Constitutional Law Dinner 2018

Address

by

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The Traditional Owners

Given the topics I will be addressing tonight, it is more than usually appropriate for me to commence, as I always do, by acknowledging the traditional owners of the lands on which we meet, the Gadigal people of the great Eora Nation, and by paying my respects to their elders past and present and acknowledging their continuing stewardship of these lands.

Legality or levity

I am greatly honoured to have been invited to address this dinner held in conjunction with the Annual Conference of those interested in Australian Constitutional law. However, I approach the discharge of this responsibility with some trepidation, because of the irreconcilable tension in audience expectations with respect to an address of this kind. On the one hand, a group of academics, judges and lawyers who have gathered to debate difficult and important issues of constitutional law can reasonably expect another judge to make a meaningful and reasoned contribution to that debate. On the other hand, any group of people gathered over fine wine and food after a long day at the coalface of the Constitution might reasonably expect some relief from the intellectual demands of such discourse in the form of levity or even humour. The difficulty of satisfying these competing demands is compounded by my long experience that the enthusiasm with which a dinner address is received is inversely proportional to its length.

[1] Chief Justice of Western Australia. I am indebted to Ms Angela Milne for her assistance in the preparation of this address. However, responsibility for the opinions expressed, and any errors, is mine alone.

Constitutional memes

I must immediately confess that those with expectations of levity are going to be disappointed by my remarks. I am not aware of any jokes on the subject of constitutional law. My unsuccessful attempts to find such jokes on the internet led me to sites containing endless memes of the late Antonin Scalia, usually made up of unflattering photographs of the late judge bearing words conveying various degrees of offence and ridicule. Memers seem to be much less interested in Australian judges and I have only been able to find one internet posting of a similar kind, but much more benign, relating to an Australian High Court judge - unsurprisingly Michael Kirby - although Dyson Heydon's post-judicial activities have attracted some unflattering memes apparently posted by unionists.

After discovering that the well of constitutional jokes was as dry as the Methodist Sunday School I attended, I thought I might address an issue of interest to me, in the hope that it may be of interest to some of you, and analyse that issue by reference to some of the more significant constitutional issues of the last 12 months.

The delicate balance between stability and change

The issue I have selected is the delicate balance between the need for constitutional arrangements to provide stability, transparency and certainty with respect to the structures of government on the one hand, and the need for constitutional arrangements to respond to changes in the composition and character of the body politic, and to changes in community standards, values and expectations on the other. The rhetorical question I invite you to consider is whether we have struck the right balance between these potentially competing constitutional objectives in Australia.

Constitutional transparency and stability

Written constitutions, like Australia's Constitution, have many advantages over unwritten constitutions. Ideally they should represent the outcome of a broadly democratic process rather than the evolutionary process of developing constitutional practices over the course of centuries - although it should not be thought that the participants in the two conventions held in Australia prior to Federation were representative of all sectors of the community as they were far from it - there were, for example, no Aboriginal people or women at either convention.

Written constitutions should also establish and elucidate the basic machinery and functions of government with a degree of certainty and transparency - notwithstanding the omission from the Australian Constitution of little things like the office of Prime Minister. They should also provide stability and certainty with respect to the basic structures of government. One does not have to be a conservative to appreciate that a certain level of predictability in the structures and operations of government is essential for any community to achieve its full potential. There are many - in fact far too many - examples of the horrendous consequences of government instability and breakdown creating social disorder, poverty, famine and violence leading to the loss of human life which could be used to illustrate this point.

Constitutional response to change

Written constitutions have a significant disadvantage, arising from the fact that they must necessarily be written at a point in time. When they are written, hopefully they reflect contemporary community standards and values - the prevailing ethos of the day if you like. However, community standards and values, and the prevailing ethos of a community change over time - not just because it is human nature for values and standards to change, but also because of changes in the size and in the cultural and ethnic composition of the community

governed. In the case of Australia, both of these factors have combined to produce a body politic with very different cultural characteristics and community standards, values and expectations to those which prevailed at the time of the constitutional conventions held in the 1890s, or at the time our Constitution was enacted by the British Parliament more than 100 years ago.

As I have already observed, written constitutions must provide stability and certainty, but if they are not to become anachronistic strait-jackets inhibiting social development and growth, they must also have mechanisms by which they can respond to inevitable changes in community values, standards and expectations. If a constitution has been drafted in a way which enables it to be regarded as a living and dynamic organism, construed in a contemporary rather than an historical context, some degree of change can be accommodated - although I can hear the bones of the late Justice Scalia rattling in his coffin so as to rise up and rail against any suggestion that a constitution can be regarded as a living, dynamic organism.

Referenda

The mechanism provided for change in the Australian Constitution is of course the referendum, which requires any change to be approved by a majority of voters in a majority of States.[2] Experience since Federation shows how difficult it has been to achieve change utilising this mechanism - out of 44 referenda only 8 have been passed - the last successful referendum was in 1977 - 41 years ago.[3]

[2] Section 128.

[3] The proposals that were carried at the 1977 referendum were: (i) *Senate casual vacancies* - to ensure, as far as practicable, that a casual vacancy in the Senate is filled by a person of the same political party as the Senator chosen by the people, and that the person shall hold the seat for the balance of the term; (ii) *Referendums – territories* - to allow electors in Territories, as well as in the States, to vote in constitutional referendums; and (iii) *Retirement of judges* - to provide for retiring ages for judges of Federal courts.

This history has had at least two consequences. First, it has discouraged politicians from expending precious political capital on any proposal for constitutional change which does not enjoy very high prospects of success. No referendum has been presented to the Australian people this century - the last was in 1999,[4] so nobody under 35 has participated in a referendum. Second, in order to increase the prospects of success, proposals for constitutional change have been reduced to the lowest common denominator - a classic example being the 1967 referendum which gave the Commonwealth power to legislate with respect to Aboriginal people but left s 25 untouched.

Recent topical constitutional issues which can be used to address the rhetorical question I posed earlier include issues with respect to constitutional recognition of Aboriginal people and the issues arising from the continuing controversies involving s 44 of the Constitution. These are the two issues associated with our Constitution which have captured by far the greatest public attention over the last 12 months. It is no doubt extremely unwise for a sitting judge to address topics which are fraught with the hazard of political controversy, but I will endeavour to do so with the restraint which befits my office. Consistently with that restraint, I will not presume to suggest where the answers lie in relation to either of these significant issues. My only purpose is to use these issues to assess whether we are striking the right balance between constitutional stability and responsiveness to change.

Aboriginal people and the Constitution

The colonies which united to form the Commonwealth of Australia were all founded on the basis of a legal and factual myth to the effect that the land which the colonists occupied was 'nobody's land',[5] available for acquisition merely by occupation. The original

[4] That referendum was held on 6 November 1999, with two proposed constitutional changes - to establish Australia as a republic and to insert a preamble into the Constitution.
[5] Often described using the Latin expression 'terra nullius'.

inhabitants were given little or no formal recognition when the colonies were founded, and were gradually displaced from the lands which they legitimately regarded as their domain, and which their ancestors had occupied for many millennia. There has been no treaty or other form of pact or agreement between the occupiers and the vanquished.[6] No Aboriginal person attended either of the constitutional conventions, and the few brief references to Aboriginal people in the Constitution discriminated against Aboriginal people and were overtly racist.[7]

Lack of constitutional recognition has substantive consequences

I share the view which has been expressed by others[8] to the effect that the historical and continuing failure to make any or any adequate provision for Aboriginal people in the foundational documents of our national polity or to formally recognise the significance of their role in the history and development of our country is directly connected to the tragic living circumstances of too many descendants of the original inhabitants, including their gross over representation in Australia's prisons and courts.[9]

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[6] Although the Hawke Government announced its intention to negotiate such a treaty, that policy was never implemented.

[7] See the explicit references in now amended s 51(xxvi) and now repealed s 127, and the implicit reference in s 25.

[8] See, for example, Professor George Williams, 'Recognising Aboriginal and Torres Strait Island peoples in the Constitution' (2015) *UTas Law R 15*; (2015) 34(2) *University of Tasmania Law Review* 114; Sean Gordon, *Claiming the common ground for recognition: Achieving a symbolic moment that makes a real difference by addressing fair and reasonable concerns* (Uphold and Recognise, 27 May 2017).
<https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/5968dea7d2b857515997616a/1500044972896/Gordon-Claiming_the_Common_Ground.pdf> (accessed 17 February 2018).

[9] Aboriginal and Torres Strait Islander prisoners represented 27% of the total full-time adult prisoner population during the September quarter of 2017, whilst accounting for approximately 2% of the total Australian population aged 18 years and over: Australian Bureau of Statistics, *4512.0 – Corrective Services, Australia, September quarter 2017*
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/9B3F80C43A73AF6CCA2568B7001B4595?opendocument> (accessed 17 February 2018).

As usual, Professor George Williams has put it better than I ever could:[10]

> Aboriginal and Torres Strait Islander peoples have long argued for change to Australia's system of public law, including reforms such as through a treaty, recognition of their sovereignty and constitutional recognition. They have done so not because of abstract concerns about the state of the law, but because of their experience in living in a nation that has practised discrimination against them. They have been denied the vote, had their children removed, been prevented from marrying, told where they could live and had their wages confiscated. The federal and state laws that brought about these actions were possible because of a national constitutional structure that does not recognise the existence of Aboriginal and Torres Strait Islander peoples, and permits discrimination against them and others on the basis of race.
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> The problem is not limited to the law. It is been recognised that Australia's legal structure contributes to a broader range of concerns. Research on subjects such as the social determinants of health shows how discrimination, disadvantage and exclusion can have a major, negative, impact on mental and physical health. It is hard to underestimate the emotional and other costs of being cast as an outsider in your own land. Experts have recognised this. For example, the Royal Australian and New Zealand College of Psychiatrists has said:
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> "The lack of acknowledgement of a people's existence in a country's Constitution has a major impact on their sense of identity and value within the community, and perpetuates discrimination and prejudice which further erodes the hope of Indigenous people. There is an association with socioeconomic disadvantage and subsequent higher rates of mental illness, physical illness and incarceration."

This view is not limited to lawyers. Professor Fiona Stanley, an epidemiologist who has spent decades working in Indigenous

[10] Professor George Williams, 'Recognising Aboriginal and Torres Strait Island peoples in the Constitution' (2015) *UTas Law R* 15; (2015) 34(2) *University of Tasmania Law Review* 114, 123.

communities[11] has expressed the view that the marginalisation of Indigenous Australians and their 'virtual exclusion'[12] from Parliament and policy making is 'a major reason for their current poor outcomes'.[13] She also said:[14]

> In spite of this, their resilience and strength is extraordinary and giving them the power to influence and change is urgent … National and international studies on colonised Indigenous peoples show clearly that when they are able to implement the solutions developed by them, the outcomes are far better.
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> Our research has shown also that the impact of previous practices of marginalisation and removal are responsible for a large part of today's trauma and First Nations circumstances.

I do not pretend that constitutional recognition is a magic elixir which will solve the multi-faceted disadvantage suffered by Indigenous people, but I do believe that formal recognition and enunciation of an appropriate relationship between Indigenous and non-Indigenous Australians could provide the circuit breaker we need to end the intergenerational cycles of trauma, disadvantage and dysfunction, and empower our First Nations peoples to take responsibility for the policies and programmes which we need to address these issues.

The need for change has been generally accepted

The need for our Constitution to be amended to bring it into line with prevailing community attitudes towards Aboriginal people has been recognised by a wide range of eminent and well qualified Australians, and by the community, for a long time. The ground relating to the precise nature of the changes which might be made has been furrowed many times and by many people. However, some of the lines remain relatively clear. It is time for s 25 to be removed and the races power

[11] And a former Australian of the Year.
[12] Michael McGowan, *Noel Pearson says Turnbull lying over Indigenous voice to Parliament* (The Guardian, 5 November 2017) < https://www.theguardian.com/australia-news/2017/nov/06/noel-pearson-says-turnbull-lying-over-indigenous-voice-to-parliament> (accessed 17 February 2018).
[13] Ibid.
[14] Ibid.

conferred upon the Commonwealth Parliament by s 51(xxvi) clarified, so that the issue which divided the court in the ***Hindmarsh Bridge*** case[15] can be resolved definitively. The extent to which we go beyond those obvious changes is a matter for reasoned public debate.

A recent survey of community attitudes shows strong public support for constitutional change to officially recognise the history and culture of Australia's Indigenous peoples (71%).[16] It also shows significant community support for a change to the Constitution to set up a representative Indigenous body to advise the Parliament on laws and policies affecting Indigenous people (60%); and for formal agreements between Australia's governments and Australia's Indigenous peoples to recognise their rights (58%).[17] That survey is consistent with earlier surveys which have shown strong and consistent support for constitutional recognition of Aboriginal people.[18]

The Uluru statement from the heart and the Referendum Council

The Referendum Council, comprising prominent Australians with expertise in this area nominated by the Prime Minister and the Leader of the Opposition produced a discussion paper identifying the possible avenues of change,[19] and more recently, following the Uluru

[15] *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337.
[16] Centre for Governance and Public Policy, *OmniPoll Australian Constitutional Values Survey 2017* (30 October 2017) <https://app.secure.griffith.edu.au/news/wp-content/uploads/2017/10/Griffith-University-UNSW-Australian-Constitutional-Values-Survey-Sept-2017-Results-2.pdf> (accessed 17 February 2018).
[17] Ibid.
[18] Mazoe Ford and Clare Blumer, Vote Compass: *Most Australians back constitutional recognition for Indigenous Australia*ns (ABC News, 20 May 2016) <http://www.abc.net.au/news/2016-05-20/vote-compass-indigenous-recognition/7428030> (accessed 18 February 2018).
[19] Referendum Council, *Discussion paper on constitutional recognition of Aboriginal and Torres Strait Islander peoples* (October 2016) <https://www.pmc.gov.au/sites/default/files/publications/Referendum-Council-Discussion-Paper-Oct2016.pdf> (accessed 18 February 2018).
The 16-member Referendum Council was appointed by the Government and the Opposition in December 2015 with the purpose of 'consulting First Nations people widely throughout Australia and taking the next steps towards achieving constitutional recognition' (see page 1 of the discussion paper). The discussion paper was distributed for comment prior to the Uluru Convention and includes 20 questions to help frame responses. It is noted in the discussion paper

Statement from the Heart,[20] published a final report identifying the precise steps recommended.[21] The component of those recommendations which has attracted the greatest controversy is the proposal to empower the Commonwealth Parliament to legislate to create a representative body giving Aboriginal and Torres Strait Islanders People a voice to the Commonwealth Parliament.[22]

It is not for me to say whether that is a good or a bad thing, but it has generated significant public controversy. As is not uncommon with significant controversy, some of the arguments put have been extreme and alarmist, and have misrepresented the proposal. Contrary to some of the criticisms voiced, the proposal has been carefully and clearly drafted,[23] and intentionally leaves the detail with respect to the body to be created to be determined by the Commonwealth Parliament, which is arguably much more appropriate than endeavouring to include the detail within a referendum proposal. Nor can the proposal be said to be radical or exceptional as some have suggested. It is entirely consistent with various articles in the United Nations Universal Declaration on the Rights of Indigenous Peoples, to which Australia has acceded.[24] As the Human Rights and Equal Opportunity

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that Australia has acceded to the United Nations Universal Declaration on the Rights of Indigenous People 'which emphasises the importance of genuine Indigenous participation and consultation in political decisions made about their rights' (on page 11).

[20] Referendum Council, *Uluru statement from the heart* <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF> (accessed 18 February 2018).

[21] Referendum Council, *Final report of the referendum Council* (30 June 2017) <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf> (accessed 18 February 2018).

[22] Ibid 2.

[23] Michael McGowan, *Noel Pearson says Turnbull lying over Indigenous voice to Parliament* (The Guardian, 5 November 2017) <https://www.theguardian.com/australia-news/2017/nov/06/noel-pearson-says-turnbull-lying-over-indigenous-voice-to-parliament> (accessed 17 February 2018). It is noted in this article that the recommendations were drafted exclusively be Megan Davis, (constitutional lawyer and University of New South Wales pro vice-chancellor, and Murray Gleeson, former Chief Justice of the High Court.

[24] *Universal Declaration on the Rights of Indigenous Peoples*, UN General Assembly 61/295 (adopted 13 September 2007). Australia formally endorsed the Declartion on 3 April 2009. NB *Article 3*: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. *Article 4*: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. *Article 5:* Indigenous peoples have

Commission pointed out in 2008, comparable countries including the United States, Canada, New Zealand and Sweden have created specific mechanisms by which Indigenous people can have a voice in the development of public policy and legislation.[25] The proposal has been endorsed by Australia's leading constitutional law academics, including Professor George Williams[26] and Professor Anne Twomey,[27] and by many prominent Australians with a particular interest in this topic, including Mr Danny Gilbert AM,[28] whose law firm is of course connected with this conference through the Gilbert + Tobin Centre of Public Law.

The Government's position

The Government has published a statement recording its decision that the Referendum Council's call for a national Indigenous representative assembly to provide a 'voice to Parliament' will not be supported.[29] One of the reasons given for that decision is that the Government considers the proposal to be undesirable because:[30]

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the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State. *Article 18*: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions. *Article 19*: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

[25] Human Rights and Equal Opportunity Commission, *Towards a new national Indigenous representative body* (2008) <https://www.humanrights.gov.au/sites/default/files/content/social_justice/repbody/repbody_guide.pdf> (accessed 18 February 2018).

[26] Department of Parliamentary Services, *Uluru statement: A quick guide* (Research Paper Series, 19 June 2017) 3.

[27] Professor Anne Twomey, 'An Indigenous advisory body: Addressing the concerns about justiciability and parliamentary sovereignty' (2015) 8(19) *Indigenous Law Bulletin* 6.

[28] Danny Gilbert AM, 'Constitutional Recognition after the Uluru statement from the heart' (speech to Sydney Institute, 23 October 2017).

[29] Prime Minister, Attorney General and Minister for Indigenous Affairs, *Response to Referendum Council's report on constitutional recognition* (26 October 2017) <https://www.malcolmturnbull.com.au/media/response-to-referendum-councils-report-on-constitutional-recognition> (accessed 18 February 2018).

[30] Ibid.

> Our democracy is built on the foundation of all Australian citizens having equal civil rights - all being able to vote for, stand for and serve in either of the two chambers of our national Parliament - the House of Representatives and the Senate.
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> A constitutionally enshrined additional representative assembly for which only Indigenous Australians could vote for or serve in is inconsistent with this fundamental principle.
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> It would inevitably become seen as a third chamber of Parliament. The Referendum Council noted the concerns that the proposed body would have insufficient power if its constitutional function was advisory only.
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> The Referendum Council provided no guidance as to how this new representative assembly would be elected or how the diversity of Indigenous circumstance and experience could be fairly or democratically represented.

The other reason given for rejecting the proposal is that the Government does not believe that there is any realistic prospect that it would be supported by a majority of voters in a majority of States.[31]

Division is death to constitutional change

I reiterate that it is no part of my purpose to suggest which of these competing arguments is to be preferred - there is clearly a respectable debate to be had. My purpose is much more mundane and it is to make the point that when a proposal for constitutional change generates this degree of controversy, or even a fraction of it, under prevailing attitudes there is very little prospect that the Australian people will ever get the opportunity to choose between the competing arguments because nobody will expend political capital pursuing a proposal which is thought to be doomed.

[31] Ibid.

Perhaps even more significantly, any significant division of opinion can destroy the momentum of any movement for constitutional change of any kind - as occurred with the republic proposal in 1999. Division is death to constitutional change. As one who sees first hand and all too often the disastrous consequences of colonisation and our continuing failure to properly and meaningfully recognise Aboriginal people - the consequences of which are played out every day in police stations, courts, hospitals and prisons all round Australia - I sincerely hope that the movement for constitutional recognition of Aboriginal people does not suffer a similar fate.

The vital need to build consensus

The plight of the Aboriginal people I see all too often in our courts is so desperate that it behoves everybody - politicians, governments officials, community organisations and interested citizens - to address these vital issues with renewed vigour, urgency and determination in order to build the community consensus required for meaningful change. That process will require people of goodwill to listen carefully and sensitively to the views of others, with a willingness to adapt positions in order to arrive at the accommodation needed to appropriately recognise and reflect, within our foundational structures, not only the tragic consequences of colonisation for the original inhabitants and their descendants, but also to facilitate an appropriate relationship between those descendants and the rest of the community into the future. If we can achieve that vitally important objective, we could conclude that as a community we do have the capacity to bring our Constitution into line with contemporary standards and values.

Section 44 of the Constitution

The ethnic and cultural composition of the Australian community has changed very significantly since Federation. Between colonisation

and Federation the vast majority of migrants to Australia came from Great Britain. Since the Second World War migrants have come to Australia from a much broader range of countries and in much greater numbers. Today, about half of the Australian community was either born overseas or has one or more parents who were born overseas, many in non-English speaking countries.[32]

Multicultural jingoism

I will not comment upon the common assertion that Australia manages multicultural issues better than any other country in the world, other than to observe that the jingoism inherent in the proposition tends to bely its accuracy. What is demonstrably clear however, is that our Constitution, and in particular s 44, has been cast in terms which respond very poorly to these demographic changes. Its inadequacies have been compounded by an international trend to expand the entitlement to citizenship, on widely differing terms and conditions.

Section 44 creates uncertainty

The many difficulties arising from s 44 will be so well known to this audience that it is unnecessary to catalogue them. The consequences of those difficulties became apparent to the general public last year when the disqualifications arising from its operation raised a potential issue with respect to the Government's majority in the House of Representatives. It may be difficult for any prospective candidate for election to know whether they are in fact entitled to the rights of citizenship of another country - a question which may turn upon difficult issues relating to the construction and operation of the laws of another country, which may not be readily available in English.[33] The

[32] Australian Bureau of Statistics, *2016 Census: Multicultural – Census reveals a fast changing, culturally diverse nation* (Media release 073/2017, 23 June 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3> (accessed 18 February 2018).

[33] See the discussion by Professor George Williams, *George Williams: Section 44 compliance 'extraordinarily difficult'* (Sydney Morning Herald, 5 December 2017)

same uncertainty may attend the efficacy of any steps taken to renounce citizenship and whether those steps satisfy the 'reasonable steps' exception which the High Court has read into s 44. Although it would be difficult if not impossible to audit the general population to ascertain the extent of dual citizenship, it seems reasonable to infer that up to half of the Australian population is rendered ineligible for membership of the Federal Parliament by reason of the section.[34]

Similar uncertainties exist in relation to the operation and effect of various other aspects of s 44 including the provisions relating to persons 'under sentence or subject to be sentenced' for a particular category of offences, the meaning to be given to the expressions 'office of profit under the Crown' and 'direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth' and so on.[35]

In short, the operation and effect of s 44 is replete with uncertainty. In many cases neither candidates nor electors will know with certainty whether or not a particular candidate is in fact eligible for election until the election has been held, and the candidate, if successful, referred to the High Court. It is hard to imagine that any reasonable person would think this to be a satisfactory state of affairs.

The effects of s 44 have been well known for a long time

Some of those caught up in the consequences of s 44 have expressed surprise, bordering on shock with respect to its effect. While there is

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<http://www.smh.com.au/comment/george-williams-section-44-compliance-extraordinarily-difficult-20171204-gzysv8.html> (accessed 18 February 2018).

[34] Australian Bureau of Statistics, *2016 Census: Multicultural – Census reveals a fast changing, culturally diverse nation* (Media release 073/2017, 23 June 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3> (accessed 18 February 2018).

[35] See the discussion by John Kalokerinos, *Who may sit? An examination of the Parliamentary disqualification provisions of the Commonwealth Constitution* (Papers on Parliament No 36, June 2001).

no reason to doubt the authenticity of their reaction, the difficulties inherent in the section, and their potential consequences have been well known and documented for decades. Since 1981 there has been a regular and relatively constant succession of reports published by the Parliamentary Library drawing the attention of political parties and their members to these issues,[36] a number of bills were presented to the Parliament to amend s 44 to resolve them,[37] and books and articles were written by prominent academics drawing attention to the potential consequences of the section, which were made abundantly clear by the decisions of the High Court in ***Sykes v Cleary***[38] and ***Sue v Hill***[39] both of which were decided last century.

So, the problems with the section and their potential consequences were well known for decades, yet no remedial action was taken. No government of any political persuasion has been sufficiently motivated to embark upon the process required to fix a constitutional provision which is clearly and obviously broken. That does not suggest a constitution with the capacity to respond effectively to the need for change.

The need for change

But let me try to end on an optimistic note. Perhaps the draconian operation of s 44 might encourage the view that a majority of voters in a majority of States can be persuaded that dual nationals should be entitled to sit in our national parliament, as they can in the United Kingdom, the United States and most Australian States and

[36] See, for example, Sarah O'Brien, *Dual citizenship, foreign allegiance and s 44(i) of the Australian Constitution* (Parliamentary Research Service, Background paper No 29, 9 December 1992); Ian Holland, *Section 44 of the Constitution* (Parliamentary e-brief, March 2004) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/Section44> (accessed 18 February 2018); John Kalokerinos, *Who may sit? An examination of the Parliamentary disqualification provisions of the Commonwealth Constitution* (Papers on Parliament no 36, June 2001).
[37] For example, the Constitutional Alteration (Right to Stand for Parliament Qualification of Members and Candidates) Bill 1998.
[38] ***Sykes v Cleary (No 2)*** [1992] HCA 67; (1992) 176 CLR 77.
[39] ***Sue v Hill*** [1999] HCA 30; (1999) 199 CLR 462.

Territories, and that improving the representative character of our democracy is worth the effort. If that view does emerge, and people of goodwill combine their energies develop a consensus proposition which can be put to the Australian people, then again, there would be a case for the view that we can gather as a community to properly utilise the mechanism for change which we have in our Constitution.

In conclusion, it is undoubtedly hard to make the provisions for change in our Constitution work. But when the need for change is important, as it is in the two areas I have addressed, I suggest that all of us have to work harder to make those provisions serve their intended purpose.