Democracy Under Siege

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Preface

Democracy Under Siege forms part of a series of essays published by the Australian Collaboration. The essays are devoted to political, societal and environmental issues facing Australia.

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Democracy Under Siege

Australians generally accept that democracy is the best system of government, the market is the most efficient mechanism for economic activity and fair laws are the most powerful instrument for creating and maintaining a society that is free, rational and just. However, we are also collectively conscious that democracy is fragile, the market is amoral and law is an inadequate measure of responsibility.

—JUSTICE TONY FITZGERALD

Australians are justly proud of their democratic traditions. Australia has introduced many new measures that have subsequently been adopted by other democracies around the world. Its system of government, established in 1900, drew upon British and United States models, selecting many of the best features of each. Recently, however, there have been worrying signs. While Australia's formal democratic institutions remain proud and strong, over the last decade there has been an increasing erosion of democratic practices. Many attacks may seem of minor consequence; some have barely been reported. It is only when they are looked at as a whole that their significance stands out strongly. It has been a wounding by a hundred cuts. There has been a noticeable and growing malaise in the electorate. This is manifest in the decline of public faith in politics and politicians over the last decade, a consistent finding of many different polls. Australia has notably failed to keep pace with many of the initiatives that have taken place in other established democracies to extend best practice in public accountability and human rights.

As former prime ministers Gough Whitlam and Malcolm Fraser point out, it is 31 years since the last official inquiry into principles of ministerial responsibility. In that time there has been enormous growth in the power of executive government. Ministerial advisers have come to play a pivotal role, many crucial government functions are now outsourced and there has been a great expansion of the lobbying industry. Accountability reforms are needed in the parliament, the executive, political parties and the electoral system. Democratic freedoms and human rights need more effective protection. We also need a system that is able to transcend political advantage-seeking over such

matters as appointments to public offices and debate over Australia's longer term future.

The essay focuses on the federal political system, beginning with a description of the essential qualities of an open democracy and a brief summary of the main characteristics of Australia's polity to draw attention to the many unwritten conventions that determine the way it works. These unwritten conventions make many democratic practices vulnerable to attack because, in a period of increasing centralisation of executive power, they can be brushed aside by determined governments. The essay describes the way in which the erosion of democracy has been taking place in Australia. It then discusses initiatives to extend public accountability in countries such as the United Kingdom, the United States, Canada, Finland, Germany and New Zealand. The essay argues that many changes are needed. A brief summary of the main recommendations follows.

Parliamentary reforms are first required. The committee system of Parliament, especially in the Senate, needs to be restored to its previous standing, and its independence and breadth of inquiry need to be extended. A commission should be established similar in scope and constitution to the Parliamentary Standards Commissioner in the United Kingdom. Other countries have used their parliaments much more effectively and imaginatively than Australia to investigate long-term issues in a non-partisan way. Australia should learn from them and adopt many of their practices.

Australia could follow the example set by Canada and introduce legislation similar to the *Canadian Accountability Act*. Its far reaching accountability reforms include: increased restrictions on donations to political parties and candidates; the creation of a new Commissioner of Lobbying as an Agent of Parliament; the prohibition of ministers, ministerial staffers and senior public servants from lobbying the Canadian Government for five years after leaving office; and the creation of an independent tribunal to increase protection for whistleblowers.

The recent amendments to the *Australian Electoral Act*, closing electoral rolls to new enrolments the day of the issuing of electoral writs, should be repealed as an unjust arrangement potentially preventing hundreds of thousands of people from voting.

Australia needs a formal appointments system to public offices similar to the so-called Nolan system in the UK to ensure that candidates are independently screened for their suitability and to avoid blatantly political or inappropriate appointments. The Australian Government should establish a standing anti-corruption commission similar to those now in existence in New South Wales, Queensland and Western Australia.

Australia is now the only major English speaking country in the world without a bill or charter of human rights. A legislated charter of rights is vital to strengthen Australian democracy and to ensure that the human rights transgressions that have occurred in the last decade are not repeated.

These and other conclusions are further discussed in the final part of the essay. It is clear that Australia's polity needs urgent overhaul. Such an overhaul should be a commitment of the Government and all political parties.

The new Rudd Labor Government has already made some significant and welcome election promises. They include: a commitment to four year electoral terms with fixed election dates; scrutiny and approval of political advertising by the Auditor General; restoration of the Westminster system of public service; stricter rules for ministerial staff; and an independent system of appointments to the board of the ABC. A full list of election promises is included in the final part of the essay. The Government has also acted promptly to introduce its 'Standards of Ministerial Ethics' which set out strict new rules for ministerial behaviour. They include the divestment by ministers of all shareholdings except those in appropriate trusts and funds, the banning of lobbying by ministers in their most recent portfolio areas for one year after leaving office and a Register of Lobbyists.

All these commitments need to be honoured in full with the support of the Opposition. The sweeping aside of the old guard in the Coalition Parties and the election of a new Leader of the Opposition offer unparalleled opportunities to carry out much needed reforms on a long-term bipartisan basis. We must ensure that the momentum for democratic and accountability change does not come to a halt.

PART A.

Democracy in Australia: its nature and vulnerabilities

Many aspects of Australian democracy may seem to be firmly entrenched, but as Sir William Deane, former Governor General of Australia, has observed 'the strong and vibrant democracy, which we have inherited, should never be taken for granted.'[1] A review of the state of democracy and public accountability in Australia therefore needs to begin with a brief summary of the key characteristics of an open and democratic society. Specifically we need to ask whether Australia's political system adequately meets the requirements of *political equality, popular control of government, civil liberties and human rights, and quality of public deliberation* (the four standards set down by the Democratic Audit of Australia).

An open, democratic society that meets these requirements gives its citizens freedom to make choices about their lives, to develop their potential as human beings and to live free from fear, harassment or discrimination. It gives them protection under the law and the right to elect legislators of their choice and to remove them if they do not perform to their satisfaction. It guarantees freedom of speech, religion and assembly and other human rights. It has an independent judiciary. Its government is answerable to parliament in fact and not just in name. The quality of its public administration is not measured solely by results but also by its transparency, consistency, reliability, procedural fairness and impartiality.

In a healthy democracy there is freedom of the press to expose corruption, malpractice and incompetence and diversity of media opinion to offer alternative interpretations of news and events. There are public officers such as auditors general, ombudsmen and parliamentary standards commissioners, answerable to the parliament not the executive, with statutory powers to review the actions of governments and office holders. There are many opportunities for citizens to participate in public life. An open democracy also has moral responsibilities to non-citizens, refugees, visitors and other nations. Many of these responsibilities are enshrined in international covenants and agreements.

These arrangements need to be underpinned by two important principles. The first is the rule of law. The rule of law requires that governments and individuals can only act in accordance with publicly known laws that are adopted and enforced in a manner consistent with well-established traditions, conventions and procedures. All citizens, no matter what their eminence or authority, come within the scope of the law; those who make and enforce the law are therefore bound by it.

The second principle is the separation of powers between the legislature, the executive and the judiciary. The legislature (the parliament) has the power to make laws; the executive (the government) has the power to implement the law; and the judiciary (the courts and legal system) has the power to interpret the law. The parliament and the judiciary are fully independent of the government and of each other.

These are the benchmarks against which the practice of democracy in Australia needs to be judged.

Australia's political system

Australia has great democratic traditions reaching back to its first colonial governments. It has been at the forefront of democratic innovation. In 1856, Victoria introduced the modern form of the secret ballot. It became known throughout the world as the 'Australian ballot'. In 1856, South Australia gave the vote to all men by eliminating professional and property qualifications and, in 1894, it gave the vote to women. In the 1890s, the colonies adopted the principle of one vote per person.[2] In 1901, Australia became the first nation ever to come into being following a people's vote on a democratic constitution. In 1903, almost two million names were entered on the first Commonwealth electoral roll. Marian Sawer, professor of political science at the Australian National University (ANU), observes that this is believed to be some 96 per cent of the adult (white) population and that it was 'the most comprehensive enrolment of any nation up to that time for the purposes of democracy.'[3] Much less admirable, however, was the exclusion of the Indigenous population from the electoral roll.

It is well known that Australia's political and electoral system is based

upon British and American systems of government. Many would argue that its political arrangements have found an excellent balance between these two great democratic exemplars, borrowing many of their best features and discarding many of the weaknesses. In the Australian system there are two chambers, the House of Representatives and the Senate. The House of Representatives is modelled on the United Kingdom House of Commons, while the Senate is modelled on the United States Senate. As in the UK, governments are formed by majorities in the lower house, in Australia's instance, the House of Representatives. In Australia, as in the US, the Senate is a house of consent and review.

The method of election to the two houses differs. Members of Parliament are elected to the House of Representatives by preferential voting in single-member electorates (the alternative vote). The benefit of this system is that by favouring the major parties it leads to clear-cut election results and strong government. Since individual electorates are limited in size, members are also able to have close interaction with their constituents. The limitation of the system is that it does not accurately represent voter preferences and also limits opportunities for candidates from minor parties to win House of Representatives seats. The system of election to the Senate is based on proportional representation using what is known as a Single Transferable Vote system (a somewhat unusual preferential form of proportional representation). Each state has a fixed number of Senate seats which are not determined by the size of the population alone but by the requirements of equality of Senate representation between the states as determined by the Constitution. The strength of this system is that it more accurately reflects public opinion and allows members of smaller parties to gain Senate seats. Its weakness in the Australian context is that it is biased in favour of smaller states. This combination of preferential voting and proportional representation, nevertheless, has many combined benefits. It is a markedly fairer system than the first-past-the-post voting system for elections to the UK House of Commons, the hereditary and political appointment system to the House of Lords, and the tortuous arrangements for the election of a US president.

A particular feature of the Australian political system, not practised in many other countries, is compulsory voting. Thirty-two countries have some

form of compulsory voting but less than half have strict enforcement. Compulsory voting is not the only factor influencing high voter turnout but it certainly reduces the likelihood of very low voter turnout. Three of the six countries with the highest voter turnout (Australia, Belgium and Luxembourg) have compulsory voting. In the 2004 election, voter turnout in Australia was estimated to be the highest in the world: 94.3 per cent for the House of Representatives and 94.82 per cent for the Senate. In the US, where institutional and cultural factors are allied to the absence of compulsory voting, voter turnout commonly struggles to exceed 50 per cent. Although compulsory voting represents a valued principle of universal suffrage, it could be abolished overnight by a government with a majority in both houses since the Constitution says nothing about compulsory voting. A parliamentary committee with a Howard Government majority did indeed make such a recommendation.

The framework for Australia's political system is provided by the Constitution. The Constitution establishes the Commonwealth Parliament, the Senate, and the House of Representatives as the legislative branch of government. It specifies the powers of the Parliament with 40 paragraphs of specific powers. The Constitution determines the broad structure of executive powers and establishes a judicature with powers vested in the High Court. It also sets out the continuing role of the states, limited only by the powers vested in the Commonwealth.

Despite the positive nature of many parts of the system, there are also many deficiencies in current institutions and practices, some of which relate to the Constitution. The Constitution does not specify many aspects of the system of government. The interpretation of the Constitution has developed largely through judgments by the High Court of Australia. The great majority of constitutional cases before the High Court are concerned with determinations about the powers granted to the Commonwealth Government by the Constitution. Progressively these determinations have given more and more power to the Commonwealth.

The Australian Constitution furthermore includes a minimum set of citizen rights. They are: the right to trial by jury; the right to freedom of religion; the right to just compensation; and the right to freedom from discrimination in one state when a resident of another state. The High Court has also found

that there is an implied but limited right to freedom of speech. Notably the Constitution does not include a bill of rights.

Other deficiencies relate to the parliament. Political scientist John Uhr has assessed Australian parliaments against the four standards set out by the Democratic Audit of Australia. He makes the important point that parliaments can be democratic but were not designed as democratic institutions; rather they have to be made relevant to democracy.[4]

Many other issues relate to the unwritten conventions that underpin the political system. Most of Australia's main democratic institutions remain robust today, but because so many of them rely on unwritten conventions, they are vulnerable to determined executive efforts to limit democratic freedoms and to reduce political accountability.

Political conventions

The former Prime Minister John Howard once said that the strength and vitality of Australian democracy rests on three great institutional pillars: the parliament with its tradition of robust debate; the rule of law upheld by an independent and incorruptible judiciary; and a free and sceptical press. According to Howard in 2006:

> Australia is one of only a handful of nations to have carried the torch of democracy through a turbulent 20th century. We began that century by becoming the first nation ever to come into being following a people's vote on a democratic constitution. We ended it staging the most successful Olympic Games of all time.[5]

Howard's public rhetoric was used to defend Australia's foreign policy in such matters as the invasion of Iraq to support a democratic regime change and the exclusion of China from the mutual security pact with Japan on the grounds that China is not a democracy. When it came to trade, however, these sensitivities seemed to evaporate.

Speaking in a much less celebratory voice, Justice Tony Fitzgerald, former Judge in the Federal Court of Australia, has commented that democracy in our tradition assumes that a broad range of political activity is controlled only by

conventions of proper conduct. He notes that because individual rights are not constitutionally guaranteed, justice, equality and other fundamental values are constantly vulnerable to the disregard of those conventions in Australia.[6] While some political standards are protected by the Constitution, legislation, common law and international law, some conventions are unwritten and some are *ad hoc*. Many political practices dependent on conventions therefore remain vulnerable and unprotected.

Political equality

The right to vote is set out by the International Covenant on Civil and Political Rights. Article 25 of the Covenant provides that:

> Every citizen shall have the right and the opportunity … to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of electors.

The right to vote and electoral equality (e.g. one vote, one value) are not, however, guaranteed in the Australian Constitution and the Covenant has not been incorporated into federal law. There may be an implied right in the Constitution but this is a matter of debate. On the one hand, the Constitution states that 'No adult person who has or acquires a right to vote at elections … shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth'. This could be interpreted as meaning that one must acquire the right to vote; that is, that the right to vote is not a right after all. On the other hand, the Constitution states that representative democracy is 'directly chosen by the people' which could be inferred to mean there is an implied right to vote. Regardless of which view is adopted, the fragility of the right to vote has been recently demonstrated by the new electoral laws which potentially disenfranchise thousands of voters, disenfranchise prisoners and increase the threshold for disclosing the source of political donations (see Part B). Marian Sawer observed that the Howard government '… increasingly thumbed its nose at the obligations imposed by the International Covenant on Civil and Political Rights.'[7]

With the introduction of their respective charters of human rights, the right to vote and electoral equality have, however, been incorporated into Australian Capital Territory and Victorian legislation.

Popular control

Representative government and the rule of the people are modern understandings of democracy, underpinning the majority of democracies in the world today. Representative democracy embraces elections, political parties, representative assemblies and public service bureaucracies.[8] These political institutions in theory serve to bolster legitimacy and popular sovereignty and are thus fundamental to democratic integrity. The representatives of the people, namely the members of the House of Representatives and Senators, are charged with acting in the interest of the people. Indeed, as Justice Isaacs has commented, the Australian Constitution 'is for the advancement of representative democracy …[9] Many critics, however, consider representative democracy to be under threat because power is now so heavily concentrated in the executive government and because significant (unwritten and thus unprotected) political conventions have regularly been undermined.

The protection of human rights

The protection of human rights is fundamental to liberty, freedom and a healthy democracy. The Universal Declaration of Human Rights, among its many provisions, sets out that:

- Everyone has the right to life, liberty and security of person;
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
- No one shall be subjected to arbitrary arrest, detention or exile;
- Everyone has the right to freedom of opinion and expression.

While the Declaration forms part of customary international law and is binding on all nations, it cannot be enforced in Australian courts. This is worrying because, as previously noted, there is very limited mention of human rights in Australia's Constitution.

One of the justifications for a charter of rights is to set out principles for the

practice of government and to give them statutory force. Another is to protect citizens from arbitrary, racist and unjust treatment. Sir Anthony Mason, former Chief Justice of the High Court of Australia, has commented that: 'human rights are [now] seen as countervailing the exercise of totalitarian, bureaucratic and institutional power – widely identified as the greatest threats to the liberty of the individual and democratic freedom in this century.'[10] A common objection to a charter of rights and responsibilities is that it places decision-making in the hands of the courts rather than in the hands of the parliament. But the introduction of a charter or bill of rights by legislation that can be fine-tuned by an act of parliament (rather than by constitutional amendment) leaves ultimate control with the parliament. There are now many models in other countries, and indeed in Australia, for the Commonwealth to draw upon (see Part C).

The quality of public debate

The quality of public debate depends upon freedom of speech, freedom of information, and freedom of the press. These freedoms are guaranteed by a number of international laws and treaties. For example, the Universal Declaration of Human Rights states:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers.

Freedom of speech refers to the right to speak freely without censorship (exceptions are defamation, libel and slander). Freedom of information and freedom of the press ensure that the media and citizens have access to public information, including governmental documents. Australia is a signatory to all the United Nations human rights treaties but a specific act of parliament is required in order to incorporate them into Australian law. This has occurred in some respects (e.g. the *Human Rights Commission Act 1981)* but because no government has implemented the free speech provisions, they are not enforceable by Australian courts, which means that in practice, parliament may restrict freedom of speech through legislation.[11] As discussed

above, the Australian Constitution does not have any express provision relating to freedom of speech.

The fact that many fundamental political conventions are unwritten and *ad hoc* underlies the fragility of Australian democracy. It means that many of the rights contained in Australian law can be amended or repealed by any government with the necessary parliamentary majority. Where the conventions are not embodied in legislation, the government is free to act as it sees fit. The following part of the essay describes threats to democracy in Australia arising from the vulnerability of these political institutions.

PART B.

Democratic challenges and threats

In a democracy, the test of political legitimacy is popular consent. Australians are generally satisfied and proud of their democracy, but 'mistrustful of politicians, the federal parliament, the legal system and the public service.'[12] There is widespread evidence of voter cynicism about politics and politicians in Australia and elsewhere. Opinion poll after opinion poll has shown low confidence in the standing of politicians and in the confidence of Australians in political institutions. In 1998, a Roy Morgan survey found that only 7 per cent of Australians thought members of both state and federal parliaments were of high or very high standards of honesty. In April 2007, public confidence in politicians increased slightly but to no more than 16 per cent, only just ahead of business executives, journalists and car sales people. By contrast, the same poll found that 91 per cent of Australians believed nurses to have high or very high standards of honesty and ethics.

Elim Papadakis, a professor of social sciences, has documented declining levels of public confidence in key societal institutions, referring to a survey in 1999 that showed 74 per cent of respondents had no or very little confidence in the Federal Government. The survey also found that 84 per cent felt the same about both major political parties.[13] In 2000, research by Ian McAllister at the ANU, found around one in three voters believed parliamentarians used their public office for financial gain and only one in four believed parliamentarians had a high moral code. These and other pieces of research show a one-third decline in confidence in government and an even greater decline of belief in the moral standards of members of parliament over the preceding two decades.[14]

What might be the cause of distrust and disillusionment about Australian politicians and politics and low citizen confidence in the political system? One explanation might be that differences between the major parties are becoming more blurred as each, drawing upon extensive public opinion polling, seeks to cater to a middle band of voters. Another is the widespread feeling that biparti-

san concern for the good of the country is rare and that the political system is constantly being manipulated for electoral gain. It is difficult, for example, to believe that the Howard Government's July 2007 intervention to take over the Mersey Hospital in a marginal seat in north-western Tasmania, in the face of widespread condemnation by medical bodies, was motivated by any reason other than electoral advantage. Although an egregious example, this is by no means a unique one. Governments of all persuasions have been guilty of the same misdemeanours. Governments are seen to have an almost exclusive focus on the short-term political cycle. Long-term issues of fundamental importance to the nation are thereby being ignored. In marked contrast to other countries, Australian governments have done very little to help develop a capacity within parliament to review long-term issues facing the nation.

Australians are also increasingly frustrated with the gladiatorial, mud-slinging style of politics and the increasing personal attacks on fellow politicians and members of the public. In May 2007, for example, Senator Bill Heffernan was widely condemned for saying that Labor's now Deputy Prime Minister Julia Gillard was unfit to run the country because she did not have children of her own; that she did not understand 'the relationship between mums, dads and a bucket of nappies.' Some years earlier, the Senator made the offensive and unfounded accusation that high court jurist, Justice Michael Kirby, was involved with rent-boys from Sydney and Wollongong. In another example of public vilification, Senator Abetz accused a professor of industrial relations of being 'a trade union choirboy' 'who engages in moral equivocation over terrorism.'[15]

Cynicism may also be a reflection of apathy and a retreat from political matters. Social commentator Hugh Mackay, for example, argues that around the turn of this century, Australians 'sought refuge in a kind of social disengagement' after being worn out and wearied by a myriad of changes and issues. In response, argues Mackay, Australian society has entered a period of self-absorption '... we have turned the focus inward, and concentrated on things that seemed to be within our control: backyards, home renovations, our children's schools, our next holiday ...'[16]

Another explanation for voter cynicism in Australia and in other democracies, is that public dissatisfaction and disenchantment with democratic

institutions are a reflection of growing citizen expectations that governments should provide more scope for political participation, ensure greater accountability and transparency, strengthen the rule of law, provide more freedom and equality, and be more responsive to citizens, organisations, the media and political debate.[17]

Cynicism and apathy are a cancer in the system since they encourage a vicious cycle of action and response. Cynicism is not simply an outcome of democratic erosions; it also serves to weaken democracy and provides a breeding ground for unbridled power seeking. Restoring faith in democratic institutions is therefore an important challenge for Australia's political future.

The erosion of democratic traditions: a wounding by a hundred cuts

Robert Manne, professor of politics at La Trobe University, has argued that the health of a democracy relies on a mixture of factors: 'limited government; strong civil society; the independence of autonomous institutions; the encouragement of dissident opinion, [and] wide-ranging debate.'[18] All of these values are currently under threat in Australia. The central democratic pillars of popular control, critical commentary, political accountability, civil liberties and human rights have all been affected.

The right to vote

The ballot box is the ultimate form of political accountability and the right to vote the cornerstone of democracy. Recent changes to Australia's electoral enrolment laws have undermined the principle that the electoral roll should include the highest number possible of those eligible to vote. A change of particular concern is that the electoral roll now closes for new enrolments at 8pm on the day the election writs are issued (a minimum of 33 days before election day) and three business days after the issuing of the writs for updating existing enrolments. Previously, the *Commonwealth Electoral Act* allowed seven days' grace for voters to enrol or bring their enrolments up to date before the close of the roll. While it is too early to determine the effects of these new laws on the 2007 federal election, in the 2004 election, over 420,000 citizens enrolled for the first time or brought their enrolments up to date in the week after the writs

were issued. Had the proposed changes been in force, many of those citizens would not have been able to vote. The new laws also require that new voters and existing voters, when they bring their enrolments up to date, have a driver's licence as proof of identity. If applicants do not have a driver's licence or other identification, such as a Medicare card sighted by an authorised person, they are required to get two electors to confirm their identity. This adds yet another obstacle to enrolment, particularly for Indigenous people, those with disabilities, the homeless and prisoners. It means that the right to vote is not enjoyed equally within Australia.

Many other democracies are moving in quite the opposite direction. Some countries such as the UK, New Zealand and Canada, are encouraging enrolment by making it as easy as possible. New Zealand and Canada, for example, allow voters to enrol the day before or the day of the election.

Under the 2006 electoral laws, prisoners lost their right to vote. This amendment was struck down by the High Court of Australia in August 2007 on the grounds that it was unconstitutional. As a consequence, the law returns to the situation pre-2006; prisoners serving less than three years remain eligible to vote. In Canada, by comparison, the Supreme Court found that the disenfranchisement of all prisoners violated the Canadian Charter of Rights and Freedoms. As a result, all prisoners can now vote in Canadian elections.

Attention has also turned to the slow growth of the Commonwealth electoral roll. After looking at changes in electoral enrolment from two perspectives (recent month by month developments over several years and annual changes over 27 years), political scientists, Peter Brent and Simon Jackman, have concluded that the growth in the electoral roll has indeed slowed dramatically because re-enrolments are not keeping up with objections.[19] Slow growth in enrolment significantly undermines Australia's system of compulsory voting. Full enrolment is as important as compulsory voting in ensuring a high level of citizen participation in democratic elections.

Another electoral issue is the design of voting papers. At the 2004 federal election, Steve Fielding was elected to the Senate as a Victorian Senator with a remarkable 1.88 per cent of the primary vote. This could hardly have been the intention of the Victorian electorate. While the major parties were sig-

nificantly responsible because of the way in which they directed their preferences on group tickets, equally to blame is the design of the Senate ballot paper. With a multitude of candidates and the need to number every candidate in order of preference to cast a valid vote, it is not surprising that most voters choose above-the-line voting according to a group ticket registered by a political party. The problem is that they have little idea to which candidates their preferences are being directed through the group ticket. This is a system in obvious need of overhaul.

The suppression of public voices

In May 2007, Australia's eight leading media organisations launched a campaign called 'Australia's Right to Know' to express concern about the state of freedom of speech in Australia. The campaign is supported by all leading Australian media organisations other than the Nine Network. At the launch of the campaign, News Ltd Chairman John Hartigan said that:

> We have joined together because we are deeply troubled by the state of free speech in Australia. Freedom of speech is one of the fundamental pillars of a free and open society. It is as important as parliamentary democracy and the rule of law in guaranteeing the freedom and rights of all Australians ... Our freedom to express an opinion, honestly and openly, is under threat ... Australia now lags well behind most major democracies. The latest worldwide press freedom index, compiled by the independent organisation Reporters Without Borders, ranks Australia 35th – equal with Bulgaria and behind nations such as Bolivia (16th) and South Korea (31st).[20]

Freedom of information (FOI) is one area of the campaign's concerns. The *Freedom of Information Act 1982* gives every person the right to access information in the Commonwealth Government's possession. The Act requires government agencies to provide access to documents unless the document is specified by legislation to be exempted for the protection of the public interest (e.g. national security) or, in the case of defamation laws, where it is necessary to protect the identity and reputation of individuals. The 'Australia's Right to Know' campaign has pointed to incidents where the right to know is not fairly

balanced with these protections but has been used for what has been referred to as 'freedom *from* information'. In one case, a major newspaper requested an auditor's report on suspected rorts of Commonwealth parliamentarians' travel expenses but was refused. Although the paper won on appeal to a tribunal, the Government asked for a fee of one million dollars to obtain the report, a sum no applicant could reasonably afford. This is was not an isolated case of governmental secrecy and restrictions on information.

The Right to Know Campaign commissioned former Independent Commission Against Corruption (ICAC) Commissioner, Irene Moss, to conduct an independent audit of free speech in Australia. The Moss Report was released on 31 October 2007, finding that free speech is being 'whittled away by gradual and sometimes almost imperceptible degrees' within a culture of secrecy. According to the audit, Australians are being denied vital information that should be made public and this is happening across all levels of government. The report states that 500 legal prohibitions restricting journalists and at least 1,000 court suppression orders are currently in force, including 335 specific secrecy provisions. In addition, the report explains how FOI applications are regularly rejected and enormous amounts are being charged for the release of information. Moss concludes: 'Unfortunately there is mounting evidence that the lure of political advantage increasingly trumps principles of democratic transparency.'[21]

The Moss Report also criticised the 'non-existent or flawed' protection of whistleblowers who disclose matters in the public interest.[22] Most Australian states have adopted some form of whistleblowing legislation to provide protection for those who make disclosures and whistleblowers are nominally protected from criminal or civil liability, dismissal or breach of confidentiality. There is, however, no uniform Commonwealth legislation that provides protection to whistleblowers in Australia. In one recent case, Allan Kessing, a former middle-ranking Customs officer, was prosecuted for leaking a Customs report to *The Australian* newspaper. The report drew attention to serious security weaknesses at Sydney airport. The Government initially denied the report but then went ahead and invested $200 million upgrading airport security after an inquiry was set up to investigate crime and security at Australia's airports. In the meantime, Kessing was found guilty of breaching the *Common-*

wealth Crimes Act 1914. News Ltd Chairman John Hartigan remarked, 'This man should be feted. They should be throwing rose petals at him.'[23] Instead, Kessing has spent half of his superannuation funds defending himself in court and has been given a nine-month suspended sentence.

In another example of the former Howard Government's punitive approach to suppressing public voices, Desmond Kelly, a middle level public servant, was accused of leaking documents exposing the short-changing of $500 million to war veterans in Australia to two journalists. He was suspended without pay from his public servant position and charged and convicted under the *Commonwealth Crimes Act*. He was acquitted on appeal. The two Victorian journalists involved, Gerard McManus and Michael Harvey from the *Herald Sun*, refused to answer questions in court about the source of their newspaper report written in 2004. They were spared a jail term but convicted and fined $7,000 each for contempt of court. The action taken against McManus and Harvey violates the fundamental right of journalists to protect their sources. It also violates freedom of speech and freedom of information.

In both these examples, national security was not in jeopardy; rather it was a government's reputation that was at stake. Any objective assessment would surely say that the public interest was properly served by the leaks. Both cases furthermore involved a huge amount of taxpayers' money to carry out the investigation and prosecution. And most significantly, they have seriously affected the lives of the individuals concerned.

Freedom of expression and political communication have been threatened through growing censorship in many other sectors. Under the Howard Government's industrial relations legislation, workers risked losing their jobs if they spoke out about their working conditions. University academics have reported the erosion of academic freedom through prevention of publication and the interference of governmental ministers in the allocation of research funding. Scientists too have been silenced. At the beginning of 2006, the ABC reported that leading climate scientists from the government-funded Commonwealth Scientific and Industrial Research Organisation (CSIRO) claimed they were gagged by the Howard Government from publicly discussing the effects of climate change and disagreeing with government policy on climate change.

Non-governmental organisations that advocate for the environment, the disadvantaged and the community have also been under constant attack through defunding, new disclosure requirements, confidentiality clauses, tax threats, and the fear of losing funding. The Australia Institute surveyed 300 NGOs, finding that nearly all believe that their futures were on the line if they did not act in compliance with the Howard Government.[24]

The public broadcasters, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS), were likewise targeted by the Howard Government. Although there has been some additional funding made available to the ABC in the last years of its office, overall there was a reduction in funding during the span of office of the Howard Government. The ABC's annual report in 2005 showed that programming funds fell from $889 million in 1985–86 to $625 million in 2005–06 (figures adjusted for inflation). Although not all attributable to the Howard Government, this represents a 30 per cent cut in ABC funding.[25]

As a comparison, the British Broadcasting Corporation (BBC) in Britain receives five times the funding per head of population given to the ABC. The cuts to ABC and SBS funding have led to the axing of long running programs, the significant abandonment of Australia drama production, the introduction of increasing advertising on SBS and, with this precedent in place, the ever present threat of advertising on the ABC.

These changes pay scant respect to the crucial role played by the public broadcasters in Australian society. The newly introduced media laws are already contributing to further concentrations of commercial media ownership, making the case for robust, well-funded, independent public broadcasters even stronger.

Accountability and unbridled executive power

The Australian political system depends on checks and balances. The principle of the separation of powers is designed to ensure that governments are subject to the scrutiny of parliament and that courts and judges are fully independent. The principle is based on the assumption that governments cannot always be trusted to act impartially and should not have the power to interfere with the exercise of justice.

The checks and balances are becoming more and more threatened in Australia; executive power has increased greatly and the scope of parliament to scrutinise the actions of government has become increasingly limited. The principle of ministerial responsibility (the principle that ministers must take responsibility for the performance of their portfolios) has regularly been ignored. Ministerial responsibility guides have been weak and inadequately enforced. The practice of ministerial staff filtering unwanted information to enable the minister or prime minister to be able to say – hand on heart – that he or she had not been informed, has undermined the principle of ministerial responsibility. A prime example is the children overboard affair in 2001 when ministers failed to correct the false report that asylum seekers were throwing their children overboard.

Probity or integrity is of crucial importance in restoring confidence in the political system. Examples of lack of probity are the unjustified breaking of election promises, disregard of codes of conduct for ministers and their staff, blatant misrepresentation of facts for political purposes, and the use of spin to gloss-over or neutralise unpleasant truths or to justify broken promises.

The politicisation of the public service has accelerated over the last decade. Frank and fearless advice has become a dangerous practice for senior public servants. Because the hiring, the remuneration, and the tenure of office of all heads of agencies has been under the direct control of the Prime Minister (together with the portfolio minister), senior officials have had little choice other than unquestioning compliance with the government's requirements. Increasing attempts to make the administration of justice an arm of government have also undermined the justice system and the independence of the judiciary.

Senate Committees play a key role in the functioning of the Federal Parliament, scrutinising bills, interrogating public servants, exploring administrative misconduct and investigating issues of long-term significance to Australian society. They have long been recognised as a valued and important political accountability mechanism. Since 1994, there have been 16 standing committees with associated reference committees to evaluate and assess government policy and programs. In June 2006, the Howard Government reformed the Senate Committee system, reducing the number of committees

to 10 and taking over chairmanship of every committee. While there may have been a case for some rationalisation of the number of committees, there was no justification for other changes such as the restrictions on committee enquiries without executive approval. The Government also limited the time made available to committees to examine bills as well as the number of days the committees met each year (e.g. 92 days in 1989 compared to just 26 days in 2006). Following the release of the latest six-monthly report on government responses to committee reports, presented to parliament on 21 June 2007, it was observed by the Democratic Audit of Australia that:

> Astonishingly, it would appear that the [Howard] government has failed to respond to a single report within the required three-month period. Indeed, some are still awaiting a response after several years … Perhaps the most worrying thing is not that the government is reluctant to respond to reports, but that parliament allows this.[26]

The Australian Democrats pointed out on their Senate Watch website, that the (Howard) Government '… reject[ed] almost all non-government amendments to bills, even when committees that include government Senators unanimously recommend those changes. This is a marked departure from previous practice.'[27] The use of the 'Return to Order' procedure for releasing governmental documents was also ignored and the then Government made increasing use of urgent declarations for the passing of legislation (e.g. the *Northern Territory National Emergency Response Act 2007*).[28]

The Senate estimate hearings are another accountability mechanism that have been under threat. The hearings enable opposition senators to question ministers and public servants about any activity of government. Because the Howard Government had control of the Senate since 2004, it was able to escape interrogation over its decisions and activities. During the hearings related to the Australian Wheat Board scandal (when the Board brokered business deals with Iraq under the United Nations oil-for-food program and knowingly made illicit payment to Saddam Hussein's regime), the Government instructed all public servants not to answer any questions during the estimate hearings. As part of Senate resolutions, ministers and public servants can be excused from answering questions during the hearings if it would

be harmful to the public interest. In this instance, this was not the stated justification; rather the Government simply gave instructions to public servants not to reply to any questions relating to the matter.[29]

There are some areas of the political system that are unregulated and lacking in accountability. In calling for the regulation of political parties, Senator Andrew Murray notes that: 'We have 2251 pages of laws to regulate the conduct of companies and 1438 pages of laws to regulate unions but no rules to govern how political parties, our most important political institutions, are run.' Murray argues that it is scandalous that political parties 'which after all control the country' are totally unregulated, putting the system dangerously at risk of corruption. He adds that political parties '... have less transparency than a tennis club.'[30]

According to Transparency International, the global organisation fighting corruption, Australia's anti-corruption performance rates among the top ten countries in the world. But Transparency International only measures certain aspects of corruption. *The Age* writer Tim Colebatch has commented that there are many hidden examples of corruption in Australia's political system that are very hard for organisations such as Transparency International to measure.[31] Australia does not have a statutory Commonwealth anti-corruption body and only three states (New South Wales, Queensland and Western Australia) have specialised bodies to deal with corruption.

Scrutiny of political donations helps to weed out corruption and is vital to ensure that politicians act in the interests of their constituents rather than in the interest of special groups. Donations from individuals and organisations are used by political parties to fund election campaigns and other activities but can also be used to exert influence and seek privileged access or 'favours' in political decision-making and can alter the level playing field for electoral competition. Until recently at the federal level, there was a requirement that political donations over the amount of $1,500 be disclosed to the Australian Electoral Commission. On 11 May 2006, however, changes to the *Commonwealth Electoral Act* raised the threshold for disclosure of political donations from $1,500 to $10,000. This weakens governmental transparency and invites corruption 'with the allure of bulging party coffers and electoral victory.'[32]

In many democracies, there are strict controls on parliamentary entitlements and incumbency benefits. In Australia, postage and printing allowances have increased dramatically in recent years, giving incumbents unfair opportunity to use these funds for campaigning and election purposes. Of particular significance is the new arrangement that permits sitting members to carry over unspent allowances and to use them for campaigning. According to political scientist Norm Kelly, these parliamentary entitlements '[tilt] election contests unfairly in favour of incumbent MPs at the expense of democratic equality.'[33]

The lack of transparency for public sector appointments is yet another example of Australia's failing democratic system. Appointments are made at cabinet, prime ministerial and ministerial whim. It is common practice for the boards of Australia's largest and most influential public corporations to be stacked with people of related ideology to that of the government of the day. As one of many examples, Stephen Estcourt, President of the Australian Bar Association, and John Hatzistergos, NSW Attorney General, have criticised the consultation system for the appointment of a High Court judge. They have described it as a formality which is 'meaningless and a nonsense.' Estcourt stated that the Australian Bar Council believes that the current process should be replaced with a judicial appointments commission that would vet all candidates for judicial office.[34] These views have been given further weight by former Chief Justice, Sir Gerard Brennan, who observed that an independent selection process for judges in a range of courts should be established to avoid the appointment of 'judicial clones' who follow the government's wishes.[35]

Threats to human rights

The protection of human rights is fundamental to a healthy democracy. Likewise a healthy democracy is essential for the protection of human rights. As previously noted, Australia is signatory to a wide range of international human rights instruments, but is the only major English-speaking democracy that does not have a charter or bill of rights. According to former Prime Minister Howard, 'Australia's human rights reputation compared to the rest of the world is quite magnificent.'[36] However, Australia's hypocrisy in promoting democracy and human rights internationally, but then restricting human

rights and civil liberties in dubious domestic laws and practices, has at times been breathtaking. Professor of law, Hilary Charlesworth, points out that the United Nations Human Rights Committee has carried out investigations on a number of human rights violations in Australia. The examples range from the mistreatment of children in immigration detention through to discrimination towards same-sex partnerships, and undue trial delays for persons in custody.[37] The treatment of the Indigenous people of Australia has also received widespread condemnation, especially the high rate of imprisonment, the appalling state of Indigenous health, education and employment, and the failure of the Australian Government to apologise to the Stolen Generation. These human rights transgressions, Charlesworth argues, demand that a charter of human rights be implemented without delay:

> ... the nostrum of anti-bill of rights campaigners that 'it ain't broke so don't fix it' sounds rather hollow. From a human rights perspective, there are many broken elements. Australia's lack of concern with its international reputation ... has done a lot of damage. This is not least because it provides an alibi for many countries, including those we regularly criticise ... to make exactly the same arguments. But it also, I think, underlines the need for much better domestic human rights protection here in Australia.[38]

The unjust treatment of Australian citizen David Hicks received widespread condemnation from human rights groups globally. David Hicks was detained without trial for over five years by the United States Government at the US naval base at Guantanamo Bay in Cuba. Because he was detained as an alleged terrorist, he was denied the normal protections of prisoner of war status under the Geneva Conventions. In March 2007, Hicks entered a guilty plea to the charges and was sentenced to serve nine months in an Adelaide prison as part of a plea bargain. There are many issues raised by this case. First, Hicks was held without charge for over five years. Second, Hicks was allegedly mistreated while in solitary confinement at Guantanamo Bay. Third, the charge to which Hicks pleaded guilty – providing material support for terrorism – was not, according to many eminent Australian jurists, a crime under either Australian or United States domestic law. And fourth, the Howard Government

did nothing to seek Hicks' repatriation while he was imprisoned at Guantanamo Bay. Arguably, this government breached its protective duty to an Australian citizen, whether guilty or otherwise, by failing to bring him home, failing to demand a fair trial and failing to demand that he receive the protections afforded under international law.

In an increasingly fearful, paranoid and security-conscious environment, immigration laws and draconian anti-terrorism legislation have further contributed to the consolidation of executive power, the erosion of the role of the judiciary, and the further violation of human rights. As a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Australia has a duty to protect and assist refugees seeking asylum. According to the Convention, refugee status applies to any person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.' The universally accepted principle of 'non-refoulement' enshrined in the Convention means that contracting states cannot expel or return persons who have the right to be recognised as refugees and who will be removed to a place where there is real risk to their life or freedom.

Asylum seekers coming to Australia face daunting obstacles. They include: mandatory detention in one of five immigration centres in Australia for asylum seekers without a valid visa or passport; the excision of vast expanses of Australian territories from the migration zone; excessive border control interception powers; and limitations of judicial review for protection applications. Many asylum seekers are denied protection status and deported before their case even receives a full investigation. In July 2007, the Howard Government announced its intention to introduce special requirements for people of Arabic descent seeking permanent residency in Australia. Measures such as these, according to the Human Rights and Equal Opportunity Commissioner, Tom Calma, have the potential to 'fuel the type of prejudice and social exclusion that many Arabic and Muslim people have [said] already exists within the community and which they are experiencing on a daily basis.'[39] In addition, differential treatment on the basis of race and ethnicity is unlawful under the

Commonwealth Racial Discrimination Act. The new Rudd Government has specifically promised to ensure that the refugee and humanitarian program is determined on the basis of need and not race.

Under the previous government, immigration laws and practices in Australia received widespread condemnation domestically and internationally. The unlawful deportation of Australian citizen Vivian Solon Alvarez, and the subsequent cover-up from the Department of Immigration and Multicultural and Indigenous Affairs, was described in an Ombudsman report as 'inexcusable.' An inquiry into the detention of Australian resident Cornelia Rau concluded that urgent reforms in immigration policy were necessary. The Federal Court also found that a duty of care to people in detention centres requires the government to ensure that a level of medical and psychiatric care is made available. Subsequently, following a backbench revolt, the Commonwealth Ombudsman was given new legislative powers to make recommendations concerning the release of persons in detention centres and to grant permanent residency to people detained for two or more years. More expeditious processing periods, in conjunction with amendments to the *Migration Act*, the acknowledgement of fathers as part of the family unit and the introduction of Residential Housing Projects for the detainment of families, marked some improvements in immigration policy. However, delays, inconsistencies, mandatory detention, lack of support in the post-release stage and temporary visa protection have continued to deny asylum seekers and refugees adequate protection and assistance in Australia. The new Labor Government has promised to end both mandatory detention and the temporary visa protection scheme. This will signal a positive step towards a much more humane immigration system in Australia.

Another issue is the counter-terror laws. No one would question the need for constant vigilance and effective powers to counter the threats of terrorist attacks. The issue is the balance that needs to be struck between counter-terrorism measures and the protection of long-standing democratic traditions. When the Anti-Terrorism Bill was introduced into Federal Parliament in November 2005, the Law Council of Australia and other state law bodies collectively published an open letter to Prime Minister Howard objecting to the legislation, stating that 'The Government is using the threat of terrorism to

introduce laws that put our most basic civil liberties under threat. The ramifications have the potential to be as terrifying as terrorism itself.'[40]

The case of Gold Coast-based doctor, Mohammed Haneef, brought many of these issues into focus. After being held for 12 days without charge under Australia's new anti-terror laws, Haneef was charged in the Brisbane Magistrates' Court with recklessly providing support to a terrorist organisation involved in the recent United Kingdom car bombings. Although Haneef was granted bail by the Court, his visa was immediately revoked by the then Immigration Minister Kevin Andrews, who said that Haneef would be deported based on character and national security grounds, regardless of the outcome of criminal proceedings against him. On 26 July 2007, Haneef was released from the Brisbane jail after the charge against him was dropped and he then left the country. His lawyers took the Minister's decision to the Federal Court. On 21 August 2007, Judge Jeffery Spender found that the Minister had acted incorrectly in withdrawing Haneef's visa on character grounds. In his judgement Justice Spender also criticised the minister for publicly releasing selective evidence while keeping it from the court. He made the significant comment that 'there is no room for the view ... that the executive should have exclusive responsibility over all matters involving national security.'[41] In another twist to this extraordinary saga, lawyers Ryan and Bosscher acting for Haneef, released the full transcript of Haneef's second police interview with an invitation to the public to judge the minister's actions for themselves.

The issues arising from the Haneef case include the length of time he was held in custody without charge, the leaking of stories detrimental to his case, the inadequacy of the information available to the public, and the opportunity for ministers with discretions that can not easily be challenged in the courts to make claims and statements and to release carefully edited material which could be politically motivated, rather than motivated by the public good alone. The new Government has promised that an independent judicial inquiry will be undertaken into the handling of the Haneef case.

The *Northern Territory National Emergency Response Act* is a further example of the setting aside of democratic rights. The bill was introduced following the release of the 'Little Children are Sacred' report by Pat Anderson and Rex Wild and sought to deal with child abuse in Indigenous communities. While

urgent and purposeful action was undoubtedly necessary, and while the Act contains many important provisions, it goes far beyond the recommendations in the Anderson and Wild report. Its draconian measures include the taking over of Aboriginal lands with five year leases, the removal of the permit system and the exclusion of the legislation from the *Racial Discrimination Act*. The Minister, furthermore, has the extraordinary right to appoint a representative of the board, direct service delivery and control the assets of non-profit organisations working in the prescribed areas. Although lengthy and complex, the bill was rushed through Parliament without proper consultation with Indigenous leaders. The Howard Government also determined to abolish the Community Development Employment Projects (CDEP) Scheme. The legislation and other measures have created great divisions within Indigenous communities. While supported by some leaders, it has been attacked by others. Pat Anderson, for example, has condemned the Act for ignoring the recommendations in the 'Little Children are Sacred' report. Important aspects of the intervention have also been opposed by the Combined Aboriginal Organisations of the Northern Territory. What the current Labor Government will do in relation to this legislation remains to be seen. It has, however, promised to reinstate the permit system and CDEP Scheme. Fred Chaney, former co-chair of Reconciliation Australia, has stressed that '… protection of children by itself is not a solution … An actual solution involves long term properly resourced action – across ministers and across the interrelated aspects of disadvantage, just as Anderson and Wild identify.'[42]

These deficiencies in political accountability and neglect of human rights paint a picture of an unhealthy democracy. To restore faith in our democratic system, recently curtailed rights and practices should be restored and democracy should be extended where it is needed. The new Labor Government particularly needs to draw upon initiatives in other English-speaking countries to extend best practice in public accountability and political foresight. In the next part we discuss examples of these initiatives.

PART C.

Recent developments in other major democracies

Whereas Australia once led the world in the introduction of new democratic practices, it has now fallen far behind other English speaking and European countries. Five examples of international best practice are discussed below.

Accountability

In late 2005, Stephen Harper, the leader of the Canadian Conservative Party, announced to a crowd of cheering MPs that he would introduce a new accountability policy, stating that '[p]olitics will no longer be a stepping stone to a lucrative career lobbying government … Cleaning up government begins at the top.'[43] The Conservative Party went on to win the 2006 Canadian election and the *Federal Accountability Act* was the first bill tabled by the new government on 11 April 2006. The background to the legislation was a federal Royal Commission inquiry headed by retired Justice John Gomery, appointed to investigate a sponsorship scandal which involved allegations of corruption within the Canadian Liberal Government. Many of the Commission's recommendations were adopted in the new Act.

The Act is a remarkable piece of legislation, setting new standards for democratic accountability. Its far-reaching reforms include the banning of all corporate and union donations to political parties and candidates and the setting of a $1,000 per annum ceiling as the maximum contribution an individual can make to a political party. The Act creates a new Commissioner of Lobbying as an Agent of Parliament. It creates an independent Public Servants Disclosure Protection Tribunal to increase protection for whistleblowers. It also prohibits ministers, ministerial staffers and senior public servants from lobbying the Canadian Government for five years after leaving office and requires that final reports of all government-commissioned opinion research be lodged with the Library and Archives of Canada.

In June 2007, the new British Prime Minister Gordon Brown released a

Green Paper entitled *The Governance of Britain* to canvass ways of increasing executive accountability. The proposals include: improved transparency of the Intelligence and Security Committee; the publication of a National Security Strategy; extending the scrutiny of departmental reports to the main chamber; extending the scrutiny of the newly established regional ministers to regional select committees; reviewing the Ministerial Code; establishing an Independent Advisor on Ministers' Interests, and opening government legislative priorities to parliamentary and public consultation. As Phil Larkin has commented, these measures put accountability firmly on the political agenda.[44]

Probity

Probity in government both protects the rights of the community against the forces of political power and helps to restore trust and confidence in government. Over the past two or three decades, major reforms have been implemented in many western democracies, driven by the need to make the public sector and government more honest. The *Canadian Federal Accountability Act*, for example, extends the role of the Ethics Commissioner (now the Conflict of Interest and Ethics Commissioner) to include responsibility for the supervision of disclosure of trusts and income from Members of the House of Commons, to consider complaints and to fine violations of public trust. The receipt of income from certain trusts is now banned and, on disposal of such trusts, members of parliament are banned from using the proceeds for political purposes. The Act also strengthens the role of the Auditor-General.

In the US, in the wake of the Watergate Scandal (the political scandals leading to the resignation of President Richard Nixon), the United States introduced the federal *Ethics in Government Act 1978*. The Act provided for the establishment of an Office of Government Ethics headed by a commissioner. Following further political scandals, in August 2007, the US Congress approved the *Honest Leadership and Open Government Act 2007*. This Act significantly overhauls and extends previous legislation. Among its many provisions are strengthened lobbying rules and penalties, requirements for lobbyist disclosures, restrictions on congressional travel, restrictions on private

employment and lobbying after leaving office, and the requirement of regular reports from the Comptroller General, the Department of Justice and the Senate Select Committee on Ethics. In all but eleven US states there are also ethics commissions. The ethics commissions include citizens and public officials, although in 24 states, public officials are forbidden from serving on ethics commissions. The commissions provide external oversight of state employees' and legislators' compliance with ethics laws. In every US state there are also ethics committees of the legislature to overview members' compliance with ethics laws.

The monitoring of ethical affairs and the establishment of ethics commissions has also been a feature of British politics in the past decade or so. In 1994, following the cash-for-questions scandal and widespread disquiet about standards in public offices, Prime Minister John Major's Government appointed a Committee on Standards in Public Life chaired by Lord Nolan. One of the outcomes of this review was the establishment of the Office of the Parliamentary Commissioner for Standards. The Commissioner's main responsibilities include: monitoring the pecuniary interest or other material benefit received by a Member; providing advice to individual Members and the Select Committee on Standards and Privileges; monitoring the Code of Conduct and Guide to the Rules; and investigating complaints related to Members who are in breach of the Code and the Guide. The ministerial code and its enforcement has been further strengthened by the new government of Gordon Brown which is also committed to a new Independent Adviser on Ministers' Interests.

In Australia, both New South Wales and Queensland have ethics mechanisms in place. In NSW in 1998, a parliamentary ethics adviser was appointed and in the following year, a Code of Conduct was introduced to deal with matters such as conflict of interest, bribery, gifts and the use of public resources. In 2006, the Ministerial Code of Conduct was amended to include employment of ministers after leaving office. The Code is monitored by the Independent Commission Against Corruption (ICAC). In Queensland, some similar provisions are in place. There is no comparable independent federal ethics commissioner nor are there federal restrictions on the post-separation employment of ministers.[45]

Appointment systems

Many countries have introduced formal measures to improve the quality and appropriateness of appointees to significant public offices.

In Britain, one part of the report of the Nolan Committee on Standards in Public Life was devoted to public appointments. In 1995, the UK Government passed legislation to respond to these recommendations. It established the post of Commissioner for Public Appointments, independent of both the Government and the Civil Service. The Commissioner regulates, monitors and reports on the way in which ministers make appointments to the boards of public bodies. The Office of the Commissioner for Public Appointments has developed a Code of Practice for Ministerial Appointments to Public Bodies. The Code sets out seven appointment principles commonly referred to as the Nolan Rules. They are: ministerial responsibility, merit, independent scrutiny, equal opportunities, probity, openness and transparency, and proportionality. The Code also sets out the regulatory framework for the public appointments process. All positions must be publicised in an effective but proportionate way. Anyone can apply and will be assessed by the same formal process. All candidates are required to provide specified information on political activity which is already in the public domain. The Code requires the involvement of an Independent Assessor for every ministerial appointment to public bodies. While the government retains the ultimate decision about appointments, the minister is expected to make the final selection from a short list of recommended candidates. Any minister who does otherwise risks public exposure by the Commissioner. The Commissioner monitors, reports and advises on appointments made by ministers to the boards of over a thousand national and regional public bodies.

In Canada there is now a similar body. A Public Appointments Commission was established in 2006 to report on the selection process for Governor in Council appointments to agencies, boards, commissions and crown corporations. The Commission will develop guidelines, review and approve the selection arrangements proposed by ministers to fill vacancies within their portfolios, and report publicly on the government's compliance with the guidelines.

Both the British and Canadian systems replace overt political patronage with measures fostering good and responsible governance.

Human Rights

On 10 December 1948, as an international response to the atrocities of the Second World War, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights as a statement of 'the inherent dignity and of the equal and inalienable rights of all members of the human family.' While not legally binding, it urged member nations to promote a number of human, civil, economic and social rights, asserting that these rights are part of the 'foundation of freedom, justice and peace in the world.' The Declaration was the first major international effort to limit the behaviour of states and press upon them their responsibilities to their citizens. It was a landmark in the long history of democratic struggle to protect civil liberties and human rights.

Because the United Nations Declaration on Human Rights is not legally binding on state parties, two international covenants were prepared and adopted by the United Nations in 1976 to give it greater strength. They were the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. They respectively commit state parties to work towards the granting of civil, political economic, social, and cultural rights to individuals. Other United Nations' conventions and treaties have since been prepared. A further human rights development was the adoption in 1950 of the European Convention on Human Rights under the auspices of the Council of Europe. All member states are party to the Convention and new members are expected to ratify the Convention and its 18 articles at the earliest opportunity.

Australia is a signatory to the Universal Declaration of Human Rights, the two Covenants stemming from it, and other United Nations human rights treaties. Australia has, however, been slow to ratify these instruments and reluctant to legislate to give them force. Only in respect of race, sex and disability has there been Australian legislation supportive of the treaty commitments. The International Covenant on Civil and Political Rights is attached to

the *Human Rights and Equal Opportunity Act 1986* but its rights cannot be directly enforced.

By contrast, countries such as the US, the UK, Canada, South Africa, New Zealand, India and throughout the European Union, have introduced a bill or charter of human rights. Australia is therefore the only major democracy without a national constitutional or legislated bill or charter of rights. *The Human Rights Act 2004* in ACT, the recently introduced *Victorian Charter of Human Rights and Responsibilities Act 2006* and the draft Human Rights Bill in Western Australia, are signs that the human rights movement is at last gathering force in Australia. Nevertheless, the observation made by Justice Spigelman, the Chief Justice of the New South Wales Supreme Court, that 'Australia remains one of the last outposts of resistance to what has been described in contemporary jurisprudence as the "rights revolution"'[46] remains the case today.

Developing a non-partisan parliamentary long-term focus

Other countries have used their parliaments much more effectively and imaginatively than Australia to investigate long-term issues in a non-partisan way. Some examples follow.

In the United Kingdom, the two houses of parliament (Commons and Lords) have jointly established a Parliamentary Office of Science and Technology. It is charged with providing balanced and objective analysis of science and technology related-matters of relevance to parliament. Its board consists of members from both houses of parliament as well as non-parliamentary members. Six parliamentary advisers produce reports that are publicly available on issues of relevance to the board. The Office also has extensive external contacts working closely with four sister organisations in the Danish, Dutch, Flemish and German parliaments.

In 1993, the Finnish Parliament established a Committee for the Future to assist the parliament and government in planning for the future. In 1999, the Committee was given a permanent status. The Committee has the task of 'pondering prospects for the future and any problems to be anticipated.' Its specific tasks are to: prepare reports on the government's Futures' White

Papers and other submitted parliamentary material; make statements to other parliamentary committees on request concerning future-related issues (especially long-term issues such as climate policy, population policy, energy policy and information society policy); and undertake analyses of future-related research and methodology. In recent years, the Committee has evaluated four White Papers on the future of the Finnish nation.

In the US, the Senate's investigative powers have made it a powerful institution. Over time, the role of Congress has broadened from merely informing itself 'to informing the nation'. The resources now available to congressional committees are one of the prime sources of its power and influence. The main change took place in 1946 when the committees systematically began to hire professional staff for their work. In 1975 additional support was given to individual senators for their committee work. Prior to these changes, committees and individual senators had to rely on executive agencies and outside interests for much of their policy information. Today, there are approximately one thousand professional and clerical staff members supporting the work of the Senate and its Committees.

In Germany, the parliament (Bundestag) has a system of study commissions made up of equal numbers of members of parliament and independent experts. The experts enjoy the same rights as the members of the Bundestag. The task of the study commissions is to gather as much relevant information as possible on a given subject to assist law-makers on complex and important issues affecting, or likely to affect, the country in the future. Three examples are the Study Commission on the Protection of Mankind and the Environment, the Study Commission on Demographic Change and the Study Commission on the Future of the Media in the Economy and Society. The inclusion of outside experts provides expertise and standing to the commissions' work.

In New Zealand, there is a Parliamentary Commissioner for the Environment who is an independent officer of the New Zealand Parliament appointed for a five-year term. The Commissioner has wide ranging roles. They are to act as environmental systems guardian, environmental ombudsman, information provider, facilitator and catalyst, environmental management auditor of the performance of public authorities, and advisor to parliamentary select committees.[47]

These many examples illustrate the ways in which the parliament of Australia, and especially the Senate, could be more purposefully used as a vehicle to explore longer-term issues facing the nation in a non-partisan way. The distinguishing feature of all these bodies is that they are the creatures of the parliament and report to it and not to government. Most draw on outside expertise to work alongside parliamentary members, collaborate widely and have close international connections.

It is unlikely that the full scope of the Australian Senate as a house of review and as an agency capable of initiating significant studies of issues affecting the future of the nation will be realised until the Commonwealth parliament is given much more substantial control over its own funding. There are many international models for Australia to draw upon. Some countries have established multi-party boards or commissions to manage parliamentary budgets. Examples are the Board of Internal Economy of the Canadian House of Commons, the Parliamentary Service Commission in New Zealand, the Board of Administration in the Swedish Riksdag, and the House of Commons Commission in the UK. In some countries including Belgium, France, Denmark, Greece, India, Italy, Sweden and Switzerland, there is even greater independence since government approval is not required for parliamentary budgets.

In Australia, by contrast, there is no equivalent parliamentary commission. The only measure of budgetary independence enjoyed by the Commonwealth parliament is the parliament's separate appropriation legislation. However, the government of the day has the final say and, should it decide to reduce funding for the parliament on the stated grounds of economic policy (as it has done), or because it wishes to starve the parliament's scope to carry out inquiries (as it also has done), it has the full scope to do so.[48]

In summary, Australia's democratic performance is lagging behind other countries. The tables on page 42 show accountability and other practices in Australian parliaments before the Rudd Government came to office and compare them with other countries. They speak for themselves.

Table 1: Australian political jurisdictions: democratic performance as at 24.11.07

	FED	NSW	VIC	QLD	TAS	SA	WA	ACT	NT
Ministerial code of conduct	√	√	√			√	√	√	
Members' code of conduct		√	√	√	√		√	√	
Employment after leaving office		√			√	√	√	√	
Register of Interests	√	√	√	√	√	√	√	√	√
Ethics/standards mechanisms		√		√					
Bill or charter of human rights			√					√	
Appointment System		*	*	*		*	*		

* These jurisdictions have publicly available guidelines for appointments but no mandatory procedural requirements.

Table 2: Selected overseas political systems: democratic performance

	UK	Scotland	Wales	N/Ireland	R/Ireland	Canada	NZ	US
Ministerial code of conduct	√	√	√	√	√	√	√	
Members' code of conduct	√	√	√	√	√	√		√
Employment after leaving office	√	√	√	√		√		√
Register of Interests	√	√	√	√	√	√	√	√
Ethics/standards mechanisms	√	√	√	√	√	√		√
Bill or charter of human rights	√	√	√	√	√	√	√	√
Appointment System	√	√	√	√	√	√	**	*

(Adapted from McKeown, 2006).[49]

* The US Senate scrutinises appointments made by the President;

** While there is no independent procedural system in New Zealand, there are formal guidelines.

PART D.

The actions needed to strengthen political accountability and extend democratic practices in Australia

In the light of the preceding discussion, the following initiatives should be taken by the federal parliament and government to extend democratic practices and to enhance political accountability in Australia.

The integrity of the political system

The electoral system

The recent amendments to the *Electoral Act*, including the closure of the rolls for new voters within 24 hours of issuing of electoral writs, the removal from prisoners of the right to vote and the closure of the rolls after three days for those seeking to re-enrol, should be repealed as they are likely to lead to the disenfranchisement of tens of thousands of voters. Enrolment could be permitted close to, or even up to, election day as in Canada.

The practice of enrolment could be changed so that all young people are automatically enrolled when they reach the age of 18. This is the system in many countries. It means that the only times that changes to enrolment are needed is when people change address or other relevant changes take place in their lives.

The design of ballot papers for the Senate needs review to give voters the opportunity to make simple choices about their second, third and fourth preferences rather than having to vote for a party (above the line) when there is little understanding of the likely flow of preferences that this will entail, or having alternatively to fill out and number all preferences in a very large field of candidates and, in doing so, risk casting an invalid vote.

Democracy would be well served by an extension of parliamentary terms from three to four years and by fixed date elections. There are effectively functioning four-year, fixed term election systems in NSW and Victoria. It would be a simple matter for the Commonwealth to introduce a similar system.

Restoring and further developing the role of the Australian parliament

Following the pattern in the UK House of Commons, there should be an independent Speaker in the House of Representatives and President in the Senate. Rules for question time should be tightened to require that appropriate answers are given to parliamentary questions.

The committee system of parliament, especially in the Senate, needs to be restored to its previous independence and breadth of inquiry and further expanded so that the Senate is able to act as a house of review and a vehicle for informing the nation. This will require rotation of chairmanship of committees between the parties, adequate time for the scrutiny of bills, independent scope to initiate inquiries and other measures.

Fundamental to these reforms is the need to give the parliament, and not the treasurer, more responsibility for the allocation of funds for the work of parliament and the carrying out of inquiries, as is practice in the UK and many other countries.

A nonpartisan parliamentary long-term system

To create a dialogue between the government and parliament (and the parliament and the nation) about future issues facing Australia, the Australian Government could with great benefit produce a Futures Report to parliament once during each electoral period. A Parliamentary Committee of the Future, similar to that in the Finnish Parliament, could usefully be established. Its duties could include commentaries on Futures Reports and other analyses of emerging issues and longer-term trends as in Finland.

Parliamentary study commissions containing a mix of parliamentarians and an equal number of outside experts should be regularly used to investigate major long-term issues as in Germany. Such studies would have great authority.

The executive

The need for a new Guide of Ministerial Responsibility and a formal code of behaviour for ministerial advisers has been recognised by the Rudd Government.

Political accountability

Probity

A Parliamentary Standards Commissioner should be appointed as in the UK. The role of the Commissioner would be to: record all statements of interest to members of parliament and senior public servants; monitor and report conflicts of interests; and ensure observance of ethical practices as set out in the legislation.

Accountability

The threshold of $1,500 for donations to political parties needs, at a minimum, to be restored. More desirable still would be tighter limitations placed on donations to political parties.

All parties should be asked to support the introduction of an accountability bill. The bill might, *inter alia:*

- Strictly limit corporate, union and individual donations to political parties and candidates;
- Create a new Commissioner of Lobbying as an agent of parliament;
- Prohibit ministers, ministerial staffers and senior public servants from lobbying the Australian Government for five years after leaving office;
- Create an independent Public Servants Disclosure Protection Tribunal to increase protection for whistleblowers; and
- Include provisions for the public lodgement of final reports of all government-funded opinion polling in the National Library and National Archives of Australia.

The *Canadian Accountability Act* (2006), which includes all these measures, provides a functioning model for legislation of this kind. The bill should also include rules for the monitoring of government advertising by the Auditor General. It could contain rules such as those in Queensland to require political parties to have democratic constitutions to prevent branch stacking and other undemocratic practices.

Governments should be asked to provide a formal statement of their accountability performance at the end of every term.

An appointments system

As in the UK, an independent Commissioner for Public Appointments should be appointed by statute to regulate, monitor, report and advise on appointments made by ministers to the boards of all federal public bodies. Ministers and government departments would be required to follow the Commissioner's principles and code of practice when making public appointments.

A federal anti-corruption commission

As has been illustrated by the Australian Wheat Board scandal, there is a need for a standing Commonwealth anti-corruption commission similar to those now in existence in New South Wales, Queensland and Western Australia. The commission should have broad powers to investigate all areas of government activity.

Freedom of information

To prevent the continuing misuse of freedom of information procedures to prevent access to information, following the recommendations of the Accountability Working Party of the Australasian Study of Parliament Group, only four classes of documents should be exempt from disclosure. These are:

- A document that is an official record of any deliberation of the Cabinet;
- A document that has been prepared by a minister or his or her staff for the specific purpose of submission for consideration by Cabinet;
- A document that would involve the disclosure of any deliberation of the Cabinet; and
- A document the disclosure of which would involve unacceptable risk to the public interest on a specified ground (e.g. administration of justice or national security) or which invades personal privacy.

Documents containing factual, statistical, technical or scientific material should be made available after the Cabinet has made a decision. The Ombudsman should be given jurisdiction over the administration of freedom of information requests to monitor failure to comply, costs and delays and excessively voluminous requests.

Civil society

Civil society is the totality of a society's voluntary, civic and social organisations and institutions. It plays a crucial part in a properly functioning democracy. As Joan Staples has forcefully argued, a strong and active civil society is intimately linked to a culture of open public debate in which there is a vibrant, dynamic contestation of ideas in the public sphere.

The new Rudd Government could give symbolic recognition of the importance of civil society by a re-statement of the democratic model set out by the House of Representative Standing Committee on Community Affairs in 1991, when it said that, '[a]n integral part of the consultative and lobbying role of these organisations (i.e. civil society organisations) is to disagree with government policy...' This model of democracy needs to be accompanied by a commitment to remove from government practice mechanisms such as confidentiality clauses that are currently used to silence civil society organisations. There is also a need for regulatory reform of the sector, including clarification of the right to advocate and to receive tax deductibility, as was canvassed in the 1995 Industry Commission Report on Charitable Institutions and the 2001 Inquiry into the Definition of Charities and Related Organisations.[50]

Citizen rights

Charter of Rights and Responsibilities

A bill or charter of rights for Australia should be prepared. Models available include the Charter of Rights and Responsibilities in Victoria, the *Human Rights Act 2004* in the ACT, the draft legislation in Western Australia and New Matilda's draft Human Rights Bill 2006.[51] There are also many charters and bills in other countries.

The Rudd Government has made a commitment that any future rights legislation would maintain the sovereignty of parliament.

An inquiry into democracy

Australia would be well served by an inquiry into democracy. It would give Australian citizens an opportunity to express their views about democracy

and accountability. Other countries (e.g. Sweden) have held inquiries with many beneficial outcomes.

Rudd Government election commitments[52]

The electoral system

- 4 year terms and fixed election dates.
- Changes to the Electoral Act to restore previous threshold for disclosure of political donations to $1,500 and to reinstate the seven day period for new and re-enrolments after the issuing of electoral writs.
- An independent system for managing leaders' pre-election debates.

The parliament and executive

- Role of speaker and parliament under review.
- Restoration of previous parliamentary committee system and roles.

The executive and bureaucracy

- A new ministerial code of conduct, including strict rules about shareholdings.
- A waiting period of one year before former ministers can take up employment in their most recent area of responsibility.
- Government advertising in accordance with auditor general guidelines for campaigns over $250,000.
- Reduction of number of ministerial staffers and staffers accountable before parliamentary inquiries. A Register of Lobbyists.
- Restoration of a Westminster system of public service. Appointments for senior public servants restored to 5 years. Removal of performance bonus.

Freedom of information

- The promotion of a pro-disclosure culture within the bureaucracy; reform of the Freedom of Information Act to make lawful disclosure possible; reform to increase protection for whistleblowers.
- Reform to provide shield protection for journalists and other professionals.

The ABC

- An independent appointment system similar to the Nolan system in the UK for the ABC (and SBS); restoration of the staff Commissioner position; guarantee of independence, and no advertising.

Human rights

- Sedition laws to be reformed according to Law Reform Commission recommendations.
- A public inquiry to allow Australian citizens the opportunity to have their say in deciding which democratic, industrial and community rights recognised in international treaties and conventions should be protected.

A concluding comment

The Rudd Government's new 'Standards of Ministerial Ethics', released on 6 December 2007, have been widely praised. Seasoned political observer, Michelle Grattan, however, points out that the code is only the first step and that enforcing the ministerial code 'will be tough in practice'. To support the code and deal with all forms of misconduct a Parliamentary Standards Commissioner and an Anti-corruption Commissioner are needed. The third major missing reform is an independent appointments system.

Former Queensland Premier, Peter Beattie, has explained the political as well as the public accountability benefits of such appointments. 'While the Queensland Crime and Misconduct Commission (CMC) inquiries caused my government considerable pain they didn't cause political damage. The reason for that is simple; whenever there was an issue of alleged misconduct it was referred immediately to the CMC for investigation. The electorate rewarded us for our honesty at the ballot box several times.'[53] An independent system for appointments to all significant public offices offers similar all-round benefits.

'*We must catch up with international developments and put accountability back where it belongs, at the forefront of good governance.*'[54]

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