Legislative Council

03/06/99

Premier, Minister For The Arts, And Minister For Citizenship Hansard Extract

The Hon. P. BREEN [11.12 a.m.] (Inaugural speech): I should like to speak to the amendment moved by the Hon. Dr P. Wong to the motion before the House. As amended the motion reads:

That this House:

1. Expresses its grave concern that the Premier and Minister for Citizenship has failed to consult with peak and other ethnic community bodies and leaders prior to the Governments's announcement on 8 April 1999 in regard to:

   (a) the change to the name of the portfolio of Ethnic Affairs to Citizenship, and

   (b) the change of the name of the Ethnic Affairs Commission to the Community Relations Commission.

2. Calls on the Carr Government to:

   (a) reverse its decision in relation to the changes as a matter of urgency, and

   (b) consult with and heed the wishes of the peak and other ethnic communities and leaders on any changes to the name, objects or functions of the Ethnic Affairs Commission of New South Wales.

Madam President, I begin by joining with other members in congratulating you on your election as President of the Legislative Council. As this is my inaugural speech, I ask for any courtesies that you and the House might extend to me for straying outside the strict terms of the amendment to the motion. The Hon. Dr P. Wong moved his amendment during his inaugural speech. He began by thanking the good Lord, and I am compelled to do the same since there can be no other reasonable explanation, except perhaps good luck, for the confluence of circumstances that first placed Reform the Legal System on top of the tablecloth ballot paper, and then allowed our party to wind its way through the twists and turns of the preferential voting system and, finally, to gain a seat in this place.

I am, like the Hon. Dr P. Wong, a dyed-in-the-wool Catholic, although both of us agree that the Catholic Church has not cornered the market on truth and wisdom. Like the Hon. Dr P. Wong, I am also a member of an ethnic community. I can trace my ancestry on both sides of the family to Irish convicts. I am a direct descendant of William Davis, who was transported to Australia for his part in the Irish uprising of 1798 and whose house in Grosvenor Street in The Rocks was the site of the first place of Catholic worship in the colony. St Patricks at Church Hill was built on land donated by William Davis and his wife Catherine.

For the preservation of my faith, I am indebted to my mother, Mary Breen, who prays for everything from justice to rain. She is in the public gallery today. I also acknowledge the presence in the public gallery of two of my five sisters. Unfortunately, my brothers are unable to be here today. The good luck I have enjoyed through my life is directly attributable to my father, the late Bernie Breen, who always said that it was better to be born

lucky than rich. I was born at Coonabarabran, in western New South Wales, on Melbourne Cup day 1947. A horse called Hiraji won the cup, firmly backed by my father, who insisted that a kid and a winner in the cup on the same day were good omens. I have no idea what Hiraji means but when I moved to the North Coast 10 years ago to write, my father decided my luck had run out and Hiraji would be a good name for a middle-aged hippie. My luck held, although I went through the mandatory divorce that seems to go hand in hand with moving to the North Coast. I did, however, complete five books in 10 years and I would like to express my thanks to Patrick Gallagher of Allen and Unwin for publishing a book called the *Book of Letters* and for firmly rejecting two novels that were awful, frankly. As one reviewer said of the two novels, "This writer uses wooden characters, his dialogue is didactic and his plot unbelievable."

My interest in politics began when I was 19. At the time I was working on the docks at Darling Harbour after two years in a seminary. I was approached by John Marsden, the brash son of the local publican, to start a branch of the Young Liberals in Campbelltown. John Marsden also suggested I could do better than a career on the docks and directed me into the law. He is present today in the public gallery, no doubt hanging by his psychological fingernails. I acknowledge that John Marsden gave me a very important break in my life. I began work at Marsden's law firm in 1969. We were soon joined by John Fahey, who would later become the parliamentary leader of the Liberal Party and the Premier of New South Wales.

As a Young Liberal I made the acquaintance of many people who were to become leading lights in the Liberal Party, including the former Attorney General, the Hon. J. P. Hannaford; Chris Puplick, a former senator and the serving President of the Anti-Discrimination Board; and many others. I take credit, rightly or wrongly, for organising Michael Baume into the Federal seat of Macarthur. It must be said, however, that I remained a working-class kid at heart, and like the Hon. J. J. Della Bosca and others on the Labor side of politics, I was a supporter of the social policies and democratic values espoused by Gough Whitlam. After Remembrance Day in 1975 I drifted away from the Liberal Party and today, with mixed feelings about the major parties and split loyalties, I find myself comfortably at home on the crossbench.

Not only was I born on Melbourne Cup day when Hiraji won the cup but, like everybody else born in Australia before the commencement of the Citizenship Act in 1949, I was once a British subject. It is an odd thing that we remain subjects of the Queen under our Constitution and citizens of Australia under the citizenship legislation. This has important consequences for citizens who belong to ethnic communities, and it is to this that I would like it address the rest of

my inaugural speech. In the history of Australia since European settlement citizenship has always been a controversial subject because it has inevitably been linked to legal equality. Inglis Clarke's 1891 draft of the Australian Constitution provided in clause 110:

> A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.

Inglis Clarke linked citizenship and equality for the first time in 1891. At the Melbourne Constitutional Convention of 1898 Sir John Forrest from Western Australia expressed the concern of many delegates during debate when he said that the right to legal equality would cause "difficulty in regard to coloured aliens and coloured persons who have become British subjects".

According to several delegates to the 1898 convention, "coloureds" could not enjoy the same rights in the colony as Europeans. Sir Isaac Isaacs, the Attorney-General for Victoria, said that the provision for equal rights would be in conflict with colonial laws, such as those discriminating against Chinese on the goldfields. Clause 110 was deleted from the draft Constitution in February 1898 and we lost our right to equality and a true definition of Australian citizenship. Delegates then debated a proposed clause in substitution for clause 110 and the debate focused on the distinction between "citizen" and "subject". I shall quote from the convention debates of 3 March 1898. Mr Barton said:

> We are subjects in our constitutional relation to the empire, not citizens. "Citizen" is an undefined term and is not known to the Constitution. The word "subject" expresses the relation between citizens of the Empire and the Crown.

Mr Trenwith, who was one of the delegates to the 1898 convention, then said:

> It would be extremely wise to reject both amendments. The Attorney-General of Victoria, Mr Isaacs, suggested that there may be here - indeed experience has shown that there will be - as in various countries of the world, races within the nation that remain distinct; that do not blend with our people; that are by their existence and by their rapid increase, inimical to the well-being of the whole community.

It was on the basis of that kind of understanding of our relationship with ethnic communities that our Constitution was framed. The problem in 1898 was that the provision prepared by Inglis Clarke in the draft Constitution that recognised Australian citizenship and legal equality of all citizens was a direct challenge to our immigration and factory laws. Legal equality and the notion of citizenship had to be jettisoned to protect the emerging white Australia policy. Our Australian Constitution, even today, remains silent on both citizenship and legal equality. As recently as 1997 the High Court confirmed in the stolen children case that there is no implied right to legal equality in the Australian Constitution and, constitutionally speaking, we remain subjects of the Queen.

So what effects do these shortcomings in our Constitution have on the people of New South Wales in 1999? I shall offer one example. On the last sitting day in December 1993 this Parliament passed the HomeFund Restructuring Act. The legislation received royal assent on 24 December 1993. One provision of the HomeFund Restructuring Act extinguished the rights of some of the State's poorest citizens to recover the money they had lost in HomeFund. This was a travesty of enormous proportions, given that more than half the people whose rights were extinguished were recent migrants and former public housing tenants, people who believed they enjoyed certain basic entitlements as citizens.

In September 1994, on the day that former Premier Nick Greiner received his Order of Australia award for economic management, I was privileged to file class action proceedings in the Federal Court on behalf of 750 HomeFund borrowers. Some of the people involved in that case are in the public gallery today and I would like to acknowledge their contribution to the Reform the Legal System Party. Although the case is now being conducted by the Public Interest Advocacy Centre, the Government, in my view, is on a hiding to nothing and ought to settle. Earlier this week the Auditor-General, Tony Harris, confirmed that HomeFund has already cost the State $500 million and with about 8,000 outstanding complaints to the HomeFund Commissioner the final bill for the failed mortgage scheme could be astronomical.

No doubt the Government would like to override the HomeFund court case with legislation, as it did last week in the Walsh Bay case. Of course, that is precisely why HomeFund borrowers are suing under Federal law. I must confess to some misgivings when I voted on the Walsh Bay legislation last week. From the point of view of the ordinary person and his or her access to justice, it is my view that our courts are a shambles, and I will generally support the idea of Parliament asserting its authority over the courts. The facts of Walsh Bay, however, are that the developer failed to make out a case as to why it should not be compelled to stick to its original tender. For that reason I opposed the legislation.

I contend that the Executive Government uses the courts to bury bad policy decisions. Outstanding claims in the courts against the Government now exceed, on one authority, $2 billion. HomeFund is but one example. In the lead-up to the budget I do not see any appropriation bills for unpaid debts to citizens. A cynic would be forgiven for observing that judges too are part of the Government. There was a time when judges could be relied on to protect citizens from the Government, but the cost and complexity of justice mean that citizens are placed at the mercy of governments.

Increasingly we find the role of courts being replaced by tribunals and boards of review. This is because the courts are making themselves more and more irrelevant to ordinary citizens. Recently I undertook a survey of 454 judges across Australia on the subject of a bill of rights. One question I asked the judges was whether a bill of rights would improve the delivery of justice in their courts. Of the 112 judges who answered the question, 80 said that a bill of rights would not assist law consumers. In other words, 70 per cent of judges do not support the idea that a bill of rights will allow citizens greater access to the courts.

Again we see the nexus between citizenship and equality rights. At present it is clear that some citizens are more equal than others. Corporate citizens are more equal than mere mortals. If we deny people their right of access to the courts, justice is denied. In the HomeFund case borrowers stood aside for the Super League case and numerous other interests to the point where even the High Court was compelled to comment on the unfair treatment of borrowers. As the judicial arm of government, judges bear a heavy responsibility to stand up for the rights of citizens. This is a fundamental aspect of our system of government.

Throughout the seventeenth and eighteenth centuries it fell to the judges to protect the rights of subjects, particularly in cases in which it was to the political advantage of the monarchs and their Ministers to allow those rights to be eroded. Today we have the odd situation, on one view, that it is Parliament that protects people from the courts.

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The deficiencies of the court system were recognised by the HomeFund Commissioner, Andrew Rogers, who recommended that the HomeFund Restructuring Act was the way to solve the problem for borrowers and was a way of overriding the breaches of State law perpetrated by the Government and its agents. What the commissioner failed to disclose was his potential conflict of interest as a consultant to law firm Clayton Utz, which stood to gain some $3 million in legal fees from the restructuring proposal as solicitors for the Department of Housing. Countless further millions in legal fees flowed to other members of the legal profession, aided and abetted by the Law Society of New South Wales, which provided guerrilla training at the College of Law in the fight against HomeFund borrowers.

Law consumers in New South Wales get very poor value from the Law Society, particularly when we remember that the Law Society is funded by the interest on solicitors' trust accounts, money that rightfully belongs to the clients. If someone has a problem with a solicitor in New South Wales and presents the file to the Law Society for an assessment of the problem, chances are that the Law Society will then use the information to defend the claim against the solicitor. And because of the way the Law Society is funded, in effect that person will be paying for the defence of his or her own claim.

If one invests money in a solicitor's mortgage scheme, the most one can expect to recover if the scheme goes bust is 50¢ in the dollar, based on recent settlements. The Law Society is not good value by any standard. What we need in New South Wales is an independent justice ombudsman, perhaps somebody like the Auditor-General, who can make judges and lawyers accountable.

Perhaps the first task for a justice ombudsman is to put all the law on computer. It requires only simple software. One need only scan in all the Acts and cases, key in a few entries and read a printout of the decision. Mallesons and other law firms are already using computers in this way. If either party wants to argue with the computer's decision, they can do so at their own expense, but not at the expense of the other party or the State. By capping legal costs in this way after a decision by the computer, most of the court cases would disappear overnight. Already the power to cap legal costs exists under State law, such as section 47 of the Legal Aid Commission Act, and under the rules of the Federal Court. HomeFund borrowers have used both provisions at various stages in their proceedings and I am suggesting that the law on computer and a justice ombudsman would enable these provisions to be extended to all citizens of New South Wales.

By now, of course, the main players in HomeFund have left the political scene: Nick Greiner, John Fahey, Robert Webster, Wendy Machin and others. Such is the reality of Executive Government. Perhaps only Joe Schipp is still trying to work out what went wrong. It was called looking after the big end of town. Not one investor in the HomeFund scheme - banks, insurance companies and superannuation funds - lost one cent. My old mate John Fahey thought he had the answer when he announced that the reason HomeFund borrowers could not afford their mortgage repayments was that they spent too much money on gambling and drinking.

Less than six months later, in March 1995, Premier Fahey faced the New South Wales electors. He lost the election by a few hundred votes in a couple of marginal electorates which were notable for their high concentration of HomeFund borrowers. Here we are in 1999, and it could be said that the Liberal Party has still not recovered from the 1995 election defeat. It is a huge mistake, in a culturally diverse country like Australia, not to listen to our minorities. After Israel, we are the most culturally diverse country in the world. Minorities are the backbone of this country, and we are all part of a minority in one way or another.

The ethnic community is saying it wants to retain "ethnic affairs", or some similar name, to maintain the spirit of multiculturalism and our diverse community and society. I agree with that sentiment. The word "ethnic" recognises and promotes our proud and evolving traditions, while notions of equality, citizenship and community relations are expressions empty of meaning until we give them a solid reality in our Constitution and our legal system.

While canvassing the value to the community of recognising minorities, I point out that this House is the most democratic parliamentary Chamber in Australia, allowing people like me who represent minorities to gain a seat with a comparatively small quota. It is no bad thing, despite the hype in today's press, and the reform agenda of the Treasurer, Minister for State Development, and Vice-President of the Executive Council.

As a taxi driver pointed out to me last night, if the Government was serious about stopping behind-the-scenes preference deals it would simply abolish above-the-line voting. Alternatively, the Government might give serious consideration to a Greens proposal that would allow voters to choose their own preferences above the line.

I agree that the tablecloth ballot paper and the proliferation of front parties with misleading names

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made a mockery of the electoral process. But the election of delegates to the Constitutional Convention last year proved that a large number of candidates, properly managed, preserves our democratic principles.

We need to guard against the inherent dangers of a bipolar political system that leaves the middle ground well covered but leaves people at the margins unrepresented. I conclude by offering a possible solution to all our legal woes about citizenship and legal equality. I refer of course to the idea of a bill of human rights and responsibilities, otherwise known as a citizens charter. I am not talking about constitutional change, but simply an ordinary Act of the New South Wales Parliament that recognises that people in this State have certain basic rights and responsibilities as citizens, equal with one another before the law.

Here is an opportunity for New South Wales to lead from the front, as it has done so often in the past. If the people of New South Wales were to have a benchmark for their rights and responsibilities in relation to the Government, then notions of citizenship and community relations would take on a whole new meaning.

After all, since the United Kingdom passed the Human Rights Act in November last year, Australia is now the only common law country in the world that does not give formal recognition in an Act of Parliament to the basic rights and responsibilities of its people. I commend to the House the amendment of the Hon. Dr P. Wong.