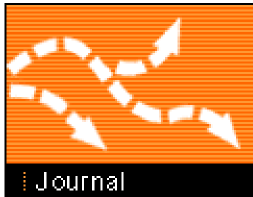

Guest Editors' Introduction

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The papers that appear in this Symposium issue of *The Drawing Board* were given at the inaugural Public Right to Know conference in Sydney in late October 2001. It was the first conference in an annual series on the Public Right to Know. The originating impulse for the series was the belief that sometime in the next decade there is likely to be a series of referenda on issues around Australia becoming a republic. As part of the discussion on that issue the question will arise as to whether we should have a Bill of Rights. We are now one of the very few countries in the world, including the Westminster jurisdictions of Britain, Canada and New Zealand, which do not have a Bill of Rights, so the issue will certainly arise.

The purpose of these conferences is not to mobilise knee-jerk support for a Bill of Rights. In 2001 it is not at all clear how fundamental democratic rights should best be protected, or in some instances even reconciled with each other. But it is certainly our belief that those rights need to be protected and extended, and so the debate about the merits of a Bill of Rights should be full, frank and considered, with practical outcomes in focus down the track. To that end these conferences will build, year by year, a body of wide-ranging, free-thinking research, analysis and discussion on how the public right to know operates in 21st century Australia, whether it would be best protected constitutionally, and if so how.

There is a body of opinion that this project is intrinsically doomed or misconceived. Without pre-empting at all the discussion we are embarking on, we want to deal with those views.

It is a commonplace that Australians don't support constitutional change at referenda. Since Federation, there have been forty-four attempts, of which only eight were successful. The 1944 and 1988 referenda included limited provisions on civil rights, and were roundly defeated. Two attempts, in the 1970s and 1980s, to pass Human Rights Bills in the national parliament were also defeated. All of those attempts at referenda and legislation were made by Labor governments. The NSW Labor government recently rejected out of hand a parliamentary proposal for a Bill of Rights in this state, whether by constitutional or legislative means.

The outlook seems bleak, but it deserves closer analysis. It is true that Australians by and large reject attempts by governments to change the rules by which they govern, even when the changes are arguably in the interests of the people vis-à-vis the government. The 1999 republican referendum is an excellent example: according to opinion polls about two thirds of voters support Australia becoming a republic, but not on the terms proposed at that referendum. On those figures the move to a republic will most likely happen, but only on terms acceptable to the majority of Australian voters.

In other words, a republican constitution will be a statement by the people of the

structure and limits of government power. It would be highly unusual if an effective and well-conceived statement of those limits to power were to emanate from the very parties that exercise that power. It was the suspicion of government power that made the inclusion of the Bill of Rights possible in the American Constitution. It is the same suspicion that bedevils attempts by governments to change the Australian Constitution.

By this reckoning, the best chance for an Australian Bill of Rights is if it doesn't emanate from government, but from the people — after long and inclusive discussion. 'We the people' drew up and adopted the first modern republican constitution in the United States, and 'we the people' in Australia will have to take the same step for ourselves if we decide we want a Bill of Rights.

A second argument against having this discussion is that a constitutionally entrenched Bill of Rights takes power from the people's elected representatives in parliament and passes it to a small group of unelected judges. The argument runs that parliament, as the elected arm of government, should reign supreme and that any other power is undemocratic. That argument fails to recognise the importance of the separation of powers in government, whereby the divisions between the legislature, the executive and the judiciary are intended as a safeguard against absolute power.

It also fails to recognise the dangerous tendency in the Westminster system, especially the Australian version, for the legislature to become a mere soapbox for the executive. If the constitution does not give the courts the power to review government practice, the people could be powerless before the executive.

That is precisely the reason why the border protection legislation of late 2001 removed the right of appeal to the courts for refugees, in order to render them powerless before government. That bill was enthusiastically supported by both the major parties seeking government in the November federal election. It is an excellent example of how an executive and a legislature cannot be trusted to protect human rights.

The international crisis precipitated by the September 11 attacks in the United States, which has self-evidently been brewing for a long time and will likely continue for some time to come, adds urgency to our task. War has been declared by Australia, in our name, on Afghanistan. Under its rubric the federal government has proposed, with strong support from the opposition to give our internal security agency ASIO unprecedented powers of arrest and detention without access to legal representation or any right to remain silent. In the United States the CIA has been given powers and a budget it hasn't had since the Vietnam War, including the legal right to assassinate suspects.

Meanwhile in Afghanistan, out of a population of 25 million people, five million are refugees outside the country, six million are displaced persons inside the country, some of whom are eating grass to stay alive in the wake of drought, famine and decades of war with foreign powers. The United Nations estimates that some five hundred thousand people are at risk of starvation, one hundred thousand of them children.

If the spectre is stark, the communication struggle surrounding it is fluid and complicated, shifting from moment to moment. Both the Taliban and the Americans deny journalists access to the war zone. But still there is saturation media coverage, supported by small armies of journalists, larger armies of 'spin doctors', and expert commentary that is wide-ranging but almost exclusively from white Anglo-Saxon sources. We know about the Afghan famine through the media, and the American media is protesting the lack of

access to the front line, but that same media has agreed to government requests for self-censorship.

'The war on terrorism' and the domestic issue of asylum seekers were conflated and became a major issue at the 2001 federal election. A government claim that refugees were throwing their children into the ocean has since been discredited, but the lack of access by the media to the refugees, and a failure by the media to probe the evidence for the false claim, left the electorate vulnerable to speculative and prejudicial interpretations of the situation. On a *Four Corners* program in September 2001 on the detained asylum seekers, Dr Aamer Sultan from inside Villawood Detention centre said that the razor wire and fences are not to keep the refugees in, they are to keep the rest of Australia out, so we don't know what is being done in our name.

These instances raise complicated issues about freedom of speech, freedom of the press, and freedom of information in relation to an emblematic issue of our time. There are very real issues about what these principles mean, how they relate to one another and how they relate to democratic politics and the rule of law. There is a distinguished body of scholarship on these questions in the academic literature of this country and internationally. However, perhaps daunted by perceptions of the difficulty of achieving constitutional change at referenda, that literature tends to be highly specialised and focused, both on its subject matter and in the disciplinary framework of analysis. With occasional exceptions it is not directed robustly towards the serious consideration of constitutional change. Lawyers talk to and write for other lawyers; environmental, consumer and civil liberties activists and scholars address their own disciplinary constituencies and the general public, but mostly not each other.

To our knowledge, this conference was the first time that Australian academics, activists and the general public have been brought together to address the many facets of the public right to know in the context of an anticipated popular political debate about this issue. The papers that we publish here represent a sample of the professional and disciplinary fields that are concerned with this issue, including the law, journalists, scientists, artists, environmental activists and the general public.

All the papers raise complex issues. Mostly they do so from the point of view of the regulatory framework that does exist or preferably should exist. As such they focus on the role and limitations of government, which fits very much within the tradition of liberal argument on this issue since the polemics of the 1640s on freedom of speech in the lead-up to the English Revolution. That is, they address public power, as held and exercised by governments and bureaucracies. But as Schauer (1994) and others have pointed out, the issue of private power, in particular of the large transnational corporations that exercise the rights and responsibilities of press freedom, is just as pressing logically and politically. Indeed, many citizens look to government and legislation to protect them from the depredations of media power, and it is not at all clear how a constitution in the liberal tradition might address this issue.

This is one among many important issues that future conferences will have to wrestle with. In the meantime, the articles that follow should be read as an early cartographic exercise, delineating a set of disciplinary and professional concerns that each have their own particular histories and fields of practice, but which are rarely charted in relationship to one another. Whether or not there is a constitutional path to be drawn that will link and unify them is what we have to explore.

Chris Nash

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