Australian Journal of Legal History

- Alex C Castles*

WORKING WITH OUR LEGAL HISTORY: A REVOLUTION JUST BEGINNING

ALEX C CASTLES[*]

Just a few weeks ago the judges of the High Court handed down a ruling on the eligibility of those standing for election to the Commonwealth Parliament.

As they determined, the United Kingdom is a ‘foreign power’ for the purposes of section 44(1) of the national Constitution, in this case making a person holding British nationality incapable of being elected to the Senate.

And here in South Australia at least, for the presiding officer of one of the houses of State Parliament, more than decade ago, it is final confirmation that she was right, when she ordered the union jack to be no longer flown on the roof of the Parliament building where it had regularly been displayed on a basis of equality with the Commonwealth and State flags for more than one hundred years.

As the judgments in the case show, a wide range of historical sources were necessarily called in aid to reach this result, some from Britain, others arising from our own constitutional experience.

As much as anything, the decision helps to illustrate the way that, in this as and other cases in comparatively recent years, living with Legal History can often remain very much as the heart of the working of our legal system.

Now, however, compared to much that went earlier, our own Legal History is far more a necessary and integral part in the ordering of our legal affairs.

Clearly, for some judges in this case, and understandably so, the status of Scots citizens in England during the period between 1603 and 1707, before the union of England and Scotland, with the same monarch ruling both, found a place in the judicial discussions, in much the same way this situation still loomed heavily for Thomas Jefferson as he drafted American’s Declaration of Independence.

Indeed, there are some who might claim, and I’m probably one of them, that the formal, legal separation that now exists between the British monarchy and its quite separate manifestations in Australia, as evidenced by this recent High Court decision, is really no more nor less than the situation that Jefferson helped to preordain in 1776.

But most importantly of all, this recent case, like the *Mabo* decision, and increasingly others like them, help to underline just how Legal History can now on occasions loom importantly in the course

and conduct of our legal business, often much more so than in the past.

Here in South Australia we had another example, not all that long ago.

Then, the High Court in Cheatle's case ruled unanimously that the system of majority verdicts in criminal trials allowed in this State could not be applied in the case of trials for criminal offences under federal law, with unanimous verdicts still being required in their traditional form, and for very strong historical reasons.

Now the case just handed down by the High Court on eligibility for Senate membership has also helped to illustrate some of the more formal causes that have helped to bring this about.

Clearly, the Commonwealth's adoption of the Statute of Westminster in 1942, freeing the Commonwealth from the dictates of the British Parliament, and the Royal Style and Titles Acts of the Commonwealth Parliament, dealing with monarchy as it relates to the national government, all had their roles to play in reaching towards the recent High Court determination.

So, too, did the adoption of the Australia Acts by the State, Commonwealth and British Parliaments, finally breaking all-formal constitutional ties with the United Kingdom in the late 1980s. Beyond this, however, the evolutionary, historical character of our own constitutional and legal history relating to this in the past half century and more also appears to have had its own special role to play in reaching towards this decision.

It seems to be this, with no precise date being determinative of our final break came with the British Crown, as Callinan J, I think, quite rightly referred to this in his judgment.

But formal instruments like the Australia Acts and historical developments surrounding them are not the only elements helping to bring our own history and our law into increasing interrelationships with each other.

The progressive and final abolition of all appeals to the Privy Council is very much another one, as the decision in the *Mabo* case helps to illustrate forcibly.

Indeed, as some of you might recall, the late Richard Blackburn, as a judge of the Northern Territory, largely presaged some elements in this High Court decision.

But in the end he regarded himself as being bound by Privy Council and other authority in deciding against the recognition of Aboriginal land claims like those upheld in *Mabo*.

Less obviously, an amendment to the *Commonwealth Judiciary Act* a few years ago has also injected a new and yet still largely untried element into judicial decision concerning our own law and its relationship to our history.

For most of this century, as the Act laid it down, in the absence of formal directives to the contrary, English common law was to provide a measure for the exercise of judicial authority.

Now, however, as the Act directs, it is no longer to be English common law, instead it is to be what the legislation describes as the common law in Australia.

It is a concept that helps to open up a variety of possibilities in sharpening the focus on the use of Australian needs and circumstances in the ordering of our legal affairs that still remain to be explored.

Seemingly, the adaptation of English common law to the Australian environment is one of these, reversing a frequent previous emphasis in Australian decision making that could even seem to require a slavish adoption of English legal principles, whether these had ever been really apposite to Australian conditions or not.

As one not so distant example of this, as some of you might recall, in 1979 the High Court and our own Supreme Court still followed ancient English principles on the liability of landowners for the escape of domestic animals, despite the fact that these were clearly inappropriate to Australian conditions, as earlier both Canadian and US decision making had already confirmed.

Less obviously, and clearly more speculatively, the change in the judiciary Act may also have the potential to revive an issue that has long remained dormant in the working of our legal system. Under the overwhelming impact of the English-style ethos that progressively gripped Australian courts in the nineteenth century, the notion that local customs and practices might find a place in the working of our law gradually disappeared.

Some, like the use of 'wife auctions' to break matrimonial ties, carried over from England, simply never had the potential to attain any form of legal recognition.

But there were others, like rural practices relating to the rights of those who took charge of domestic animals for others without any fees that seem, for a time, to have to have been given forms of recognition, at least at the lower levels of the working of colonial legal systems.

For a time, the customs of the goldfields, as they were sometimes described, also found a place in the working of the law, until they were snuffed out by later judicial decision making.

In some cases, however, local customs found a more permanent existence with legislation that recognised them, sometimes down to the present day.

In Tasmania the formal recognition of de facto matrimonial relationships for some purposes is one example of this, dating back to the 1830s.

Similarly, in both New South Wales and Tasmania, legislatively ordained procedures were devised to override the strict letter of English-style land law that denied the existence of customary practices on landholding.

In Tasmania, quite remarkably, these procedures on landholding still proved to be quite a viable means of dealing with some much vexed questions on land ownership in the north-west of the State not so very long ago.

But this still left open other issues on the recognition of so-called customs, much like the way these could be recognised under English common law, not the least of these, the extent, if any, to which Aboriginal Law might be given formal recognition in our courts.

For most of the first half of the nineteenth century the balance of our law and government practice was on the side of recognising that Aboriginal Law could be acknowledged legally in certain situations, notably in terms of the regulation of Aboriginals conducting relationships amongst themselves.

It was an issue that sometimes still found a place in high level decision making well into the second half of the nineteenth century, leaving behind questions that still might be regarded as unanswered in the working of our law.

In both New South Wales and Victoria the highest local courts still wrestled with one issue relating to this and hardly came up with any conclusive answers.

In each instance, the question was raised whether marriages validated under Aboriginal tribal law, whether polygamous or not, precluded a person married in this way from giving evidence against another Aboriginal in criminal proceedings.

With more than a few touches of equivocation and uncertainty in both cases, the absence of any proof

of these matrimonial arrangements, and the absence of expert evidence authenticating them, was sufficient to ensure no such barriers were raised to witnesses giving evidence against other Aboriginals.

Beyond the instrumental ways like the Australia Acts, the amendment to the Judiciary Act on common law and other formal changes that have drawn our own Legal History more decisively into the working of our law, there are other developments in comparatively recent times that almost of necessity point in the same direction.

For more than a century, at least since the coming of responsible government in each of the Australian colonies in the nineteenth century, there have been key issues that can be raised on the extent to which traditional British principles on the working of government are incorporated into the ordering of our governmental and legal affairs more generally.

Our legislatures, even where we had nominated upper houses, were never precise copies of their British counterpart, they varied markedly once elective upper houses were introduced into South Australia, Victoria, Tasmania and Western Australia.

Our systems of cabinet government all owe something to the accidents and other events of British constitutional history, including the way the inability of the first Hanoverian Kings to speak English contributed to this development.

But side by side with this, the variations between the working of cabinets in Australia have also shown that it can be difficult to generalise about them, not least when issues are raised in courts about the validity of government actions that may be challenged, with cabinet decision making potentially regarded as relevant to the outcome of particular legal proceedings.

Nevertheless, through all this, issues have remained on whether significant landmarks in English and then British constitutional history may still find a place, albeit in modified forms, in the legal regulation of how government may be carried on in this country. At times this was manifested in the possibility that famous constitutional instruments such as *Magna Carta* and the *Bill of Rights* were part of the English legal regimen received in each of the Australian colonies.

More recently, such arguments have also appeared in another guise.

Considerable arguments may also be advanced that at least some of the principles embodied in basic British constitutional instruments, such a the *Bill of Rights*, are impliedly incorporated into the constitutional directives that regulate the powers of our Parliaments and the government authorities that operate in relation to them.

Certainly, in the past twenty years *Magna Carta* has appeared as a relevant influence on judicial decision making in Australia, even if in normal terms, as in Britain, and as A P Herbert once so whimsically recounted in his Uncommon Law, the precise terms of *Magna Carta* have long been overridden by statutory provisions to the contrary.

There are in fact issues here that, for the present at least, will not go away, bringing together elements of both British and Australian constitutional and related legal history that have, even in recent weeks, been raised in the public demesne.

Here in South Australia, the State's Auditor-General, in recent reports, had touched on them in querying whether the power of the State legislature to control fiscal and other matters as part of its traditionally accepted authority, flowing from the English Bill of Rights, and in other ways, may have been denied in some circumstances.

In one aspect of the Auditor-General's report last year the issue was also raised directly that, conceivably, illegalities might flow from the way some arrangements might be made in the ordering of government administrative affairs if they violate Parliamentary directives.

Elsewhere, others have claimed that the 'Contract State' more generally, as some have defined it, is similarly undermining principles of government that might be still be protected legally in this and other ways.

To those who hold this view, such States are those where basically many of the workings of government are marked by 'privatisation, deregulation and contracting out', as one recent commentator has attempted to give meaning to the phrase.

Trenchantly, just before leaving office in June, the outgoing Auditor-General of Victoria was reported as claiming that one result of this, in that State, had been to transform the local Parliament into an 'irrelevancy', as he described it.

Then more recently, the New South Wales Auditor-General has followed in making remarks in a similar vein, suggesting that without the recognition of principles such as those in a *Bill of Rights* much the same evolution is taking place in his State. More esoterically perhaps, as the Republican debate in Australia seems to be heating up again, finally there are signs that some of the long obscured, deep seated historical uncertainties about the exercise of monarchical powers in this country may be revealed. There is, for example, the spectre that monarchical forms might be retained in some governmental units in this country, and not in others, as one learned commentator has recently affirmed.

To add to the complications, what is not always understood is the way the exercise of monarchical style powers has sometimes changed dramatically in this country in the past half-century because of our constitutional evolution.

In one State, perhaps more, as a result of these changes, there may in fact be no effective monarchical powers left at all. And if Conrad Black, the Canadian born newspaper magnate is right, the once sacrosanct legal veil that surrounded the exercise of some monarchical powers may now even be the subject of judicial proceedings.

Last week, as some of you probably noted, Mr Black announced he was commencing proceedings in the Canadian Courts.

He is, so he declared, setting out to challenge the validity of the advice given to the Queen by the Prime Minister of Canada, recommending successfully against the newspaper owner being appointed to the House of Lords.

Whether Mr Black succeeds in his action or not, it highlights the way in which the monarchy today is constitutionally separated from the Crown exercising powers in the right of the United Kingdom in both its Australian and Canadian manifestations.

In both countries, there is not only the constitutional authority to determine who their monarchs shall be, not necessarily following the rules set for this in Britain, but well beyond this, subject to their own constitutional instruments, both countries have the power to determine how these powers may be exercised, if at all.

At the same time, however, as Legal History may emerge more assertively in these and other ways in the ordering of our affairs, we must also recognise that there can also be considerable dangers along the way.

One example is how we cannot necessarily rely on some of the uses of our Legal History that have been made in the past.

Some were made when more detailed scholarship was lacking; in an era, until comparatively recent times, when most lawyers, like those of my generation, and some that came later, were still left unaware of many of the indigenous developments that had taken place in the working of our law.

Certainly, Legal History was part of the curricular in our law Schools, but it was basically English Legal History, as if this was all that we needed to know about the subject.

This was well epitomised in the one general Legal History text published in Australia in the middle years of this century, Windeyer's Lectures in Legal History.

In the last chapter, Sir Victor's readers were finally introduced briefly to the legal situation in Australia, to be told, in effect, that basically the reception of English law in Australia had made our legal system virtually an extension of the one in a mother country.

This attitude was so entrenched, that even later, as I found personally, when I published a short article on Australian law, I received a 'My Dear Castles' letter from a legal notable, informing me solemnly that Australian experiences in relation to the working of our law should, at the very least, be discounted, preferably mostly entirely ignored.

To further complicate the situation, even when references were made to our own Legal History in various ways, the limiting of these to local State experience could even effect the outcome of important national deliberations.

This is more than well illustrated by the late Sir Garfield Barwick in his Autobiography that was published not long before he died.

He obviously could not avoid some discussion of the role he had played and the advice he had given in the 1975 constitutional crisis that led to the dismissal of the Whitlam government.

Born and bred in a State when the upper house of the local Parliament was not elected, by tradition and working not all that unlike the House of Lords and the Canadian Senate, these bodies basically provided him with the constitutional precedents he used in proferring advice on the 1975 constitutional crisis he gave to Governor-General Kerr.

Only many years later, as we find in his Autobiography, at the time when he gave his advice to the Governor-General, he was unaware of different precedents relating to conflicts between elective houses of Parliament in Australia, not least those that occurred in Victoria in the second half of the nineteenth century, which had even led to litigation in the courts.

In comparatively recent times, there has also been an increasing tendency to explore the roots of the making of our national Constitution to help to explain the nature of its working down to the present day.

And here again, there are potential hazards along the way, that were not always fully recognised in the past, and help to confirm the presence of similar problems that exist in dealing with other aspects of our Legal History.

From time to time, the Convention Debates of 1897-8 have understandably been called in aid to help determine the meaning of some constitutional provisions.

For many years Quick and Garran's Annotated Constitution was used almost as a Bible in the seeming absence of other sources to achieve similar goals.

What this too often overlooked was that there were other very important primary sources that could bring us even closer to understanding the meaning of some constitutional clauses.

Not the least of these are the considerable number that remained virtually unchanged from the 1891 Constitutional Convention, often with very little further debate, sometimes with a crucial role to play in the future evolution of the Commonwealth.

Neither Quick nor Garran were present at the mostly secret negotiations they helped to bring these

about, and it has only been in comparatively recent times that the significance of early drafts for a national Constitution have begun to emerge as potentially important aids in helping to comprehend some key clauses in it.

Quite remarkably, the first draft of a proposed Constitution used by the Drafting Committee at the 1891 Convention was not generally available until the mid-1950s, when a Tasmanian historian appended it to an article he wrote on the role of Andrew Inglis Clark in the making of the Constitution.

And as the late judge Neasey of Tasmania showed soon after, there were important elements in Inglis Clark's draft that could still be seen to be extant when the Constitution came into force in 1901, sometimes still largely untrammelled by later constitutional debates in the last decade of the nineteenth century, in ways that had not been recognised previously.

The second draft proposal for the national Constitution was prepared here in Adelaide by Charles Cameron Kingston, again before the 1891 Convention, a far more obscurely hidden document, for reasons that have never been adequately explained, A few years ago, I regarded it as a minor scandal that I couldn't find a copy of it anywhere in Adelaide, not least because of its potential significance in helping to understand the meaning of some constitutional provisions.

Finally, I tracked a copy down in the Dixson Library in Sydney in the Sir Samuel Griffith Papers housed there, and as Griffith himself had recorded it, as the Chair of the 1891 Drafting Committee, he had regarded a consideration of Kingston's draft as the second successive stage in the preparation of the Constitution.

Pre-eminently Kingston was a great, highly skilled legal draftsman, far better than Inglis Clark.

As I soon found, in examining his draft, here, too, there were significant elements that clearly should not be ignored.

Not the of least of these was the way some important constitutional provisions may still be traced directly to Kingston's style of drafting and the variations resulting from this, compared to the way Inglis Clark approached particular constitutional matters, some of vital significance today in the working of our system of national government.

And in using elements of our Legal History in the working of the law today there are still other major problems at times that are sometimes little different, if at all, from those that can lead to doubts being raised on the past use of it in the working of our legal system.

Perhaps the most troubling of all them relates to the use of precedents in reaching towards decisions that involve our Legal History.

For most of the nineteenth century, our formal law reporting was mostly haphazard, where it existed at all, key decisions could go unreported for considerable periods because of financial and other constraints, the quality and the authenticity of some law reporting simply does not bear any careful scrutiny.

At times reports were taken from not always accurate newspaper versions of litigation when compared to the details of judgments contained in still extant court records.

Nevertheless, even in comparatively recent times, some reported cases like this have been used as the basis for making important judicial decisions.

In the absence of any formal law reporting details of cases have been cited from other sources that do not necessarily reflect the full reasoning and other details relating to particular cases.

In the early 1840s, for example, Mr Justice Willis of the New South Wales Supreme Court, sitting in Melbourne, delivered a long, and in some ways a highly erudite judgment dealing with the amenability

of Aboriginals to European law.

It was printed in full in one Melbourne newspaper, later, after he revised it, this version of his judgment was printed as British Parliamentary paper.

Fortunately, at least in the cases of New South Wales and Tasmania, steps are now being taken to overcome deficiencies like this, that can on occasion seriously detract from the quality and authenticity of official dealings with our Legal History.

Beyond issues like this, however, there are broader dimensions that we share with others that also cannot be lightly ignored as we bring our Legal History into greater focus in the working of the law.

Most importantly of all, as a number of American legal historians have emphasised in various guises down the years, there can be great dangers for the effective working of our law if its history is used to keep it in a time warp, unfitted to meet the needs of changing circumstances, as English law was imprisoned in this position by the beginning of the nineteenth century.

Rather, as these historians have pointed out, we should use Legal History, most of all, to help illuminate the present, to better understand how our law operates, using its history to help illuminate the past reasons for its application in particular ways. But then, within the normally accepted constraints of our judicial and other legal processes, our Legal History should be a signpost, sometimes but not always an important one, in helping to better fit our law to deal with the constantly evolving societal needs and circumstances that surround it.

In this fashion, it can play its own special role in helping to maintain the credibility and integrity of the law, by helping to balance past experience with the requirements of future needs, with time honoured methods that have often served our legal system more than satisfactorily.

In the conspectus of the legal traditions that form part of the working of the law in this country, changing the law without seeming to change it is one of the very important ones, not least for maintaining the law's credibility, and Legal History can play a vital role in helping to achieve this.

Over the course of time, sometimes more quickly than many realize, while the outward forms of the law may appear to be the same, it can become much like an old bottle filled with new wine. It may still have the same old label attached to it, as history seems to dictate, but in substance it has moved to fit the law far better to changing needs and circumstances, with the necessary and active role of Legal History almost necessarily being a vital tool in helping to bring this about.

A prime and enduring example of this is the way jurors in the English tradition changed from being essentially witnesses to become triers of facts, with other less obvious, but nevertheless still important changes taking place with this in the past one hundred years.

And here in Australia, as the emerging role of our own Legal History is now taking a much needed and long overdue role in the working of our law, without it, some of the more transcendent values of our law like this could simply disappear if they are not fitted to our own history, with the societal and other values it encompasses that are a necessary background to enable our law to meet changing needs and circumstances.

---

[*] Professor Alex C Castles, Emeritus Professor, School of Law, University of Adelaide. This speech was originally delivered as a first 'Alex Castles Lecture on Legal History' delivered in Adelaide, 12 August 1999, under the auspices of the School of Law, Flinders University.
