Rights and freedoms under the Australian Constitution: what are they and do they meet the needs of contemporary Australian society?

Abstract

The Australian Constitution is one of the six oldest written constitutions in the world. In approximately 12,500 words it succinctly prescribes a system of representative and responsible government, united under the Crown, which has presided over 117 years of relative stability. In its succinctness - and as a product of the context in which it was written - the Constitution does not contain a multitude of express rights and freedoms, many of which are now considered essential to a functioning and democratic citizenry. In examining the rights and freedoms that the Constitution <u>does</u> guarantee, this essay will consider the gap between that which is provided and that which contemporary Australian society needs. It will consider whether that gap can be bridged; what role (if any) the Constitution has to play in that process and – perhaps most importantly – why it all matters.

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In 2018, the question of what constitutes our fundamental 'rights' and 'freedoms' is one that permeates modern society. In all corners of our globe, and in innumerable manifestations, the debate about what an individual should be free to do, and which rights they should be free to exercise, is one that continues to challenge conceptions of democracy, of good government and of what it is that an individual needs to sustain themselves in the 21st century.

In Australia, as is the case in many western democracies, the debate about individual rights and freedoms impacts heavily upon both public and political discourse. In recent times, and by way of example only, the concept has arisen in the context of a citizen's right to be elected

to the Commonwealth parliament, the right of a person to – now infamously – be 'a bigot'[1] and the right of two persons of the same sex to be legally married in this country. The freedom of journalists to communicate and, in some cases, possess sensitive information has been the subject of proposed legal amendments and the freedom of persons to communicate their political views online has been the subject of court proceedings.[2] Each of these examples have provoked strong and disparate reactions, and in many cases those on opposite sides of the debate have sought to justify their position – with varying degrees of success - by reference to the *Australian Constitution* (**Constitution**).

The Constitution, now in its 117th year, is both lauded and chastised for the role that it has played – or on one view – even has the capacity to play – in the arena of guaranteeing rights and freedoms. The Constitution, described as the 'birth certificate of our nation'[3] does not contain a comprehensive statement of the rights and freedoms of its citizenry, and those it does contain have been interpreted narrowly by the institution charged by its terms with their interpretation, the High Court of Australia (**Court**).

This reality imbues both very mixed reactions from some sectors of Australian society, as well as no reaction at all from others. For instance, there are those who consider that the limited nature of rights and freedoms in the Constitution is as it should be, in that the Constitution itself should be limited to setting up a system of governance rather than providing for the rights of those to be governed. For others, however, the Constitution is seen as being increasingly incapable of responding to the needs and values of contemporary Australian society - to the point where we have been labelled the 'frozen continent' when it

[1] Emma Griffiths, *George Brandis defends 'right to be a bigot' amid Government plan to amend Racial Discrimination Act* (24 March 2014) ABC News http://www.abc.net.au/news/2014-03-24/brandis-defends-right-to-be-a-bigot/5341552.
[2] See, eg, Latika Bourke 'SBS sports reporter Scott McIntyre sacked after Malcolm Turnbull intervention, court to hear' *Sydney Morning Herald* (Sydney) 13 October 2015.
[3] 'Australia's Constitution – With Overview and Notes by the Australian Government Solicitor', Commonwealth of Australia, 2010, iv.

comes to the constitutional protection of rights and freedoms.[4] Somewhere between the two though, is the significant proportion of Australians (in fact 35% in 2015) that have not even heard of the Constitution,[5] as well as all those who, having lived through a series of failed referendums for constitutional change, suffer from 'reform fatigue' and are no longer particularly interested in whether the Constitution protects or encroaches on their rights and freedoms, nor whether it meets their contemporary needs - whatever those needs may be.[6]

In that context then, and noting the wildly differing viewpoints on the topic - let us step back and ask the question: what are the rights and freedoms under the Constitution, and do they meet the needs of contemporary Australian society?

In answering that question, this essay sets out to do four things. First, it seeks to elucidate what is meant by a 'right' and what is meant by a 'freedom', and why that difference matters. Second, it will explore which rights and freedoms (so understood) are contained within the Constitution, including why they are there contained and how they have come to be interpreted. Third, it will examine whether those identified rights and freedoms meet – or could ever attempt to meet - the needs of contemporary Australian society. Lastly, and once that position is established, this essay will argue whether in fact they should.

PART I

Rights and Freedoms

The words 'rights' and 'freedoms' echo through our history, however their usage has taken on particular credence since the surfacing of international human rights law and norms following the conclusion of WWII. It was during this period in the mid-20th century that the

[4] George Williams, 'Thawing the Frozen Continent' (2008) 19 *Griffith Review* 11.
[5] Nick Miller, 'More than one third of Australians have not heard of the Constitution, survey finds' *Sydney Morning Herald* (Sydney), 21 February 2015.
[6] Williams, above n 4.

idea of human rights and freedoms as innate aspects of the dignity and equality of every human being - irrespective of nationality, race, gender, religious belief or any other discerning characteristic began to gain currency.

However, and despite their common usage, the words 'rights' and 'freedoms' are often confused with one another such that, 'people may say that they have a right to do something when they are simply free to do it'.[7] In this way it is important to discern what constitutes a right from that which is properly construed as a freedom. A right is an individual's moral or legal entitlement to have or to do something. The characterisation of an interest as a 'right' is something which is in some circumstances self-evident, while in others it can be less than clear and should be approached with caution. That is because an interest characterised as a 'right' will inevitably come up against, and seek to trump, another interest such that those claiming an interest in the former will struggle to see eye-to-eye, or at all, with the latter. Common examples of 'rights' are the right to life, the right to vote and the right to equal treatment before the law.

A freedom, on the other hand, is simply the condition of a person who has the capacity to do something, whether that be to eat, drink or run, or to form an opinion, assemble or protest. If a person has the capacity to do something, and that capacity is not otherwise limited by a law, then that person will have the freedom to engage in that activity if they so choose. Ergo, and that logic accepted, a freedom does not depend on anything other than its own existence to bring it into being, or to otherwise provide its validation. You are free to walk to work in the morning because you are not restricted from doing so. You are free to watch television

[7] Robert French 'Rights and Freedoms and the Rule of Law' (Speech delivered at the Victorian Law Foundation, 9 February 2017) < https://www.victorialawfoundation.org.au/sites/default/files/attachments/rights_and_freedoms_and_the_rule_of_law_-_victorian_law_foundation_oration.pdf>.

because there is no legal prohibition on you doing so. And you are free to express your opinion unless that opinion is otherwise limited by the law. That is the substance of a freedom. By definition, and particularly in the context of a functioning democracy, an individual will have far more freedoms than it will express rights. Common examples of freedoms include, the freedom of speech, the freedom of expression and freedom of assembly.

All that being said, the concepts of 'rights' and 'freedoms' do overlap - including because of the fact that an express right may be necessary to protect a freedom. In this regard, an example may assist. In 2017, Australians voted in a non-binding postal plebiscite which was intended to gauge the public's opinion as to whether same sex couples should have the right to marry in this country. The plebiscite, and the subsequent amendment to the *Marriage Act 1961* (Cth), were required because until that time, the 'right' for same-sex couples to marry was limited by the definition of marriage under that Act. In that way, and relevantly for the purposes of this essay, it is the case that the recognition of a 'right' at law will sometimes come about as a result of a competing restriction placed on what would otherwise have been a freedom.

The extent to which rights and freedoms are - and should be - expressed as a matter of law is one that is traversed regularly by legal commentators, activists, religious groups, politicians and interested citizens of all political stripes, colours and creeds. Indeed, it is true that the place occupied by rights and freedoms in modern political discourse is - at least for the immediate future - all but assured. For confirmation of this, one must look no further than the twitter page of the 45th President of the United States, President Donald Trump.[8]

[8] See, for eg, President Donald J Trump (16 August 2018) Twitter <https://twitter.com/realDonaldTrump/status/1030094399362007040>.

PART II

Rights and Freedoms in the Constitution

'The Australian reluctance about rights'[9]

The Constitution does not - by any stretch of language - contain a comprehensive statement of fundamental rights and freedoms. The reasons for this are varied and could easily fill the pages of an essay of its own. Largely though, the absence can be explained by reference to the context in which the Constitution was drafted, and the legal traditions upon which it was based.

The Constitution, though drafted by and approved by Australian citizens, came into being as a provision of a British law, specifically s 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp). It is so, of course, because at the time of its signing Australia was a British colony which was itself made up of six colonies. Aboriginal Australians were regarded in large part to be uncivilised nomads, colonial affairs were controlled by men of status and women's suffrage was still a distant dream.[10] For those reasons and many others, the Constitution was evidently drafted at a time very different to that in which we now live. It reflected the political and social realities which were then embedded in the minds, habits and customs of the Australian people. Sir Harry Gibbs, has observed, for example, that:

> At the time the Constitution was written the founding fathers were actuated by what appeared to them to be practical needs inspired by an ideal. The principle needs which they saw were to provide a common framework for defence and to establish what would now be called a

[9] Dan Meagher et al, *Australian Constitutional Law* (Lexis Nexis, 10th ed, 2016), 1032.
[10] Michael Kirby, 'The Constitutional Centenary and the Counting of Blessings' (The Fifth Sir Ninian Stephen Lecture, The University of Newcastle, 20 March 1997) http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_niniansp.htm.

> common market for the purposes of trade. The ideal was that the Australian continent would be occupied by only one nation[11]

Importantly, these practical needs and that ideal, as identified here by Sir Harry Gibbs can be readily distinguished from the needs and ideals that informed the drafting experience of America's founding fathers. The US Constitution – including, specifically Amendments 1 – 10 (known together as the US 'Bill of Rights') – came to be as a product of struggle against an overbearing state and one which intuitively cautioned its drafters to protect the rights of individuals by imposing express limitations on governmental power. Indeed, in a letter penned by Thomas Jefferson to James Madison on December 20 1787, Jefferson stated that: 'a Bill of Rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse or rest on inference'.[12]

The Australian experience, however, can be starkly contrasted with that of the American one. Australia's founding fathers had come to exist in an environment where government was - in many cases - the only body capable of performing many of the functions which were undertaken privately in other countries. There had (with the obvious exception of the treatment of Aboriginal Australians) been no revolution or struggle against oppression which preceded the drafting of the Constitution and as such history 'had not taught them [the framers] the need of provisions directed to the control of the legislature itself',[13] in the form of, express 'rights' or 'freedoms'. The framing of the Constitution was instead - in the simplest of terms - to give effect to an agreement between the colonies for a federal union under the Crown.

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[11]Sir Harry Gibbs, 'Re-writing the Constitution' (Paper presented at the Samuel Griffith Society, Melbourne 1992).

[12] Thomas Jefferson, From Thomas Jefferson to James Madison, 20 December 1787 Founders Archives < https://founders.archives.gov/documents/Jefferson/01-12-02-0454>.

[13] Owen Dixon, "Two Constitutions Compared" reprinted in Jesting Pilate (Melbourne: Law Book, 1965) at 102 cited in Robert French, Protecting Human Rights without a Bill of Rights' (Speech delivered at John Marshall Law School, Chicago, 26 January 2010) < http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf>.

Further still, a number of the Australian framers (with the notable exception of Andrew Inglis Clark)[14] saw the inclusion of express rights and freedoms as indicating some kind of deficiency in the democratic system of government they sought to create by suggesting that, in some way, they needed to be restrained from oppressing their people. Influenced by that notion, the framers 'appeared to accept that the citizens' rights were best left to the protection of the parliaments and the common law, and they were not concerned to protect the individual from oppression from the majority will'.[15] Indeed, the framers drew heavily from, and believed deeply in, the democratic institutions of their forefathers in Britain. With few exceptions then, they relied on other mechanisms for protecting rights and freedoms, including specifically:

- constitutional conventions;
- the common law;
- presumptions of statutory interpretation;
- community attitudes of tolerance and respect for human rights; and
- expressions at the ballot box.[16]

I return to a number of these concepts later in this essay.

Express Rights and Freedoms

Notwithstanding all that has otherwise been said above, and despite the context in which it was drafted, the Constitution does prescribe some express 'rights' and 'freedoms'. They are generally understood to be the following:

[14] Cheryl Saunders, 'Protecting Rights in the Australian Federation' (2004) 25 Adelaide Law Review 177, 184.
[15] Geoffrey Kennett, 'Individual Rights, the High Court and the Constitution (1994) 19 Melbourne University Law Review 581, 582.
[16] Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 University of Queensland Law Journal 9, 25.

- Section 51(xxxi) - **Right to Just Terms on Acquisition**;
- Section 80 – **Right to Trial by Jury**;
- Section 92 – **Freedom of Trade and Commerce**;
- Section 116 – **Freedom of Religion**; and
- Section 117 – **Freedom from Interstate Discrimination**.

Many of these rights or freedoms were important to achieving and maintaining federation and the relationship between the states (for example, s 92 and s 117), but they are – on their face - not personal rights which are likely to be regarded as important by the average citizen. They are instead, largely, to be characterised as restrictions on legislative power.

I provide an overview of each in turn **below**.

The Right to Just Terms on Acquisition is, of course, most famously known by reference to The Castle[17] – after all, when it comes to your familial property, 'it's not a house it's a home' right Darryl?[18] Practically speaking, this constitutional provision requires that property acquired by the Commonwealth, for a 'purpose in respect of which the Parliament has the power to make laws' be acquired on just terms, and is intended to prevent 'arbitrary exercises of the power at the expense of a State or subject'.[19] The concept of 'just terms' is broader than the equivalent provision in the US Constitution which provides for 'just compensation', and has been interpreted by the Court to be a multifaceted concept. Generally speaking, the approach taken by the Court is one of 'fairness',[20] however it is important to note that a 'fair' approach will take into account the interests of <u>all</u> parties affected, including both the Commonwealth and the party directly affected by the acquisition. This, naturally, will lead to a divergence in views as to whether or not any such arrangement is 'fair' in the eyes of an

[17] *The Castle* (Directed by Rob Sitch, Working Dog and Village Roadshow Entertainment, 1997).
[18] Ibid.
[19] *Grace Brothers Pty Ltd v Commonwealth* (1944) 72 CLR 269, 291 (Dixon J).
[20] *Durham Holdings Pty Ltd v New South Wales* [2001] HCA 7.

interested party, including particularly those of Aboriginal Australians and other minority groups whose concepts of 'fair' and 'just' may differ from those espoused by the Commonwealth and of a – traditionally - white, male and middle-aged bench.

The **Right to a Trial by Jury** has long been critiqued for being limited in its practical effect - so much so that in the words of Chief Justice Susan Kiefel, it 'may not be thought to be much of a protection'[21] at all. In particular, the right to a trial by jury will apply only where (a) the matter is being heard on indictment and (b) the offence for which the individual is accused is a Commonwealth offence. These limitations are significant. Relevantly, it has been consistently held by the Court that whether an offence is tried on indictment or not is a matter to be determined by the legislature[22] – the effect of this being that Parliament can decide to, for example, limit the number of matters heard on indictment for (arguably) political purposes, or, to cut the costs associated with hearing matters on indictment. Indeed, and as was observed by McHugh J 'the words of s 80 were deliberately and carefully chosen to give the Parliament the capacity to avoid trial by jury when it wished to do so.'[23] The most recent case to squarely consider this aspect of s 80, which was heard in 2016, has not disturbed this position.[24]

In 2017, 688 successful prosecutions were tried on indictment, compared with 1773 successful prosecutions which were tried summarily.[25] Also relevant is the fact that – notwithstanding isolated encroachments by the Commonwealth[26] - the criminal jurisdiction of the Commonwealth is substantially more limited than that of the States. As a result, persons

[21]Susan Kiefel, 'Social Justice and the Constitution - Freedoms and Protections" [2013] 20 *James Cook University Law Review* 6, 7.
[22] See, for eg, *R v Archdall & Roskruge* [1928] 41 CLR 129, 139.
[23] *Cheng v The Queen* (2000) 203 CLR 248, 292 (McHugh J).
[24] *Alqudsi v R* [2016] HCA 24, 17.
[25] (-) *Prosecution Statistics* (2016-2017) Commonwealth Director of Public Prosecutions, <https://www.cdpp.gov.au/statistics/prosecution-statistics>.
[26] See, for eg, *Human Rights (Sexual Conduct) Act 1994* (TAS).

tried for State criminal offences which include, pertinently, murder, manslaughter sexual assault, together with almost all other violent crimes, do not have a constitutional right to a trial by jury.

The **Freedom to Interstate Trade and Commerce** was considered in the oft-cited case of *Cole v Whitfield.*[27] In that case, the Court overruled past precedent in finding that what had once been read as an individual's right to 'freedom in interstate trade' was now to be replaced with the more limited economic notion of "free trade". Put another way, the Court held that the freedom ensured only that interstate trade was not to be subject to discriminatory burdens of a protectionist kind. For this reason, the case has been described by some legal commentators to be 'extraordinary'.[28]

The **Freedom of Religion** has, perhaps unsurprisingly, and much like its counterpart in the US, garnered much public and political interest in the 117 years plus since its conception. For the Court's part though, and despite proclamations by each of Mason and Brennan JJ that 'freedom of religion is the paradigm of freedom and conscience and the essence of a free society',[29] section 116 is both limited by its own terms, and has in practice been attributed a narrow interpretation by the Court. The Freedom of Religion is not a complete guarantee of protection and its practical effect is limited by the fact that:

a) it prohibits only the Commonwealth making laws which:

    (i) establish any religion;

    (ii) impose any religious observance; or

[27] [1988] HCA 18.
[28]Connolly, Peter, 'Right According to Law' (Paper presented at Annual Samuel Griffith Society Conference, Melbourne 1992).
29 *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130.

(iii) prohibit the free exercise of religion;

b) it does not apply to the States or Territories; and

c) it does not provide individuals with any avenue of redress should the Commonwealth violate the specified protections listed at sub-paragraph (a).

Including for those reasons, very few cases have alleged a contravention of s 116 and no case has resulted in a law being struck down on account of that provision.

Freedom from Discrimination as between States provides a limited protection against discrimination on the basis of residing in one State compared with another. In *Street v Queensland Bar Association*,[30] Mason CJ and Brennan J held that while s 117 confers personal immunity on an individual against impermissible discrimination, it does not render the law invalid.

While what it set out above is a summary only, it is clear that the express rights and freedoms in the Constitution are not comprehensive in terms. In many cases they are limited by the fact that they operate in the Commonwealth sphere only (as distinct from in relation to the States) and also because of the interpretation attributed to them to date by the Court. However, and despite the limitations that do exist in relation to their application, these rights remain and they are important. They are also, and this essay will argue importantly so, supported by rights and freedoms that have been implied into the Constitution.

Implied Rights and Freedoms

There are a number of 'rights' and 'freedoms' that can - and to date have - been implied into the Constitution, both by the Court and more generally by convention.

[30] [1989] HCA 53, 17.

Broadly speaking those rights and freedoms can be ascribed into two categories:

(a) those that can be implied from a system of representative and responsible government; and

(b) those that are derived from chapter III of the Constitution,

These rights and freedoms are informed by the essential characteristics of the Constitution, which together operate to set up both the structures of government, as well as the limitations on the power of that government. Stripped to its basics those essential characteristics are:

a) that Australia is a federal union under the Crown;

b) there are three separate arms of government, being the democratically elected legislature, the executive and the judiciary; and

(c) the Commonwealth is to be "indissoluble" (with the Constitution itself being difficult to amend).

Let us first consider the system of representative and responsible government. As Harrison Moore remarked in his seminal 1910 text, 'the great underlying principle is that the rights of individuals are sufficiently secured by ensuring as far as possible to each a share, and an equal share, in political power'.[31] This principle finds expression in each of ss 7 and 24 of the Constitution which respectively provide that the representatives who are to sit in each of the Senate and the House of Representatives are to be directly elected by the people, and that the citizens of each state are to enjoy equal representation in the Senate (irrespective of their size or population). Indeed, the 'right to vote' is so entrenched a concept in Australian civic life that when the Court was called upon to determine whether a citizen who had not enrolled to vote by the date provided for in the *Commonwealth Electoral Act 1918* (Cth), and whether

[31] William Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 616.

a law that disqualified prisoners from voting was invalid, the former was allowed to vote and the latter law was rendered invalid.[32]

Importantly, ss 7 and 24 of the Constitution have also provided the foundation for the more recent implication of freedom of political communication. Perhaps the first substantive reference to that concept can be found in the judgment of Stephen J in *Attorney General (Cth); Ex rel McKinlay v the Commonwealth*[33] who there discerned the:

> Three great principles from s 24 of the Constitution: representative democracy (which is to say that the legislators are chosen by the people); direct popular election; and the national character of the lower House. Once this is understood it does not seem so great a step to recognise that communication between citizens about politics and government is necessary if effect is to be given to those principles.[34]

That decision was handed down in 1975.

In two judgments of the Court that were to follow in 1992, the freedom of political communication was further explored such that in Australian jurisprudence it is now generally accepted that 'to sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential'[35] and that this freedom extends to publishing material which discusses government and political matters, concerns members of Parliament and relates to their performance in office and/or comments on the suitability of persons (whether elected or unelected) for office. Freedom to communicate about this matters, so says the Court, enables people to exercise a free and informed choice as electors.[36]

[32] *Rowe v Electoral Commissioner* (2010) 243 CLR 1; *Roach v Electoral Commissioner* (2007) 233 CLR 162.
[33] (1975) 135 CLR 1.
[34] Ibid, 56 (Stephen J).
[35] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47 (Brennan J).
[36] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

The important caveat on the implied freedom of political communication, however, is that which was established in *Lange v Australian Broadcasting Corporation*[37] and later altered in *Coleman v Power*.[38] That caveat being that no freedom shall be considered absolute, and that the freedom of political communication is limited to that which is necessary for the 'effective operation of the system of representative and responsible government for which the Constitution provides'.[39] In other words it is not unfettered, and does not extend to a citizen being free to say whatever it is they want to say about an elected official of this country. This may provide some illumination as to why, for example, the infamous Pauline Pantsdown song '*Backdoor Man*'[40] – a parody of One Nation founder Senator Pauline Hanson - lasted all but six days on the ABC radio network Triple J before it was taken off air pursuant to an injunction sought and granted by Senator Hanson. It was not, it seems, necessary for the effective operation of government to be able to sing along to Backdoor Man. The notion of what is and what is not 'necessary' for the effective operation of government in this country is one about which reasonable minds will no doubt differ.

Separate to (though its members are formally appointed by) the representative and responsible government is the judiciary (or, the Court). In recent times, and including in the context of legislation concerning the treatment of terrorist suspects, members of 'bikie' gangs and repeat child sex offenders, the separation of the executive branch and the judicial branch of government has been considered by and before the Court.

When this separation is considered, a key question is whether a law of the Commonwealth provides for the criminal conviction of a person by anyone or any body other than the Court. If it is, then it will be invalid under Chapter III of the Constitution, which renders the Court as

[37] Ibid.
[38] (2004) 220 CLR 1.
[39] Kiefel, above n 21, 15.
[40] Simon Hunt, 'Backdoor Man' (1997).

the only governmental branch able to exercise judicial functions (such as, for example, sentencing an offender). A quote which illustrates this concept, and which has been cited in many cases concerning the application of Chapter III of the Constitution, comes from the US decision of *Mistretta v United States.*[41] In that case it was stated that 'the legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action'.[42] In this way, it has been stated that the executive is not to use the courts as their instrument.[43]

In addition to prohibiting the 'freedom' of elected members of parliament to undertake judicial functions, and for the citizens of this country to enjoy that as a matter of 'right', Chapter III of the Constitution also provides that the Court has original jurisdiction to hear all matters in which the Commonwealth is a party, as well as any matters in which judicial review is sought as against an officer of the Commonwealth.[44] As The Hon Robert French put it, Chapter III serves as a safeguard against 'attempts to place Commonwealth executive action beyond legal scrutiny and challenge'.[45] In effect, the Chapter is intended to operate such that if the Commonwealth passes a law in respect to an area which it has no constitutional power to do so, that law will be invalid. If one of its officers makes a decision that is ultra vires, that decision is able to be challenged and reviewed by the Court. If it attempts to impose a criminal conviction upon a citizen, that conviction too, will be invalid.

It is true that these rights are not expressly ascribed to an individual by the Constitution. But neither are they hollow ones. And, for that, they should not be undervalued.

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[41] 488 US 361 (1989).
[42] Ibid, 407.
[43] Kiefel, above n 21, 17.
[44] *Australian Constitution* s 75(iii), (v).
[45] French, above n 7.

Part III & Part IV

To be or not to be? Meeting the needs of contemporary Australian society

Now that we have distilled, at least in summary form, the express and implied rights and freedoms in the Constitution, we must ask whether those rights and freedoms meet the needs of contemporary Australian society.

In order to properly make that assessment we must first have some understanding of the make-up of contemporary Australian society, such that we can identify what could be considered its 'needs'. Australia, much like many nations, is a land of diversity. Some aspects of that diversity are to be assumed. For example, in the 2016 Census, 50.7% of the population were recorded as female with 49.3% of them recorded as male.[46] Others are a reflection of changing times. For example, 48.1% of people over the age of 15 were married, with 35% having never been married, the median number of children per household is reducing and our population continues to steadily age.[47] Others still, are an important reflection of our national character. For example, and as is so often espoused by those in political office, Australia is the most successful multicultural nation in the world.[48] Indeed, 52.7% of Australians have at least one parent who was born overseas.[49]

Another characteristic of contemporary Australian society is that of its political leanings. Markedly, those leanings are becoming increasingly polarised (though some might argue that has more to do with happenings in Canberra than political views themselves). Let us leave that to another time. In 2010, the federal election resulted in a hung parliament, meaning that

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[46] Australian Bureau of Statistics, *2016 Census Quick Stats* (23 October 2017) Census Data < http://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036>.
[47] Ibid.
[48] See, for eg, Malcolm Turnbull, *Press Statement – Parliament House – 24 August 2018* (24 August 2018) Malcolm Turnbull < https://www.malcolmturnbull.com.au/media/press-statement-palriament-house-24-august-2018>.
[49] ABS, above n 46.

neither party secured enough votes to confirm a majority in both houses of parliament. The most recent election was won by a slim two party preferred margin of 0.72%.[50] We have not witnessed a Prime Minister see out their full term since John Howard, whose tenure in office ceased on 3 December 2007 - now well over 10 years ago.

Of course, none of the factors set out above are definitive of what it is that contemporary Australian society 'needs', as it is difficult for us to ever truly know what it is that one individual 'needs' from the next. However, it is pertinent to note that these factors can – whether sub-consciously or consciously – affect a person's perception of their own needs. To that end, I argue that 'needs' can be divided into two categories.

The first category of needs are innately personal. They will vary immeasurably from person to person and will often actualise from an individual's particular circumstance. These needs will be affected by a person's perception of them constituting a 'need' as distinct from something that they want to have, or that they think they ought to have as a consequence of their standing, age, upbringing or any number of other subjective characteristics. I will call these needs 'subjective needs'. Subjective needs are difficult to define and they are not constant. Subjective needs adapt and change to society in the same way that society itself adapts and changes. They are ephemeral and difficult to define.

The second class of needs are something more akin to that what is required as a matter of necessity. These needs are those without which, an individual cannot exist in society either at all or with the degree of dignity to which every individual – by essential nature of that character – is entitled. I call these 'objective needs'. Objective needs, when considered in this sense, are intrinsically aligned with those that are considered by international law to

[50] Australian Electoral Commission, *House of Representatives – final results* (8 August 2016) AEC Tally Room, < https://results.aec.gov.au/20499/Website/HouseDefault-20499.htm>.

constitute 'fundamental' rights and freedoms and which are set out in the *Universal Declaration of Human Rights*[51] to which Australia is a signatory. Some examples of objectives needs - and thus fundamental rights and freedoms when considered in this way - are the right to protection from torture or cruel and unusual punishment, from arbitrary arrest, to freedom from slavery and equality before the law.

In the main, it is unlikely that anyone would suggest that these fundamental rights and freedoms are not things that contemporary Australian society, nor any society for that matter, needs. Yet, and as has been outlined above, they are not squarely 'met' by either the express nor implied rights or freedoms in the Constitution. When carefully – and perhaps uncomfortably considered - they are also not things that Australia, in good conscience, is able to say that it has guaranteed. For example, there are those of us within Australian society who argue that the conditions to which individuals are subjected on Nauru and Manus Island constitute torture and that the provisions of the *Migration Act*[52] which allow for the indefinite detention of refugees and asylum seekers cross a line into arbitrary arrest. At least in relation to the former, it is clear that a wide cross section of Australian society agrees that Australia's treatment of refugees is, if not torture, certainly cruel and unusual punishment.[53]

These are important matters. They are matters to which Australian members of parliament should be called out in respect of and held to account for. They are matters that should, and in some cases have already, affected our exercise of the right to directly elect our representatives and to freely communicate matters relevant to that election. They are matters which say much about the liberty of our spirit as a citizenry. And they are needs. They are needs not just of contemporary Australian society but of any society.

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[51] GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[52] 1958 (Cth), s 189, 196, 198.
[53] Michael Gordon, Most Agree, keeping refugees on Manus and Nauru is cruel: pollster, *Sydney Morning Herald*, (Sydney) 21 February 2017.

However – and this is, I accept, not an uncontroversial position - the Constitution is not the place for either the subjective or objective needs of contemporary Australian society to be met.

The reasons for each of those positions are different, and to this I will return below. However, in large part the answer lies in the role a constitution is intended to play, and how – in fact – the Constitution has played, in its long history now to date. A constitution is meant to endure. It should, as S.E.K. Hulme notes, be a 'broad and continuing document which does not seek to prescribe the answers to each generations problems but which provides the basic structure within which each passing generation will carry on and resolve the issues important to that generation'.[54] And endure it has. In the 117 years since its passing, and despite the fact that the Constitution is contained within 12,500 words and does not mention – for example – a word about the party system and/or majorities, it has remarkably weathered the permeations of contemporary Australian society to date.

At its core, a constitution is a structural document which regulates the exercise of power by the organs of government, and which is concerned with providing government defined limitations on the extent of its power. And so it is. In the case of the Constitution, the essential characteristics of the three branches of government, including an elected parliament and a separated judiciary, provide the basic structure within which the problems and subjective needs of today's generation, and the generation to follow, can be determined. It is by no means a perfect system, but no legal system ever is, or could reasonably hope to be.

The Constitution does not and should not meet the subjective needs of contemporary Australian society in any express way. It <u>does not</u> because it cannot. It <u>should not</u> because, if

[54] S.E.K. Hulme 'Constitutions and the Constitution' (Paper presented at Annual Samuel Griffith Society Conference, 1992, Melbourne).

the Constitution were to be amended to reflect what are considered by some to be the subjective needs of today, then it would need to be amended every day for the rest of time. This may sound as though it is being facetious. It is not. The Constitution is one of the six oldest written Constitution in the world,[55] and it has been able to become such precisely because it remains relevant to each generation through the provision to them of the tools and structures within which they are able to operate and to influence. The most powerful of which, is direct access to a ballot box. In this way, citizens are able to make the case for their own subjective needs, without those needs being guaranteed to them in circumstances where there is no way to tell if they will still be relevant in fifty years' time. Indeed, and as past experience has shown, a lot can happen in fifty years. To think that fifty years ago, NSW clubs were still banned from serving alcohol on Sundays, computers were – well - hardly computers as we now know them, and smoking indoors was the norm. It almost beggars belief – until, of course, the exercise repeats itself.

Objective needs, on the other hand, are innate. The executive has a responsibility for ensuring that objective needs are met, and not to do so constitutes a severe dereliction of the duty for which its representatives were elected. However, objective needs – just like subjective needs – should not be 'met' by the Constitution. I say this for three primary reasons. First, the task of codifying objective needs is never as easy as one may like it to be. Second, Australia must take appropriate heed of the American constitutional experience in relation to the enshrining of fundamental rights and freedoms. Third - and while practical difficulties should never stand in the way of necessary change in this country - it does us no service to ignore the practicalities associated with amending the Constitution. I deal with each in turn below.

[55] Kirby, above n 10.

'To define is to limit'[56]

It may seem as though objective needs, including specifically what we consider to be fundamental rights and freedoms, are clear, unambiguous and capable of being transcribed in a meaningful way. However, and as the Hon Michael Kirby has noted (in an article which, I must note, sets out the justifications both for and against a constitutional bill of rights):

> However comprehensive a bill of rights would be, it would require squeezing difficult problems into the artificially limited categories expressed in a written bill of rights. However clever may be the drafter, it would be inherent that any language would expressly state, and thereby confine, the basic rights of the people.[57]

We have seen from our own constitutional experience how a 'right' or 'freedom' that is limited by its express terms such as, for example, s 116, can result in what is deemed by many to be a wholly unsatisfactory protection. However, and without an effort being made by drafters to define the parameters and limitations of a particular right or freedom, two problems are likely to follow. One being that a consensus position is not able to be reached between those who may agree on the underlying objective need, but who have different views in respect of how that need ought to be protected. The other is that, in the absence of sufficient definition, the underlying need is in danger of being either diluted or politicised by the interpretation subsequently given to it by the Court. Both of these problems are revisited in context below.

[56] Michael Kirby, 'A Bill of Rights for Australia – But do we need it? 21(1) *Commonwealth Law Bulletin* 276.
[57] Ibid.

"There are no greater friends than the United States and Australia"[58]

The United States and Australia may well be good friends, but there are elements of American society and American civic life that could hardly be described as enviable in the current political climate. Including for reasons that were referenced earlier in this essay, the US Constitution contains a codified Bill of Rights. That Bill of Rights sets out many of the fundamental rights and freedoms that correlate, at least in part, with what have been described here as the objective needs of individuals and which, relevantly, are not found in the Constitution.

There are, of course, innumerable observations that one could make about the operation of the American system of government but there are three I wish to make here. The first being that the codification of subjective needs as express rights can neither be said to have guaranteed those subjective needs to American citizens, nor has it permeated the political culture such that fundamental rights and freedoms could be said to be a guiding principle in political discourse. In November 2016, President Donald Trump was elected as the 45th President of the United States of America following a campaign in which Mr Trump labelled Mexicans as 'rapists', was televised mocking a disabled reporter at a political rally and was exposed as having indicated that he could 'grab women by the pussy'. Within one month of ascending to the presidency President Trump had introduced a travel ban affecting refugees and citizens from seven majority Muslim countries and which has, in an amended form, now been upheld by the Supreme Court of the United States.[59]

[58] President Donald J Trump (16 August 2018) Twitter https://twitter.com/realDonaldTrump/status/1033148759084093440?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1033148759084093440%7Ctwgr%5E373939313b636f6e74726f6c&ref_url=https%3A%2F%2Fwww.theguardian.com%2Faustralia-news%2F2018%2Faug%2F25%2Fno-greater-friends-donald-trump-congratulates-scott-morrison-on-new-role.

[59] *Trump, President of the United States et al v Hawaii et all* 17-965 (2018).

This is not to say that the election of President Trump, or President Trump's policies, should influence the question of whether or not Australia should consider amending its own Constitution to meet objective needs. But it does say that the entrenching of those needs as express constitutional rights and freedoms will not, by experience, operate as a red line to which elected officials dare not cross.

The second is that the codification of rights and freedoms in the Bill of Rights has not removed ambiguity as to what is and isn't guaranteed to an individual citizen. If nothing else, this is the lesson we are able to learn from the American experience in relation to the 2nd and 14th amendments. The fact that Americans have a 'right to bear arms' and a guarantee of 'equal protection before the law' does not appear to have determined, in any meaningful way, what those rights mean today to the average citizen.

The third, and perhaps the most important of all, is that the express reference to fundamental rights and freedoms in the Bill of Rights has resulted in an inescapable politicisation of the US Supreme Court (to which the Court is Australia's equivalent).

As no right or freedom can be expressed in such a way that it needs no interpretation, the more rights and freedoms that are expressed, the more scrutiny of a judicial officer's positions on issues of political significance. The scope and content of a fundamental right or freedom has always been – and will always continue to be – hotly contested in many cases. In that way, and over the last 10 years in particular, we have borne (jurisdictionally removed) witness to an increasingly heated debate in America in respect to those appointed to the US Supreme Court and who will ultimately be tasked with their interpretation. Taking the most recent example of President Trump's nomination of Justice Kavanaugh, it is difficult to understate the wave of consternation across some sectors of American society in relation to the way in which Justice Kavanaugh may interpret and apply Article 21 - or as it is

commonly known, the 'Right to Life'. The danger here is, of course, clear. With the executive branch of government, both in Australia and in the US, responsible for judicial appointments, the temptation to ensure appointees align with your – and your constituencies – political viewpoint in relation to rights and freedoms is, some would argue, par for course. It is also why the potential appointment of a new justice to the US Supreme Court is a matter for national media attention for months in the lead up to their nomination, and why, in Australia it is not so. This is not to be considered apathetic by any stretch, but rather a commendation to the practical implications of the 'separation' of powers in Australia.

'The way of the reformer is hard in Australia'[60]

These infamous words can be attributed to Gough Whitlam, Australia's 21st Prime Minister and someone who - without needing to muster a wild guess - would be unlikely to consider that his rights and freedoms were protected by the Constitution on 11 November 1975. And irrespective of your views as to Mr Whitlam, it is also a fact that at least in relation to constitutional reform, the man had a point.

Of the 44 times that an amendment to the Constitution has been proposed, all but eight have failed.[61] Now, there are of course many reasons for this and they will not be detailed in this essay. Some failures may be attributed to the way in which proposed amendments were drafted – such that insufficient specificity was given to their terms, others to the way in which they were sold to the Australian public. Some proposed amendments may well have reflected the objective needs of contemporary Australian society, but yet they were voted down anyway. Indeed, for all that is said about s 116 and how narrow it has been interpreted to be,

[60] Williams, above n 4.
[61] Ibid.

the Australian public has now voted twice against an extension of that provision so that it apply to the States (as well as the Commonwealth) (in 1944 and 1988).

All this is not to say that past failures should be treated as insurmountable, and that we should stand still if change is indeed necessary. It is, however, to say that the process for constitutional amendment is, rightly - and including for those reasons stated above - an arduous one. It requires a majority of voters in a majority of states. It also requires an intense, targeted and far-reaching marketing campaign that – in the context of fundamental rights and freedoms – has the ability to bring out both the best and the worst of people. Though in an altogether different context, the recent same-sex plebiscite serves as a reminder of how that can be so. It also bears reminder that it cost the taxpayers of this country up to $122 million.

In those circumstances, and noting that the constitutional codification of a right or freedom is not guaranteed to deliver certainty of application and interpretation, we must err against any assumption that the Constitution is the only (or rightful) home for fundamental rights and freedoms.

<u>'The Constitutional Century and the Counting of Blessings[62]'</u>

These words, as you may expect, did not come from the mouth of Gough Whitlam, but rather The Hon Michael Kirby. These words too, ring true. And they perhaps rang their truest at a time that was - to many - unexpected. In 1951, the Court heard what is now known as the '*Communist Party Case*'.[63] In that case, and amidst a backdrop of hysteria across the western world, the Court held that the Australian Government did <u>not</u> have the power to make a law which had the effect of banning the Communist Party in this country.

[62] Kirby, above n 10.
[63] (1951) 83 CLR 1.

In commenting many years later on this case – and in a context where His Honour had just commented on his own personal connections with a member of that Communist party - The Hon Michael Kirby made the following observations:

> When, therefore, I reflect on the defects of the Constitution, as many there doubtless are, I balance these thoughts with a remembrance of that anxious time in 1951 and of other times since. Of the continuity and change we have seen. Of the rule of law secured by independent judges. Of the peaceful shifts of political power secured by free elections accepted by all combatants. Of the civil service and armed forces who submit dutifully to the civil power. Of the ways in which the Constitution has served us, the people of Australia. Like every product of fallible human beings, it may be improved, as no doubt it will. But amidst all the personal attacks and the legitimate differences of opinion over this and that, let us, a century on, count our blessings.

And count our blessings we should.

Conclusion

For all its strengths and for all its blessings, it is true that the Constitution does not – in any express way - meet either the subjective or objective needs of contemporary Australian society. This essay has argued, however, that this is as it should be.

It is as it should be because the Constitution instead provides those bound by its terms (including both the governing and the governed) with the requisite tools to safeguard - and to improve - a system of government which works for, and is accountable to, both its own people as well as the common law legal traditions from which it was born. A system of government that is responsible for securing and guaranteeing the objective needs of its citizenry, as well as (in some cases) the subjective needs of its political base, and which can adapt and be responsive to challenges not yet imagined.

As a citizenry, it is therefore important to always remember that with this system comes responsibility. It is important that we exercise the right to directly elect our representatives

pursuant to ss 7 and 24 of the Constitution, and that we freely communicate and inform ourselves about the suitability of those persons for office. It is important that - once elected - we hold those same representatives to account and that we make our voices and views heard on the issues that matter, and the needs that go unmet. It is important that we promote and facilitate a culture of acceptance of fundamental rights and freedoms in our wider communities, such that the next generation of representatives consider those concepts critical to – and not detractors from – a coherent and successful strategy for political office.

It is important that we engage.

In the oft-borrowed words of the United States jurist, Judge Learned Hand:

> Liberty lies in the hearts of men and women, when it dies there, no constitution, no law, no court can save it, no constitution, no law no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.[64]

What Australia needs then, is not the words 'We the People' in our birth certificate. What we need is to invigorate, and to feed always, the liberty of spirit in our people. Only then, will the needs of contemporary Australian society, and the needs of the contemporary Australian society after that, be truly met.

[64] Judge Learned Hand, 'The Spirit of Liberty' (1944) quoted in French, above n 7.

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