Sir Samuel Griffith : behind the scenes operator

Emeritus Professor **Geoffrey Bolton**'s biography of Edmund Barton is to be published in October 2000.

It is well known that in 1893 Sir Samuel Griffith, Premier of Queensland, appointed himself to the position of Chief Justice at a substantially increased salary.

Five years later on the death of Sir Arthur Palmer, he was made Lieutenant-Governor as well. This marked a departure from precedent, as previously the position of Lieutenant-Governor had gone to the President of the Legislative Council. Following that practice, the job should have passed to the outgoing Premier, Sir Hugh Nelson, who with marginally greater restraint than Griffith had just appointed himself president of the Legislative Council. Perhaps there was Colonial Office influence at work here, since Downing Street was opposed to giving vice-regal appointments to individuals who came straight from local politics, and Griffith may have been seen as insulated from partisanship by his period on the Supreme Court Bench.

In the event, Griffith's appointment was not without unforeseen consequences for the Federation movement and for the early years of the Australian Commonwealth. It turned out that Griffith held extreme, if not anachronistic views about the powers of the holder of vice-regal office, at least in terms of capacity to communicate directly to the Colonial Office without consulting the elected government of the day. Subsequently, after his appointment as a Privy Councillor in 1901, Griffith behaved as if this honour further reinforced his privilege of communication privately and directly with the British authorities. Using this line of access he continued at intervals for the rest of his life to favour Governors-General and the Home government with advice, often unsolicited and at times in direct contradiction to the federal government of the day.

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It may be said on Griffith's behalf that as the main author and steersman of the 1891 draft Constitution he would naturally feel a parental concern in its future development. Prevented by his judicial position from intervention in the political process, he must have found it provoking during the 1897-98 Convention and beyond, as the Constitution which he had come to regard with proprietorial pride was modified under the stewardship of Barton, O'Connor and Downer: good enough lawyers in their way, but not up to his own quality. Lacking a sense of proportion about his own importance, Griffith probably never reflected that his impotence was entirely self-inflicted. He might have foregone the financial security of judicial office in order to remain an active participant in the fight for Federation: Barton, whose financial circumstances were considerably worse, made that choice and was respected for it. It was not enough for Griffith that during the 1897-98 Convention he was often consulted informally and his status as an architect of the Constitution and a pre-eminent constitutional authority was given recognition.[1] He came to see himself as Australia's master-craftsman of constitution-making, entitled to intervene if it was necessary to improve and correct the work of less skilful practitioners. It probably surprised him when others found such conduct meddlesome.

Griffith's sense of frustration at his marginalisation in the process of constitution-making was doubtless fed by Queensland's failure to appoint a delegation to the 1897-98 Convention.[2] There would presumably have been nothing to prevent the Chief Justice from serving as a member of such a delegation, especially if that delegation had been

1 For example Barton to Griffith, 4 April 1897, MSQ 189 ff 287-294, Mitchell Library Sydney; R. B. Joyce, *Samuel Walker Griffith*, University of Queensland Press, St Lucia, 1984, pp. 204-6.

2 G. C. Bolton and D. B. Waterson, 'Queensland' in *The Centenary Companion to Australian Federation*, ed H. Irving, Cambridge University Press, Cambridge, 1999, pp. 93-127.

nominated by Parliament as Sir Hugh Nelson wished, instead of submitting to the hurly-burly of popular election, but I have seen no evidence to suggest whether Griffith cherished the ambition of participating. Certainly his presence would have made a difference to the balance of forces in the Convention, especially in the absence of Inglis Clark. As it was, as John Williams has reminded us, his comments on the work of the judiciary committee chaired by Josiah Symon were sharpened by disappointment at Queensland's continued failure to come in.[3]

'Abortion' without Queensland

Without Queensland, Griffith lamented to Richard Chaffey Baker, Federation must be 'abortion'[4], but although this diagnosis has recently gained the support of Geoffrey Blainey the Canadian precedent suggested that, if the heartland of Australia agreed on Federation, Queensland and Western Australia would have straggled in soon afterwards, just like British Columbia and Prince Edward Island in Canada. When belatedly pro-Federation activity stirred in Queensland, Griffith played a useful and honourable part. He wrote pamphlets in support of the cause and lent his authority as a figurehead to the Queensland Federation League, and in the 1899 Referendum campaign he played host to visiting speakers from New South Wales and Victoria. No Chief Justice could have done more. But once Queensland voted 'Yes' to entering the federal fold Griffith addressed himself to 'improving' the Federal Constitution endorsed by the voters of five colonies and due for submission to the British Parliament early in 1900.

His main concern was Section 74 of the Constitution. In the 1891 draft this provided that the High Court might become the final tribunal of appeal for all cases not involving constitutional questions. These might be referred to the Judicial Committee of the Privy Council. The 1898 version of the Constitution went in a completely opposite direction, restoring the right of appeal late in the Melbourne session on a motion by Sir Joseph Abbott of New South Wales. This followed sustained lobbying by chambers of commerce and companies concerned to protect the British investor against the unpredictable verdicts of colonial judges, and was passed by the narrow margin of 20-19. The majority, surprisingly, included Deakin and O'Connor but not Barton, whose personal experiences fed his scepticism about the Privy Council's wisdom. Symon then moved that the Privy Council should not have jurisdiction over constitutional cases and Barton supported him: 'if Australia is to be the maker of its Constitution' he said, 'it is fairly competent to be the interpreter of its own Constitution'. The Convention agreed by a margin of 21 votes to 17.[5]

When early in 1900 the Australian delegation went to London to monitor the passage of the Commonwealth Bill through the British parliament they expected Section 74 to be a major sticking-point with Joseph Chamberlain and the Colonial Office, but they probably did not anticipate the extent of

Chief Justice Samuel Griffith. (John Oxley Library, Brisbane).

3 J. Williams, 'A Toast to Absent Friends', *The New Federalist,* no. 1, pp. 27-28.

4 Griffith to R. C. Baker, 7 August 1897, Baker MSS, Mortlock Library PRG38, Adelaide.

5 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897, Government Printer, pp. 2295 et seq.

the white-anting which would come from Australian sources. Many Australian businessmen, and more surprisingly the Brisbane *Worker* believed that British justice was more to be trusted than the Australian version.[6] They were reinforced by the bulk of the legal profession, partly from self-interest but also from cultural cringe. Powerful leadership was found in the Chief Justices, especially Griffith in Queensland and Sir Samuel Way of South Australia. Griffith used his channel of communication as Lieutenant-Governor to advise Chamberlain that the Commonwealth Bill was far from perfect and that Australian public opinion would welcome British improvements of it. This was completely contrary to the line taken by Barton, Deakin and Kingston, who argued that a Bill endorsed by referenda in five Australian colonies should not be tampered with because it bore the stamp of public approval. Griffith, a stranger to self-doubt, never questioned the propriety of his intervention, and in old age boasted of it to Sir Ronald Munro-Ferguson.[7] Chamberlain's tough line with the delegation over Section 74 was doubtless strengthened by his advice from Griffith and Way, and the colonial Governors were also encouraged to intervene. Most informed the Colonial Office of the strength of 'respectable' opposition in Australia to Section 74. That ass Lord Lamington, the Governor of Queensland, criticised what he termed the obstinacy of the Australian delegation in public at a church gathering in May 1900. Like Griffith, who probably encouraged him, he remained unrepentant in his later years. In 1923 when Walter Murdoch's biography of Alfred Deakin was reviewed by the *Times Literary Supplement* Lamington wrote to that journal with the aim of putting Murdoch right over his Deakinite interpretation of the section 74 controversy. Nemesis overtook him, however, as this provoked a tremendous rejoinder from Sir Josiah Symon a few weeks later.[8]

Influence in London

Griffith influenced more substantial figures than Lamington. When Robert Philp broke ranks with the other Premiers and expressed readiness to jettison Clause 74 altogether, and when Dickson refused to go on with his fellow delegates in London in resisting amendment to the Bill, they were fortified by faith in Griffith's authority. Perhaps his influence reached further. Barton in London was dismayed to receive from that eminent constitutionalist James Bryce an astonishing communication in which Bryce complained that the Bill in its final form 'emanated from a small coterie of Prime Ministers', that there was 'no evidence to show that this Bill or draft Constitution had been really satisfactorily discussed and considered in the colonies themselves' and that 'it was a very scanty, fragmentary, and imperfect sketch of a Federal Constitution'.[9] Of course Bryce may have been capable of thinking of such ignorant criticisms by himself, but it required no conspiracy theory to speculate that he may have been guided by an Australian source whose opinions he respected, and if so Griffith would be a prime suspect.

Eventually Chamberlain made a concession. Constitutional cases involving the Commonwealth and States, or relations between two or more States, should be decided by the High Court unless the relevant governments agreed to let the case go to the Privy Council. It did not suit Chamberlain to remain at odds with the potential leaders of a Federated Australia, and by conceding a degree of Australian constitutional authority Britain retained what really concerned him, the right of the Privy Council to intervene in commercial cases. The Australian delegation were happy with this compromise, but Queensland remained critical. The Philp Government expressed alarm that the new arrangement might take away the right of appeal from State Supreme courts to the Privy Council. Griffith thought that Barton had made a mess of it. By allowing governments to decide whether appeals might go to the Privy Council, Clause 74 brought the executive into matters which were properly judicial.[10] By 16 June the issue was sorted out by agreement that the High Court itself and not the governments should decide whether a Constitutional case should be referred to the Privy Council. Griffith plumed himself on having suggested this formula. In fact its origins lay in an *Argus* editorial which had been taken up by Sir George Turner and communicated to Barton through O'Connor and Wise.[11] Griffith was apparently asked to cable the new wording to Chamberlain as a suggestion from himself. This was of course a way of ensuring that the hitherto critical Griffith was associated with the accepted compromise. He now had a stake in the section 74 formula. Nevertheless his criticisms of Barton were carping. 'I think the behaviour of Barton and Kingston has been monstrous', he told Inglis Clark, and a few weeks later returned to the theme: 'I think that Barton in London was trying to retrieve the blunder he made in Melbourne, and in doing so made still worse blunders.'[12]

In November 1900 Barton, hopeful that he might be the first Prime Minister, discussed with Deakin the makeup of a potential Cabinet in which all States might be represented. Griffith was the outstanding figure in Queensland, and Deakin wrote to him twice. Although reluctant to abandon the security of the Bench for a return to politics, Griffith showed some interest in becoming Attorney-General with a promise of going to the High Court when it was constituted. But Barton told Deakin that he refused 'to begin with bargains about great offices'. In any case he preferred

6 *Worker* (Brisbane), 19 August 1899.

7 Griffith to Munro-Ferguson, 24 June 1914, Novar MSS, NLA 696/3750.

8 *Times Literary Supplement*, 28 June 1923, p. 440.

9 Bryce to Barton, 4 May 1900.

10 Joyce, *Samuel Walker Griffith*, p. 213.

11 *Argus*, 4 June 1900; J. Quick and R. R. Garran, *The Annotated Constitution of the Commonwealth of Australia*, Angus & Robertson, Sydney and Melbourne, 1901, p. 247.

12 Griffith to A. I. Clark, 9 August 1900, Inglis Clark MSS, University of Tasmania.

Deakin or O'Connor. Although less unforgiving than Kingston about Griffith's conduct over Section 74, Barton had been affected by the experience, and he may also have doubted the viability of a cabinet including both Griffith and Kingston. In December when Lord Hopetoun commissioned Lyne to form the first ministry, Lyne at a late stage in his negotiations offered the Attorney-Generalship to Griffith, with a promise of becoming first Federal Chief Justice, but Griffith wanted to haggle about terms and Lyne was in a hurry and at length threw up his commission.[13] Griffith would be consoled only by appointment to the Privy Council, It is hardly wonderful that during the celebrations inaugurating the new Commonwealth Griffith was in a bad temper. Barton, he confided to his normally reticent diary, was a 'fathead' and Dickson, Queensland's Cabinet Minister, a 'prating cockatoo'. His mood cannot have been improved by the Federation banquet on the night of 1 January. He was meant to be the main after-dinner speaker, but found it hard to make himself heard against the hubbub of conversation among the diners, and Barton had to scold the guests to be quiet.[14]

'A state bordering madness'

Amongst the earliest tasks confronting the new Commonwealth Government was the administration of British New Guinea (later Papua). Having reluctantly annexed the south-eastern quarter of New Guinea in 1884 and established an administration in 1888, the Colonial Office was only too happy to hand over the territory and its costs to the Australian Commonwealth. Hitherto its administration had been delegated to the Queensland Government with the Governor as formal link with London. Griffith, still taking an exalted view of his authority as Lieutenant-Governor, claimed authority to communicate directly with the Governor-General over the details of the transfer, by-passing the Minister for External Affairs, Barton. During the later months of 1901 he bombarded the Governor-General, Lord Hopetoun, with communications about New Guinea. Where Hopetoun and Barton understood that the Australian Government was taking over from Britain as the colonial power in charge of Papua, Griffith believed that it was simply replacing the Governor of Queensland as agent of the British Government. He was, reported Hopetoun, 'in a state bordering on madness over it', wanted the Governor-General to advise Joseph Chamberlain that the Barton Government was unfit to perform its duties, and questioned the need for the Commonwealth Government to pass legislation sanctioning the takeover.[15] This blinkered view of Australian autonomy was quietly overruled. The necessary legislation was introduced into the House of Representatives in November 1901 and went through Parliament without difficulty. The hand-over followed in March 1902, but Griffith continued to fuss about a variety of details ranging from areas in which he was indubitably competent to express an opinion, such as the appointment of a new Chief Justice for Papua, to gossip about the private life of the anthropologist Dr. W.E. Roth, who was under consideration for an appointment in the Territory.[16] He was under strain at the time because of the lingering death of his elder son, but his behaviour showed that he was still chafing against his exclusion from the process of Australian nation building.

Thus it showed considerable magnanimity in Barton when the High Court was constituted in September 1903 to insist that Griffith should be Chief Justice. Kingston and others objected strenuously. As Chief Justice Griffith did not abandon his activities as grey eminence and amateur Polonius, for although no longer Lieutenant-Governor he saw his Privy Councillorship as entitling him to advise the powerful. The most startling example of this occurred at the outbreak of war in August 1914, when 'on my responsibility as privy councillor' as he put it, and without informing the Cook Government, he urged the new Governor-General Munro-Ferguson to approach the British Government with an extraordinary suggestion. The double dissolution general election was due in early September. Griffith wanted the British parliament to legislate that in the event of war the Governor-General of a Dominion could cancel impending elections and recall the old Parliament.[17] This showed an outmoded view of Australian autonomy to say the least, and the Colonial Office politely dismissed the suggestion as impractical.

It should not be thought that Griffith was consistently deferential to British authority even to the judicial committee of the Privy Council. In its early years the High Court, as is well known, drew on American precedent to establish the doctrine of the implied immunity of instrumentalities as a device to prevent the Commonwealth and the States from encroaching on each others areas of authority. In 1906 the Victorian Supreme court took advantage of a loophole in Section 74 to appeal direct to the Privy Council in the case of *Webb v Outtrim*, regarding the liability of Commonwealth officials to pay State income tax. The Privy Council rejected the doctrine of implied immunity on the grounds that it could not apply in a British Empire community, adding gratuitously that the royal authority could be invoked to resolve conflicts of legislation. Griffith and Barton were furious. 'Old man Halsbury's judgement deserves no better description that that it is fatuous and beneath consideration' wrote Barton. 'But the old pig wants to hurt the new Federation and does not much care how he does it.'[18] Griffith was more measured but equally dismissive. In its subsequent judgements the High Court largely ignored the Privy Council's findings. And in 1915, when the British government floated a suggestion that Dominion judges should be seconded to the judicial committee of the Privy Council, Griffith summarily rejected the proposal because he believed that the visiting judges would not have parity of salary or status. In his defence of the Australian perspective vis-a vis the Privy Council Griffith had turned full circle. The poacher had turned gamekeeper, but of course the High Court was now his preserve which he was protecting.

13 J. Hume Cook, 'Recollections and Reflections: The Story of My Life' 1935, unpublished MS, Hume Cook, NLA 601/9/1.

14 *Sydney Morning Herald*, 2 January 1901.

15 Hopetoun to Barton, 8 October 1901, Barton MSS, NLA 51/1/832-35.

16 Hopetoun to Barton, 3 December 1901, Barton MSS, NLA 51/1/869-71; same date 51/1/872; 30 January 1902 51/1/906

17 Griffith to Munro-Ferguson, 8 August 1914, Novar MSS, NLA, 696/3770.

18 Barton to Bavin, 26 January 1908, Bavin MSS MLA 560/1/47.