

# Address to the Eureka Stockade Commemoration Committee

4 December 2009

I acknowledge the traditional owners of the land on which we meet, the Gadigal people of the Eora nation.

It is a particular pleasure to speak at function chaired by Jack Munday. Jack was probably an early influence on my ideology. As a junior high school student at North Sydney Boys High, I remember an assembly at which the school was addressed by Jack. It must have been in the mid 1970s, when the green ban campaigns to save the historic fabric of inner Sydney were still highly controversial. I suspect that whoever in the school hierarchy was responsible for the invitation would have copped some criticism. There must have been some interesting discussion about free speech.

On this occasion, it is imperative to recall the Eureka oath

“We swear by the Southern Cross to stand truly beside each other and fight to defend our rights and liberties!”

The rights and liberties referred to in the Eureka oath were set out in the Ballarat Reform League Charter, which was heavily influenced by the Charters of the various movements for democratic reform in Europe during the previous couple of decades. The claims (apart from those relating to regulation of mining activity) were essentially for democratic reform. Specifically:

1. A full and fair representation
2. Manhood suffrage
3. No property qualification of Members for the Legislative Council.
4. Payment of Members
5. Short duration of Parliament

Nowadays, we tend to view claims for democratic reforms as being outside the scope of discussion of rights and liberties. There are two causes of this. First, in Australia we largely take democracy for granted. Second, the current debate about rights is the debate about protection of human rights. Human rights have been specifically conceived to operate independently of the form of government – they apply (or should apply) in representative democracies, people’s democracies and other forms of government alike.

The claims of Eureka for democratic reform now look in part inadequate and in part unfulfilled aspirations. Manhood suffrage was understood not only to exclude women, but also male Aborigines. The claim for short duration of Parliament remains an aspiration, at least in New South Wales!

The campaign for democratic reform continues. Just last week, submissions closed on a Commonwealth government discussion paper raising several issues for consideration. We expect that the government will announce some reforms in the new year.

It is a mistake to take our democratic arrangements for granted. Several developments in recent years show potential fragility.

The last government saw fit to attempt to reduce the franchise so as to exclude all prisoners from voting. At the time, prisoners serving sentences of more than 3 years had their right to vote suspended for the duration of their sentence. The government attempted to extend the suspension to all sentenced prisoners. That was subject to a High Court challenge. While the legislation was struck down on Constitutional grounds, the Court confirmed that the present disenfranchisement laws were valid. In dissent, Heydon J, would have upheld not only the complete disenfranchisement of convicted prisoners but also speculated that parliament may validly make laws which returned the franchise to the position it was in at the time of federation, in which the right of women to vote depended on whether the particular State in which they resided allowed women to vote.

Another controversial move of the last government was to close the electoral rolls shortly after calling the election. In 2007, this resulted in the effective disenfranchisement of several hundred thousand people. The calling of an election is always a prompt for people to enroll or update their enrollment.

In the introduction to the recent discussion paper, Special Minister of State Joe Ludwig says:

As has often been remarked, democracy is not now, and never will be, a 'finished product'. From its origins, each state that has adopted this system of government has been confronted with the question of how democracy can best be achieved through a process that supports that society's objectives.

The discussion paper raises many interesting issues. Some of these are:

**To what extent should Australian citizens living overseas be permitted to vote in Australian elections?**

Approximately 5% of Australians are overseas at any time. Currently, eligibility to vote depends on an intention to resume residency in Australia within a specified time. Our Victorian counterpart organization, Liberty Victoria, has recommended removing this requirement. Another approach would be to do what Italy has done – create overseas electorates for citizens residing overseas. Clearly the global village creates new challenges and possibilities in this area.

**Should the voting age and/or enrolment age for Australian elections be lowered?**

Article 12 of the Convention on Rights of the Child requires that relative to their age and level of maturity, the views of young people ought to be considered in matters that affect them. As many persons under 18 work casual jobs, use public transport and education services it stands to reason that they should be able to respond to these policy issues by voting if they so desire.

**Should the current exclusions from the franchise be maintained, amended or abolished, in particular for persons serving a prison sentence of three years or more?**

Article 25 of the ICCPR supports the right of every citizen to vote at regular elections. The loss of voting rights by prisoners constitutes extrajudicial punishment and serves only to further stigmatize and isolate incarcerated persons from the wider community.

**What changes should be made to the special enrolment arrangements for silent electors, homeless persons and youth?**

Changes to the Electoral Act are required to fully facilitate the right to vote particularly by homeless persons.

We have also seen recent developments in New South Wales concerning electoral arrangements. The NSW Government has announced an intention to introduce a “smart” electoral roll. This sounds wonderful – no-one wants a dumb electoral roll! The proposal involves the passing of legislation to override existing privacy protection laws so as to enable the government to mine databases maintained by government agencies, such as the RTA and the Department of Education, to utilize information provided for the particular purposes of those agencies to be used for the additional purpose of updating the electoral roll.

If the only effect of that would be to facilitate people’s ability to exercise their voting rights, it may be that the overriding of privacy laws could be excused. However, the electoral roll has numerous secondary uses, many to do with law enforcement. The real effect of the legislation will be to provide law enforcement agencies with unfettered, simplified and unaccountable access to a significant amount of data collected by a variety of government agencies for entirely unrelated purposes.

There is further potential for such an approach. Various schools are now introducing biometric identity systems for facilitating school attendance records and better managing access to school facilities. With legislation of the type proposed in NSW, it is a small step to the government being able to compile a biometric electoral roll, and to provide the law enforcement agencies with an extensive range of biometric information.

These are some of the issues which need to be considered in the ongoing renewal and maintenance of our democracy. They are perhaps far removed from the democratic claims of Eureka. Those claims were essentially claims for rule by the majority. Democracy was seen as the protection against autocratic rule by an elite.

The claims for simple majoritarian rule are presently under significant challenge. Perhaps the most important reform presently on the national agenda is the call for better protection of human rights. Australia is now one of the few democratic countries which fail to have constitutional or legislated protection of human rights.

The Brennan committee, after an extensive community consultation over the first half of 2009, has recommended a statutory charter of human rights, similar to those in the ACT and Victoria. We are currently awaiting the government response to this report.

A common criticism of the proposal is that it will transfer power from elected politicians to unelected judges. Human rights protection is thus portrayed as anti-democratic.

Our experience of democracy is that our elected politicians have all too regularly legislated inconsistently with human rights standards. Obvious recent examples are the arbitrary detention of asylum seekers and the overriding of racial discrimination laws in order to implement the NT intervention.

Elected politicians cannot be relied upon to respect human rights.

The human rights cause asserts there are legitimate limits to the role of democratic majoritarian rule.

The human rights movement has grown out of the experience of the 20<sup>th</sup> century, and particularly the second world war. The legitimacy of the major international human rights instruments, the Universal Declaration of Human Rights, the ICCPR and the ICESCR derives from their near universal acceptance. While they are the product of international political compromise, and contain a mixture of legal norms and aspirational goals, they provide the foundation for understanding the boundaries for legitimate governments. The boundaries apply equally to representative democracies and other forms of government.

Given that the objective of human rights laws is to restrict the powers of governments, it is hardly surprising that a major source of opposition to effective protection of human rights is politicians themselves. It is their power that is under attack. The experience of the Brennan committee is that the vast majority of people they consulted with and submissions they received advocated better protection for human rights. Yet the political debate which is now underway seems much more finely balanced. It is perhaps ambitious to get the majority in society, and their elected representatives, to recognize that there should be limits to their powers. Yet, that is what we now need.

On this occasion of the 155<sup>th</sup> anniversary of the Eureka stockade it is important to recognize that there are proper limits to democratic aspirations. Australia is the last major democracy to embrace such limits. It is now time to do so.

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