Australian Journal of Public Administration
Vol. 53 No. 1, March 1994

PUBLIC MANAGEMENT FORUM

THE GOVERNOR AND THE CONSTITUTION: A PRACTICAL PERSPECTIVE

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The Crown in Australia

The Crown in Australia has undergone significant changes during the past 200 years. As both a constitutional entity and a social institution, it now differs markedly from the Crown before federation, and from the Crown in the United Kingdom, Canada, New Zealand, and the dozen or so other countries in which the Queen reigns. In this respect, it is comparable with other inherited institutions such as the houses of parliament, the cabinet, the courts and the common law, which have all taken on distinctly Australian characteristics.

The Governor-General of the Commonwealth and Governors of the States now exercise virtually all of the Queen's powers and functions in Australia, and do so exclusively on the advice of their respective Australian governments. The office of governor, with which I am particularly concerned, is our oldest link with the sovereign and with our constitutional origins. It is today in all respects a state office. The "governor's progress" from imperial administrator and British envoy to modern head of state has taken place in a peaceful and orderly way under existing constitutional procedures. It is a good example of the Crown's capacity to adjust to changing cultural and political expectations.

The role of a modern governor is best understood against the background of the nation's broader constitutional framework. In essence, this combines the Westminster system of responsible government with a federal system inspired chiefly by North American models. The Crown has a role to play in both these components. For example, the royal prerogatives and other powers vested in the Crown are sources of the prime minister's and premiers' executive authority, and statutes derive their legal force from the actions of the Crown in parliament. It is also an element in our federal arrangements, under which particular powers are given to the commonwealth and residuary powers remain with the states. Thus, the Crown in right of the states is different from the Crown in right of the commonwealth. This is an important distinction from the states' perspective, since it reinforces their sovereignty within the federation.

The constitutional conventions

A key feature of our system of constitutional monarchy is its use of unwritten customs and practices, known generally as the conventions of the constitution. Because these conventions are not laws, they are not recognised or enforced by the courts. However, long usage has given them the status of written constitutional provisions. They might best be described as constitutional or political ethics. Collectively, they provide a mechanism for regulating the highest levels of government in a flexible way, while safeguarding the basic principles of representative democracy. Developed largely through trial and error over many centuries, they continue to evolve in response to changing social and political expectations. Reduced to writing as formal provisions, they could only be amended by equally formal processes and would then be subject to judicial interpretation.

The constitutions of the Australian states, which are preserved by our federal constitution[1] but operate independently of it, followed the

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British practice of leaving many important aspects unstated. The written text provided only half the story. Notions of responsible government, the office and role of the premier, the functions of cabinet, relations between the governor and ministers, the manner in which governments are chosen or replaced and the summoning and dissolution of parliament are all the subjects of constitutional conventions. The architects of our 1901 federal constitution followed this example. They also took for granted the fact that the unwritten conventions would continue to apply, and drafted their text accordingly. Thus, the written commonwealth constitution also tells only half the story. The unwritten conventions tell the rest.

The Crown is central to many of these conventions because they have evolved out of powers once exercised personally by the monarch. They involve institutions and offices associated historically with (and sometimes deriving their authority from) the Crown. Remove the Crown from such a scheme and it becomes necessary to provide substitutes for the conventions and to establish other sources of authority through written constitutional provisions. Of course, this process would have to be adopted for each of the states as well as the commonwealth. Written formulations, which would undoubtedly differ from state to state and between the states and the commonwealth, would then be open to the interpretations of the courts, with all the delays and uncertainties that might entail. A degree of subjectivity would remain, despite the most detailed drafting, because no written formulation could anticipate every circumstance that might arise. As every public servant knows, some personal discretion is always needed in the application of written rules. It is pertinent to ask, therefore: if monarchical conventions were swept away with the advent of a republic, against what standards would a president's actions be judged? Under what constraints would discretion be exercised?

Reducing constitutional conventions to writing is no guarantee of certainty. A Nigerian case[2] of the 1960s illustrates this very well. In that case, the written constitution of Western Nigeria empowered the governor to remove a premier from office if it appeared to the governor that the premier no longer commanded the support of a majority of members of the House of Assembly. In the wake of a political dispute, a majority of members signed a letter to the governor saying that they no longer had confidence in the premier. And so the premier was dismissed. He challenged the decision, and because the dispute involved an interpretation of the written constitution, it went to the courts — to the Federal Supreme Court and then to the Privy Council. This process took one year. The aggrieved premier argued that he should not have been dismissed in the absence of some test of confidence on the floor of the house, as had always been required by convention. The Supreme Court agreed with him. However, the Privy Council reversed the decision, taking the view that the written constitution stood in its own right as a precise formulation of powers and duties; that it could not be overridden by extraneous principles or conventions that were not part of its written formulae; and that, consequently, there was no requirement for a test of confidence on the floor of parliament as a precondition for dismissal. In other words, the written language as interpreted by the courts (and on which the courts had disagreed) was the sole measure of what could or could not be done. Convention had been supplanted by an expression of positive law. One can only speculate whether the outcome was really what the legislators had had in mind when they had attempted to spell out the governor's role in detail.

The American experience offers an alternative model to the codification of conventions, but that would involve the introduction of elaborate checks on the executive government, including the creation of an independent legislature. It seems unlikely that such a course would be seriously entertained in twentieth century Australia.

The evolving role of the governor

It is still suggested in certain quarters that state governors are neo-colonial satraps under some vestigial obligation to the United Kingdom government. Critics who perpetuate that idea are tilting at windmills. South Australia has had Australian-born governors for a quarter of a century. Dame Roma Mitchell is the sixth. The story is similar in the other states. The Australia

Act of 1986, passed in identical terms by the United Kingdom and commonwealth parliaments at the request of all of the state parliaments, gave legal effect to what had long been a practical reality of non-involvement by the British government in the affairs of the states. Even the residual theoretical links have now been severed. In the commonwealth sphere, the Statute of Westminster achieved the same result half a century ago.

The Australia Act specified that no statute of the parliament of the United Kingdom passed after its commencement would form part of the law of Australia, that no statute passed by a state parliament would be void on the ground that it was repugnant to the law of England, that no statute of a state parliament required reservation for Her Majesty's consent. It ensured that governors are now appointed by the Queen of Australia on the direct recommendation of the premier of the state. It also furnished governors with wider powers than they had had before, because prior to 1986 only specific powers were conferred on governors, whereas section 7 of the Australia Act provided that, with two exceptions, "all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State". The two exceptions relate to the right to appoint a governor and the right of the Queen to exercise her powers personally when physically present in the state. It should also be noted that the Australia Act may be amended only at the request or with the concurrence of the parliaments of *all* of the states. This is a major impediment to attempts to change the powers of the Queen and the governors in the states.

If one takes account of the fact that only the premier may offer formal advice on state matters to the Queen or the governor, and that governors are now invariably Australians, it is clear that the office is now genuinely a state one. Nothing further is required to ensure this. Obviously, the same can be said of the governor-general in relation to the commonwealth.

State governors are in no way subordinate to the governor-general. Governors and governor-general represent the Queen equally in their different jurisdictions according to the distribution of powers between the state and the commonwealth. Were it otherwise, the states would be subordinate to the commonwealth. As a matter of courtesy, the governor-general is accorded precedence on occasions when both he and state governors are present, and governors take precedence amongst themselves according to the dates of their appointment. However, these are matters of protocol and do not imply a constitutional relationship.

It can now be said that, while the Queen is Australia's sovereign and sovereignty is vested in the Australian Crown, the governor-general is *de facto* head of state in respect of those matters for which the commonwealth is responsible, and the governor is *de facto* head of state in respect of those matters for which the state is responsible. The fact that the sovereign is, in a sense, outside the system, being neither entirely of the commonwealth nor entirely of the states, maintains the constitutional balance in a most ingenious way. It is unlikely that the same could be said of a president acting on the advice of commonwealth ministers (*á la* the governor-general) while purporting to be head of state for the states as well.

The reserve powers of the governor

The assumption that a governor will act formally only on the advice of the government, and in particular the premier, is not spelled out in any general way in constitutional documents. There are requirements for action to be on the advice of the executive council or the premier in particular circumstances. However, the absence of a blanket requirement to act on advice reflects the reality that, on occasions, there may be no one who can properly give such advice. And that is why the governor retains reserve powers: to ensure the continuation of lawful and responsible government, even at a time of political confusion and hiatus.

How and when would the governor or the governor-general exercise these reserve powers? One of the most important constitutional conventions is that requiring the cabinet to command a majority in the lower house of parliament and to be able to obtain supply, that is, the funds to carry out the business of government. As a last resort the governor has the power to ensure this by dismissing a premier who does not have the support of the House of Assembly if some other member does have that

support, or by dismissing a premier who cannot obtain supply, at least if some other member can. The governor is also empowered to dismiss a government engaged in conduct which is clearly and manifestly illegal, if a premier declines to desist or to introduce legislation validating the practice. To vest such powers in a premier or prime minister would make nonsense of any checks against abuse or illegality. No system will ever be free of controversy, but the cumbersome supervisory procedures and drawn-out court cases which apply in some countries would hardly be an improvement on our present flexible arrangements.

The governor may appoint a premier when the office of premier is vacant. Obviously, after an election, the leader of a party with an absolute majority in the lower house would be invited to form a government. But there might well be no single party with a clear majority, only loose or emerging coalitions, and then the governor's task in identifying a premier would be far from straightforward. Likewise, there have been examples in Australian history of prime ministers dying in office, requiring governors-general to appoint at least interim successors before party selection processes have been completed. Similar dilemmas might well face a governor.

Why not just wait until personal and factional struggles have thrown up an undisputed political leader? The answer is that the routine business of government must go on and the governor requires ministerial advice on all manner of things, even in the midst of leadership crises and during the forging of new political alliances. Much of the business of government — appointments, proclamations, grants, regulations, even the dissolution of parliament and the holding of elections — cannot legally be undertaken without the governor's approval. And yet, except when exercising the very limited reserve powers, the governor cannot give this approval without advice. It is crucial therefore, that ministers be in office to tender such advice. If ministers have been appointed in this way in emergency circumstances or after the exercise of other reserve powers, convention also requires that the parliament or the electorate be given the responsibility of deciding at the earliest opportunity whether they should remain in office or be replaced. The reserve powers are not a substitute for authority obtained through the ballot-box because the government, not the governor, determines policy. However, they ensure, in extreme circumstances, the electorate's right to have the last word.

The success or otherwise with which such critical issues are resolved in practice depends, of course, on the perspicacity and skill of the governor or governor-general of the day. That is why due consideration should be given to the quality of appointments. At least, at present, there is a body of experience and precedent to assist the process.

Perhaps I can best sum up these observations by posing three questions in the context of the present debate about establishing a republic. The first is: would the removal of the Crown from our constitutional fabric tend to favour the commonwealth as against the states? I think there is a real likelihood that it would, not least because the sovereignty of the states within the federation derives from an independent source of authority in the Crown. The commonwealth would seem to have the most to gain from the removal of this source of authority and the states most to lose.

My second question is: what are the consequences of having to codify all of the unwritten conventions which currently form part of our constitutional heritage? Court decisions in countries where this has been attempted show that, despite the best of intentions, the clarification of responsibilities and indeed the maintenance of prior conventional rights cannot always be assured. In our federal system we might also end up with seven or eight different sets of statutory rules on the subject. An American-style separation of executive and legislative powers is unlikely to commend itself either to governments or to Australians generally.

My third question is: would the so-called minimal change of abolishing the monarchy have only minimal consequences for our constitutional arrangements? I think not, because the Crown as an entity is at least the warp if not the weft of our constitutional fabric – written and unwritten, commonwealth and state.

In these circumstances, even minimal change is necessarily profound change.

Despite the transformation in recent decades of the offices of the governor and governor-general into authentically Australian institutions, some people will still argue for radically different constitutional arrangements. Many will claim that a new, and as yet undefined, form of government is "inevitable". But I am reminded of the American journalist Lincoln Steffens who visited the Soviet Union in 1919 in the wake of the Bolshevik revolution and declared on his return: "I have seen the future; and it works!" So much for inevitability.

Being a good deal more cautious, I will not claim to have seen the future during my time at Government House, but I can report that the present is still functioning very well.

NOTES:

1. Section 106 of the Constitution of the Commonwealth.
2. *Adegbenro v. Akintola* (1963), AC 614.