from the other?

2. Should the conventions of responsible government be codified, and can this be achieved effectively? Should any present reserve powers or conventions be abolished, and should any new reserve powers or conventions be introduced to enhance the operation of the existing constitutional system? Do not consider whether that system should be monarchical or republican, and do not attempt to draft a detailed code.

3. Should persons who pose a danger to the community (through the threat of commission of criminal and/or terrorist acts) or a specific person or persons be subjected to preventive detention? Should persons in prison for an offence involving violence be treated differently from others? If preventive detention were to be introduced by State legislation, how should it operate? Consider constitutional, legal and policy issues.

4. Assess the utility of the referendum in the context of Australian federal political and constitutional history. Discuss the legal and political significance of one successful constitutional referendum held under s 128 of the Constitution.

5. You are the Official Secretary to the Governor-General of Australia. The Governor-General has asked you to provide written advice about the constitutional implications of the following situation. In your advice you should anticipate what alternatives the Prime Minister and Leader of the Opposition have and how the Governor-General should act according to the applicable constitutional principles.

Situation

The House of Representatives has 150 members who serve for a maximum term of three years. The Alliance Party has 80 members and the Progressive Party has 70. The Alliance Party undergoes a split, leading to the formation of two parties, the Conservative Party, led by the Prime Minister, and the Reform Party, led by the Foreign Minister. Realizing that she has lost her House of Representatives majority (although losing no vote in the House), the Prime Minister advises the Governor-General to dissolve the House, which has served only two years. The ensuing general election produces the following result:

Conservative Party: 57 seats

Reform Party: 20 seats

Progressive Party: 73 seats

No party is willing to join another in coalition, or even to support a government of another party. The Progressive Party is willing to provide a Speaker; the other two parties have declined to indicate whether they are willing to support a Progressive Speaker. The House of Representatives is to meet thirty days after the return of the writs.

Australia faces economic crisis and the threat of terrorism which demand urgent action. The leader of the Conservative Party has advised the Governor-General to dissolve the House again and that, in any event, she should remain Prime Minister at least until the House meets. As leader of the largest party, the Progressive leader (Leader of the Opposition) insists that he should be commissioned as Prime Minister until the House meets and has publicly opposed a second dissolution of the House.

Supplementary Question for Finalists
If the framers of the Constitution were able to be assembled today, what successes and failures might they see in their work?
How would their assessment compare with contemporary perspectives?

Appointment of a Prime Minister in a Hung Parliament

Benjamin was the gold medallist in the Undergraduate Programme. This is an edited version of his essay.

Benjamin Davies

In a scenario in which, in a time of severe economic crisis and security threat, a general election fails to give one party a majority in the lower House and the balance of power is held by a third party, the intervention of the Governor-General may be necessary to resolve the situation if the political parties themselves cannot. In the event that the incumbent Prime Minister's party no longer has a majority and cannot count on the support of the balance of power party, yet advises another dissolution and election, the Governor-General must decide whether or not to accept such advice. The situation is further complicated if the Leader of the Opposition requests that he be commissioned to form a government but has not received a clear commitment of support from the balance-of-power party. In such a situation, the Governor-General is likely to be required to exercise two of his powers:

1. The power to appoint a Ministry following an election;
2. The power to either accept or refuse a Prime Minister's advice for a dissolution of Parliament.

> It is imperative that a Governor-General not pre-empt a situation and instead allow political events to play themselves out if there is any possibility of agreement being reached between the parties.

This scenario involves the interaction of the conventions of responsible government and the reserve powers of the Governor-General. Both are inherited from the United Kingdom and largely operate in a similar manner in Australia.

It is the duty of the Crown to determine who shall form a government whilst at the same time adhering to its prime duty to be politically impartial.[1]

In this scenario the Governor-General has three options:

- commission the Opposition Leader as Prime Minister;
- agree to the Prime Minister's request and dissolve the House in accordance with his power to do so under s. 5 of the Constitution; or
- explicitly decline the request and give more time for political events to play themselves out in the hope of a resolution.

It shall be argued that the third course of action is the most appropriate for the Governor-General and in pursuing this course of action he should exercise his right to consult with each of the three parties to properly ascertain the likelihood of a workable resolution.

Power to appoint a Prime Minister

Under the system of responsible government, the Prime Minister is appointed by the Crown, on the basis of his or her ability to command the confidence of the lower House. Section 64 of the Constitution gives effect to the conventions of responsible government in Australia by requiring the Governor-General to appoint Ministers who are members of the House of Representatives or Senators.[2] The Governor-General is obliged to commission as Prime Minister the party leader most likely to gain the confidence of the House and only has independent discretion in so doing in situations where neither party can demonstrate a clear likelihood of commanding such confidence.[3]

In the Westminster system, the incumbent Prime Minister remains Prime Minister in circumstances in which the result of the election is unclear. There is no convention that he or she resign unless it appears certain that he or she cannot gain the confidence of the new House.[4] It is a commonly observed convention that when no party achieves a majority following an election an incumbent Prime Minister is entitled to a reasonable period of time to ascertain whether he or she is able to form a new government[5] and there are several precedents in which this convention was followed. Following the hung Parliament of the 1923 British general election, Stanley Baldwin remained as Prime

Minister until his position was put to a vote of confidence in the Commons, which he duly lost.[6] Tasmanian Premier Robin Grey pursued the same course in similar circumstances in 1989,[7] whilst Victorian Premier Jeff Kennett also had several weeks to ascertain whether he could form a government following the 1999 election before the Legislative Assembly had sat. A Prime Minister is still entitled to remain commissioned and explore the options for a new government even when his party no longer has the greatest number of seats.[8] The Governor-General should therefore decline any request of the Leader of the Opposition to commission him as Prime Minister. Under normal circumstances, a Governor-General should avoid quickly exercising his discretion and allow the Parliament and the political process to determine the matter.[9]

Whilst the Governor-General must commission the Prime Minister who has the best chance of gaining the confidence of the House, there is a difference between a party which commands a majority who support it and a party which does not have a majority of the House prepared to vote against it.[10] If the latter scenario is possible then the Governor-General has the option of commissioning a minority government by either large party without a formal coalition or agreement with the balance-of-power party. Such a situation occurred in the British Parliament in 1923 when Ramsay MacDonald was commissioned to form a Labour government with only 191 seats in the Commons without having received a formal pledge of support from the Liberals, who held 159 seats, enough to give MacDonald a majority.[11] There is no requirement for a Prime Minister to seek majority support in a hung Parliament, nor any obligation to enter into negotiations with the balance-of-power party.[12] It is, therefore, open to the Governor-General to commission either of the large parties as a minority government, although he should refrain from doing so until such time as the parties themselves indicate that one is likely to be able to form a viable government. In such a situation a Prime Minister who is no longer likely to command the confidence of the House could be reasonably expected to resign and recommend to the Governor-General that the other large party be commissioned to form a government.

Power to refuse a request for a dissolution
The Governor-General has the power to refuse to dissolve Parliament against the wishes of a Prime Minister.[13]

The exercise of this power, however, is limited to situations in when it is absolutely necessary to do so to preserve the operation of the political system.[14] George Winterton has described the limits to this discretion in the following way:

An unelected Governor-General can be allowed no personal discretion beyond that absolutely necessary to ensure the effective operation of parliamentary democracy.[15]

The Governor-General has a duty to ensure that the rule of the people is given proper effect by enabling their chosen Parliament at least to attempt to produce a government.

The Governor-General's first duty must be to the system of government.[16] He should only refuse the Prime Minister's request for a dissolution if he is satisfied that the granting of a dissolution would detract for the proper functioning of the system. It is generally agreed that a Governor-General should refuse a dissolution before the House has had an opportunity to meet and consider in whom it has confidence following an election.[17] In the situation postulated, the granting of a dissolution would detract from the proper functioning of the political system. It would thwart the will of the people by denying the Parliament they have chosen the opportunity to consider who is able to form a government.

In normal circumstances an incumbent government cannot be forced out of office until it has lost the confidence of the House, and the Crown should not take action until that has either happened is clearly likely to happen.[18] Convention therefore dictates that a dissolution not be granted before the House has met.[19] It is imperative that a Governor-General not pre-empt a situation and instead allow political events to play themselves out if there

is any possibility of agreement being reached between the parties. If, following consultation with the Governor-General, it becomes clear that agreement cannot be reached and a workable government cannot be established, the Governor-General should commission one of the party leaders on the condition that they recommend a dissolution.[20] It is important that such a dissolution only be granted on the advice of the commissioned Prime Minister, so that the political party is seen to be taking political responsibility for bringing on the election, rather than the Governor-General.[21]

The Governor-General is also entitled to make inquiries of all relevant parties as to whether an alternative Prime Minister can command a majority.[22]

In 1989 the Governor of Tasmania, General Sir Phillip Bennett was faced with a similar situation in which an election had failed to produce a clear majority. The incumbent Liberal Party had the highest number of seats of any party and Premier Robin Gray advised the Governor that he would be able to form a government.[23] The Governor accepted this advice and granted him a new commission, on the understanding that his support would be tested in Parliament when next it met.[24] The Government then lost a no-confidence motion and the Governor was left to appoint a new government, based on his own discussions with the opposition Labor Party and the five Greens-Independents who held the balance of power. On the basis of assurances provided to him by these members, he commissioned the Labor Party to form a minority government.[25] Although the Labor Party had a parliamentary motion of confidence in its favour, the Governor still consulted with the Greens-Independents afterwards to satisfy himself that they would provide ongoing support to the Government, given that they had not previously given such an assurance.

The Governor-General would be well advised to follow a similar course in the postulated situation. As Sir Phillip Bennett did in 1989, he should seek the agreement of the Prime Minister to exercise his right to consult with all three parties in order to encourage them to reach a breakthrough or, if such a breakthrough it not possible, to properly satisfy himself personally that the parties' intransigence precludes such a solution. Unlike Sir Phillip in 1989, there should not be any need for the Governor-General to consult the balance-of-power party following a confidence vote in the House. Sir Phillip deemed it necessary to consult the Greens-Independents afterwards as they purported not to be a conventional political party in which conventional party discipline applied and, as such, could not guarantee their ongoing support for the new government.[26] Assuming the balance-of-power party operates according to conventional notions of party discipline, there would be no such need, and it would be inappropriate for the Governor-General to consult with the party after a confidence motion in the House.

The national crisis situation

In the postulated situation which occurs at a time of acute economic crisis and security threat, this would militate against a course of action which will take a long time to reach a resolution, and this should be taken into consideration by the Governor-General in the exercise of his powers. Although it is not normally appropriate for the Governor-General to make assessments of the "national interest" in handling such a situation, given the political nature of such assessments, in times of national crisis it is permissible for him to do so.[27] In 1916, when facing a "hung" Parliament in which support for Prime Minister Asquith had collapsed, King George V informed the party leaders in the course of his discussions with them that a minority government was not in the national interest in wartime and encouraged them to seek a solution which provided a stable coalition with a majority in the Commons. In 1931, during a period of economic emergency, George V commissioned a National Government comprising both major parties in response to the crisis. It should also be borne in mind that in both of these situations George V also expressed a view that a new general election at such a time was undesirable.[28] These precedents do not suggest that either of the two options presently available to the Governor-General (a new election or commissioning a minority government) is more appropriate than the other. They do, however, confirm is that when it comes to his discussions with the party leaders, the Governor-General is within his rights to encourage them to seek a solution in which a stable parliamentary majority can be achieved, in order to provide the certainty necessary to deal with the national crisis. The Governor-General must be careful

An unelected Governor-General can be allowed no personal discretion beyond that absolutely necessary to ensure the effective operation of parliamentary democracy.

not to insist on such an outcome, as this could be seen as exerting undue influence on the political process, as well as being partial towards the balance-of-power party, whose influence it would be guaranteeing.[29]

Conclusion

The Governor-General should first refuse the request of the Leader of the Opposition to commission him as Prime Minister before Parliament sits, for the reasons outlined above. He should then seek the agreement of the Prime Minister to engage in direct discussions with the leaders of all three parties to more accurately ascertain their positions. In doing so, he should exercise his right to encourage the parties to seek a solution which provides for a stable government to be formed, given the imperative of a national crisis, although he should not be so forthright if there were not a national crisis.

The Governor-General has a duty to ensure that the rule of the people is given proper effect by enabling their chosen Parliament at least to attempt to produce a government.[30] The undesirability of a further election so soon after the last one in a time of national crisis is a further argument in favour of the House of Representatives considering the matter. If it becomes apparent that the Opposition Party will be able to form a government with the support of the balance-of-power party then, according to convention, the Prime Minister ought to resign and recommend that the Leader of the Opposition be commissioned as Prime Minister.[31] If the Prime Minister does not resign and faces the House and loses a confidence vote, then by convention he must resign (if not, he can be dismissed by the Governor-General) and the Leader of the Opposition can then be commissioned.

If there is no likelihood of either party being able to form a government, then the Prime Minister is entitled to face the House and attempt to govern as a minority government. It is important that the Governor-General not pre-empt such an outcome by passing judgement on the likely viability of such a government before the Prime Minister has faced the House. If the Prime Minister then loses the confidence of the House and the Leader of the Opposition cannot gain it, then another dissolution is the only available option, and the Governor-General should seek such a recommendation from the commissioned Prime Minister.

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Australian and Canadian Federalism Compared

Monique was a joint silver medallist in the Undergraduate Programme. This is an edited version of her essay.

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Introduction

Australia and Canada are both constitutional monarchies with responsible parliamentary government, developed economies and federal systems of government. However, Canadian federalism originally had a strong central government and has since become decentralised, whereas the Australian framers desired the protection of States' rights, but a centralised federation has evolved. By comparing the social circumstances and judicial decisions that impacted upon the design and development of each federation it is possible to see how aspects of each system could be adopted by the other to rectify the problems that have emerged in each country.

Origins of federalism

Canada

The Canadian Federation was established by the British North America Act 1867 (BNA) (now retitled the Constitution Act 1867)[1] and originally consisted of four Provinces, but now includes ten Provinces and three Territories.[2] British North Americans desired union as protection against the threat of the United States of America, particularly given the withdrawal of British troops in 1864[3] and the inadequacies of colonial defence.[4] The USA also influenced the shape of the BNA since colonists believed the recognition of State sovereignty by the United States Constitution had given rise to the secessionist movements that caused the American Civil War.[5] British North Americans also feared independence from Britain and hoped that federalism would make Canada more significant to Britain and tighten the bonds with the Empire.[6] Since colonists did not desire popular sovereignty, they designed a system of subordinate federalism where sovereign power resided only in the central government.[7] The framers attempted to centralise power in s. 91 of the BNA by granting the Dominion legislature power over "all the great subjects," such as trade and commerce, and by giving residual rights to the central authority in order to ensure national unity and avoid the conflicts of coordinate federalism.[8] In addition, the Governor General had the power to disallow Provincial statutes and to appoint Provincial Lieutenant Governors and judges.[9]

In addition to external pressures, Confederation was also the result of internal forces, including the commercial promise offered by expansion into the North West territories.[10] Confederation was also politically expedient in order to rectify the political impasses that were occurring in the Province of Canada, where the interests of French-speaking Lower Canada conflicted with those of English-speaking Upper Canada.[11] It was hoped that, by widening the union, these conflicts could be overcome.[12] However, it was also necessary to recognise the permanent existence of a French-Canadian minority.[13] The BNA did this through constitutional asymmetry, where s. 93 established denominational and linguistic guarantees in education and other sections allowed the use of French civil law.[14] It was also believed that a strong central government was needed to protect the interests of minorities.[15] Although union was desired, colonists throughout British North America shared a long tradition of localism[16] and loyalists fleeing the American Revolution had also brought a dislike of strong and distant government to British North America.[17] As a result, s. 92 of the BNA enumerated the exclusive powers of the Provincial legislatures in order to ensure that the Provinces retained local control over the divisive local issues.[18]

Adopting Canada's intergovernmental relations policies and taxation model could alleviate some of the problems caused by Australia's centralised federation.

Australia

Australian federation was established in 1901 and, like Canada, was made possible by improvements in rail and the electric telegraph which linked geographical distant colonies.[19] Unlike Canada, Australia's federation was not greatly influenced by external factors

and, although it was desirable for defence and immigration to be controlled by a federal government, they were not key issues in the federation movement.[20] Unlike Canada, Australia's non-aboriginal population was almost entirely Anglo-Celtic[21] and federation was facilitated by the presence of a common language, culture and allegiance to the Queen and British political traditions.[22] As in Canada, Australian federalism was motivated by imperial sentiments and the hope that unity would increase Britain's attention to colonial grievances.[23] However, the primary motivation behind federating was the economic concerns that had emerged during the Depression of the 1890s.[24] Section 92 of the Constitution expressed the colonists' hope that federation would achieve intercolonial free trade and revitalise trade and commerce.[25]

Despite the homogenous nature of Australian society, the population was concentrated in dispersed State capitals and colonial identities remained strong.[26] Each colony had developed an independent economy, which had led to interstate rivalries and the implementation of protectionist policies.[27] Rivalry was expressed in the unnecessary duplication of railways, which actually contributed to the Depression of the 1890s.[28] Colonists envisaged the federal government as an agency that dealt with intercolonial matters in the interests of the States,[29] and rejected the Canadian model as too centralised.[30] In addition, although both federations were established by the elites of each country, the Australian framers had greater faith in democracy than their Canadian counterparts.[31] By 1900 democratic principles were increasingly popular and people wanted greater powers retained by colonial governments.[32] The importance of States rights was reflected in s.51 of the Constitution listing the legislative powers of the federal Parliament but making them concurrent powers and giving the residual powers to the States under s.107.[33]

Canada's lack of federal loyalty could be improved by adopting Australia's political party conventions and senate model.

Development of federalism

Canada

Despite the intentions of its founders, Canadian federalism has become increasingly decentralised as a result of judicial interpretation and continuing regional differences. Judicial decisions have limited the scope of federal powers such as the s. 91(2) trade and commerce power, which was limited to international and interprovincial trade[34] in *Citizens Insurance Co. v Parsons*.[35] In the same case the scope of Provincial powers was widened, particularly the s. 92(13) property and civil rights power which was given a broad definition.[36] Later cases, such as *Re Board of Commerce*,[37] employed similarly narrow interpretations of the trade and commerce power out of a desire to avoid interfering in the Provinces.[38] Once appeals to the Privy Council were abolished in 1949, the scope of the power widened as the courts allowed regulation where it was necessarily incidental.[39] Recent use of the peace, order and good government clause has also widened the scope of federal power.[40] However, judicial interpretation has generally respected the autonomy of Provinces, and especially the rights of the French minority.[41]

In 1982 Provincial powers were expanded and a Charter of Rights and Freedoms was added to increase the recognition of the cultural and language rights of French Canadians and Aborigines.[42] Despite the decentralisation of Canadian federalism and the 1982 reforms, the provisions of the BNA have remained largely intact and have proved to be flexible enough to allow the Constitution to evolve as society has demanded. The people have been able to amend and interpret the provisions of the Constitution to suit contemporary circumstances,[43] which in the case of Canadian regional differences has required Provincial autonomy and the recognition of the rights of minorities.

Australia

Australian federalism has developed in the opposite direction to Canada's by becoming increasingly centralised, particularly regarding federal fiscal relations. The early High Court was composed of framers of the Constitution and developed the doctrine of reserved State powers, which favoured State autonomy when interpreting Commonwealth legislation.[44] This doctrine was rejected in favour of legal

Both federal systems have generally served each country well since they have proved flexible enough to allow federalism to be adapted to contemporary circumstances.

textualism in the *Engineers* case,[45] allowing the expansion of federal power. The *Tasmanian Dam* case[46] and *Airlines of NSW Pty Ltd v NSW (No 2)*[47] widened the scope of Commonwealth power under the s. 51(xxix) external affairs power and the s. 51(i) trade and commerce power respectively.

The fiscal power of the federal government was greatly increased when difficulties obtaining wartime finance resulted in the imposition of a uniform taxation system in the *First Uniform Tax* case,[48] drastically centralising governmental power.[49] This case also established the legality of imposing conditional financial grants on the States, reducing their autonomy. The power of the States to impose taxes has also narrowed. Under s. 90 the Commonwealth has the exclusive power to raise excise duties and the broad definition of "excise" established in *Ha v NSW* [50] has limited the States' ability to raise funds. These constitutional decisions have increased central power in the federation and made the States financially dependent on the Commonwealth. However, as in Canada, these changes also reflect social concerns although, unlike Canada, they have been facilitated by a largely homogenous society.[51] The imposition of uniform tax was largely due to the national interest during World War II and the expansion of the external affairs power in the *Tasmanian Dam* case reflected national concern about the environment. Although Australian federalism has developed from that envisaged by the framers, like Canada's it has been flexible enough to accommodate these changes.

Reforms suggested by a comparative analysis

Canada

The major problem facing Canadian federalism has been the threat of secession by Quebec, which contains the majority of French-Canadians in a country where they are a national minority. Successive Quebec governments have attempted to achieve greater autonomy for Quebec and an increased federal role for the Province.[52] Recently Canada has also seen the rise of regional political parties, which sends a danger signal for federal unity.[53] Although Australia lacks a State analogous to Quebec, the 1933 Western Australian secession attempt exemplifies how regional grievances can be solved by special financial assistance rather than resorting to violence.[54] Canadian federalism has generally attempted to accommodate Quebec, such as by increasing constitutional asymmetry and allowing Quebec to operate its taxation system differently.[55] However, it may also be necessary to strengthen the federal focus of loyalty.[56] In Australia, ties between State and federal branches of political parties and composing federal cabinets having regard to the State backgrounds of members has created a greater sense of ownership of the federal government.[57] Changes to Canadian political party conventions could therefore facilitate national unity.

Reforming Canada's second federal chamber could also improve regional representation. The Canadian Senate is based on the regional representation of provincial groups and senators are appointed by the federal government to hold office until their retirement at 75.[58] Australian Senators are popularly elected for six years and each State is given equal representation.[59] Due to the Canadian Senate's role as a house of review, adopting the Australian model would increase regional representation and national unity.

Australia

The major problems that have emerged in Australian federalism have been the lack of State participation in policy making[60] and a high vertical fiscal imbalance.[61] Although the Hawke government's New Federalism suggested possibilities for reform, subsequent governments have increased the centralisation of power.[62] Constitutional amendments have been largely unsuccessful in Australia, but the Canadian system suggests some alternative reforms. Australia's highly concurrent federation means that intergovernmental relations are important for assuring that State interests are recognised.[63] Canada has an extensive network established for intergovernmental affairs, including permanent intergovernmental affairs departments in Provincial and Dominion Governments, and a permanent secretariat to administer and support conferences.[64] Australia has the Council of Australian Governments, which could be made more effective by establishing a supporting secretariat and mandating attendance at meetings.[65] Australia could also establish Ministers, interparliamentary committees and Senate committees for intergovernmental affairs.[66]

In addition to reforming intergovernmental

relations, Canadian federalism also provides a model for reducing vertical fiscal imbalance. In Canada, Provinces are allowed to collect their own sales and income taxes, reducing their dependence on the federal government.[67] Aside from Quebec, provincial taxes are calculated as a percentage of federal tax and collected by the federal government, ensuring transparency and reducing tax administration.[68] Unconditional grants have also helped to reduce provincial dependency on the federal government and are an additional measure that Australia could adopt.[69] Finally, given Australia's indigenous community and multicultural society, Australia could also learn from Canada's example of the 1982 inclusion of a Charter of Rights and Freedoms in its constitution, which recognises the rights of Aboriginals and minority groups.[70]

Conclusion

The timing and shape of federation in both Australia and Canada was influenced by colonial experiences. Economic concerns were particularly important in Australia, whereas regional diversity and external pressures influenced Canadian federalism. These same factors have led to Canadian federalism becoming increasingly decentralised and Australian federalism becoming more centralised. Canada's lack of federal loyalty could be improved by adopting Australia's political party conventions and senate model. Meanwhile, adopting Canada's intergovernmental relations policies and taxation model could alleviate some of the problems caused by Australia's centralised federation. In spite of these problems, both federal systems have generally served each country well since they have proved flexible enough to allow federalism to be adapted to contemporary circumstances.

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Predicting Danger: Constitutional Limitations and Policy Implications of Preventive Detention Legislation

Tamara was a joint silver medallist in the Undergraduate Programme. This is an edited version of her essay.

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Introduction

Protection of community safety is becoming increasingly topical in Australia, as the danger posed by violent offenders encroaches on the public consciousness. State and Commonwealth legislatures are being challenged to devise strategies for the management and prevention of aggressive crime. One particularly controversial strategy is the anticipatory detention of persons held to pose a threat of commission of violent acts. This paper will critically examine whether preventive detention should be implemented by State Parliaments, addressing the issue from two perspectives. First it will give a technical examination of the constitutional validity of each of a legislative, judicial and executive model of preventive detention. It will then undertake a broader examination of the policy considerations relating to this issue. Overall, it will argue that while there is potential for State Parliaments to implement a constitutionally valid model of preventive detention, imposed by an executive body, the significant policy concerns should deter legislatures from taking such a step.

Constitutional Limitations on Preventive Detention Legislation

In this discussion, "preventive detention legislation" is defined as legislation of an Australian State Parliament that provides a legal mechanism by which a person who is held to present an actual threat of criminal harm to another person or to the community can be detained for a limited or indefinite period to prevent the envisioned criminal act being executed. The stated purpose of such legislation is community protection.

Accordingly, preventive detention legislation may be divided into three broad categories. First, legislation stating that a specific, designated person poses a danger, and ordering their incarceration (a "legislative model"). Second, legislation empowering (or indeed compelling) the judiciary, on finding that a person is dangerous, to order their imprisonment (a "judicial model"). Third, legislation empowering a member of the executive or an executive body to make a determination of danger and order imprisonment (an "executive model"). This section will examine whether any of these models might validly be implemented by State Parliaments, and identify particular constitutional limitations that would restrict them.

Legislative Model

Though, politically, it would seem unlikely for a State Parliament to employ a legislative model and imprison a citizen entirely of its own motion, there are no strong constitutional reasons why such legislation should fail. If enacted by the Commonwealth Parliament, such legislation would probably[1] comprise a Bill of Pains and Penalties — a statute "impos[ing], of its own mere force and without the possibility of judicial intervention … penal consequences to the formation of an opinion by the Executive, not judicially examinable"[2] — and as such would breach the separation of powers entrenched in the Commonwealth Constitution,[3] constituting an invalid usurpation of judicial power by Parliament.[4] However, the New South Wales Court of Appeal has established that the provisions of State Constitutions that found State judicatures do not entrench a separation of powers.[5] Kirby P found that "far from providing a constitutional protection, separation, and entrenchment of the judiciary", the *Constitution Act* 1902 (NSW) "specifically contemplated that … power would be held by the legislature … to impinge on courts and the judicial function".[6] This was confirmed by the High Court in *Kable v DPP (NSW)*:[7] the *Constitution Act* 1902 (NSW) "cannot be seen as reposing the exercise of judicial power exclusively in the holders of judicial office".[8] Therefore, it is constitutionally valid for a State legislature to usurp judicial power.

Nonetheless, Rees and Fairall[9] have argued that a legislative model could be invalid because in

designating a person for detention, it violates a potential obligation that State laws apply equally. In *Leeth v Commonwealth*,[10] a minority found Commonwealth legislative power to be limited by a doctrine of legal equality.[11] Rees and Fairall suggest that, like the implied freedom of political communication, legal equality "shapes and controls the common law".[12] They argue that as, in *Leeth*, the minority held that "the notion of the inherent equality of the people"[13] was implicit in the free agreement of citizens to federate, "[t]he same implication must apply at a state level if it is accepted that the conceptual basis of the states … was the free agreement of the people who comprise each State".[14] If this were accepted, the legislative model would be invalid, as would any model that authorised the imprisonment of a particular person only.[15]

However, not only is this argument speculative and currently not endorsed by precedent, it would appear that it has been substantially undermined by the decision of the High Court in *Kruger v Commonwealth*.[16] There, the expansive approach to an implied right of equality taken in the minority decision of Deane and Toohey JJ in *Leeth* was rejected by four justices. Dawson J, McHugh J agreeing, cited numerous examples of "respects in which the Constitution does not support … equality", suggesting that the existence of these must "surely … undermine any basis for asserting that the Constitution assumes a doctrine of equality".[17]

Thus, it would seem that there is no restraint deriving from the Commonwealth Constitution that would limit a State Parliament's power to pass a Bill of Pains and Penalties.

Judicial Model

Judicially-determined preventive detention is perhaps the most likely model to be implemented; all three preventive detention statutes so far enacted have employed a judicial model.[18] However, it would seem likely that the finding in *Kable* may have circumscribed the potential scope of such legislation.

As discussed above, State legislative power is not limited by the separation of powers. Thus, the notion that the Commonwealth Constitution precludes use of federal courts "for the discharge of functions which are not in themselves part of judicial power"[19] does not find a parallel in the State constitutions.

However, by the majority judgments of Toohey, Gaudron, McHugh and Gummow JJ in *Kable*, the Commonwealth separation of judicial power implied from Ch III of the Commonwealth Constitution restrains State Parliaments from conferring powers on State Supreme courts that are "repugnant to or incompatible with"[20] their "integrity, independence and impartiality"[21] as repositories of federal jurisdiction under s. 71.[22]

Kable tested the validity of the *Community Protection Act* (*CPA*), which required the Supreme Court of New South Wales to make preventive detention orders where it was "satisfied, on reasonable grounds … that [a] person is more likely than not to commit a serious act of violence".[23] Procedural provisions set out the projected operation of the courts in reaching a decision. The *CPA* was clearly intended to apply to one person only: it "authorise[d] … a detention order against Gregory Wayne Kable and [did] not authorise … a detention order against any other person".[24] Kable had been convicted of manslaughter in 1990, and the *CPA* was passed in response to threats of violence he made from prison.[25]

The Court's reasoning derived from the incompatibility doctrine established in Grollo v Palmer.[26] There, the doctrine of *persona designata* — whereby non-judicial power can be conferred on Ch III judges if this power is conferred on the judge, not as a member of the court, but in their personal capacity[27] — was limited such that no power "can be conferred that is incompatible … with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power".[28] Having regard to this doctrine, and to the "integrated Australian judicial system",[29] comprising an interlocking "system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power",[30] the Court held that State courts capable of being invested with federal judicial power cannot exercise "powers or functions that are repugnant to or incompatible with the exercise of the judicial power of the Commonwealth".[31]

The majority held the CPA to be legislation whose "procedures compromise[d] the institutional impartiality of the Supreme Court"[32] and accordingly held it to be invalid by operation of the Commonwealth Constitution. The question, therefore, is whether the facets of

the *CPA* that rendered it invalid under the *Kable* principle are fundamental to the judicial model of preventive detention.

Kable identified elements of the *CPA*'s determination process that were held to prejudice (in actuality or in the public eye)[33] the integrity of the judicial finding for which it provided. Gaudron J expressed doubts that public confidence in the courts could be maintained where judges were required to form an opinion "by reference to material which may or may not be admissible in legal proceedings … on the balance of probabilities".[34] The unacceptability of the civil standard of proof was similarly raised by McHugh J.[35] Another difficulty was the lack of judicial discretion afforded by the *CPA*.[36]

These findings would suggest that a judicial model of preventive detention must incorporate the conventions of judicial process. Certainly, the majority judgments in *A-G (Qld) v Fardon*[37] and *Fardon v A-G (Qld)*[38] would support this conclusion. There, the Queensland Court of Appeal and the High Court, respectively, held that the Queensland Act, which provides for the preventive detention of sexual offenders where the Supreme Court is satisfied they present "a serious danger to the community",[39] is valid. It is worthwhile to note that both courts, in upholding the Act, distinguished *Kable* on these procedural grounds. De Jersey CJ endorsed the trial judge's finding that the evidentiary requirements of the *Act* do "not relax the usual requirements";[40] that the Act "requires the court to be satisfied of matters preliminary to the making of an order 'to a high degree of probability'";[41] and "it confers a discretion … as to whether an order should be made".[42] Williams JA agreed, and further noted that the Queensland Act provides for a "full and fair hearing",[43] "in contrast to the legislation in issue in *Kable*".[44] Similarly, on appeal, McHugh J referred to the "substantial discretion as to whether an order should be made"[45] that is afforded to the Court under the Queensland Act, and Gummow J noted that "nothing in the Act … exclude[s] rules of natural justice … [and] impose[s] upon the respondent a duty of disclosure of evidence … which was the same duty of disclosure as the prosecution has in a criminal proceeding".[46]

Kable and the two *Fardon* judgments seem to be authority for the constitutional requirement that a judicial model must hold to normal criminal evidentiary standards, make findings to a high degree of probability, and allow judicial discretion.

More fundamental than these procedural concerns, however, is the question whether *Kable* stands for the proposition that arbitrary detention without criminal conviction for preventive purposes is, of itself, a repugnant exercise of judicial power. The *CPA* breached the *Kable* principle because it required the Court "to participate in the making of a preventive detention order where no breach of the criminal law [was] alleged and where there has been no determination of guilt".[47] This is because the Court accepted the principle that, with some exceptions, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[48] Thus the *CPA* requirement that the Court exercise this judicial power in a manner divorced from adjudging guilt — "the antithesis of the judicial process"[49] — breached the *Kable* principle.

The question is thus whether, first, preventive detention could be characterised as "reasonably capable of being seen as necessary for a legitimate non-punitive object",[50] and as such, comprise an executive power (remembering that "there is nothing to prevent the [State] Parliaments … from conferring powers on their courts that are wholly non-judicial")[51] exceptional to the *Lim* rule (like "[i]nvoluntary detention in cases of mental illness or infectious disease"):[52] and second, whether such an executive power, so vested, would nonetheless

While there is potential for State Parliaments to implement a constitutionally valid model of preventive detention, imposed by an executive body, the significant policy concerns should deter legislatures from taking such a step.

be incompatible with receipt of federal jurisdiction. The *Kable* majority seemed to hold that preventive detention cannot comprise a new category of exception. Toohey J distinguished the *CPA* from the legislation at issue in *Lim*, suggesting that "[p]reventive detention under the *CPA* is an end in itself",[53] though the stated object is community protection,[54] and as such, does not "fall within the 'exceptional cases' mentioned in *Lim*, directly or by analogy".[55] However, the disparity of judgments — McHugh J suggested "there is no reason to doubt the authority of the State to make general laws for preventive detention where those laws operate in accordance with … ordinary judicial processes"[56] — leave the question unclear.

In this vein, the Queensland Court of Appeal in *A-G (Qld) v Fardon* thus concluded that the Queensland *Act* is valid because it provides for involuntary detention, determined according to "normal judicial processes",[57] for community safety purposes, "which should be characterised as non-punitive",[58] "fall[ing] naturally into the exceptional category recognised in *Lim*".[59] However, in characterising a statute, "it is the operation and effect of the law in question which defines its constitutional character",[60] not "the purposes, motive or intentions" [61] of Parliament and, as McMurdo P found in her *A-G (Qld) v Fardon* dissent, "[d]espite the stated objects of the Act, (to protect the public and to rehabilitate the prisoner), the effect of the Act [was] punitive and not within the exceptions referred to in *Lim*".[62]

Moreover, even if preventive detention were a *Lim* exception, it is arguable that investiture of this "purely executive"[63] power in State courts would nevertheless breach the *Kable* principle as, insofar as this executive power requires the body exercising it to impose detention without criminal conviction, directly contradicting normal judicial process, it is highly likely to prejudice public confidence in the judicial system. The court in *A-G (Qld) v Fardon* did not address this particular consideration; rather, there was a tendency to assume that if preventive detention is a valid *Lim* exception, *Kable* will not preclude its investiture as a power of State Supreme Courts. This was taken up in *Fardon v A-G (Cth)*, however, where the High Court chose to reject jeopardising of public confidence as a measure of *Kable* incompatibility. Thus, McHugh J held that the Queensland Act "authorises and empowers the Supreme Court to act in a manner which is consistent with its judicial character … [and] does not confer functions which are incompatible with the proper discharge of judicial responsibilities",[64] because the Court held that "it cannot be a serious objection to the validity of the Act that … [it] relates to a subject that is … politically divisive or sensitive".[65] The Court also noted that the Queensland Act could be distinguished from the *CPA* because the latter "was held to impair the institutional integrity of a court [by] involv[ing] it in an *ad hominem* exercise".[66]

Even if preventive detention were a Lim exception, it is arguable that investiture of this "purely executive" power in State courts would nevertheless breach the Kable principle.

The difficulty with this reasoning, however, is that it discounts the possibility, which arguably emerges from *Kable*, that proceedings imposing preventive detention, that thus "do not in any way partake in the nature of legal proceedings",[67] may be inherently and of themselves repugnant to judicial office, as they upset the requirement that "state courts must remain at all times curial receptacles proper to the exercise of federal jurisdiction".[68] The High Court obliquely addressed this question in *Fardon v A-G (Qld)* in issuing general statements to the effect that "nothing in the Act … gives any ground for supposing that the jurisdiction conferred by the Act compromises the institutional integrity of the … Court",[69] but did not address the position articulated in *Kable* – that State courts not only refrain from acting "in a manner which is inconsistent with traditional judicial process",[70] but also abstain from performing functions of their own nature "repugnant to judicial process".[71] This was restated by Kirby J in *Fardon v A-G (Qld)*, where His Honour noted that the imposition of preventive detention by courts "represent[s] a departure from past and present notions of the judicial function in Australia".[72] However, if it was the intention of the Court in *Fardon v A-G (Qld)* to circumscribe this limitation through broad statements such as that quoted above, it would

appear that McHugh J was indeed correct in his assessment: "*Kable* is a decision of very limited application".[73]

On present authority, therefore, it would appear that the High Court in *Fardon v A-G (Qld)* has restricted the constitutional limitation set out in *Kable* to a requirement that preventive detention legislation employing a judicial model make appropriate provision for the procedural trappings of judicial determination to be exercised.

Executive Model

The most solid model of preventive detention, constitutionally, is probably executive. Whether executive or judicial in nature, the power to imprison preventively can, in the absence of an entrenched separation of powers, be invested in executive bodies. This was most recently acknowledged in the judgment of Gleeson CJ in Fardon v Attorney-General, where His Honour noted that Fardon's "challenge to the validity of the Act would disappear if the power to make the relevant decision were to be vested in a panel of psychiatrists (or, presumably, retired judges)".[74] State legislatures could either create specialised administrative tribunals (like the Mental Health Review Board), or authorise an executive member to make determinations and order detention.

Thus, the constitutional position regarding preventive detention legislation is as follows. The *Kable* principle will probably not invalidate any attempt to implement a judicial model, as it seems preventive detention itself is not, on present authority, incompatible with judicial office. There are only speculative difficulties with a legislative model, and no apparent constitutional limitations on the power of State Parliaments to implement an executive model.

Policy Considerations

There are many well-documented difficulties with preventive detention. First, numerous commentators[75] have argued that freedom from imprisonment is a fundamental right and thus preventive detention "create[s] the danger of infringement of basic human rights which should underlie the laws of a modern democratic society".[76] As Grove J noted, criticisms of the *CPA* on this ground "have fallen from almost every judge who has had to exercise some aspect of jurisdiction"[77] under it, including that it represents "a radical departure from our rule of law principles".[78] Second, "there are serious practical problems (and hence potential injustice) in relying … on the prediction of future violent behaviour".[79] There are significant evidentiary and medical difficulties with laws requiring a determining body to delve into psychological, psychiatric, and neurological methods and conclusions. It has been suggested that the dangerous offender "with a career of seriously injuring others is … virtually impossible to identify in advance"[80] and the concept of dangerousness itself "so insidious that it should never be introduced in penal legislation".[81] Third, it is an ever-potential hazard that, as Levine J noted, that "which is intended to be a shield [might be] converted into a weapon in the hands of the mischievous, the spiteful, the vindictive, the jealous, the revengeful or similarly motivated individual or individuals to use by way of actual or threatened false allegation against an innocent person".[82]

On the other hand, there are also numerous arguments in favour of allowing for a cautious and limited version of preventive detention. Democratically elected governments have obligations to protect the public, and "the law does not presently provide a mechanism whereby the community can be protected from a potentially violent individual, who is not mentally ill for the purposes of the mental health legislation, and who has not committed a serious act of violence".[83] This is the central argument in favour of preventive detention, enunciated in *Veen v The Queen [No 2]*[84] by Deane J, who envisioned "the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people".[85] This situation was described by Gleeson CJ as "an almost intractable problem"[86] in *Fardon v A-G (Qld)*; he argued that while "predictions of future danger may be unreliable … they may also be right".[87] The advantage of a statutory scheme, as envisaged by Deane J, is that "the disadvantages of indeterminate prison sentences could be avoided", and, especially, prisoners could be placed under "continuing detention in an institution other than a gaol and [be provided with] a guarantee of regular and thorough review by psychiatric and other experts".[88] Certainly, it is not necessarily true that the implementation of preventive detention

is an attempt to create "a seamless web of community protection via state action".[89] Rather, it might be argued that preventive detention is a measure of last resort to deal with specific cases where there is an articulated and immediate risk of harm demonstrated to a very high standard of proof. Neither does it exclude the possibility of utilising other social responses such as modification of existing mental health legislation or improvement of rehabilitation programs for convicted offenders.

However, while these are valid arguments, to posit preventive detention as a solution to the perceived "gap" between mental health legislation and the criminal justice system is to delve into murky waters. "[T]here is no scientific process or basis to form a view about dangerousness … [the question is] highly subjective".[90] As noted by Kirby J, "[e]ven with the procedures and criteria adopted, [preventive detention legislation] ultimately deprives people … of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed 'guess".[91] Preventive detention is an inappropriate solution to the risks posed by violent offenders, open to abuse and involving a significant offence to fundamental human rights.

Conclusion

Constitutionally, this paper concludes that while Kable has excluded any possibility of a valid judicial model, State Parliaments have scope to implement a legislative or executive scheme to this effect. However, the factual difficulty of determining threat and the potential for abuse of such a scheme mean that nebulous concerns of community safety cannot justify the infringement of a fundamental human right. Preventive detention should not be implemented by State Parliaments.

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The Need to Account

Corporate Governance Statement

CEF-A pursues high standards of corporate governance.

We are committed to the operating the Governor-General's Prize Programme and our other activities and investing funds in a business-like manner as well as developing systems and practices that enhance good corporate governance.

The Trustees are responsible for directing and overseeing CEF-A. They have not received fees for their services as Trustees. The Trustees are eminent Australians drawn from a cross-section of the community.

The roles and responsibilities of the Trustees are clearly defined in the Constitution Education Fund Deed of Settlement.

Kerry Jones Strategic Management Service Pty Ltd (KJSMS) raises funds for CEF-A and manages the delivery of its activities on a day-to-day basis.

Kerry Jones, as Director of KJSMS, has responsibility for the operations and administration of CEF-A.

Tony Bandle FCA is the national auditor for CEF-A. He has extensive experience auditing a number of charities including the National Trust and the Royal Life Saving Society of Australia.

Auditor's Statement

1 March 2005

We have audited the Financial Statements of the Constitution Education Fund for the year ended 30 June 2004 and the accounting records and other records relating to those statements. The audit report has been given to the CEF trustees.

We have found that the level of compliance with statutory requirements to be of a high standard and the recordkeeping practices adopted for this operation satisfactory for the purpose of the Trust and its donors and supporters.

Bandle McAneney & Co is proud to be the national auditor for the newly established CEF-A Governor-General's Prize Programme and formally congratulate CEF-A for achieving tax deductible status. We look forward to conducting our annual audit for this important Trust for many years to come.

Anthony Bandle FCA

Trustees' Report

The objects of CEF-A are set out in the Trust Deed. The general object is "to better educate the people of Australia in matters relating to the Commonwealth of Australia Constitution, and the Constitution of the States." Without in any way limiting the generality of this, the Trustees have been assisted by ten specific objectives. It is relevant to mention the first of these, which is "To educate Australians of all ages on the detail and workings of the Australian Constitution and the Australian system of government".

In this our first annual report, it is appropriate to recall that in 2002, the Trustees decided that a series of projects should be undertaken by CEF-A to advance these objects and that practical strategies for implementation and fundraising should be put in place. For practical purposes, these would have to be stages, and the Trustees decided that the first projects should be targeted towards the youth of the nation.

The Trustees determined that these projects, as with all of the activities of CEF-A, should be undertaken only to advance its objects, and not for any partisan or political purpose. The theme was to be about enhancing community knowledge and understanding of the way we are governed, and not to advance any particular cause. The Trustees sought the highest imprimatur for the attainment of the objects. Accordingly, they decided to seek the patronage of the highest office holder in the land, one above politics which would clearly indicate that CEF-A was for all, and not a partisan instrument. The Trustees are grateful to the Governor-General for agreeing to undertake this role.

The Trustees decided that they needed patronage from a broad range of leaders of the Australian community, and therefore established a Foundation Council for that purpose.

The Trustees have resolved that an annual report should be published to coincide with the presentation of awards in the Governor-General's Prize Programme on 28 January 2005, the culmination of the CEF-A's activities over the last eighteen months. Accordingly, the accompanying accounts have been prepared to present the position of the Constitution Education Fund as at 28 February 2005.

In the opinion of the Trustees the accompanying accounts:

1. Present fairly the financial position of the Constitution Education Fund and the results of the Trust for the year ended 30 June 2004;
2. Present fairly the financial position of the Constitution Education Fund for the period 1 July 2004 – 31 March 2005;
3. At the date of this statement, there are reasonable grounds to believe that the Trust will be able to pay its debts as and when they fall due.

This statement is made in accordance with the resolution of the trustees and is signed for and on behalf of the trustees by:

David Flint

Statement of Financial Performance

CONSTITUTION EDUCATION FUND
ABN: 76 750 439 829

STATEMENT OF FINANCIAL PERFORMANCE
FOR THE PERIOD JULY 1, 2004 - MARCH 31, 2005

REVENUES FROM ORDINARY ACTIVITIES	2004 $	2005 YTD $
Donations	348,545	472,538
Interest revenue	56	166
TOTAL REVENUE FROM ORDINARY ACTIVITIES	348,601	472,704
EXPENSES FROM ORDINARY ACTIVITIES*		
Prizes and Scholarships	14,400	62,600
Employee Expenses	154,281	167,387
Promotion Expenses	10,756	5,021
Consultancy Expenses	11,500	8,980
Rental Expenses	24,912	71,097
Travel and Accommodation	3,721	6,980
Expenses from Office Administration	74,157	134,524
	293,727	456,589
NET SURPLUS	54,874	16,115

* Note:

1) Expenses paid through the management company KJSMS Pty Ltd on behalf of CEF-A

2) The accounts are audited annually by Mr Tony Bandle of Bandle McAneney & Co and presented to the Trustees for approval.

Endnotes

Popular Sovereignty Requires Informed Voters - George Winterton

[1] J. Quick and R. R. Garran, The Annotated Constitution of the Australian Commonwealth (Sydney, 1901), 989.

[2] Attorney-General (WA) v Marquet (2003) 202 ALR 233.

Appointment of a Prime Minister in a Hung Parliament - Benjamin Davies

[1] V. Bogdanor, The Monarchy and the Constitution (Oxford: Oxford University Press, 1985), 147.

[2] Constitutional Centenary Foundation, The Australian Constitution (2nd ed., Melbourne: Constitutional Centenary Foundation, 1997), 72.

[3] Republic Advisory Committee, An Australian Republic: The Options – The Appendices, Appendix 6 – The Reserve Powers of the Governor-General (Canberra, 1993), 248.

[4] Ibid.

[5] G. Winterton, Monarchy to Republic: Australian Republican Government (Melbourne: Oxford University Press, 1986), 35.

[6] Bogdanor, above n.1, 148.

[7] R. McGarvie, Democracy: Choosing Australia's Republic (Melbourne: Melbourne University Press, 1999), 50.

[8] A precedent for such an event can be found following the British general election in 1885 when Lord Salisbury, despite being reduced to having the second largest party in the Commons, remained Prime Minister until he lost a vote of no-confidence: Bodganor, above n. 6, 149. A similar situation also occurred in relation to the Government of Edward Heath in 1974, although Heath chose to resign before the House of Commons had met: Winterton, above n.5, 35.

[9] Ibid, 36-37.

[10] Bogdanor, above n.1, 151-152.

[11] Ibid, 152-3.

[12] Ibid, 153.

[13] W. Bagehot, The English Constitution (Brighton: Sussex Academic Press, 1997), 45.

[14] McGarvie, above n. 7, 146.

[15] G. Winterton, Parliament, the Executive and the Governor-General (Melbourne: Melbourne University Press, 1983), 152.

[16] J. Kerr, Matters for Judgment (Melbourne: Macmillian, 1978), 327.

[17] Republic Advisory Committee, An Australian Republic: The Options – The Report (Canberra, 1993), 91.

[18] Bogdanor, above n. 1, 151.

[19] Republic Advisory Committee, above n.3, 250.

[20] E. Forsey, "The Present Position of the Reserve Powers of the Crown", in Evatt and Forsey on the Reserve Powers (Sydney: Legal Books, 1990), xiii, lxi-lxii.

[21] McGarvie, above n. 7, 53.

[22] Bogdanor, above n. 1, 158.

[23] McGarvie, above n. 7, 50.

[24] D. Smith, "The Role of State Governors: An Endangered Species?" in (2004) 16 Upholding the Australian Constitution, 48, 56.

[25] G. Winterton, "The Constitutional Position of Australian State Governors", in G. Winterton, & H.P. Lee (eds), Australian Constitutional Perspectives (Sydney: Law Book Co, 1992), 274, 304-314.

[26] Smith, above n. 24, 114.

[27] Bogdanor, above n. 1, 159.

[28] Ibid, 160.

[29] Ibid, 153.

[30] McGarvie, above n. 7, 147.

[31] Winterton, above n .5, 36

Australian and Canadian Federalism Compared - Monique McHardy

[1] P. Davenport and R. H. Leach (eds), Reshaping Confederation: The 1982 Reform of the Canadian Constitution (Durham: Duke University Press, 1984), 303.

[2] Victoria Parliament, Federal-State Relations Committee, Report on Federalism and the role of the States: comparisons and recommendations (Melbourne: Parliament of Victoria, 1999), 4.

[3] E. H. Jones, "Localism and Federalism in Upper Canada to 1865", in B. W. Hodgins, D. Wright and W. H. Heick (eds) Federalism in Canada and Australia: The Early Years (Canberra: Australian National University Press, 1978), 19.

[4] Ibid.

[5] M. J. C. Vile, Federalism in the United States, Canada and Australia (London: Her Majesty's Stationery Office, 1973), 11.

[6] Jones, above n. 3, 20, 36.

[7] Ibid, 30, 39.

[8] B. W. Hodgins, "The Canadian Political Elite's Attitudes Toward the Nature of the Plan of Union", in Hodgins, Wright and Heick, above n. 3, 43, 47.

[9] Vile, above n. 5, 11.

[10] Jones, above n. 3, 20.

[11] Victoria Parliament, above n. 2, 3.

[12] R. Stack, 'The Legal Geography of Expansion: Continental Space, Public Spheres, and Federalism in Australia and Canada' (2001) 39 Alberta L. Rev. 488, 495.

[13] Hodgins, above n. 8, 43.

[14] R. Watts, Comparing Federal Systems in the 1990s, (Kingston: Institute of Intergovernmental Relations, 1996), 60.

[15] Hodgins, above n. 8, 45.

[16] Jones, above n. 3, 22.

[17] Ibid.

[18] Hodgins, above n. 8, 50.

[19] Stack, above n. 12, 492.

[20] R. Norris, "Towards a Federal Union", in Hodgins, Wright and Heick, above n. 3, 173, 184-186.

[21] B. W. Hodgins, "The Plans of Mice and Men", in Hodgins, Wright and Heick, above n. 3, 3, 6.

[22] Hodgins, above n. 21, 6.

[23] Norris, above n. 20, 178.

[24] Ibid, 189.

[25] Ibid, 190.

[26] Watts, above n. 14, 22.

[27] Norris, above n. 20, 174.

[28] Ibid, 175.

[29] Ibid, 180.

[30] G. Winterton, H. P. Lee, A. Glass and J. A. Thomson, Australian Federal Constitutional Law: Commentary and Materials, (Sydney: LBC, 1999), 12.

[31] Hodgins, above n. 21, 8.

[32] Stack, above n.12, 504.

[33] Vile, above n. 5, 14.

[34] J. E. Magnet, Constitutional Law of Canada (5th ed., Cowansville: Y. Blais, 1993), 297.

[35] (1881) 7 App. Cas. 96.

[36] Magnet, above n. 34, 236.

[37] [1922] 1 A.C. 191.

[38] Magnet, above n. 34, 298.

[39] R v Klassen (1959) 20 D.L.R. (2d) 406 (Man. C.A.).

[40] Magnet, above n. 34, 237.

[41] Stack, above n. 12, 509.

[42] P. Davenport, "Introduction", in Davenport and Leach, above n. 1, 1, 1.

[43] Stack, above n. 12, 500.

[44] Winterton et al., above n. 30, 743.

[45] Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd. (1920) 28 CLR 129.

[46] Commonwealth v Tasmania (1983) 158 CLR 1.

[47] (1965) 113 CLR 54.

[48] South Australia v Commonwealth (1942) 65 CLR 373.

[49] Winterton et al., above n. 30, 389.

[50] (1997) 189 CLR 465.

[51] Watts, above n. 14, 22.

[52] A. G. Gagnon, "Quebec-Canada relations", in M Burgess (ed.), Canadian Federalism: Past, Present and Future, (Leicester: Leicester University Press, 1990), 114.

[53] Watts, above n. 14, 103.

[54] Ibid, 106.

[55] Ibid, 59.

[56] Ibid, 104.

[57] Ibid, 83.

[58] Ibid, 87.

[59] Ibid, 86.

[60] Victoria Parliament, above n. 2,190-192.

[61] Winterton et al., above n. 30, 411.

[62] M. Nahan, "Federalism burgeons overseas", (1995) 47(4) IPA Review 36.

[63] Victoria Parliament, above n. 2, 199.

[64] Ibid, 28-32.

[65] Ibid, 203-213.

[66] Ibid, 208-213.

[67] Ibid, 227.

[68] Ibid, 227 and 237.

[69] Ibid, 18.

[70] Watts, above n. 14, 111.

Predicting Danger: Constitutional Limitations and Policy Implications of Preventive Detention Legislation - Tamara Vu

[1] Subject to the finding that imposition of preventive detention may be characterised as an exercise of judicial power, discussed further below.

[2] Marcus Clarke & Co Ltd v Commonwealth (1952) 87 CLR 177, 253 (Fullagar J).

[3] New South Wales v Commonwealth (1915) 20 CLR 54, 88 (Isaacs J).

[4] Polyukhovich v Commonwealth (1991) 172 CLR 501.

[5] Clyne v East (1967) 68 SR (NSW) 385; Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372.

[6] Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372, 401.

[7] (1996) 189 CLR 51 ("Kable").

[8] Ibid, 77 (Dawson J).

[9] N. Rees and P. Fairall, "Gregory Wayne Kable v The Director of Public Prosecutions for New South Wales: The Power to Legislate for One" (1995) 1 High Court Review <http://www.bond.edu.au/law/hcr/articles/104rees.htm>.

[10] (1992) 174 CLR 455 ("Leeth").

[11] Ibid, 492 (Deane and Toohey JJ), 502 (Gaudron J).

[12] Theophanous v Herald & Weekly Times Limited (1994) 182 CLR 104.

[13] Leeth (1992) 174 CLR 455, 486 (Deane and Toohey JJ).

[14] Rees and Fairall, above n. 9, [4].

[15] As, for example, both the CPA and the Victorian CPA, though using a judicial model, applied only to Gregory Kable and Garry David, respectively.

[16] (1996) 190 CLR 1 ("Kruger").

[17] Ibid, 64.

[18] See the Community Protection Act 1990 (Vic) s. 8(1) ("the Victorian Act"); the Community Protection Act 1994 (NSW) s. 5(1) ("the CPA"); and the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s. 13(1) ("the Queensland Act").

[19] R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254, 271 (Dixon CJ, McTiernan, Fullagar, and Kitto JJ).

[20] Kable (1996) 189 CLR 51, 103 (Gaudron J).

[21] Ibid, 52 (Toohey, Gaudron, McHugh and Gummow JJ).

[22] Ibid, 98 (Toohey J), 103–104 (Gaudron J), 116 (McHugh J), 132–133 (Gummow J).

[23] CPA s. 5(1).

[24] CPA s. 3(3).

[25] Kable (1996) 189 CLR 51, 52.

[26] (1995) 184 CLR 348.

[27] See Hilton v Wells (1985) 157 CLR 57.

[28] Grollo v Palmer (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

[29] Kable (1996) 189 CLR 51, 102 (Gaudron J).

[30] Ibid, 114 (McHugh J).

[31] Ibid, 104 (Gaudron J). This was the conclusion reached by Gaudron, McHugh and Gummow JJ; Toohey J reached the same conclusion only in respect of State courts in the course of proceedings in which federal jurisdiction is actually invoked. As Williams has argued, the conclusion reached by Gaudron, McHugh and Gummow JJ is to be preferred to that of Toohey J; it would indeed be "a strange result if the applicability of the incompatibility doctrine were to depend on a plaintiff invoking federal jurisdiction": G. Williams, Human Rights under the Australian Constitution (Melbourne: Oxford University Press, 2002), 212.

[32] Kable (1996) 189 CLR 51, 121 (McHugh J).

[33] One category of incompatibility is "the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution … is diminished": Grollo v Palmer (1995) 184 CLR 348, 385 (Brennan CJ, Deane, Dawson and Toohey JJ).

[34] Ibid, 107.

[35] Ibid, 120.

[36] Ibid, 123 (McHugh J).

[37] [2003] QCA 416. De Jersey CJ and Williams JA comprised the majority; McMurdo P delivered a dissenting judgment.

[38] (2004) 210 ALR 50. The judgments of Gleeson CJ, McHugh J, Gummow J, Hayne J and the joint judgment of Callinan and Heydon JJ made up the majority; Kirby J dissented.

[39] Queensland Act s. 13(1).

[40] A-G (Qld) v Fardon [2003] QCA 416, [13].

[41] Ibid, [15].

[42] Ibid.

[43] Ibid, [107].

[44] Ibid, [105].

[45] Fardon v A-G (Qld) (2004) 210 ALR 50, 57.

[46] Ibid, 77.

[47] Kable (1996) 189 CLR 51, 98 (Toohey J).

[48] Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) ("Lim"). See also similar comments at 55 (Gaudron J).

[49] Kable (1996) 189 CLR 51, 106 (Gaudron J).

[50] Kruger (1997) 190 CLR 1, 161 (Gummow J).

[51] Kable (1996) 189 CLR 51, 106 (Gaudron J).

[52] Lim (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ).

[53] Kable (1996) 189 CLR 51, 98.

[54] CPA s. 3(1), (2).

[55] Kable (1996) 189 CLR 51, 98.

[56] Ibid, 121.

[57] A-G (Qld) v Fardon [2003] QCA 416, [42] (de Jersey CJ).

[58] Ibid.

[59] Ibid.

[60] Re Wakim; Ex parte McNally (1999) 198 CLR 511, 572.

[61] Ibid.

[62] A-G (Qld) v Fardon [2003] QCA 416, [90].

[63] Kable (1996) 189 CLR 51, 122 (McHugh J).

[64] (2004) 210 ALR 50, 57.

[65] Ibid.

[66] Ibid, 58 (Gleeson CJ).

[67] Kable (1996) 189 CLR 51, 106 (Gaudron J).

[68] Fardon v A-G (Qld) (2004) 210 ALR 50, 86 (Kirby J).

[69] Ibid, 62 (McHugh J).

[70] Kable (1995) 189 CLR 51, 98.

[71] Ibid, 134.

[72] Fardon v A-G (Qld) (2004) 210 ALR 50, 83 (Kirby J).

[73] Ibid, 65.

[74] Ibid, 56.

[75] See, e.g., G. Zdenkowski, "Community Protection Through Imprisonment Without Conviction: Pragmatism Versus Justice" (1997) 3 (2) Australian Journal of Human Rights 8; R. Merkel, "'Dangerous Persons': To Be Gaoled for What They Are, Or What They May Do, Not for What They Have Done" (Paper presented at the Australian Institute of Criminology "Serious Violent Offenders: Sentencing, Psychiatry and Law Reform" Conference, Canberra, 29–31 October 1991); B. Keon-Cohen, "Can the Victorian Parliament Abolish Fundamental Rights?" (Paper presented at the Australian Institute of Criminology "Serious Violent Offenders: Sentencing, Psychiatry and Law Reform" Conference, Canberra, 29–31 October 1991).

[76] Kable v DPP (NSW) (1995) 36 NSWLR 374, 376 (Mahoney JA).

[77] DPP (NSW) v Kable [1995] NSWSC (Unreported, Grove J, 21 August 1995) 3–4.

[78] M. Kirby, "Intellectual Disability and Community Protection: The Community Protection Bill 1994" (1994) 1 Australian Journal of Human Rights 398, 399.

[79] Zdenkowski, above n. 75.

[80] New South Wales, Dangerous Offenders Legislation: An Overview, Parl. Paper No. 14/97 (1997) [3.1].

[81] L. Radzinowicz and R. Hood, "A Dangerous Direction in Sentencing Reforms" [1981] Criminal Law Review 713, 722.

[82] DPP (NSW) v Kable [1995] NSWSC (Unreported, Levine J, 23 February 1995) 189.

[83] New South Wales, Parliamentary Debates, Legislative Council, 27 October 1994, 4790 (John Hannaford, Attorney-General).

[84] (1988) 164 CLR 465.

[85] Ibid, 495.

[87] Ibid.

[88] Veen v The Queen [No 2] (1988) 164 CLR 465, 495.

[89] Zdenkowski, above n. 75.

[90] Merkel, above n. 75, 43.

[91] Fardon v A-G (Qld) (2004) 210 ALR 50, 83.

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