EDUCATION AND INVOLVEMENT: THE QUALITY OF OUR DEMOCRACY

The William Oats Memorial Lecture

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In his contribution to the final volume of "New Horizons in Education", Professor John Stephenson referred to the founding meeting of the New Education Movement, the forerunner of the World Education Fellowship ("WEF"). That meeting, which was held in Calais, France, in 1921, was convened as a response to the carnage of World War I. Professor Stephenson described the meeting as one in which "educators from many countries shared the belief that schools had a major part to play in building a society where all peoples had the will, ability and confidence to live and work together in peace and harmony."(1)

William Oats, the distinguished Headmaster of The Friends' School, whom we remember tonight, was far too young to participate in the meeting at Calais. However, from his early and long membership of WEF, we may reasonably suppose he whole-heartedly approved the vision shared by those who did participate.

Implicit in that vision is the notion that government is the business of every citizen. The appeal of that notion, in 1921, is not surprising. The world had just witnessed the devastating effect of the oligarchic rule that characterised, to a greater or lesser extent, all the major participants in the war.

Implicit, also, is the notion that, for ordinary citizens to have the ability to fulfil their role in the governance of their country, they would need instruction. It would have been natural for those who met at Calais to think primarily of instruction at school, as Professor Stephenson suggests. Today, I believe, we would not so limit ourselves; we have become used to the notion of continuing –indeed, whole of life—education.

To what extent has the vision of those who met at Calais been realised? They had in mind democracy, that is rule by the people, as distinct from oligarchy (rule by a few) or dictatorship (rule by one person). So we can rephrase the issue by asking, three generations after Calais: to what extent do we have democracy?

It is not possible to return a single answer to that question. The situation varies greatly between one country and another. So I will limit myself to consideration of the situation in Australia. And I propose an answer not unfamiliar to teachers: "can do better".

It would be wrong to ignore the progress that has been made in Australia over those three generations, both in the educational level reached by the majority of the population and in development of our democratic institutions. It would equally be wrong to ignore the limitations on our present democracy.

The Ancient Greeks, who gave us the word itself, practised a particularly pure form of democracy. Their system of government was described by IF Stone in this way:

“For the Greeks, (the word) *polis* had a special characteristic that distinguished it from other forms of human community. It was, as Aristotle says, ‘an association of free men,’ as distinguished from such other and earlier forms of association as the family, which was ruled by its patriarch, or monarchy, or the relation of master and slave. The *polis* governed itself. The ruled were the rulers…Whether in oligarchies, where citizenship was restricted, or in democracies like Athens, where all freeborn males were citizens, major offices were filled by election but many others were filled by lot to give all citizens an equal chance to participate in their government. Every citizen had the right to vote and speak in the assembly where the laws were enacted, and to sit in the jury courts where those laws were applied and interpreted.” (2)

You will have noted that citizenship rights were limited to freeborn males. Women and slaves were excluded from participation in government. Today, of course, we would find the exclusion of women totally unacceptable. So I ask you to consider the Athenian model on the basis that women would participate equally with men.

I do not contend it would be practicable for us, in Australia, to adopt Athenian democracy. Our community is too large: our world and its problems too complex. However, I do contend we should remember the Athenian system and regard it as the shining light, in whose glow we examine the adequacy of our own level of participation in the governance of our country.

Not everyone is willing to become involved in the governance of our country: many people have little or no interest in that subject. That fact demonstrates we have not yet fully realised the vision of those at Calais. We may deprecate the fact; nevertheless, it is a reality. So we are not really talking about everybody being directly involved in the public decisions that must be made but, rather, that every citizen should have a reasonable opportunity to participate in the making of those decisions.

Does every citizen have such an opportunity? Well, yes, to a point. Every citizen has the right—indeed, the obligation—to cast a vote at each election. And elections are conducted by an independent statutory authority, the Australian Electoral Commission, which is widely regarded as impartial and competent.

Many would argue this is enough to justify describing Australia as a democracy. However, although our system of government contains the essential prerequisite of a democratic system, universal franchise, it is difficult to regard it as truly democratic. I see two reasons for this: first, deficiencies in the parliamentary system itself and, second, the people’s lack of redress for perceived tyranny by the executive government or the parliamentary majority.

When electors cast a vote, whether at a Commonwealth or State election, they participate in the selection of the next government. They make their choice by reference to all manner of factors. Some of the matters they take into account may influence them in different directions. Policy and personal preferences may conflict. In Tasmania, the conflict is slightly ameliorated, in State elections, by the Hare-Clark system. Nonetheless, even then, electors have only one vote and must decide which party on balance they prefer. They may cast their vote with a heavy heart. Perhaps many New South Wales voters did this last March. On the day of the election, an opinion poll was published. It revealed that 51% of respondents thought the Government did not deserve to be re-elected, but 57% thought the Opposition did not deserve election in its place.

Whether voters elect a government reluctantly or enthusiastically, that is all they get to do. The long-time (Conservative) Lord Chancellor of England and Wales, Lord Hailsham, summed up the position back in 1976:

"We live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice." (3)

No doubt that statement still reflects the position in the United Kingdom. It is certainly true of Australia. Consider how our parliaments operate.

Ordinarily, legislation is first discussed by the Cabinet. We know little about the workings of Cabinets, because confidentiality surrounds their deliberations, at least until the release of Cabinet minutes 30 years later. However, the Prime Minister or Premier, who has the power to appoint or dismiss the other Ministers, is always likely to have a considerable, even dominant, influence on the decision that Cabinet must make. Particularly is this likely to be the case where the Prime Minister or Premier has already publicly indicated a position on the relevant matter; so the issue is no longer what is the right decision, but whether the leader is to be publicly humiliated.

Whether or not the Cabinet's decision coincides with the view of the Prime Minister or Premier, once it is made, it is regarded as binding on all members of the Cabinet. On both sides of politics, Ministers are expected to support a Cabinet decision in the Party room. And, of course, on both sides of politics, all members-Ministers and backbenchers alike- are expected, publicly and in Parliament, to support the Party room decision, whether they agree with it or not. This has always been the rule in the Labor Party. At one time, the non-Labor parties prided themselves on being tolerant of dissent; however, not any longer. Consider the outcry last year against the handful of government backbenchers who expressed opposition to the legislation that would have mandated that all asylum-seekers be sent to Nauru. Even though this might reasonably have been considered a matter of conscience that was not critical to the government's ability to govern, the dissentients' reasons for concern were not debated on their merits; rather the dissentients were chided for disunity and told this would imperil colleagues in more marginal seats.

The effect of the practices and attitudes I have mentioned is that it is possible for legislation to be enacted by a parliament notwithstanding that it is contrary to the real view of a majority of members. What would the Athenians have thought of that?

The problem I have mentioned would not be so serious if pressure to toe the line was confined to legislation that was critical to a government's ability to survive, such as legislation voting money for the services of government, or was a direct implementation of an election promise when, it might be argued, all government members had a moral obligation to support implementation of the promise. However, it is not so confined. Rather, if the government has the numbers, it is applied to all legislation; even legislation not mentioned at the preceding election.

Occasionally, pressure is placed upon a government to allow a "conscience vote" on a particular Bill. When that happens, the parliament comes alive. Members, on both sides of the House, say what they really think and are able to influence the form of the legislation by moving amendments. They do what they were elected to do. They apply their own judgment to the matter under discussion, no doubt after having considered the interests, and likely attitudes, of their constituents. The debate is usually engrossing, often quite moving.

I ask why this cannot be the norm, leaving aside Bills that are critical to the government's ability to govern or an implementation of an election promise. Are electors so stupid that they cannot see there is room for different viewpoints within a party, notwithstanding a shared opinion that their party should continue to govern?

There are other deficiencies in the way our parliaments operate, which undermine their claim to be truly democratic institutions and impede our ability, through them, to participate satisfactorily in the government of our country. I will mention four of them.

First, over the course of the last century, there has been a reversal of the power relationship between parliaments and executive governments. In theory, the executive government (that is, the Ministry) holds office at the pleasure of the parliament, which is free to cause the dismissal of a Prime Minister or Premier at any time. In reality, such a situation is now most unlikely. In an address given in 1990, Sir Gerard Brennan, a Justice (later Chief Justice) of the High Court of Australia, commented on the changes which had occurred since Federation in 1901:

“Concurrently with the growth of executive power, the tightening discipline of political parties and the predilection of the media for individuals on whom to concentrate attention tied the political fortunes of the members of the Parliament to the political status and reputation of party leaders. Members in the governing party became increasingly dependent on the Ministry for their chances of re-election; backbench members of the opposition became increasingly dependent on shadow cabinets for their chances of governing. The theory of responsible government, which made the fate of an Executive Government dependent upon the confidence of the Parliament was, so to speak, turned on its head by the political dependence of the majority members of the Parliament on the Executive Government. Policy formulation became primarily an Executive function. As the pressure on legislative time intensified, a virtual monopoly over initiatives for legislation passed to the Executive Government” (4)

In the United States of America, there is a clear separation between the executive government (the President and such people as the President chooses as Secretaries of State) and the legislature (the Senate and House of Representatives). Secretaries of State—Ministers, in our terminology-- do not sit in Congress. The President is not dependent, for continuance in office, on the confidence of the legislature. By the same token, the legislature is not controlled by, or dependent upon, the President. Each sector of government has its own role to play. Although party affiliations are not unimportant, each sector has a degree of independence quite unknown in Australia.

Consider this example. In late 2003, the Senate established a committee, consisting of six Republicans and six Democrats, to review the decision of the Bush Administration to invade Iraq in March 2003. In 2004, an election year, the committee issued a unanimous report strongly criticising that decision. Could you imagine a committee of Australian federal parliamentarians doing that? Indeed, is it believable, bearing in mind that about two-thirds of the Australian population was opposed to the Iraq war, that not one Liberal or National parliamentarian shared their misgivings?, Yet not one government member expressed opposition to the war in the parliamentary debate that followed –note, followed, not preceded—the Prime Minister’s announcement of Australia’s commitment of troops in support of the United States.

Arguments may be made in support of both the American and Westminster systems of government.

In support of the American system, it may be said that, although this focuses attention on the President, and puts into his/her hands considerable power, this is substantially offset by the power of an independent legislature, first, to enact legislation not desired by the President and refuse to enact legislation desired by him or her and, second, through the Congressional committee system, to hold the President to account, even for executive actions.

The argument in favour of the Westminster system is that, although all Ministers are members of the parliament and involved in the enactment of legislation, they are totally

dependent on the continuing confidence of the parliament—or at least its popular house . The problem, as Sir Gerard Brennan pointed out, is that the latter statement is true only in theory, not in actuality.

It might be argued that we, in Australia, have the worst of both worlds. We have governments focussed on the ideas and personality of the Prime Minister, or Premier, but without the checks and balances imposed by an independent legislature.

Second, the rationale of the Westminster practice that Ministers sit in the parliament, is that this enables them to be directly accountable to it. Traditionally, the primary method by which Ministers were held accountable was by their obligation to answer members' questions. However, question time is now a farce. The available time is divided beforehand between the government and opposition, the government members' questions being mostly "Dorothy Dixers" that will enable the Minister to make a statement about some topic related to the question. The opposition front bench tends to monopolise the questions available to their side, targeting the controversy of the day. Ministers make no attempt to deal with the substance of opposition questions. Rather, they deliver themselves of a prepared statement that usually has only a tangential connection with the question that was asked. Any protest about the Minister's failure to address the question is invariably brushed aside by the Speaker, and often ends with the protester being thrown out of the chamber.

I have often thought how different the situation would be in a court of law, where the presiding judge would insist that the witness address the question, not make a statement about something else. I do not put the difference down to the fact that, ordinarily, Speakers lack legal training, but rather that they are usually members of the same political party as the Minister. It is perhaps too much to expect a Speaker to rein in a senior member of the party upon whose electoral standing he or she depends for re-election.

As you may know, the tradition in the House of Commons, in the United Kingdom, is that a newly-elected Speaker immediately resigns from his or her party and no longer attends party meetings. In return, the tradition is that the Speaker will not be opposed by any other party at the following election. The development of such a tradition in Australian parliaments would go a long way towards restoring fairness in parliamentary debate and the utility of question time. Perhaps this is beginning to be realised. After the recent New South Wales election, and although they did not need to do so, from a numbers point of view, the Labor majority in the Legislative Assembly elected an independent Speaker, the Premier referring to the Westminster tradition. It will be interesting to see what difference this makes.

I earlier referred to the American committee system. Of course, Australian parliaments also have committees. However, they are effective only where the government does not have control of the relevant house and /or the government is prepared to allow public servants to give frank evidence to the committee. Sadly, neither of those situations presently applies in the federal arena, or in most States. Consequently, most committees are frustrated in obtaining real information. There is surely a strong case, therefore-and this is my third point- for enacting legislation that will expressly require people, including public servants, to provide information to parliamentary committees (both by oral evidence and production of documents) subject only to objections on specified, serious grounds such as prejudice to judicial proceedings or police operations or national security.

While I am on the topic of information, let me mention the sad decline in the utility of freedom of information laws. These laws were never popular with public servants but were put into place by politicians who believed that sunshine was the best weapon

against bureaucratic corruption and incompetence. Sadly, however, the present generation of politicians seems to have been captured on this issue by their public servants. Ministers seem now routinely to exercise what was intended to be the extraordinary power to issue a conclusive certificate that the release of a particular document, or series of documents, would be contrary to the public interest. Consider, for example, the certificate given by the Commonwealth Treasurer that it would be contrary to the public interest to disclose documents concerning the effect of bracket creep on the First Home Owner's Scheme(5). Recently, and at a time when there is an unprecedented community effort to reduce the level of water consumption in Sydney, it came to light that Sydney Water, a government authority, has refused a newspaper's freedom of information request to disclose the names of Sydney's major industrial water users(6). This is despite the fact that publication of names in other cities has led to large water savings by industrial users. My fourth point is that it would greatly help parliaments to do their work if our freedom of information laws were overhauled.

So much for deficiencies in the parliamentary system. I turn now to the second major limitation on the democratic nature of our system of government: the lack of redress for people who suffer what they regard as tyranny at the hands of the executive government or the parliamentary majority. This raises the question whether we ought to have a charter of rights, either embodied in the Australian Constitution or enacted by statute (federal or State).

It seems obvious that any right of redress for government actions that fall within a law enacted by Parliament should be strictly limited. With all their faults, our parliaments are the closest approximation, in modern times, to the democratic ideal. Their members are chosen by the people in free and open elections. So the decisions they make about legislation are entitled to great respect. Yet it cannot be denied that parliaments sometimes enact statutes that unnecessarily trample on important human rights. This usually happens at times of high emotion, following some disaster or perceived crisis. Extraneous influences, such as an imminent election, sometimes cause legislators to support legislation they would ordinarily find abhorrent.

I illustrate the point by an American example. After September 11, 2001,President Bush made an executive order that included the imprisonment of suspected terrorists at Guantanamo Bay. The executive order contained numerous provisions that treated such prisoners less favourably than other persons suspected of having committed serious criminal offences.

The Bush Administration chose Guantanamo Bay as the prison site in the belief that, it being in Cuba, the United States courts would hold they had no jurisdiction to supervise what went on there. However, the courts held otherwise. In June 2006, the United States Supreme Court held, not only that it had jurisdiction to rule on the legality of the executive order, but that it was in fact invalid; the President could not do what he wished to do by executive order, legislation would be required. Three Justices held these things could not be done at all, even by legislation; they were incompatible with the Constitution. Unfortunately, in my view, the remaining members of the Court did not rule on that question, with the predictable result that the President decided to try again via legislation. A Bill was presented to Congress just before it rose for the November 2006 mid-term elections. One of the provisions in the Bill was a clause purporting to exclude Guantanamo Bay from the jurisdiction of the United States courts. It is inconceivable to me that such a provision would have been accepted at any other time; Americans have a proud tradition of adherence to the rule of law. But what member of Congress, in the middle of the Iraq war and with an imminent election, would wish to be painted as soft on terrorism? So the Bill passed.

Some of you will think of the migration legislation enacted in our own Parliament in 2001, in the wake of the Tampa incident and confected hysteria about "boat-people" flooding

Australia. And consider the legislation about Northern Territory Aborigines that was rammed through the Commonwealth Parliament last week. This legislation, emotively entitled *Northern Territory (National Emergency Response) Act 2007,* is the most racially discriminatory legislation seen in this country since abandonment of the White Australia policy.

The discriminatory nature of the legislation was conceded by the government's decision to include in the legislation a clause excluding the application to it of the *Racial Discrimination Act 1975.* The concession was obviously justified. What else could one say about legislation that authorises the government to quarantine the welfare benefits of Aboriginal (but not non-Aboriginal) people who are good parents, simply because there are others in their community who are not? Would the white community of Hobart stand for that? Or for the imposition of a compulsory lease to the Commonwealth of land owned by, and managed for the benefit of, the local community?

The significant point about both these examples is that, in each case, the legislation was supported by an opposition that ordinarily would not have done so but was spooked by an imminent election.

Experiences such as this have given rise to a widespread belief that there is a case for allowing people to challenge legislation that conflicts with a limited list of fundamental human rights. The list varies from country to country but generally follows one or more of the great international human rights conventions, such as the *International Covenant on Civil and Political Rights,1966,* which Australia signed in 1972. There are now very few countries without a human rights charter; Australia is the only developed country in this category.

Time does not permit me to argue at length the pros and cons of a charter of rights. In essence, the argument in favour of a charter is that it enables judges, who are independent of both the executive government and any parliament, to examine whether a particular
Executive action or statute is compatible with one or more relevant
guaranteed rights.

It is important to note that the guarantee can never be an absolute one; important rights often conflict. Section 1 of the Canadian *Charter of Rights and Freedoms* provides an example of the test that is typically used. Section 1 says the rights and freedoms set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Note what this involves. First, the relevant limitation on people's rights and freedoms must be reasonable. That means rational, defensible, not capricious or idiosyncratic. Second, the limitation must be prescribed by law; that is, it must be contained in a statute or in legislation made under statutory authority. Third, it must be demonstrated to be justifiable, the onus of proof resting with the party (usually the government) who argues in favour of the limitation. Finally, the yardstick is what is acceptable, not in a fascist country, but in a free, democratic society.

Some of these elements are highly subjective; they are matters about which people may reasonably differ. That goes to the heart of the objection most often put against the notion of a charter of rights. It is argued that, if someone has to make a judgment about the acceptability of a limitation on a person's rights or freedoms, that someone should be the parliament, whose members are accountable to the public at each election, or an executive official, such as a Minister or public servant, who is accountable to the parliament.

It is surely naïve, under modern conditions, to think any general election will turn on the electors' opinion about the reasonableness of a particular restriction on human rights. Nonetheless, parliamentarians are elected and judges are not. If one is truly a democrat, there is much to be said for the view that the last word in any conflict should be spoken by the people themselves or those who are elected by them.

It would be possible to adopt a charter of rights and freedoms, which are to apply subject to criteria like those stated in the Canadian Charter, but to allow the parliament, perhaps only after a referendum, specifically to override the protected right or freedom. This would enable the relevant limitation to be dispassionately and independently reviewed by the courts but also enable the electorate, or the parliament, if it saw fit and with the benefit of the courts' opinion, nonetheless to decide the limitation should apply. Experience with a similar provision in the Canadian Charter(7) suggests that parliaments will generally be content to accept the courts' view.

During recent years, there has been some interest, at State and Territorial level, in legislation designed to safeguard fundamental human rights. Both the Australian Capital Territory and Victorian parliaments have enacted charters of rights(8). As these charters take the form of statutes, rather than constitutional provisions, the protections they enact can be overridden by later, inconsistent statutes. Nonetheless, the ACT and Victorian statutes are useful. They prescribe standards that must be observed by government officers, including the police. They also require members of the parliament, usually Ministers, who propose to introduce legislation into the parliament, first to have it examined by an independent specialist agency for its compatibility or otherwise with the standards set out in the Act. These procedures do not prevent a deliberate decision to bypass the stipulated protections; but they should ensure this does not occur inadvertently.

Having listened to all this, many of you, I suspect, will be pining for the simplicity of Athenian democracy. We cannot go back to those days. However, in the spirit of those who gathered at Calais in 1921, we can resolve to improve the democracy of our own day. We can do this at a number of levels.

Those of you who teach may be inspired to raise some of these ideas with your students. All of us can discuss them with friends and within any organisations (including political parties) to which we belong. More generally, the internet now offers everyone unprecedented opportunities directly to involve themselves in public policy issues. There are now independent online public interest bodies (such as GetUp Australia) which facilitate public discussion about such issues and encourage people to band together to do something about them.

I hope my comments will provoke each of you to consider what you are able to contribute to the development of a true democracy in this country.

(1)"New Education for the 21st Century?" in "New Horizons for Education", Vol 115, November 2006 at 41.

(2) "The Trial of Socrates", Picador, 1988 at 10-11.

(3) See the 1976 Dimbleby Lecture.

(4) "Courts, Democracy and the Law", the Blackburn Lecture, 7 August 1990 at 8-9.

(5) *McKinnon v Secretary, Department of Treasury* (2006)HCA 45.

(6) "Sydney Morning Herald" 16 July, 2007.

(7) See s.33, which I discussed in "An Australian Charter of Rights?", 1993, Law Book Company of Australia, at 177-182.

(8) *The Human Rights Act 2004(ACT)* and the *Charter of Human Rights and Responsibilities 2006 (Vic)*.