Samuel Griffith Society Conference 2014

The Commission of Audit – Federalism strikes back

Adrian Hanrahan

At the 2014 Samuel Griffith Society Conference I had the privilege of listening to Peter Crone, an Executive Officer on the National Commission of Audit. The Commission was established to examine the scope and efficiency of the Commonwealth Government and recently published a number of proposed, and somewhat controversial, reforms.

It was fitting that I found myself meeting for this conference in Melbourne, a stone's throw from the Victorian Parliament, where 124 years ago the 1890 Federation Conference was convened to decide whether the previously separate governments across the Australian nation should function as a federation.

Mr Crone spoke of his involvement in the Commission, which proposed measures the Commonwealth Government could take to ensure a responsible and stable long term budget strategy for Australia. Part of the Commission's role was also to assess the roles of the Commonwealth, State and Territory Governments and comment on the current architecture of Commonwealth/State financial relations.

Mr Crone spoke of the many shared roles and responsibilities of the Commonwealth and States. The Commission found that the lack of clear division in such roles and responsibilities contributed to decreased efficiency, accountability and fairness in service delivery of governmental functions generally. This has ultimately led to a less functional federation.

It is no great surprise that the Commonwealth raises more money than it needs. The Commonwealth must assist States with revenue shortfalls so the States can carry out the functions for which they are responsible. Last year, the Commonwealth provided the States $51 billion in untied general revenue assistance (largely from the GST) and $44 billion in tied funding for specific areas of what the Commonwealth terms, "national importance".

As a consequence, the States have little autonomy. A vertical and fiscal imbalance exists between the Commonwealth and the States, which is arguably to the detriment of Australia as a Federation.

The imbalance is set to increase. The Commonwealth benefits from a growing tax base (income, company and consumption taxes), while the States are reliant on more inefficient taxes and duties and cyclical royalties.

The Commission highlighted the need to recognise that the States and Territories should be free to compete among themselves, respecting the regional differences and the implications that follow from such differences, without being reliant on tied grants.

The Commission found that the best option to address the vertical and fiscal imbalance is to increase State revenue capacities so the States can better fund the areas of their responsibility. This may be achieved by, for example, providing the States with access to the personal income tax system and offsetting (or at least minimising) the net effect on taxpayers by decreasing the reliance of States on tied Commonwealth grants.

The Commission made 86 recommendations. As with any major reform, successful implementation is ultimately dependent on the ability of our leaders to emphasise the importance of the reform and effectively "sell" these tough decisions to the Australian public.

As the Hon. John Macrossan said at the 1890 Federation Conference, "*It is the leaders who begin reforms and the people take it up from them*". The Commission has provided a blueprint for reform. It is now up to us, the voting public of Australia, to demand a sustainable Commonwealth budget that affords a greater degree of fiscal sovereignty for the States in order for Australia to reap more of the benefits from our structure as a Federation.

Professor David Flint AM – The Republic, Royals and Religion
Michael Olds

I recently had the opportunity to attend the 26th Conference of The Samuel Griffith Society over the weekend of the 22-24 August 2014 in Melbourne thanks to a scholarship from the Mannkal Economic Education Foundation.

Over the course of the weekend, I had a fantastic time meeting and talking with barristers, academics, senators and even had the opportunity to meet and take a photo with the Hon. Ian Callinan AC.

I was very interested in the presentation by Professor David Flint AM on "The Republic, Royals and Religion" in Session 2 of the proceedings, "The Crown".

Professor Flint's presentation began with a discussion regarding the trends for and against a Republic since federation. There was an issue as early as 1907 in which there was uncertainty as to who was the Constitutional Head of the Commonwealth. The presentation illustrated a trend from the 1950s to the 1999 referendum which charted that support for the monarchy fell and support for republicanism rose.

Despite this, the 1999 referendum which was based on the preparations for the centenary of federation, the failings of the Royal Family's marriages and the Sydney Olympics, was rejected by a huge 72% of voters.

Over time, there was strong support for the monarchy by those in the middle-age bracket. However, a recent trend has shown that the young are replacing the middle-aged as monarchists. This is a positive sign for those who wish to keep Australia as a monarchy.

On this note, I had the opportunity to ask a question, this being "is becoming a republic constitutionally possible in light of the words of the Constitution's preamble that it creates 'one indissoluble Commonwealth?"' Although nerves set in when asking the question, especially in light of the distinguished members of the conference, the question resulted in a thoughtful discussion which culminated in Professor Flint answering that yes the Commonwealth could do this. This, in his view, is due to the powers gained by the Commonwealth by the cumulative force of the *Balfour Declaration*, *Statute of Westminster*, and *Australia Act*.

In summary, I found the Samuel Griffith Society to be a wonderful experience. I learned so much over the conference weekend and have many new ideas that I wish to explore in the constitutional law field.

Commissioner Hon Jerrold Cripps QC

May Yan

The Independent Commission Against Corruption (ICAC) Commissioner Hon Jerrold Cripps QC actively served on the Commission for 5 years between 2004 to 2009. Throughout his 5 year term, Mr Cripps presided over hearings relating to bribery, fraud and corruption allegations. During the period, the Commission uncovered about $19 million of inappropriate activities and conducted numerous inquiries and investigations.

Over the past 50 years, Mr Cripp's achievements in the field of law are remarkable. He became a barrister in 1959 after completing his Bachelor of Laws and Masters of Laws at the University of Sydney. He was appointed Queen's Counsel in 1974 and was a member of the judiciary for 15 years where he served as a judge of the NSW Supreme Court, Court of Appeal and District Court.

At the Samuel Griffith Society Conference, Mr Cripps emphasised the corruption issue present today, as he painted an engaging image of a happy family sitting down at dinner and people suddenly storming in with machine guns.

He gave a succinct summary of what corrupt conduct entails and how the ICAC 's role is not a criminal one despite what most people think, as their power exceeds that of the police. His discussion exposing corrupt conduct and the necessity for a public inquiry to inform the community of this type of behaviour was extremely interesting and insightful.

It was interesting to hear Mr Cripps perspective that the real problem is the way the investigation is conducted given the public scrutiny and the resulting effect of investigations on reputations.

Professor Anne Twomey – Williams No 2: What it means for the Federation

Penny Bond

I recently was fortunate to be selected to attend the 26th Conference of The Samuel Griffith Society from 22-24 August 2014 in Melbourne, thanks to a scholarship from the Mannkal Economic Education Foundation.

The Conference itself was a fantastic opportunity to meet and talk with distinguished members of the legal profession, including academics, former judges and politicians.

A particular highlight for me was the presentation on *Williams No 2*, a recent decision of the High Court handed down in June. This presentation was provided by the inspiring Professor Anne Twomey in the Session 1 of the Conference proceedings, named "Institutions of the Federation".

Professor Twomey's exciting presentation was very fitting in the Session relating to Federation as the *Williams No 2* decision further constrained the Commonwealth's spending power as defined in *Pape* and narrowed in the first *Williams* decision in 2012.

What I found to be particularly interesting was that the National School Chaplaincy program, while not being able to fall under a head of Commonwealth power, was argued to be permissible under the executive power of the Commonwealth. In an uplifting twist for federalism, the High Court narrowed the test required for the Commonwealth to grant financial assistance.

In an interesting twist, the Commonwealth waived the debt owed by SUQ, even though the money granted has now been rendered unlawfully granted as a consequence of its unconstitutionality. As Professor Twomey opined, this raises an interesting issue in that the funding has still remained by way of proxy.

As for the implications for federalism, the Commonwealth possesses quite an expansive financial power, and over the years this has become more powerful, for example with the well documented broadening of the Corporations power and the addition of s 51(xxiiiA) in 1946, which was a head of power argued in support of the Commonwealth in *Williams*. Will the High Court allow an intrusion into education? Or will the Williams decision assist in further refining the scope of the Commonwealth legislative power and return that power that once belonged to the States? Only time will tell.

Samuel Griffith Conference- Peter Crone
Report by Zoe Lim

During the end the August I had the privilege of attending the 26th Samuel Griffith Society Conference in Melbourne thanks the Mannkal Economic Education Foundation. Over the two-day conference, a number of speakers were invited to present papers on various issues including the implications of the High Court decision in *Williams No.2*, reform of the Senate elections and Australia's honours award system.

I took great interest in the presentation by Peter Crone discussing his work with the National Commission of Audit in 2013. The National Commission of Audit was set up by the Abbott government as an independent body and given broad terms to review and report on the performance, functions and roles of the Commonwealth Government. The result of the National Commission of Audit was a two phased report entitled "Towards Responsible Government".

One key issue with Australia's federal system identified by the report is the encroachment of the Commonwealth Government into areas not constitutionally given to them. Areas that display the problems with this encroachment include hospitals (where there are no clear responsibilities and high levels of cost shifting), education, housing, mental health and Indigenous programs.

The main issue that stands the chance of reform is the current fiscal system in Australia. Australia currently suffers from an extreme case of vertical fiscal imbalance; approximately 40% of the State Government's spending is supplemented by the Commonwealth Government while that 40% constitutes only 25% (approximately) of total Commonwealth Government revenue.

The vertical fiscal imbalance's effect is heightened by the grants power under s 96 of the Commonwealth Constitution. Section 96 allows the Commonwealth to attach to a grant any conditions that form a grant to a State Government. As such, the Commonwealth has been successful in encroaching into State constitutional areas of legislative power.

The National Commission of Audit made it clear that the extreme vertical fiscal imbalance needs to be rectified and tied grants need to be reduced in frequency and size. Sovereignty needs to be given back to each level of government and within each government's sphere. States will need to work together to show that they have the interest and ability take on their residual legislative power and the Commonwealth must resist the temptation to legislate beyond its given enumerated and concurrent powers. If not, the country risks entering into a long-term fiscal strategy that is not sustainable.

Such a change will take time and alignment of the right people in the right positions. The National Commission of Audit report is just the beginning of a needed change in attitude of the Australian government and people. With a White Paper being organised for release at the end of 2015, it is hoped that change will become higher on the agenda of public and implemented in the near future.

Attending the Conference was an informative and valuable experience. I would like to express many thanks to the Samuel Griffith Society for organising the conference and to the Mannkal Economic Education Foundation for opening up this opportunity to attend the conference this year.

Reigning in the Commonwealth Government

Nigel Siegwart

In late August 2014, I attended the Samuel Griffith Society Conference in Melbourne. My attendance would not have been possible without the generosity of the Mannkal Foundation and its commitment to providing students with the opportunity to explore political issues and engage in debate and discussion. The result of making these opportunities available is ultimately a generation of better informed and involved youth. I wish to sincerely thank the Foundation.

One of the many highlights of the conference was Professor Anne Twomey's presentation on the consequences of the High Court's decisions in the two *Williams* cases. Professor Twomey explored whether those cases set the foundation for a more restrictive interpretation of the Commonwealth's powers.

Briefly put, in the 2012 *Williams No. 1* decision, the High Court held that the Commonwealth Government needed specific authorisation from the Commonwealth Parliament to contract and spend money. The bare appropriation of monies in the Budget Bills was not sufficient authorisation. The Commonwealth Parliament reacted to the decision by passing legislation that generally authorised the Commonwealth Government to enter into contracts and spend money in relation to 427 grants and programs, one of them being the School Chaplaincy Program.

In *Williams No 2*, the High Court determined that the Commonwealth Parliament did not have power to legislate in respect to the Chaplaincy Program and the Act it passed was invalid insofar as it related to that programme. While the Court did not specifically address any of the other 426 grants and programs, there are undoubtedly many others that could be the target of a successful challenge.

Professor Twomey's key point was that the High Court's approach in these cases significantly limited the Commonwealth's power. Since Federation, the Commonwealth Government has gradually involved itself in almost every area of governance with little regard to its set of assigned responsibilities. The 427-strong list of programs is a perfect example of this mission creep. Among them are:

- 'Safer Suburbs' with the objective to reduce crime and antisocial behaviour by funding local initiatives;
- 'Teach Next' to address teacher shortages in regional schools;
- 'Sustainable Communities' with the objective to assist State and local governments to plan for employment opportunities in the growing outer suburbs; and
- 'Student resilience and wellbeing' with the objective of "supporting student resilience and wellbeing".

The programmes themselves may be perfectly worthwhile, but there is an issue as to whether the Commonwealth has the constitutional power to fund them.

Ultimately, Australian federalism should not be defined by the Commonwealth seizing control in every area it thinks fit to do so. Its powers should be strictly and consistently policed. *Williams No 2* is a step in that direction.
Professor Twomey's presentation was accessible, understandable and amusing. It accompanied the many other insightful presentations and debates over the course of the weekend. Other speakers included Antony Green, Professor David Flint AM, Senators David Leyonhjelm and Bob Day AO, WA Attorney-General Michael Mishin, among many others.

The Samuel Griffith Conference was a brilliant intermingling of politically engaged youth, current power-holders, leading academics and the older and wiser. The event was a unique insight into how the ideas of today become tomorrow's reality.

Toying with the Senate: The Western Australian Senate Election Re-run and Proposals for Reform

Melissa Ferreira

I was recently lucky enough to be selected to attend the Samuel Griffith Society Conference in Melbourne on a scholarship from the Mannkal Economic Education Foundation.

The first session of the conference was focused on the "Institutions of Federation', which included a presentation by the ABC's Antony Green, well known for his work in election analysis. His topic: "Toying with the Senate: the Western Australian Senate Election Re-run and Proposals for Reform". Antony's experience and background in statistical analysis meant he was able to provide a number of very interesting observations about the way in which our Senate elections are run, have been run in the past and should be run in the future.

The issue of gaming the vote in Senate elections is a serious one, particularly when the balance of power becomes the plaything of previously unheard-of micro-parties. While there are arguments to be made that this will result in more scrutiny of the government and elevate the Senate from its status as a 'rubbber-stamp', the concern is that there is currently a real lack of transparency in the way voting preference deals are being done and who our votes end up actually electing. A prime example of preference flows resulting in questionable outcomes is that of Senator Ricky Muir achieving a six-year term with only 0.51% of the vote.

The reality of the current system of voting is that parties engage in preference harvesting, instead of attempting to support the next most similar party in terms of ideology or policy. This trend means that rather than supporting a "competitor" parties currently send their preferences to all sorts of unexpected candidates and parties. The problem is that the average voter has no idea where there preference will end up (although the preference flows are available online), nor the inclination to stand in the booth and number some 77 boxes.

Mr Green had a number of proposals to rectify the current situation including shifting towards an above-the-line preferential voting system, tightening up the rules surrounding the registration of parties for the Senate ballot and changing the focus of the rules that define invalid votes to more readily enabling validity.
Antony Green's presentation was immediately followed by presentations from Senator David Leyonhjelm and Senator Bob Day who certainly did not agree with the allegations of 'gaming' the system and provided an interesting counterview.

The Samuel Griffith Conference was an excellent opportunity to hear from some of Australia's finest legal minds and foremost constitutional scholars. The range of topics presented on, combined with the calibre of delegates at the conference meant that there was always a spirited debate to be had around the dinner table and there were many interesting conversations to be had in the breaks.