FIRST REPORT OF THE CONSTITUTIONAL COMMISSION

VOLUME I

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27 April 1988

Hon Lionel Bowen, MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

At your request, and pursuant to paragraph (iv) of our Terms of Reference, we present our first report on the revision of the Australian Constitution.

Yours sincerely,

Sir Maurice Byers, CBE, QC
Chairman

Professor Enid Campbell, OBE

Hon Sir Rupert Hamer, KCMG

Hon EG Whitlam, AC, QC

Professor Leslie Zines

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LIST OF ABBREVIATIONS

The abbreviations used most often in this Report are listed below.

Publications

Australian Constitutional Convention

ACC Proc, Adelaide 1983	Proceedings of the Australian Constitutional Convention, Adelaide (1983) Government Printer, South Australia
ACC Proc, Brisbane 1985	Proceedings of the Australian Constitutional Convention, Brisbane (1985) Government Printer, Queensland
ACC Proc, Hobart 1976	Proceedings of the Australian Constitutional Convention, Hobart (1976) Government Printer, Melbourne
ACC Proc, Melbourne 1975	Proceedings of the Australian Constitutional Convention, (1975) Government Printer, Melbourne
ACC Proc, Perth 1978	Proceedings of the Australian Constitutional Convention, Perth (1978)
ACC Proc, Sydney 1973	Proceedings of the Australian Constitutional Convention, Sydney (1973) Government Printer, New South Wales

Constitutional Commission

Executive Report	Executive Government, Report of the Advisory Committee to the Constitutional Commission (1987) Constitutional Commission
Judicial Report	Australian Judicial System, Report of the Advisory Committee to the Constitutional Commission (1987) Constitutional Commission
Powers Reports	Distribution of Powers, Report of the Advisory Committee to the Constitutional Commission (1987) Constitutional Commission

Rights Report	Individual and Democratic Rights, Report of the Advisory Committee to the Constitutional Commission (1987) Constitutional Commission
Trade Report	Trade and National Economic Management, Report of the Advisory Committee to the Constitutional Commission (1987) Constitutional Commission

Other

ALR	Australian Law Reports
CLR	Commonwealth Law Reports
FLR	Federal Law Reports
Conv Deb, Melbourne 1898	Official Record of the Debates of the Australasian Federal Convention (1898) Government Printer, Melbourne
PP	Parliamentary Paper (Cth)
Quick and Garran	J Quick and RR Garran, The Annotated Constitution of the Australian Commonwealth (1901, reprinted 1976) Legal Books, Sydney
1929 Report	Report of the Royal Commission on the Constitution (1929) Commonwealth Government Printer, Canberra
1959 Report	Report from the Joint Committee on Constitutional Review, 1959 (1959) Commonwealth Government Printer, Canberra

Titles of judicial officers and committees

ACJ	Acting Chief Justice (eg Mason ACJ is Acting Chief Justice Mason)
CJ	Chief Justice (eg Gibbs CJ is Chief Justice Gibbs)
J	Justice (eg Deane J is Justice Deane)
JA	Judge of the Court of Appeal, Supreme Court of New South Wales (eg Samuels JA)
P	President of the Court of Appeal, Supreme Court of New South Wales (eg Kirby P)

Executive Committee	Advisory Committee to the Constitutional Commission on Executive Government
Judicial Committee	Advisory Committee to the Constitutional Commission on the Australian Judicial System
Powers Committee	Advisory Committee to the Constitutional Commission on the Distribution of Powers
Rights Committee	Advisory Committee to the Constitutional Commission on Individual and Democratic Rights under the Constitution
Trade Committee	Advisory Committee to the Constitutional Commission on Trade and National Economic Manaagement

SUMMARY OF RECOMMENDATIONS FROM THE FIRST REPORT OF THE CONSTITUTIONAL COMMISSION

APRIL 1988

We have been closely guided by our Terms of Reference which emphasise the need for the Constitution to:

(a) adequately reflect Australia's status as an independent nation and a Federal Parliamentary democracy;

(b) provide the most suitable framework for the economic, social and political development of Australia as a federation;

(c) recognise an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government; and

(d) ensure that democratic rights are guaranteed.

From the outset it has been our clear intention not to propose an entirely new Constitution. We have sought to ensure that any proposals for change would preserve the framework and principles contained in the Constitution. In particular, we have been conscious of the need to retain in form and spirit the federal framework of government in Australia, parliamentary government and democratic institutions.

There are, however, some significant problems, and we have sought to identify ways in which the Constitution should be improved. The recommendations made in this Report, and those which will be made in our Final Report in a few month's time, have that objective.

In this First Report we deal with these matters:

(a) our Terms of Reference, and their implications;

(b) the preamble to the Commonwealth of Australia Constitution Act 1900, the first eight clauses of that

Act ('the covering clauses'),[1] and whether a new preamble should be added at the start of the Constitution;

(c) the Parliaments, including issues such as the right to vote, one vote one value, the terms of Federal Parliament, and the relationship between the Senate and the House of Representatives;

(d) the Executive Government of the Commonwealth, including the way the Constitution gives expression to accepted principles governing the Westminster system as it applies in Australia;

(e) the need for more precise and simplified means for the creation of new States;

(f) the recognition of Local Government in the Constitution;

(g) the extension of the guarantees of the right to trial by jury, freedom of religion and the right to just compensation for the acquisition of property;

(h) we also enclose proposals in the form of proposed constitutional alterations to give other rights and freedoms the protection of constitutional entrenchment;[2]

(i) the need for a federal law-making power on defamation;

(j) the need to allow for the inter-change of legislative powers between the Federal and State Parliaments; and

---

1 Clause 9 of the Act is the Constitution itself.

2 Appendix K, Bill 13, Constitution Alteration (Rights and Freedoms) 1988.

(k) the removal of the constitutional provision which prevents the States from raising excise duties.

We list our recommendations in the same order as they appear in this Report.

CHAPTER 2. THE TERMS OF REFERENCE

We recommend as follows:

(i) It is unnecessary to alter section 51(xx.) of the Constitution so as expressly to prohibit discrimination against State statutory corporations.

(ii) The Constitution should not be altered so as to provide expressly that every legislative power of a State shall, subject to section 109, extend to the Commonwealth.

(iii) Section 117 of the Constitution should be omitted and the following provision substituted:

> 117. (1) A person who is resident, temporarily resident or domiciled in any State or Territory shall not be subject in another State or Territory to any disability or discrimination on the ground or substantially on the ground of that residence, temporary residence or domicile.
>
> (2) Sub-section (1) of this section is not infringed by a law that imposes reasonable conditions of residence as a qualification for an elector.

(iv) The enacting clause of the Commonwealth of Australia Constitution Act 1900 should be repealed.

(v) The words 'the United Kingdom' and the 'the United Kingdom of Great Britain and Ireland' should be omitted from covering clause 2 of the Commonwealth of Australia Constitution Act 1900 and the Note to the Schedule to the Constitution, respectively. The word 'Australia' should be substituted in each case.

(vi) There should be added to section 51 of the Constitution the following paragraph:

(xxxviiiA.) Succession to the Throne, and regency, in the sovereignty of Australia:

(vii) Section 58 of the Constitution should be omitted and the following provision substituted:

58. (1) Subject to sub-section (2), when a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, the Governor-General shall, on being so advised by the Federal Executive Council, assent to it in the Queen's name.

(2) The Governor-General in Council may return to the House in which it originated a proposed law so presented to him and may transmit with it any amendment that the Governor-General in Council recommends and the Houses may deal with the recommendation.

(viii) Sections 59 and 60 of the Constitution should be repealed.

CHAPTER 3. PREAMBLE AND COVERING CLAUSES

PREAMBLE

We recommend:

(i) against altering or repealing the preamble to the Commonwealth of Australia Constitution Act 1900; and

(ii) against the inclusion of a preamble to the Constitution proper.

THE COVERING CLAUSES

We recommend that the covering clauses of the Commonwealth of Australia Constitution Act 1900 be altered as follows:

(i) covering clause 5 should be altered by omitting all words appearing after the words 'laws of any State'; and

(ii) covering clauses 7 and 8 should be repealed.

CHAPTER 4. THE PARLIAMENTS

THE RIGHT TO VOTE

We recommend that the Constitution be altered to provide that:

(i) the laws made by the Federal and State Parliaments or by the legislature of a Territory prescribing qualification of electors shall provide for enfranchisement of every Australian citizen who has attained the age of eighteen years;

(ii) the Federal and State Parliaments and the legislature of a Territory may make entitlement to vote dependent on compliance with reasonable conditions as to:

- residence in Australia or in a part of Australia or in a Territory, in the case of federal elections; or

- residence in the State or Territory, or a part thereof, in the case of State and Territorial elections; or

- enrolment;

(iii) the Federal and State Parliaments or the legislature of a Territory may make a law disqualifying from voting Australian citizens who have attained the age of eighteen years who:

- are incapable of understanding the nature and significance of enrolment and voting by reason of unsoundness of mind; or

- are incapable of understanding the nature and significance of enrolment and voting by reason of unsoundness of mind; or

- are undergoing imprisonment for an offence;

(iv) in choosing a member of a House of a State Parliament or of a legislature of a Territory, each elector shall vote only once; and

(v) section 41 of the Constitution be repealed.

We also recommend that section 25 of the Constitution should be repealed.

The recommendations we have made in relation to the qualification of electors preserve the present constitutional requirement that each elector shall vote only once in elections where senators and members of the House of Representatives are chosen.

ONE VOTE ONE VALUE

We recommend that the Constitution be altered to provide that:

(i) the number of enrolled electors in the electoral divisions where members of the House of Representatives or the legislatures of a State or Territory are chosen shall not vary by more than 10% above or below the relevant quota prescribed for that division. That is, 'one vote one value';

(ii) federal, State and Territorial electoral divisions shall be determined at such times as are necessary to ensure that the number of electors in each division is consistent with the prescribed quota for that division;

(iii) a federal electoral division shall not be formed out of parts of different States. A division may be formed out of different Territories, out of parts of different Territories or out of a Territory and part of another Territory;

(iv) the number of members of the House of Representatives to be chosen in each federal electoral division shall be the same;

(v) in the absence of an applicable law for a federal or Territorial electoral division, a particular State or Territory respectively shall be one electorate. Where State electoral divisions do not comply with the prescribed quota, the State shall be one electorate and the method of choosing members of a House of a legislature shall be, as nearly as practicable, the same as the method of choosing senators for the State;

(vi) State and Territorial electoral divisions shall be consistent with their prescribed quota at the time when those divisions are determined;

(vii) a formula to ensure that the principle of one vote one value is maintained for State electoral divisions where two or more members are to be chosen shall be prescribed in the Constitution; and

(viii) the number of members of a legislature of a Territory to be chosen in each Territorial electoral division shall be the same.

We also recommend no change to the existing provision:

(ix) in section 24 that each Original State is entitled to representation by at least five members in the House of Representatives; and

(x) in section 7 that each Original State is entitled to equal representation in the Senate.

DIRECT ELECTIONS

We recommend that the Constitution be altered to provide that:

(i) each House of a Parliament of a State shall be composed of members directly chosen by the people of the State;

(ii) the legislature of a Territory shall be composed of members directly chosen by the people of the Territory; and

(iii) this requirement shall not apply to the filling of casual vacancies.

The recommendations we have made in relation to election of senators and members of the House of Representatives preserve the present constitutional requirements that senators and members of the House of Representatives shall be directly elected.

CITIZENSHIP

We recommend that section 51 of the Constitution be altered to give the Federal Parliament an express power to make laws with respect to nationality and citizenship. We recommend that this alteration be by the addition of the words 'nationality, citizenship' to section 51(xix.) so that this paragraph would read:

(xix.) Nationality, citizenship, naturalization, and aliens:

ENFORCEMENT OF DEMOCRATIC RIGHTS

We recommend that any person who claims that his or her rights have been infringed by a breach of, or a failure to comply with, sections 8, 30, 107B or 122D of the Constitution may apply to a court of competent jurisdiction for an appropriate remedy.

MEETINGS OF THE FEDERAL PARLIAMENT

We recommend that section 5 of the Constitution be omitted and the following section be substituted:

> 5. (1) The Governor-General in Council may appoint such times for holding the sessions of the Parliament as the Governor-General in Council thinks fit.
>
> (2) The Governor-General in Council may, from time to time, by Proclamation or otherwise, prorogue the Parliament.
>
> (3) The Governor-General in Council may, subject to this Constitution, in like manner dissolve the House of Representatives.
>
> (4) After a general election of the House of Representatives, the Parliament shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.

If this proposal were adopted, the alterations to the Constitution which would be effected would be as follows:

(i) The power of the Governor-General to appoint times for holding sessions of the Parliament, to prorogue Parliament and to dissolve the House of Representatives would be vested instead in the Governor-General in Council. The power to dissolve the House would, however, be subject to proposed section 28. This section would allow the Governor-General to dissolve the House within the first three years of its term, but only if the House had resolved that the Government did not have its confidence and the Governor-General was satisfied that it was not possible for a Government having the confidence of the House to be formed.

(ii) The present provision on the first meeting of the Parliament after the establishment of the Commonwealth would be omitted.

(iii) The time within which the Parliament would be required to be summoned after a general election would not be, as at present, 30 days after the day appointed for return of writs, but 75 days after polling day.

We further recommend that the following sections be added to the Constitution:

> 110A. After a general election of the more numerous House of the Parliament of a State (or, if there is only one House of the Parliament of a particular State, after a general election of that House), the Parliament of the State shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.
>
> 122B. After a general election of the legislature of a Territory, the legislature shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.

COMPOSITION OF THE FEDERAL PARLIAMENT

We recommend as follows:

(i) The nexus between the size of the House of Representatives and the Senate should be broken, subject to the inclusion in the Constitution of provisions expressly limiting the size of both Houses of Parliament.

(ii) The number of senators for each Original State should be fixed at 12.

(iii) The power of the Parliament to determine the number of members of the House of Representatives should be qualified by providing that the number of people

represented by a member of the House of Representatives shall be not fewer than 100,000, subject to the present guarantee that, 'five members at least shall be chosen in each Original State' (section 24) and to our recommendations on the representation of Territories and new States.

(iv) The entitlement of Territories and new States to representation in the House of Representatives and the Senate should be prescribed in the Constitution.

(v) The Australian Capital Territory and Jervis Bay Territory should be treated as one Territory for the purposes of representation.

(vi) A Territory should be entitled to its own representative in the House of Representatives when its population is in excess of 50,000.

(vii) The number of members of the House of Representatives chosen in each new State and in each Territory which is entitled to be represented should be in proportion to the population of the new State or Territory, provided that at least two members of the House of Representatives should be chosen in the Australian Capital Territory and at least one member in a new State and in the Northern Territory.

(viii) Residents (being persons qualified to be enrolled as electors) of a Territory that is not entitled to be represented in the Parliament should be entitled to vote at an election of senators or members of the House of Representatives for or in a Territory on the mainland of Australia, as the Parliament provides.

(ix) Each new State and Territory should be entitled to representation in the Senate on the basis that it returns one senator for every two members whom it is

entitled to return to the House of Representatives, subject to the following:

- a new State, the Australian Capital Territory and the Northern Territory should each be entitled to representation in the Senate by at least two senators

- no new State or Territory should be entitled to be represented in the Senate by more than twelve senators.

This formula would produce the following results:

(a) New States, Australian Capital Territory, Northern Territory

Number of members of House of Representatives	Number of senators
1, 2, 3, 4 or 5	2
6 or 7	3
8 or 9	4
10 or 11	5
12 or 13	6
14 or 15	7
16 or 17	8
18 or 19	9
20 or 21	10
22 or 23	11
24 or more	12

(b) Representation in the Senate of Territories other than the Australian Capital Territory and the Northern Territory would be the same as in the above table except as set out below:

Number of members	Number of senators
1	0
2 or 3	1

CASUAL VACANCIES IN THE SENATE

We recommend no change to the procedure set out in section 15 of the Constitution for filling casual vacancies in the Senate except that special provision should be made in terms similar to section 15 for Territorial senators.

We recommend that the last four paragraphs of section 15, being transitional provisions, now be repealed as expended.

TERMS OF THE FEDERAL PARLIAMENT

We recommend alterations to the Constitution to reduce the frequency of elections by increasing the maximum term of the House of Representatives to four years, with a qualified minimum term of three years. To achieve that purpose we recommend that, subject to the qualification below, there be a minimum term of three years during which neither House can force an election.

We recommend that the Constitution be altered to provide that:

(i) The maximum term of the House of Representatives shall be four years.

(ii) The House of Representatives shall not be dissolved within three years of its first meeting after a general election unless the House has passed a resolution expressing a lack of confidence in the Government and no Government can be formed from the existing House.

(iii) Senators chosen in the States shall hold their places for two terms of the House of Representatives except in the event of a double dissolution.

(iv) Senators chosen in the Territories shall hold their places for one term of the House of Representatives.

(v) The polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.

(vi) If, after the election of senators following a dissolution of the Senate but before the division of senators into two classes takes place, a senator dies, resigns or becomes disqualified, the division is to be made as if the place had not become vacant.

ELECTORAL LAWS AND WRITS FOR ELECTIONS

We recommend that sections 9, 10, 11, 12 and 31 of the Constitution be repealed and that the following sections be substituted:

> 9. (1) The Parliament may make laws, subject to this Constitution, with respect to the election of senators but so that the method of choosing senators shall be the same for all the States and for the Territories that are entitled to be represented in the Senate.
>
> (2) The polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.[3]
>
> 10. (1) The Governor-General in Council shall cause writs to be issued for the election of senators whenever the terms of service of senators are about to expire or have expired.
>
> (2) The writs shall be issued within ten days of the expiry of those terms of service.
>
> 31. The Parliament may make laws, subject to this Constitution, with respect to the election of members of the House of Representatives but so that the method of choosing members shall be the same for all the States and for the Territories that are entitled to be represented in the House of Representatives.

[3] The recommendation reflected in this sub-section is dealt with under 'Terms of the Federal Parliaments' above (recommendation (v)).

SIMULTANEOUS FEDERAL AND STATE ELECTIONS

We recommend that section 394(1) of the Commonwealth Electoral Act 1918 (Cth) should be repealed. That section provides:

> 394. (1) On the day appointed as polling day for an election of the Senate or a general election of the House of Representatives, no election or referendum or vote of the electors of a State or part of a State shall, without the authority of the Governor-General, be held or taken under a law of the State.

RELATIONSHIP BETWEEN THE SENATE AND THE HOUSE OF REPRESENTATIVES

Powers of the Houses with respect to money Bills

We recommend that the Constitution be altered by omitting sections 53 and 54 and substituting sections incorporating the following principles:

(i) A proposed law imposing taxation or appropriating revenue or moneys shall not originate in or be amended by the Senate.

(ii) The Senate may not amend any proposed law that:

- imposes taxation or deals only with the imposition, assessment or collection of taxation; or

- appropriates revenue or moneys:

  - for the ordinary annual services of the Government;

  - for the construction of public works or buildings;

  for the acquisition of land; or

- for the acquisition of plant or equipment,

or for two or more of those purposes.

(iii) The Senate shall, however, have power to amend an appropriation Bill mentioned in (ii) above so far as it appropriates revenue or moneys for a new purpose, that is a purpose:

. in respect of which revenue or moneys were not appropriated for expenditure in the previous financial year; or

. the accomplishment of which is not specifically authorised by law or is dependent upon the enactment of a proposed law.

(iv) A Bill shall not be taken to be one within any of the classes mentioned in (i) and (ii) above by reason only that it contains provisions for:

. the imposition or appropriation of fines or other pecuniary penalties; or

. the demand, payment or appropriation of fees for licences or for services under the proposed law.

(v) The Senate may not amend a proposed law so as to increase a proposed charge or burden on the people.

(vi) The Senate may request amendment of Bills it may not amend.

(vii) If a Bill which the Senate cannot amend becomes a law, a provision in it that deals with a matter which could have been the subject of amendment by the Senate is of no effect.

(viii) The first paragraph of section 55 should be omitted.

(ix) Subject to the foregoing, the Senate shall have equal power with the House of Representatives with respect to all Bills.

We further recommend that the Constitution be altered by the inclusion of sections to limit the power of the Senate to reject, or refuse to pass, Bills it cannot amend. In particular we recommend that the Constitution be altered to provide that:

(i) If at any time during the first three years of a Parliament the Senate rejects, or fails to pass, within 30 days of its transmission, a Bill it cannot amend, the Bill shall be presented for the Royal assent.

(ii) If, in the fourth year of a Parliament, the Senate rejects, or fails to pass, within 30 days of its transmission, a Bill it cannot amend, the Senate and the House of Representatives may be dissolved simultaneously by the Governor-General in Council.

(iii) If a Bill which cannot be amended by the Senate has not been rejected or passed by the Senate at the time the House of Representatives is dissolved, or the Parliament is prorogued, the above provisions shall not apply.

The recommendations are an integral part of the series of recommendations we make in relation to the terms of the Parliament, the terms of senators, termination of the appointment of a Prime Minister and the power to dissolve the Houses of the Parliament.

Recommendation of money votes

We recommend that section 56 of the Constitution be altered by omission of the word 'Governor-General' and substitution of the words 'Governor-General in Council'. This alteration would make it clear that the Crown's financial initiative is exercisable by the Governor-General only on ministerial advice.

Disagreement between the Houses

Section 57 of the Constitution should be renumbered as section 57B and altered as follows:

(i) it should apply only to proposed laws which may be amended by the Senate, that is, non-amendable money Bills should be excluded from its operation;

(ii) simultaneous dissolution of the House of Representatives and the Senate following the second 'rejection', as defined, of a proposed law by the Senate should be permitted only in the fourth year of the term of the House of Representatives;

(iii) it should be made clear that the Governor-General acts on the advice of Ministers when dissolving the two Houses and, following the third rejection of a proposed law, when convening a joint sitting;

(iv) the drafting of the section should be clarified in the following ways:

- 'rejection' of a proposed law by the Senate should be defined to include the concepts of 'failure to pass' and 'passage with amendments to which the House of Representatives will not agree';

- the only amendments to a proposed law which should be considered and voted on at a joint sitting are

those which have been made by the Senate and not agreed to by the House of Representatives;

. it should be made explicit that the period which must elapse before the second passage of a proposed law by the House of Representatives runs from its rejection by the Senate;

. the intervening period should be expressed as 'ninety days' rather than 'three months';

(v) affirmation by a special majority of members at the joint sitting should be required before:

. an amendment to a proposed law shall be taken to have been agreed to;

. a proposed law shall be taken to have been duly passed by both Houses of the Parliament.

The special majority should consist of an absolute majority of the total number of members of both Houses and at least half the total number of senators and members chosen for or in a particular State, in at least half the States;

(vi) a proposed law should not lose its identity as the proposed law which is the subject of the section if it contains only such alterations as are necessary by reason of the time which has elapsed since its introduction or which represent amendments made by the Senate; and

(vii) section 58 (assent to Bills) should not apply to a proposed law passed at a joint sitting unless the Speaker of the House of Representatives has certified

that it has complied with all the requirements set out in section 57 as amended.[4]

CHAPTER 5. THE EXECUTIVE GOVERNMENT OF THE COMMONWEALTH

MINISTERS AND DEPARTMENTS AND FEDERAL EXECUTIVE COUNCIL

We recommend that a number of alterations be made to the provisions in Chapter II - The Executive Government - of the Constitution to give constitutional expression to certain accepted principles governing the operation of the Westminster system as it applies in Australia.

We recommend that the Constitution be altered by omitting sections 62, 63, 64, 65 and 66 and by substituting the following sections:

Prime Minister, Ministers and Departments of State.

62. (1) The Governor-General shall appoint a person, to be known as the Prime Minister, to be the Head of the Government of the Commonwealth.

(2) The Prime Minister shall not hold office for a longer period than ninety days unless he is or becomes a member of the House of Representatives.

(3) The Prime Minister shall hold office, subject to this Constitution, until he resigns or, following a resolution passed by the House of Representatives that the Government does not have the confidence of the House, the Governor-General terminates his appointment on that ground.

Ministers and Assistant Ministers.

63. (1) The Governor-General may, with the advice of the Prime Minister, appoint Ministers and Assistant Ministers.

(2) No Minister or Assistant Minister shall hold office for a longer period than ninety days unless he is or becomes a senator or a member of the House of Representatives.

(3) The Governor-General may, with the advice of the Prime Minister, terminate the appointment of a Minister or an Assistant Minister.

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4 The Speaker's certificate would not be conclusive of compliance with the provisions.

Queen's Ministers of State.

64. (1) The Prime Minister, Ministers and Assistant Ministers appointed under section sixty-two or section sixty-three of this Constitution shall be the Queen's Ministers of State for the Commonwealth.

(2) The number of Ministers and Assistant Ministers shall not exceed the number prescribed by the Parliament.

Federal Executive Council

65. (1) There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth.

(2) The Councillors shall be the Queen's Ministers of State for the time being, who shall each make the oath or affirmation prescribed by the Parliament.

(3) The Governor-General may convene meetings of the Federal Executive Council.

(4) The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Departments of State.

65A. (1) The Governor-General in Council may establish departments of State of the Commonwealth.

(2) The Governor-General may, with the advice of the Prime Minister, appoint any of the Queen's Ministers of State to administer each of those departments.

Remuneration of Ministers of State.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Ministers of State, an annual sum the amount of which shall be as fixed by the Parliament.

The effect of the proposed section 65 is:

(i) to limit the membership of the Federal Executive Council to the Prime Minister, Ministers and Assistant Ministers of State for the Commonwealth for the time being;

(ii) to make it clear that the power to convene a meeting of the Federal Executive Council is vested in the Governor-General;

(iii) to preserve the present constitutional requirement that members of the Federal Executive Council shall be sworn in, but to clarify what is meant by that requirement.

Sir Rupert Hamer recommends that the reserve powers of the Governor-General be expressly retained in relation to section 62(3).

THE GOVERNOR-GENERAL

Appointment and terms of office

We recommend no alteration of the provisions of the Constitution which relate to the appointment and terms of office of the Governor-General other than of the provision relating to the Governor-General's salary.

We recommend that section 3 be omitted and the following section be substituted:

Remuneration of the Governor-General.

3. There shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Governor-General, an annual sum the amount of which shall be fixed by the Parliament.

The remuneration of the Governor-General shall not be reduced during his continuance in office.

The command in chief of the Defence Forces

We recommend that section 68 of the Constitution be altered to read:

> The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative, acting with the advice of the Federal Executive Council.

The object of this proposed alteration is to make it clear that whatever powers the Governor-General may exercise by virtue of having the command in chief of the Defence Force are powers which, constitutionally, cannot be exercised except in accordance with the advice of the Federal Executive Council.

Administrator of the Commonwealth and deputies of the Governor-General

We recommend that section 126 of the Constitution be altered to read:

> The Governor-General may, with the advice of the Prime Minister, appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

TRANSFERRED DEPARTMENTS

We recommend that the Constitution be altered by repealing:

(i) section 52(ii.);
(ii) section 69; and
(iii) sections 84 and 85.

CHAPTER 7. NEW STATES

We recommend that the Constitution be altered so as to provide more precise and simplified means for the creation of new States. In particular we recommend that section 121 be altered to make it clear that the Federal Parliament has power:

(i) to create or establish a constitution for a new State:

- established from a Territory;

- formed by separation of territory from a State or by the union of two or more States, or parts of States; or

- formed by the union of a part or parts of a State and a Territory, and

(ii) to make its approval of the Constitution of an independent body politic a condition of the admission of that body politic as a new State.

We also recommend that the Constitution be altered to establish the entitlement of a new State to membership of the House of Representatives and the Senate (as set out in Chapter 4 under the heading 'Composition of the Federal Parliament').

CHAPTER 8. CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

We recommend that a new section 119A be added in the Constitution in the following terms:

> 119A. Each State shall provide for the establishment and continuance of local government bodies elected in accordance with its laws and empowered to administer, and to make by-laws for, their respective areas in accordance with the laws of the State.

The addition of the proposed new section 119A would give Local Government recognition for the first time in the Australian Constitution.

CHAPTER 9. RIGHTS AND FREEDOMS

TRIAL BY JURY

We recommend that section 80 of the Constitution be altered to provide for a right of trial by jury in all cases where the accused is liable to capital punishment, corporal punishment or imprisonment for two years or more, except in cases of trial for contempt of court or the trial of defence force personnel under defence law.

This guarantee should apply to trial by jury of offences against laws of the Commonwealth, States and Territories.

Trial by jury of any offence against a law of the Commonwealth should be held in the State or Territory where the offence was committed. However the court should have power to transfer the trial to another competent jurisdiction on the application of either the accused or the prosecution. Where such an offence was not committed in a State or Territory, or was committed either in two or more of the States and Territories or in a place or places unknown, the trial should be held where Parliament prescribes.

The legislatures of the Commonwealth, States and self-governing Territories should have the express power to make laws relating to waiver by the accused of trial by jury, the size and composition of juries, and majority verdicts.

PROPERTY RIGHTS

We recommend that the Constitution be altered to ensure that:

(i) a law of a State may not provide for the acquisition of property from any person except on just terms; and

(ii) a law made for the government of any Territory (under section 122) or a law of a Territory may not

provide for the acquisition of property from any person except on just terms.

FREEDOM OF RELIGION

We recommend the alteration of section 116 of the Constitution so that the guarantees of freedom of religion therein shall apply to the Commonwealth, States and Territories.

We further recommend the omission of the words 'make any law' from section 116 of the Constitution in order to give the provision operation beyond the making of a statute.

Section 116 as altered would provide:

> The Commonwealth, a State or a Territory shall not establish any religion, impose any religious observance or prohibit the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth, a State or a Territory.

OTHER CONSTITUTIONAL RIGHTS AND FREEDOMS

We recommend the alteration of the Constitution to embody certain other rights and freedoms. These are set out in Bill No. 13 Constitution Alteration (Rights and Freedoms) 1988, but will not be dealt with in the First Report of the Commission.

Professors Campbell and Zines recommend the addition to that draft Bill of a provision enabling a Parliament to exclude, for three years by express provision, the application of any one or more of those rights and freedoms.

CHAPTER 10. THE DISTRIBUTION OF POWERS

DEFAMATION

We recommend that the Constitution be altered by adding after paragraph (v.) of section 51 the following paragraph:

(vA.) Defamation otherwise than in the course of the proceedings of the Parliament of a State or of a court of a State:

The effect of the alteration would be to empower the Federal Parliament to make uniform laws with respect to all forms of print and electronic media on the subject of defamation. But the proposal is expressly made subject to the qualification that this power is not to impinge on the powers of the States to make laws with respect to the publication of defamatory matter in the course of proceedings in their Parliaments or their courts.

INTER-CHANGE OF POWERS

We recommend that the Constitution be altered to allow the inter-change of legislative powers between the Federal and State Parliaments. The alteration has the following features:

(i) The Federal Parliament may designate any of its exclusive powers as matters about which a State Parliament may make laws, and a State Parliament may refer a matter to the Federal Parliament for the purposes of section 51(xxxvii.) of the Constitution.

(ii) Any designation or reference under this provision:

- shall be by Act of the Parliament making the reference or designation;

- may be subject to limitations or conditions;

- if limited in duration, may be extended by or under an Act of the Parliament making the reference or designation;

- may be modified or revoked, but only by express provision in an Act of the Parliament making the reference or designation.

The purpose of this alteration is to allow the Commonwealth, if it wishes, to refer any of its few exclusive law-making powers to the States, and to clarify the operation of the existing provision in the Constitution under which the States (if they wish) may refer any of their law-making powers to the Commonwealth.

CHAPTER 11. THE NATIONAL ECONOMY

EXCISE DUTIES

We recommend that the States be empowered to levy excise duties, by omitting the words 'and of excise' from section 90 of the Constitution.

Alternatively, we recommend that the States be empowered to levy an excise duty with the consent of both Houses of the Parliament of the Commonwealth. This may be achieved by an alteration of section 91 of the Constitution.

SAVINGS PROVISION

We also recommend the alteration of the Constitution so as to provide certain saving provisions necessitated by an alteration of the Constitution. These provisions provide, inter alia:

(i) for the continued operation of a law of the Commonwealth, a State or Territory, except to the extent (if any) that, under this Constitution as so altered, the law could not have been made;

(ii) that a constitutional alteration does not affect the previous operation of this Constitution or anything duly done or suffered before the alteration took effect;

(iii) that a constitutional alteration does not affect the holding of the office of Governor-General or any

other office established by or referred to in the Constitution and a person holding the office immediately before the constitutional alteration took effect continues to hold the office as if the alteration had not been made.

CHAPTER 1. INTRODUCTION

ESTABLISHMENT AND PURPOSE

Establishment of the Constitutional Commission and Advisory Committees

On 19 December 1985 the Acting Prime Minister and Attorney-General, Hon Lionel Bowen, MP, announced that the Federal Government had decided to establish a Constitutional Commission to carry out a fundamental review of the Australian Constitution. The members of the Commission would be Sir Maurice Byers, CBE, QC, (chairman), Professor Enid Campbell, OBE, Hon Sir Rupert Hamer, KCMG, Hon Mr Justice JL Toohey, AO, Hon EG Whitlam, AC, QC, and Professor Leslie Zines.

The Attorney-General also announced that the Commission would be assisted by five Advisory Committees, each of which would examine and report to the Commission on a particular area of the Constitution, namely:

(a) Australian Judicial System
(Chairman: Hon Mr Justice DF Jackson);

(b) Distribution of Powers
(Chairman: Hon Sir John Moore, AC);

(c) Executive Government
(Chairman: Rt Hon Sir Zelman Cowen, AK, GCMG, GCVO, K St J, QC);

(d) Individual and Democratic Rights Under the Constitution
(Chairman: Mr Terence Purcell); and

(e) Trade and National Economic Management
(Chairman: Hon Mr Justice MG Everett).

The Advisory Committees comprised 37 people from a range of backgrounds who have achieved distinction in various fields of Australian life. Many members brought experience and knowledge which was directly relevant to the matters being considered by their committee. A list of the members of the Advisory Committees is set out at Appendix A.

Members of the Commission and the Advisory Committes were appointed by letters of appointment from the Attorney-General.

The Hon Justice Toohey, then a judge of the Federal Court of Australia, served as a member of the Commission until 31 December 1986 when he resigned before taking up his appointment as a Justice of the High Court of Australia.

Terms of Reference

The Terms of Reference are set out in Appendix B. They provide for the Constitutional Commission:

> To inquire into and report, on or before 30 June 1988, on the revision of the Australian Constitution to:
>
> (a) adequately reflect Australia's status as an independent nation and a Federal Parliamentary democracy;
>
> (b) provide the most suitable framework for the economic, social and political development of Australia as a federation;
>
> (c) recognise an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government; and
>
> (d) ensure that democratic rights are guaranteed.

To put this Report, and particularly the recommendations, in context, the key terms in this part of the Terms of Reference will be analysed in the next Chapter. That Chapter will include discussion of the term 'federation' as it applies in Australia and elsewhere. 'Australia's status as an independent nation' and the type of 'Federal Parliamentary democracy' which operates in Australia will also be considered.

The second part of the Terms of Reference describes the procedural aspects of this review and has guided the way in which the Commission and the Advisory Committees have conducted their activities. Those matters are discussed later in this Chapter.

Each of the Advisory Committees had a separate set of Terms of Reference relevant to its particular area of review. Those sets of Terms of Reference are found in Appendix C. They were drafted and proposed by the respective Advisory Committees and were approved by the Commission.

Meetings of the Constitutional Commission

The first meeting of the Commission was marked by a public ceremony on Friday 31 January 1986 in the main courtroom of the Federal Court in Sydney. The ceremony was attended by the Prime Minister, the Federal Attorney-General, members of the Commission, the chairman of each Advisory Committee and members of the Advisory Committees.

Up to the date of this Report, members of the Commission have met formally on 29 occasions for a total of 70 days. Most meetings were held in the Commission's offices in Sydney, with some taking place in Canberra. A list of those meetings is at Appendix D.

THE CONSTITUTIONAL COMMISSION AND CONSTITUTIONAL REVIEW

At the ceremony to mark the first meeting of the Constitutional Commission the Prime Minister, Hon RJL Hawke, AC, MP, said:

> This commission is unique in Australia's history of Constitutional reform and brings with its establishment a new hope for the renewal of the Australian Constitutional framework.

There are some features which distinguish this Commission from previous reviews of the Constitution. The members of the Commission and Advisory Committees have a wide variety of backgrounds and expertise, and an active attempt has been made to involve the people of Australia by seeking submissions from them.

However, the Commission and its work should not be seen in isolation from the referendums and general reviews which preceded it. Thirty-eight proposals for change to specific provisions of

the Constitution were put to the electors, in accordance with section 128 of the Constitution, between 1906 and 1984. Eight proposals were approved by a majority of all the electors voting and also by a majority of the electors voting in a majority of the States. Consequently alterations were made to the Constitution in 1906, 1910, 1928, 1946, 1967 and 1977. Five other proposals[1] were approved by a majority of the electors voting but failed to attract a majority in four or more of the States.

Seven Bills containing proposals for alterations to the Constitution have been passed by both Houses of the Parliament in relation to which writs for referendums have not been issued,[2] and in 1914 six Bills were passed by the Senate but were not submitted to the electors at referendum.[3]

Table 1.1 shows the history of referendums on the Constitution to date.

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1 One each in 1936, 1977 and 1984, two in 1946.

2 Two in 1965, five in 1983.

3 The amendment process will be dealt with in Chapter 13 of our Final Report.

TABLE 1.1: HISTORY OF REFERENDUMS

YEAR	PROPOSAL	GOVERNMENT SUBMITTING	STATES WHERE ELECTORS APPROVED PROPOSAL	PERCENTAGE OF ALL ELECTORS APPROVING PROPOSAL
1906	Senate elections	* Protectionist	6	82.65
1910	Finance	* Fusion	3 (Qld, WA, Tas)	49.04
	State debts	* Fusion	5 (all exc. NSW)	54.95
1911	Legislative powers	Labor	1 (WA)	39.42
	Monopolies	Labor	1 (WA)	39.89
1913	Trade and commerce	* Labor	3 (Qld, SA, WA)	49.38
	Corporations	* Labor	3 (Qld, SA, WA)	49.33
	Industrial matters	* Labor	3 (Qld, SA, WA)	49.33
	Railway disputes	* Labor	3 (Qld, SA, WA)	49.13
	Trusts	* Labor	3 (Qld, SA, WA)	49.78
	Monopolies	* Labor	3 (Qld, SA, WA)	49.33
1919	Legislative powers	* Nationalist	3 (Vic, Qld, WA)	49.65
	Monopolies	* Nationalist	3 (Vic, Qld, WA)	48.64
1926	Legislative powers	Nat. - C.P.	2 (NSW, Qld)	43.50
	Essential services	Nat. - C.P.	2 (NSW, Qld)	42.79
1928	State debts	* Nat. - C.P.	6	74.30
1936	Aviation	U.A.P.	2 (Vic, Qld)	53.56
	Marketing	U.A.P.	0	36.26
1944	Post war powers	Labor	2 (SA, WA)	45.99
1946	Social services	* Labor	6	54.39
	Marketing	* Labor	3 (NSW, Vic, WA)	50.57
	Industrial Employment	* Labor	3 (NSW, Vic, WA)	50.30
1948	Rents, prices	Labor	0	40.66
1951	Communists	Liberal/C.P.	3 (Qld, WA, Tas)	49.44
1967	Nexus	Liberal/C.P.	1 (NSW)	40.25
	Aboriginals	Liberal/C.P.	6	90.77
1973	Prices	Labor	0	43.81
	Incomes	Labor	0	34.42
1974	Simultaneous elections	* Labor	1 (NSW)	48.32
	Amendment	* Labor	1 (NSW)	48.02
	Democratic elections	* Labor	1 (NSW)	47.23
	Local Government	* Labor	1 (NSW)	46.87
1977	Simultaneous elections	Liberal/NCP	3 (NSW, Vic, SA)	62.20
	Casual vacancies	Liberal/NCP	6	73.30
	Territorial votes	Liberal/NCP	6	77.70
	Retirement of judges	Liberal/NCP	6	80.10
1984	Simultaneous elections	* Labor	2 (NSW, Vic)	50.60
	Inter-change of powers	* Labor	0	47.10

* Referendum held at the same time as a federal election. Underlined subjects achieved sufficient majorities for change to Constitution.

There have been a number of general reviews of the Constitution. A Royal Commission, appointed by Letters Patent in 1927, reported to the Governor-General in 1929.[4] There was a conference of Federal and State Ministers in 1942. A Joint Parliamentary Committee on Constitutional Review was constituted by resolutions of the two Houses of the Federal Parliament in May 1956. It took evidence in all States and presented its final report in November 1959.[5] In 1973, following the initiative of the Victorian Parliament, the Australian Constitutional Convention was convened. The Convention comprised delegates from all Houses and all political parties in the State and Federal Parliaments and representatives of Local Government. It met in Sydney (1973), Melbourne (1975), Hobart (1976), Perth (1978), Adelaide (1983) and Brisbane (1985). Committees and Sub-Committees of the Convention worked between those sessions and produced reports to the Convention.

So the work of the Constitutional Commission is a further part in a process of constitutional alteration and review dating back to the years immediately after Federation.

GENERAL APPROACH TO THE REVIEW AND RECOMMENDATIONS

From the outset it has been our clear intention not to propose an entirely new Constitution. We consider that the Terms of Reference, while providing for a thorough review of the existing document, were meant to ensure that any proposals for change would preserve the framework and principles contained in the Constitution. In particular, we have been conscious of the need to retain in form and spirit the federal framework of government in Australia, parliamentary government and democratic institutions.

It will be apparent from the Report that, in our view, many provisions of the Constitution do not need to be altered or

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4 1929 Report.

5 1959 Report.

removed. We approached the task on the basis that, for the most part, the Constitution has served Australia well. There are, however, some significant problems and we have sought to identify ways in which the Constitution should be improved.

As Sir Robert Menzies said:

> a written Constitution is an expressed scheme of government designed to give a basic structure in a changing world; not designed to inhibit growth in a growing world, nor to make the contemporary world subject to the political, social, or economic ideas of a bygone age.
>
> ...
>
> [A] Constitution is not a strait-jacket; it is a frame of government.[6]

Bearing in mind the fundamental nature of the Constitution, we have not recommended changes on matters which it is not necessary or appropriate to include in such a document. Nor have we, for the most part, recommended changes on matters which are more appropriately dealt with by the Parliament, operating within the general frame of government provided by the Constitution. In other words, we have concentrated on the structures created or preserved by the existing document, and we have considered whether they need modification.

In two main respects we have gone beyond those structures. First, in this Report we recommend the constitutional recognition of Local Government as the third sphere of government in Australia. Secondly, in this Report we recommend a number of alterations which will enhance the rights and freedoms of all Australians in relation to Governments, both Federal and State. The rationale for recommending those changes in relation to State Governments is discussed in Chapter 2. The question of whether additional constitutional rights and freedoms should be included will be dealt with in the Final Report.

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6 R Menzies, Central Power in the Australian Commonwealth (1967) 152, 28.

Under our system of government the operation of the Constitution is supervised by the High Court. The Court can decide, for example, whether the Federal Parliament has acted within its power in purporting to pass a law, whether a person is disqualified from sitting as a senator or member of the House of Representatives, or whether a law of a State or the Commonwealth breaches the constitutional guarantee that 'trade, commerce, and intercourse among the States...shall be absolutely free.' The Constitution is, and must remain, a living document the purpose of which is 'to authorize and facilitate action within ascertainable limits',[7] and it is the High Court which ensures that the limits set by the Constitution are interpreted and applied appropriately.

Because of the role played by the High Court, it is not desirable to attempt to set out in considerable detail such matters as the precise limits of a legislative power; nor would it be appropriate to do so. It is impossible to foresee the multitude of situations with which the Parliament, the Executive and the courts will have to deal. Too much precision in some areas may impose unforeseen and undesirable limitations on what it is appropriate for the branches of government to do. Our concern has been to ensure that the 'frame of government' is sound.

A number of other objectives or factors have influenced the content and form of the recommendations. First, there is a need to make the Constitution more intelligible and less misleading. As the Advisory Committee on Executive Government observed:

> the language of the Australian Constitution is less straightforward than that of most constitutions. This makes the Constitution difficult or impossible to teach in schools or to become an acknowledged part of the political culture of the nation, as constitutions can in other societies. Our Constitution remains too much of a mystery to those who should be its masters.[8]

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7 id, 28-9.

8 Executive Report, 61.

Many of the recommended alterations, particularly the Executive Government provisions, would make for a clearer statement of accepted principles (such as responsible government) and practices by omitting some provisions and adding others.

Secondly, there is a need to provide means within the Constitution whereby purely transitional provisions can be safely excised from the text when their force is spent. Similarly, there is a need to provide for problems which are incidental to formal constitutional change, for example, by general savings clauses. The savings provisions would include such matters as the continued operation of certain laws made or actions taken before the Constitution was altered, and the continuation in office of people holding certain offices, such as the Governor-General, immediately before the alteration took effect. These matters will be dealt with in Chapter 14 of the Final Report.

Thirdly, we have borne in mind the necessity for any alteration to comply with section 128 of the Constitution. While we see section 128 as a clear recognition by the Framers of the Constitution that alterations would need to be made,[9] we recognise that it is a costly process which is only invoked for what are seen as necessary or highly desirable alterations. Consequently we have limited our recommendations to such matters, rather than including alterations which would amount to no more than tidying up or revising existing forms of expression.

While recognising that no alteration can be made except with the approval of a majority of the electors voting and a majority of electors voting in a majority of the States, we have not recommended only those proposed alterations which seem likely to have popular appeal, nor have we rejected meritorious proposals because they may be unpopular or because similar proposals have been defeated previously at referendum. Rather, we have

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9 See Quick and Garran, 986-95.

recommended alterations which would, in our view, improve the Constitution for the benefit of the nation.

Materials considered

To make a general review of the Constitution in the way contemplated by the Terms of Reference is a large undertaking. We have drawn on a huge volume of material in preparing this Report. It has been appropriate and necessary to go back, from time to time, to the Constitutional Convention debates of the 1890s to see what the Framers of the Constitution had in mind when drafting certain provisions. Reference has been made to classic early texts, especially the The Annotated Constitution of the Australian Commonwealth (1901) by J Quick and RR Garran, and to the reports of the Royal Commission on the Constitution (1929) and the Joint Parliamentary Committee on Constitutional Review (1959).

The reports of the proceedings of the six sessions of the Australian Constitutional Convention between 1973 and 1985 and the reports of Convention Committees and Sub-Committees have been carefully considered. Recommendations of the Convention have been treated as if they were submissions to this Commission and have been given the considerable weight which they merit. Submissions made to the five Advisory Committees and to the Commission have been a valuable source of information and arguments. We have been referred to numerous court decisions, textbooks and journal articles, as well as to constitutional provisions in the Australian States and other countries which are relevant to the matters being considered.

This Report has been written with such material in mind and we have referred to it where appropriate. In dealing with each topic we have considered the current constitutional position and the issues raised during this review. We have noted any previous recommendations for reform and referred, where necessary, to the other material to support our recommendations.

Types of recommendations

All the provisions of the Constitution and the covering clauses of the Commonwealth of Australia Constitution Act 1900 have been examined in the course of this review. It is not necessary, however, to comment on each provision. Our comments are limited to those provisions which we recommend be altered and those provisions which, despite some difficulties with their meaning or operation, we recommend remain unaltered.

Our recommendations can be broadly classified in six ways. First, there are many provisions in the Constitution which have a clear meaning, adequately meet the ends they were designed to serve and continue to be appropriate. In some instances the meaning is clear from a reading of the words as they are used in ordinary English. In other instances the words or phrases have gained a settled meaning as a result of court decisions. We have not recommended change where there seems no compelling reason to do so. In some places we expressly recommend that the words be left as they are.

Secondly, there are provisions in the Constitution which are outmoded or expended. They fall into the following four categories:

(a) original provisions which have been spent;

(b) interim provisions which dealt with specific matters pending the enactment of federal legislation;

(c) provisions which have been accepted by the Australian Constitutional Convention as obsolete and inconsistent with Australia's status as a sovereign nation; and

(d) a transitional provision added to cover the period before the commencement of the operation of an alteration (to section 15) made to the Constitution in 1977.

Rather than deal with them as a group, we shall consider the expended or outmoded provisions separately when discussing the relevant subject matter of the Constitution.[10] The purpose of recommending the removal of these provisions from the Constitution is to create a more readable document. They could be repealed with no practical effect on the operation of the Constitution. Unencumbered by the clutter and potentially confusing presence of these provisions, the document would be more easily understood and would give a clearer picture of the constitutional framework of government in Australia.

Thirdly, some provisions were included by the Framers of the Constitution with a particular purpose in mind but have not achieved that purpose. For example, the protection given by section 117 against discrimination based on residence in a particular State has been interpreted narrowly, so that the section does not seem to provide the protection which the Framers of the Constitution intended. In such cases we recommend changes to the existing words which would preserve the spirit of the provisions while spelling them out more clearly and effectively.

Fourthly, some provisions of the Constitution seem out of step with the economic, social and political needs and realities of Australian life or with the role Australia plays in international affairs as an independent sovereign nation. Where circumstances have changed sufficiently since Federation and provisions are no longer adequate or appropriate (either in their own terms or the way in which courts have interpreted them) we recommend that changes be made. So, for example, we recommend expansion of the revenue raising and legislative capacity of the States by alterations to sections 90 and 52 respectively. We also recommend the addition of a qualified federal power to make laws with respect to defamation to take account of the revolutionary technological changes which have taken place since Federation.

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10 We recommend, however, that most of the expended or outmoded provisions be dealt with in one Bill.

Fifthly, experience of the structures of government in Australia (legislative, executive and judicial) has shown the need for alterations to be made to some constitutional provisions. Our review of the way in which the Federal Parliament is elected and functions has led us to recommend modifications to aspects of the election process, the terms of the Houses of Parliament and the relationship between those Houses. We also recommend constitutional recognition of Local Government as the third sphere of government. Those matters and our recommendations concerning Executive Government are dealt with in this Report.[11] The Australian Judicial System will be dealt with in Chapter 6 of the Final Report.

Sixthly, we recommend that some matters which are not expressly dealt with should be included in the Constitution. For example, some high governmental offices and some procedures which are features of the government of the nation are not mentioned in the Constitution. In this Report we recommend that the office of Prime Minister, the way in which Ministers and Assistant Ministers are appointed and related matters should not remain the subject of conventions but should be clearly provided for in the Constitution. Their addition would make the Constitution a more comprehensive and certain statement of the way Australia is governed. Other topics will be dealt with in our Final Report.

As a general rule, we have confined our recommendations to provisions of the Constitution and have not recommended amendments to legislation or new legislation. This approach was taken because the Terms of Reference expressly limit the exercise to a review of the Constitution and because legislation which may be passed pursuant to the Constitution is a matter for the Parliament. We recognise that some Advisory Committees made recommendations which could be given effect to by legislation.

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11 Chapter 4, 'The Parliaments', does not deal with all relevant matters. For example, the discussion of the qualifications and disqualifications of members of Parliament is not included in this Report but will be included in the Final Report.

We will not usually be commenting on such recommendations in this or our Final Report. Our lack of comment should not be taken as any reflection on the merit of any or all of those recommendations but merely as an indication that the adoption or otherwise of them is a matter of policy for the Parliament. In one case dealt with in this Report, however, we have thought it appropriate to recommend a change to the Commonwealth Electoral Act 1918. One or two other cases will be dealt with in the Final Report.

We also want to make clear that there is a significant difference between whether a provision should be included in the Constitution and the use to which such a provision might be put, especially in the case of legislative powers. We have had to consider such matters as whether it is appropriate that a particular power should be granted to the Federal Parliament and, if it should, whether the Federal Parliament should have exclusive power or whether Federal and State Parliaments should each be able to exercise the power. We have also had to consider whether powers exclusively held by the Commonwealth should be shared by the States. In this Report, for example, we have recommended that the Federal Parliament be given an express, concurrent power to make laws with respect to defamation. For the reasons outlined in Chapter 10, we consider it appropriate that the Federal Parliament have such a power. A number of submissions on this topic were concerned with what a national defamation law might contain. The issues raised are important. But whether, when and how that power is exercised would be a matter for the Parliament to decide.

Similarly we have recommended altering the current provision which gives the Federal Parliament exclusive power to impose duties of excise (section 90) in order that that source of revenue be made available to the States. We recognise that there could be a number of consequences of such a change, including a significant rearrangement of federal financial relations. Again, the recommendation is one of principle. The way in which the States and the Commonwealth reorder their revenue raising and revenue sharing arrangements would be for them to work out.

A number of submissions were made arguing for inclusion of provisions relating to matters which, however important, we do not think should be dealt with in the Constitution. For example, essentially symbolic matters such as the national anthem and the Australian flag are best dealt with otherwise.[12]

In summary, we have not devised nor do we recommend a new Constitution for Australia. We have not recommended that sections be rewritten merely for the sake of clearer expression nor have we recommended a more rational reordering of existing provisions. Rather we have reviewed the existing text and have recommended deletions, alterations and additions where they seem appropriate.[13] Taken separately, alterations based on these recommendations would resolve or significantly relieve specific problems arising under the existing Constitution. Taken together, the changes recommended would result, in our opinion, in a Constitution more able to provide for the present and future needs of Australia.

PUBLIC INVOLVEMENT IN CONSTITUTIONAL REVIEW

The Terms of Reference state that, during the course of the inquiry, the Commission shall:

> (i) seek the views of the public, and business, trade unions and financial institutions;
>
> (ii) hold public hearings and sponsor public meetings to ascertain the views of interested organisations, groups and individuals on constitutional reform....

Letters were sent to State and Federal Governments, government departments, Local Government bodies, senior judges, leaders of political parties, and numerous organisations and individuals

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12 eg see Flags Act 1953 (Cth).

13 As a consequence of alterations to some sections, alterations will need to be made to some marginal headings which, although not part of the Constitution, provide a useful guide to its contents.

thought to have an interest in matters being considered by the Commission. They were invited to make submissions. Where appropriate, such bodies and individuals were contacted on behalf of a particular Advisory Committee or Committees. Many responded with oral submissions made at public hearings or private meetings, or by making written submissions. Detailed submissions were received from some Governments on specific matters of particular interest to them. Only the Tasmanian Government and the Queensland Government made comprehensive submissions on the range of matters being considered by the Advisory Committees, Tasmania responding to the issues first raised by the Committees and both Tasmania and Queensland responding to the Reports of the Advisory Committees.

As well as direct requests, there was widespread advertising of the Commission's work and the public hearings. The advertisements attracted other submissions.

Submissions

The Advisory Committees and the Commission received submissions at meetings, most of them public, on 92 days in 27 cities and towns in all States and mainland Territories and on Norfolk Island. Each Advisory Committee held at least one public hearing in each State capital city. Some 670 people made submissions at such meetings. A list of where and when meetings were held and the number of submissions made at those meetings is at Appendix E. Approximately 4,000 written and oral submissions were received by the Commission and the Advisory Committees.

Numerous submissions were made to the Advisory Committees and were dealt with by those Committees in the preparation of their reports. As a general rule we have not thought it necessary to refer to them except as they were reflected in the reports of the Advisory Committees.

Other submissions which we have considered include:

(a) submissions made to the Commission on matters which were not being considered by an Advisory Committee but were reserved for our consideration (for example, the Parliaments);

(b) submissions made to Advisory Committees but received too late to be considered by the Committees when preparing their reports; and

(c) submissions made in response to the reports of the Advisory Committees.

Public discussion and awareness

The Terms of Reference also required the Commission to:

> (iii) stimulate public discussion and awareness of constitutional issues by circulating draft proposals and putting forward initiatives and views on constitutional reform....

We encouraged individuals and organisations to make submissions about those matters which they thought needed changing (as well as those which should remain unchanged) and to suggest changes which they wanted made. Secondly, we tried to raise the level of knowledge about the Constitution in the community so that the work and recommendations of the Commission can be seen in the context of the provisions and operation of the Constitution as a whole. A survey conducted in April 1987[14] showed that only some 53.9% of Australians knew that Australia has a written Constitution. In the 18-24 age group, nearly 70% of the respondents did not know that we have a written Constitution. The survey showed that the people most aware of the Constitution and its significance are men who are over 35 years of age, who left school at 17 years of age or older, who work full-time and are white collar workers.

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14 'Australian Constitution Study' conducted by Newspoll for Hill & Knowlton Australia Pty Ltd, April 1987.

We are most concerned at the widespread ignorance of the Constitution and of the major impact which it has on life in Australia. The process of constitutional reform is ultimately determined by the electors of Australia. They will decide whether any change is made to the Constitution. We believe that there is a real need to educate people in at least its basic scheme and provisions. Education in these matters will assist greatly in improving the general appreciation of how our system of democratic government operates. More particularly, such education would help many people understand more fully the arguments for and against specific proposals for change to the Constitution. As a first step we suggest that the education authorities in each State and Territory give consideration to including appropriate material on constitutional provisions and parliamentary institutions and practices in school curriculums.

In order to meet these objectives we arranged for the printing of 145,000 copies of the Constitution for free distribution to people who requested them. Thirteen Background Papers were produced in which specific issues being considered by the Commission and options for possible change were discussed. Where we had a preliminary view about what to recommend, that view was set out. Submissions were invited on the matters raised. A list of Background Papers is at Appendix F.

The Commission also published a series of Bulletins reporting on the work of the Commission and the Advisory Committees and summarising some of the issues being considered and our preliminary views. A list of Bulletins is at Appendix G.

Members of the Commission and Advisory Committees and Commission staff spoke at meetings and seminars organised for or by the Commission. They addressed meetings of service clubs, schools, electorate branches and other groups and organisations, as well as giving numerous radio, television and press interviews throughout Australia. Articles were written for newspapers. Television producers and magazine publishers were assisted in preparing programs and publications relevant to the Commission's work.

An essay competition early in 1988 on the topic 'Australia's Constitution: What it means to us in 1988' attracted considerable interest. Entries were received in the under 18 years and open categories from people in all States and mainland Territories. One winner in each of the 14 categories was selected from a total of 1,078 entries, the prize for each being travel to Canberra and a place at the official opening ceremony at the new Parliament House on 9 May 1988.

Advisory Committees' proposals

In 1986 each Advisory Committee prepared an Issues Paper, which was published and distributed by the Commission. The Advisory Committee on the Australian Judicial System also prepared a Summary of Issues Paper and a Statement of Preliminary Views. In mid-1987 each Advisory Committee presented its report to the Commission. A list of papers and reports prepared by Advisory Committees is at Appendix H.

The report of each Advisory Committee was published separately. Copies were distributed by the Commission and were sold at Australian Government Bookshops at a cost of $9.95 each. Four of the Advisory Committees marked the publication of their Reports with a formal function.

The Report of the Advisory Committee on Individual and Democratic Rights was launched on the Ray Martin Midday Show, a national television program, on Monday 20 July 1987. Three members of the Committee (Mr Terence Purcell, Mr Peter Garrett and Mr Thomas Keneally) were interviewed by Mr Martin about the Report. A press conference followed that program.

On Friday 31 July 1987 the Report of the Advisory Committee on the Australian Judicial System was launched by Committee member Professor James Crawford at a function in the judges' chambers next to the Chief Justice's garden in the old New South Wales Supreme Court building, Sydney.

The Report of the Advisory Committee on the Distribution of Powers was launched by Committee member Mr George Polites at a reception in the Victorian Parliament on 6 August 1987.

The Advisory Committee on Executive Government released its Report at a press conference at the National Press Club, Canberra, on Wednesday 19 August 1987. Sir James Killen (deputy chairman) announced the findings and recommendations and two other Committee members, Mr David Solomon and Associate Professor George Winterton, also spoke to the representatives of the print and electronic media.

The Report of the Advisory Committee on Trade and National Economic Management was released on Wednesday 12 August 1987.

Publication of the Reports was reported in newspapers and on radio and television. A number of newspaper editorials and feature articles were written about the work of the Advisory Committees and the main recommendations in the Reports. Members of the Advisory Committees as well as staff of the Commission gave interviews and spoke at meetings about the Reports. These occasions were used to encourage people to read the Reports and comment on the recommendations in order to assist us in the preparation of our Final Report.

To inform as many people as practicable about the recommendations of the Advisory Committees and to assist people making submissions to the Commission, a summary of those Reports was published. Entitled Australia's Constitution - Time to Update, the 72 page booklet also included the Commission's Terms of Reference, a background note on the Constitution and the Commission, a list of members of the Commission and the Advisory Committees, a list of publications prepared by the Commission and the Committees, and cartoon-style illustrations. Readers of the booklet were invited to send their comments on the Advisory Committees' recommendations to the Commission.

One hundred and sixty thousand copies of the booklet were printed for free distribution to people who contacted the Commission and asked to be sent our publications, as well as to judges, members of parliaments, libraries, schools and the media. More than 1,000 other organisations and individuals were sent the booklet because the Commission thought they would be interested in some or all of the matters mentioned in it. These included civic associations (for example, RSL), Local Government associations, teachers' associations, political associations, electorate secretaries to State and federal parliamentarians, libraries, major and small business groups, trade unions, rural groups, women's groups, Aboriginal groups, ethnic affairs bodies, public speaking bodies, welfare groups and environmental groups.

We were encouraged by the quantity and quality of the responses made to the recommendations of the Advisory Committees and these were considered when we were deciding whether to adopt those recommendations.

Commission's proposals

On Friday 2 October 1987, at a press conference convened at the National Gallery in Canberra, we announced proposed recommendations on three major matters. In summary, they dealt with:

(a) extending the maximum term of the Parliament to four years with a fixed three year term component, and consequent changes to the constitutional provisions governing the powers of the Senate with respect to money Bills and the means of resolving deadlocks between the House of Representatives and the Senate over other legislation;

(b) giving the Federal Parliament power to make laws with respect to defamation, but not so as to affect the privileges of State Parliaments; and

(c) strengthening the constitutional guarantee of trial by jury for serious offences under federal, State and Territorial laws by altering section 80.

The chairman indicated that we would consider comments on the proposals. The announcement was widely reported and attracted editorial and other comment. The recommendations concerning the Parliament were the subject of a number of statements in the Federal Parliament and of debate in the House of Representatives on 8 October 1987[15] and in the Senate on 17 December 1987.[16] We have considered the views expressed in those debates and elsewhere and have modified elements of the proposed parliamentary scheme announced on 2 October 1987.

ADVISORY COMMITTEES

The Terms of Reference required the Commission to:

(v) consult with, and evaluate the reports and recommendations of, advisory committees which are established to examine specific subject areas of constitutional reform.

The Advisory Committees provided invaluable assistance in this review of the Constitution. They included people who are experts on the matters considered by each Committee. Their widespread consultation did much to attract useful submissions from a range of people and organisations. As will be readily apparent from this Report and our Final Report, the Reports by the Advisory Committees have been a source of much information and considered analysis of the issues. We have adopted many of their recommendations. Most of the Committees' work was carried out between the time of their appointment and the submission of their Reports to the Commission in the middle of 1987.

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15 Hansard, 8 October 1987, 1023-32.

16 Hansard, 17 December 1987, 3325-36.

Although they ceased to function formally as Committees after making their final Reports, from time to time we have drawn on the expertise of members as we considered specific issues with which they had dealt. At all times we found them helpful, and the load on the Commission was reduced accordingly. We express our gratitude to the chairmen and members of the Advisory Committees and to the secretaries to the Committees.

INTERIM REPORT

The Terms of Reference required the Commission to:

> (iv) make interim reports on matters under study at intervals to be determined in consultation with the Attorney-General....

At a Commission meeting on 27 January 1988, the Attorney-General asked us to provide him with an interim report by the first week of May on the following matters:

(a) maximum four year term for House of Representatives (and related matters such as the term and powers of the Senate);

(b) the right to vote in federal and State elections;

(c) one vote one value in federal and State elections;

(d) aspects of Executive Government;

(e) trial by jury (alterations to section 80);

(f) freedom of religion (alterations to section 116);

(g) compensation payable by States and Territories for acquisition of property (section 51(xxxi.));

(h) recognition of Local Government;

(i) federal power to make laws with respect to defamation;

(j) State power to impose duties of excise (section 90); and

(k) inter-change of powers.

It was agreed that the interim report would contain our recommendations and reasons for them as well as draft Bills for proposed alterations to the Constitution.

This Report deals with those and related matters. In some cases we have included all or most of our reasons and recommendations on a broad topic (for example Chapter 4 'The Parliaments' and Chapter 5 'The Federal Executive') which includes some of the matters listed above but goes beyond them. In other cases we have dealt with matters separately (for example compensation for acquisition of property by Governments, trial by jury and freedom of religion) and will put them with related matters in the context of broader topics (for example Chapter 9 'Individual and Democratic Rights') in the Final Report.

At the end of this Report we set out proposed alterations to the Constitution which would give effect to our recommendations. The proposed alterations were prepared, on the basis of detailed instructions, by experienced former Parliamentary Counsel, Mr JQ Ewens, CMG, CBE, QC, Mr J Finemore, AO, OBE, QC and Mr S Mason. We have been assisted greatly by them. They have not only cast our recommendations in appropriate constitutional language but have also drawn our attention to matters of detail which might otherwise have been overlooked.

The style adopted in the proposed alterations is based on the existing text. We have preferred to follow such things as the punctuation already used so that the altered document would retain a cohesive appearance. Where appropriate, additional provisions have adopted or adapted the language used in provisions which they supplement. For this reason we have

decided to include in some proposed alterations expressions in the masculine gender (for example, 'he', 'his', 'him') where we might otherwise have recommended that the proposals be drafted in non-sexist or gender neutral language.

We are aware that modern drafting practice is to employ non-sexist or gender neutral language and we have attempted to adopt that style in the writing of this Report. If the Parliament prefers to use such language in proposed alterations, we suggest that consideration be given to making alterations to some other sections so that the same form of expression is used throughout the Constitution.[17]

Although this is an interim report, in the sense that it precedes our Final Report, it is not a provisional report. The recommendations and reasons set out below are final. They will be reproduced in the complete Final Report on the review of the Constitution.

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[17] The sections of the Constitution with references to 'he', 'his' or 'him' are sections 2, 3, 4, 5, 13, 15, 17, 18, 19, 20, 33, 34, 35, 36, 37, 38, 40, 42, 45, 46, 48, 58, 62, 64, 70, 72, 84, 117, 126.

CHAPTER 2. THE TERMS OF REFERENCE

INTRODUCTION

As noted in Chapter 1, our Terms of Reference require us to report on the revision of the Constitution to:

(a) adequately reflect Australia's status as an independent nation and a Federal Parliamentary democracy;

(b) provide the most suitable framework for the economic, social and political development of Australia as a federation;

(c) recognise an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government; and

(d) ensure that democratic rights are guaranteed.

The Terms of Reference involve an understanding of a number of concepts related to the nature and structure of government in Australia. In this Chapter we discuss three basic qualities that inhere in our constitutional and political system, namely, federation, parliamentary government and national independence. The Terms of Reference treat these concepts as major assumptions upon which our consideration of constitutional revision must proceed. An analysis of these concepts requires some examination of the provisions and structure of the Constitution, the development of its interpretation, the practices and conventions operating in public affairs and the evolution of Australian independence.

Recommendations

Recommendations made in the course of this Chapter are set out at the end of it.[1]

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1 pages 143-4.

AUSTRALIA AS A FEDERATION

The federal concept

Paragraphs (a) and (b) of our Terms of Reference refer respectively to Australia as a 'Federal Parliamentary democracy' and as a 'federation'. The Australian Commonwealth is expressly described in the preamble to, and section 3 of, the Commonwealth of Australia Constitution Act 1900 as 'Federal'. It is an assumption of our Terms of Reference, therefore, that the Australian Constitution is and shall remain federal in nature.

A federal state must, of course, comprise a central government and regional governments, which have a degree of independence or autonomy. Beyond that, however, the concept of a federation is not one that has a precise legal or political meaning. It has given rise to a great deal of literature and much argument and debate from legal, political and philosophical viewpoints. Sometimes the concept is qualified by adjectives such as 'co-ordinate', 'co-operative', 'organic'[2] and 'new'.

Whether a particular country can be called a federation raises issues involving legal and social factors and their inter-relationships as well as questions of degree. The following situations in a simplified form have, for example, given rise to discussion and argument as to the characterisation of the particular system as federal.

(1) The Austrian Constitution distributes power in the same manner as the Australian and United States Constitutions. Express legislative power is conferred on the central government and the States have the residue. The central government's powers, however, include all major areas of political and social life. The States' area of power resembles the functions of Local Government; but, unlike Local Governments in Australia, the powers, governmental structure and areas of the States are

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2 G Sawer, Modern Federalism (2nd edn, 1976) Ch 8.

guaranteed. The powers and existence of the State governments cannot, therefore, be destroyed at the will of the central government. Also, the Austrian central government is, unlike common law federations such as those of Australia, India or the United States, in relation to some subjects, permitted only to lay down general policy; the States must provide the details of the program. In other areas, the central government may declare the law in all its details, but it must be administered and executed by the States. (A similar situation exists under the Constitution of the Federal Republic of Germany.)

(2) The central government of the Federal Republic of Germany has a degree of power vis-a-vis the States which has also raised questions as to whether the system can properly be described as federal. Does it make a difference to one's assessment of the situation to know that the upper House of the Federal Parliament consists of members who are appointed by the State Governments and who can be removed at any time by those Governments if they do not vote according to State Government directions?

(3) The Swiss Cantons have considerable constitutional power, but the constitutional court has no power to declare a federal law invalid. It can declare a Cantonal law invalid. On the other hand, the federal legislature does not have the last word; the Constitution provides that on the demand of a prescribed number of voters or Cantons a federal law must be put to the people at a referendum.

(4) The Canadian Constitution divides power between the Federal Government and those of the Provinces in a fairly rigid manner. The Provinces have, in comparison with other federations, a large area of exclusive power. The Federal Government has power, however, to disallow a Provincial statute; it appoints the Lieutenant-Governors of the Provinces and can instruct them to refuse consent to Provincial Bills and to reserve them for consideration by the Federal Executive. Yet Canada is almost universally recognised as a state in which the federal system thrives. The political and social forces in the country have

resulted in the powers of disallowance and reservation becoming a dead letter.

With much of this general debate we are not concerned. Our task relates to federalism as it is understood in Australia. Although this narrows the area of inquiry, it does not imply that 'Australian federalism' is a precise notion about which there is wide agreement in the community. Nevertheless, while critics differ in their lists of countries which they regard as worthy of being called federations, Australia is included in all lists and is often grouped with a few other countries which are referred to as 'classic federations' or 'genuine federations'.[3]

What one learns from a study of the wider theories of federation is that the federal aspects of a society cannot be properly judged from the legal provisions of the Constitution alone. Institutions laid down in the Constitution, whether aimed at strengthening the influence of the central or State Governments, may not achieve the purpose that was intended because of extra-constitutional institutions or other political or economic forces. For example, most (though not all) agree that the Australian Senate has not proved a vehicle for the expression of State interests owing to the rise of tightly controlled political parties. Votes in the Senate are generally on party lines rather than upon a State basis.

On the other hand, it has often been observed that despite the greater financial might of the Commonwealth as compared with the States, the latter are often vigorous, and quite often successful, opponents of Federal Government policy. They have not been 'brought to heel' by financial pressure as Alfred Deakin predicted over eighty five years ago.[4] This has no doubt been due to the operation of democratic politics and more particularly the organisation of the major political parties in Australia, all of which give State branches an equal or near equal say in the determination of federal policy.

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3 SR Davis, The Federal Principle (1978) 217-9.

4 A Deakin (JA La Nauze ed) Federated Australia (1968) 97.

So, while the organisation of political parties prevented the Senate fulfilling the role some thought it should have as a States' House, those same parties have themselves become a means by which State interests affect federal policy. While, therefore, we are primarily concerned in this Chapter with the legal and constitutional framework of Australian society, our examination and recommendations must have regard to the broader political and social forces that operate.

Federal features in the Australian Constitution

In the nineteenth century, the Constitution of the United States was seen by many as the pre-eminent model of federal government. Our Framers looked mainly to it as a guide to the sort of governmental system they were seeking to establish. While they rejected the presidential system of government and a comprehensive Bill of Rights, in other respects they found, in the American system, what Sir Owen Dixon described as 'an incomparable model.' The federal features of that country's Constitution that we followed were:

(a) the establishment of a central (or Federal) Government and State Governments, each with its own governmental institutions;

(b) a distribution of authority between the Federal and State Governments that confined the former to express enumerated subjects, while leaving the undefined residue to the States;

(c) a judicial authority, appointed by the Federal Government, to determine whether either level of government had exceeded its legislative, executive or judicial powers;

(d) the supremacy of federal laws over State laws in cases of inconsistency; and

(e) an entrenchment of these features by a rigid constitutional framework that is difficult to alter.

It would seem that the minimal essential features of a federal system as it has come to be understood in Australia are a high degree of autonomy for the governmental institutions of the Commonwealth and the States, a division of power between these organisations, and a judicial 'umpire'.

There are other aspects of the Constitution which, while not creating a federal state, reflect its federal nature. Some of these are concerned with ensuring that the Commonwealth behaves fairly to each State as compared with other States. These include section 51(ii.) which restricts the taxation power 'so as not to discriminate between States or parts of States'; section 51(iii.) and section 88 which require bounties and customs duties, respectively, to be 'uniform throughout the Commonwealth'; and section 99 which provides that 'the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue give preference to one State or any part thereof over another State or any part thereof.'

Similarly there are provisions relating to the respect and fairness owed by a State to the Government and people of other States. Section 117 is aimed at preventing a State (and perhaps the Commonwealth) from discriminating against non-alien residents of other States. Section 118 requires that 'full faith and credit' be given throughout the Commonwealth to 'the laws, the public Acts and records and the judicial proceedings of every State.' Discrimination against the trade and commerce of another State is prohibited, and the entry of its people is protected, by section 92, guaranteeing that 'trade, commerce and intercourse among the States shall be absolutely free', and by section 102 dealing with State railway rates which are 'undue and unreasonable or unjust to any State.'

Another feature of the Constitution which has, in the courts and in public political debate, been closely associated with the

federal principle in Australia is representation in the Senate. The people of the Original States are guaranteed equal representation (section 7). The founding fathers were divided on the desirability of an upper House of this nature (usually depending on whether they came from the larger or smaller colonies). Many of the delegates seem to have approved the adoption of this principle on the practical ground that otherwise union would have been impossible, rather than on the basis of federal principle. This is perhaps borne out by the fact that the right of equal representation in the Senate was not granted to any new State which might be admitted to the Commonwealth, but was, in section 121, made to depend on the will of the Federal Parliament.[5]

Nevertheless it is clear that, although an upper House of the nature that we have may not be an essential element of a federation, it reflects the union of the original colonial communities which were co-equal in status. It was the people of each of those colonies, voting separately, rather than the vote of the mass of Australia people as a whole, which determined the union and who would join it. Again, the provision in respect of new States points to this explanation.

Relationship between Governments

Coordinate federalism

In a classic work on the subject, Professor KC Wheare gave this as his test for federal government: 'Does a system of government embody predominantly a division of powers between general and regional authorities, each of which, in its own sphere, is co-ordinate with the others and independent of them?'[6]

This concept of federalism (which the author regarded as a matter of degree), namely two sets of coordinate and independent

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5 Quick and Garran, 189.

6 KC Wheare, Federal Government (1946) 32-3.

Governments pursuing their own policies, does not conform to a number of provisions of the Australian Constitution. Indeed, even the institution of a Senate designed to intrude State interests into the federal authority (regarded by many as a federal aspect of our system) detracts from this 'coordinate' model.

There are many other provisions which do not conform to it. For the first ten years of the federation, the Commonwealth, which was given exclusive power to levy customs and excise duties, was required to give three-quarters of this revenue to the States. The amount received by the States constituted a large proportion of their revenue. (The situation to-day is similar. The States rely on federal grants for most of their revenue.) The Commonwealth was empowered, under section 96, to make grants to the States on terms and conditions, and was required, by section 94, to give surplus revenue to the States. (The latter provision became a dead letter as a result of a legislative device ensuring that there was no 'surplus'. This device was upheld in New South Wales v Commonwealth (Surplus Revenue Case).[7]) It was clearly envisaged, therefore, that the States would not necessarily be able to raise enough revenue of their own to carry out all their functions.

Under Chapter III of the Constitution the Commonwealth was empowered to confer federal jurisdiction on State courts, and so use State courts as 'judicial agents' of the Commonwealth. Similarly, under section 120, each State is required to make provision in its prisons for persons accused or convicted of offences against the laws of the Commonwealth.

If the founders' view of federalism conformed to the 'independent and coordinate' theory it is clear that practical considerations produced a number of departures from it.

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7 (1908) 7 CLR 179.

On the other hand, the Constitution contained a number of provisions designed to establish the independence of one level of government from the other in respect of particular matters. Section 114 prohibits the States, without the consent of the Commonwealth, from taxing the property belonging to the Commonwealth, and prohibits the Commonwealth from levying a tax on State property. The powers given to the Commonwealth with respect to banking (section 51(xxiii.)) and insurance (section 51(xiv.)) expressly exclude some areas of State Government banking and insurance.

It is arguable, therefore, that the extent to which the two levels of government were to be independent of, and coordinate with, each other was to be determined by the terms of the Constitution alone. In other words, the understanding of 'federalism' in Australia was to be judged by the way in which the Constitution created the polity, whether or not it conformed to any theory or definition of federalism.

But from the earliest days of the High Court the judges considered that the broad structure of the Constitution required the application of doctrines, of one sort or another, which were derived from a concept of federalism not to be found expressly in the Constitution. The nature of these doctrines changed over the decades as different notions of federalism were applied.

The first High Court's conception went considerably beyond the minimum essential features we described earlier. They found implied in the Constitution a doctrine which had the object of making Australia conform as fully as possible to the 'independent and coordinate' theory. The Commonwealth and the States were regarded as coordinate and independent organisations of government, each 'sovereign' within its sphere of responsibility. Neither was subject to the power of the other, and each was free to carry out its functions and exercise power without any interference or hindrance from the other (subject to section 109 of the Constitution). The result of the application of this doctrine was, for example, that a State could not levy income tax

on the salary of an officer of the Commonwealth[8] and the Commonwealth could not, under section 51(xxxv.) - the conciliation and arbitration power - authorise the Arbitration Court to make an award arising out of a dispute between a State and its railway employees.[9]

The idea, however, of two separate streams of governmental authority running parallel with each other and never intermingling proved impossible of practical application. All the judges held that the Commonwealth could levy customs duty on a State. Several of them referred to the practical consequences of the contrary view, including the possible destruction of any tariff policy the Commonwealth adopted.[10] Similarly in World War I the defence power of the Commonwealth was seen as a paramount power before which any implied State rights had to give way.[11]

This doctrine of the first High Court - known as the immunity of instrumentalities - was finally overruled in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)[12] which held that under the conciliation and arbitration power federal legislation could bind a State Government. Emphasis was placed on the express words of the Constitution and the plenary nature of the powers of the Commonwealth. Implications from the general concept of federalism were regarded as too vague and subjective for judicial application. The possibility of abuse of power by the Commonwealth in relation to the States was seen as a matter to be resolved in the political arena and, ultimately, by the electorate.

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8 Deakin v Webb (1904) 1 CLR 585.

9 Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway, Traffic Employes' Association (Railway Servants' Case) (1906) 4 CLR 488.

10 Attorney-General of NSW v Collector of Customs for NSW (Steel Rails Case) (1908) 5 CLR 818.

11 Farey v Burvett (1916) 21 CLR 433.

12 (1920) 28 CLR 129.

Power of the Commonwealth to bind the States

Federation, as a legal principle, however, did not disappear from Australian constitutional law. From the early 1930s there was a revival of federal theory in constitutional interpretation led mainly by Justices Dixon and Evatt. In Melbourne Corporation v Commonwealth (State Banking Case)[13] a federal law which required State and Local Governments to bank with the Commonwealth Bank was held invalid on the ground that it singled out the States from the rest of the community. There was no express provision in the Constitution prohibiting discrimination of this sort. Mr Justice Dixon, however, declared that: 'The federal system itself is the foundation of the restraint upon the use of the power to control the States'.[14] He went on to say that 'The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities'.[15]

This doctrine, or something like it, has been accepted by most judges in recent times. The following formulation by Mason J sums up, we believe, the present view of the Court:

> ... the implication that should be made is that the Commonwealth will not in the exercise of its powers discriminate against or 'single out' the States so as to impose some special burden or disability upon them, unless the nature of a specific power otherwise indicates, and will not inhibit or impair the continued existence of the States or their capacity to function.[16]

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13 (1947) 74 CLR 31.

14 id, 81.

15 id, 82.

16 Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25, 93.

This was expressly adopted by Brennan J in Commonwealth v Tasmania (Tasmanian Dam Case)[17] and was also quoted with apparent approval by Deane J in the Queensland Electricity Commission v Commonwealth (Queensland Electricity Commission Case).[18]

The principle of non-discrimination was applied in the Queensland Electricity Commission Case to invalidate a Federal Act relating to arbitration which provided special and more stringent rules to govern a dispute involving the Commission, which was a public authority of Queensland. The High Court made it clear that the implied restraint protected not only the State Government, but also the statutory authorities of a State. It was also applicable where only one State Government or its authority was discriminated against.

The Australian Constitutional Convention in 1985 recommended that the corporations power in section 51(xx.) be altered by adding the words: 'but so as not to discriminate against State statutory corporations'.[19]

In the light of the decision in the Queensland Electricity Commission Case it seems that such an alteration is no longer required and we recommend accordingly.

No federal law has been held invalid under the second limb of the implied restriction, namely, that it threatens the existence of a State or its ability to function as an independent Government. It was held that the application of federal payroll tax legislation to the States did not breach the principle; and a similar finding was made by a majority of the Court which upheld

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17 (1983) 158 CLR 1, 215-6.

18 (1985) 159 CLR 192, 247.

19 ACC Proc, Brisbane 1985, vol I, 419.

the federal legislation that had the effect of preventing Tasmania from building a dam in that State.[20]

There is considerable difficulty in determining the scope of this second restriction. It is clear, of course, since the Engineers' Case, that to run foul of the restriction it is not enough to show that the law binds the States in the sense that it prevents a State from carrying out a particular function or controls the way it may be performed. Nor is the Court willing to make any distinction between 'inalienable' or 'governmental' functions and other functions performed by a Government, because of the difficulty of formulating any test to distinguish those functions in the absence of an ideological commitment.

What seems to be involved, however, is the independence of the organisation and machinery of government, which we earlier referred to as an essential element of a federation as it has come to be understood in Australia. The area protected was described by Stephen J as 'the structural integrity of the State components of the federal framework, State legislatures and State executives'.[21] This description has been approved by Mason J in the Tasmanian Dam Case[22] and Gibbs CJ in the Queensland Electricity Commission Case.[23] Brennan J similarly distinguished federal measures which 'diminish the powers of the executive government' of a State from those which 'impede the processes by which its powers are exercised.'[24] It is only the latter which are of concern to the implied restrictions on federal power.

It is clear that the restriction is concerned with what we described earlier as essential to federalism, namely, a high degree of autonomy for the governmental organisation and

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20 Victoria v Commonwealth (Payroll Tax Case) (1971) 122 CLR 353; Tasmanian Dam Case (1983) 158 CLR 1.

21 Koowarta v Bjelke-Petersen (1982) 153 CLR 168, 216.

22 (1983) 158 CLR 1, 139.

23 (1985) 159 CLR 192, 207.

24 Tasmanian Dam Case (1983) 158 CLR 1, 214.

institutions of the units of the federation. There are, however, few judicial examples of laws that will be regarded as impairing this essential aspect of our system. Professor Zines has suggested[25] that the following, among others, might be regarded as necessary to the organisation and processes of State Governments: 'advice to Ministers by the Civil Service, the relationship of the Governor to Ministers and to parliament, parliamentary debate and the internal procedures of parliament, the operation of "responsible government", and the freedom of the State judiciary.'[26]

Even in areas such as these, however, it seems that the Court would be concerned to look at the actual or potential operation of the particular law, rather than rely on abstract propositions exempting particular areas from federal power. It may be, for example, as some judges have suggested, that particular applications of federal taxation laws to the States could threaten their independence, such as a progressive receipts tax as applied to the ordinary revenue of the States. That, however, was not regarded by the High Court as a sufficient reason for constitutionally exempting the States from federal payroll tax. The Court pointed to the fact that the States had been paying the tax for many years, without impairing their existence or capacity to function as States. It can, however, be stated as Gibbs J said of the taxation power[27] that a federal law operating on the matters referred to in the preceding paragraph 'would be more likely than many other laws to offend against the limitations that apply generally to Commonwealth powers'.

In dealing with such a broad concept as 'the federal system' it is inevitable that there will be different views expressed in relation to particular cases. For example, there is little doubt that freedom of speech in a State Parliament is an important

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25 L Zines, The High Court and the Constitution (2nd edn 1987) 295-6.

26 id, 296.

27 Payroll Tax Case (1971) 122 CLR 353, 424.

aspect of State Government. Federal laws that impaired it could have the capacity to threaten the functioning of a State as an independent unit of the federation. But does that mean that in no circumstances may a federal law prohibit or regulate such speech? Would the Commonwealth be powerless, say, to prevent the giving of information in a State Parliament in wartime that would imperil Australian ships or forces? On this issue the members of a Senate Committee in 1985 were divided. The majority were of the view that, under present law, the Commonwealth had no such power, because of the implied federal restriction and section 106 of the Constitution. As indicated above, we do not believe that the view of the majority of the Committee is consistent with the more flexible and practical approach adopted by the High Court.[28]

In our view it is impossible to formulate any clearer principles in this area to ensure the independence of State governmental institutions and procedures. The High Court has taken cognizance of the indispensability of the States and the autonomy of their organisations to the federal system. Whether any federal law, if valid, would threaten those essential features of our system depends on the particular situation and requires the weighing of many factors. We do not believe that it is possible to provide any more precise formula in the Constitution.

As mentioned above, the Senate Committee relied on section 106 as well as the implied federal restriction for reaching its conclusion. That section provides:

> 106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Section 106 and section 51 of the Constitution are both expressed to be 'subject to this Constitution'. It was suggested by some

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28 Commonwealth law making power and the privilege of freedom of speech in State Parliaments, Report by the Senate Standing Committee on Constitutional and Legal Affairs (1985).

judges in Australian Railways Union v Victorian Railways Commissioners[29] and New South Wales v Commonwealth [No 1] (Garnishee Case)[30] that section 106 might prevent the Commonwealth from imposing on the States an obligation to pay money that was not conditional on an appropriation of funds by the State Parliament.[31] In fact, however, the Court has not over the past fifty years relied on section 106 for the purpose of restricting federal power to bind the States. The Court has gone directly to the concept of a federal state.[32] The need for a State parliamentary appropriation to satisfy a federally imposed obligation is clearly one which requires consideration of the implied federal restrictions on the powers of the Commonwealth.

State laws and the Commonwealth

Insofar as federal principles prevent the Commonwealth from binding a State, it follows that the States are equally restricted in relation to the Commonwealth. In fact, however, the decisions of the High Court to date indicate that the Commonwealth has a far greater area of immunity.

It had been held in In re Foreman and Sons Pty Ltd; Uther v Federal Commissioner of Taxation (Uther's Case)[33] that the Companies Act of New South Wales had validly prescribed an order of priority for payment of debts on the winding up of a company which was incompatible with the prerogative right to priority of the Commonwealth. As the prerogative right had its source in the

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29 (1930) 44 CLR 319, 352 (Isaacs CJ), 389 (Starke J).

30 (1932) 46 CLR 155, 176 (Rich, Dixon JJ).

31 Such an unconditional obligation was upheld in the Garnishee Case, but the Court relied on the special provisions of section 105A(5) which declares the Financial Agreement binding 'notwithstanding anything contained in this Constitution or the Constitution of the several States ...'.

32 Of course, section 106 is one of the provisions of the Constitution, together with others, from which the federal nature of the Constitution may be inferred: Queensland Electricity Commission Case (1985) 159 CLR 192, 231 (Brennan J).

33 (1947) 74 CLR 508.

common law, it was held that it could be abrogated by a valid Act. The Act as a whole was regarded as having a close relationship with the peace, welfare and good government of New South Wales. Mr Justice Dixon dissented, and his reasoning predominated in the later case of Commonwealth v Cigamatic Pty Ltd (In Liquidation) (Cigamatic Case)[34] which overruled Uther's Case. In both cases he affirmed that a State could not legislate as to the rights which the Commonwealth should have against its own subjects. The fact that the Commonwealth's claim was based on the prerogative was 'an added reason', 'perhaps conclusive in itself', to deny State power to control it.[35] In the Cigamatic Case he expressed the view that the prerogative right might in modern times be better referred to as 'one of the fiscal rights of government'.[36]

While the Cigamatic Case clearly decided that prerogative rights of the Commonwealth could not be subjected to State law, the broad language used by Dixon CJ seems to point to a much wider area of immunity. This view is confirmed by dicta in Commonwealth v Bogle.[37] Mr Justice Fullagar said that: 'The Commonwealth - or the Crown in the right of the Commonwealth, or whatever you choose to call it - is, to all intents and purposes, a juristic person, but it is not a juristic person which is subjected either by any State Constitution or by the Commonwealth Constitution to the legislative power of any State Parliament.'[38] This broader view was accepted by Barwick CJ in the Payroll Tax Case.[39]

There is some dispute about the interpretation of these decisions and dicta. One view confines it to the immunity of the

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34 (1962) 108 CLR 372.

35 Uther's Case (1947) 74 CLR 508, 528.

36 (1962) 108 CLR 372, 377.

37 (1953) 89 CLR 229, 259-60 (Fullagar J, with whose judgment Dixon CJ, Webb and Kitto JJ agreed).

38 id, 259.

39 (1971) 122 CLR 353, 373.

prerogatives of the Commonwealth.[40] Another view is that it extends to the Commonwealth only when it is exercising governmental rights as distinct from 'rights or interests which are shared by ordinary members of the community'.[41] Others consider that the meaning of the decisions is that a State has no power to make laws binding the Commonwealth.[42]

The latter view of the immunity has been supported on the basis that it is in the nature of the federal system that the concerns of the Federal Government are those of the nation as a whole, and therefore are beyond the purview of what relates to the 'peace, order and good government' of any one State. From the political point of view, also, the Commonwealth is the Government of all the people in all the States, who are represented in its Parliament. They are not represented in a State Parliament. While the States are part of the Commonwealth, the Commonwealth is not a part of any State.[43]

This view has been criticised by a number of writers who take a different view of the nature of our federal system and who also criticise it on practical grounds. These critics emphasise the dual nature of federalism. They claim that the Commonwealth should therefore have no greater degree of immunity than is accorded to the States. Also, they argue, a wide area of immunity is incompatible with the ideal of government under law. More significantly, it is argued that the wide area of immunity provides the Commonwealth with more than is necessary to preserve federal interests. This is because the Commonwealth always has power to protect itself, its agencies and its servants by

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40 G Evans, 'Rethinking Commonwealth immunity' (1972) 8 Melbourne University Law Review, 521.

41 RD Lumb, The Constitution of the Commonwealth of Australia Annotated (4th ed, 1986), 352-3.

42 L Zines, The High Court and the Constitution (1987) op cit, 314ff.

43 cf Marshall CJ in McCulloch v Maryland (1819) 4 Wheat 316 and D'Emden v Pedder (1904) 1 CLR 91, 115 (Full High Court); MJ Detmold, The Australian Commonwealth (1985) 19; MH Byers in G Evans (ed), Labor and the Constitution 1972-1975 (1977) 67.

legislation from the operation of State laws. The Federal Government plays a large part in many areas of economic and social activities. To exclude it automatically can have serious impact on the effectiveness of State legislation. Where there are countervailing arguments of public interest, the Commonwealth can determine this and act accordingly by legislation.[44]

The matter was discussed by the Australian Constitutional Convention at the Brisbane (1985) session when it was recommended that the following provision should be made:

> 107A. Every power of the Parliament of a State shall, subject to section 109, extend to the Commonwealth in its operations within that State; but the Commonwealth shall not be bound by a State law unless the Crown in right of the State is bound by that law.[45]

The main areas where it was suggested by the New South Wales Government that the immunity of the Commonwealth caused difficulty were occupational health and safety, town planning and environmental controls, State and Local Government taxes and charges, and human rights legislation. The Federal Government opposed the resolution.

The practical significance of the constitutional immunity enjoyed by the Commonwealth, however, has been very much reduced by the interpretation given by the High Court to section 64 of the Judiciary Act 1903 (Cth). That section provides:

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44 L Zines, The High Court and the Constitution (1987) op cit, 321-2. It should be noted that even on the widest view of the immunity, the Commonwealth may be affected by State law if it chooses (in the absence of federal law) to enter into a transaction such as a contract or trust, or otherwise takes advantage of machinery or institutions provided by State law, such as registration of a company or of land under Torrens title: Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (Farley's Case) (1940) 63 CLR 278, 308 (Dixon J); Commonwealth v Bogle (1953) 89 CLR 229, 260 (Fullager J); Uther's Case (1947) 74 CLR 508, 528 (Dixon J).

45 ACC Proc, Brisbane 1985, vol I, 420.

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

For many years there had been disagreement among the judges as to whether this provision was limited to procedural law. In Maguire v Simpson,[46] however, it was held that the section had the effect of applying to the Commonwealth in a suit the whole body of substantive law that would be applied if the Commonwealth were a subject.[47] This seems to suggest that the decision in the Cigamatic Case was incorrect, not as a matter of constitutional law, but because the Court failed to take into account that the State Companies Act was to be applied, not as a result of it operating by virtue of State authority, but as a result of a federal statutory direction, namely section 64.[48]

At the time of the Brisbane (1985) session of the Australian Constitutional Convention, however, there was still some doubt about the effect of Maguire v Simpson as evidenced by differing decisions by State judges. In Commonwealth v Evans Deakin Industries Ltd,[49] the High Court emphatically affirmed its earlier view.

It seems to follow from this decision that a successful suit can be brought against the Commonwealth in many areas in which the proponents of a constitutional alteration desire the Commonwealth to be bound by State law. Indeed, in one respect, section 64 goes beyond the proposed alteration. The Commonwealth under section 64 may be made liable by reference to a State law which does not bind the State (or even one which expressly declares that the Commonwealth is not bound).

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46 (1977) 139 CLR 362.

47 The Court did not consider the validity and operation of the provision insofar as it deals with suits to which a State is a party. In any case it would apply to the latter suits only where federal jurisdiction is being exercised.

48 See (1977) 139 CLR 362, 402 (Mason J), 403-4 (Jacobs J).

49 (1986) 66 ALR 412.

There may still be some areas of federal immunity despite section 64. First, that provision is qualified by the words 'as nearly as possible'. It is clear, however, from the decisions, that the Court will not give this phrase a broad meaning so as to undermine the basic principle established in Maguire v Simpson and the Evans Deakin Case. The actual scope of the qualification is still uncertain. What is clear is that the special position of the Crown is not itself a reason for not applying the ordinary law.

Secondly, it is doubtful if section 64 has anything to say about the prosecution of servants of the Commonwealth in relation to criminal acts in the course of their employment. Such a prosecution is probably not a 'suit' within section 64.[50] In Pirrie v McFarlane[51] a member of the Royal Australian Air Force driving in the course of his duty was held subject to State law relating to driving licences. The decision is difficult to reconcile with the wide view of the immunity of the Commonwealth expounded in later cases. Section 64 of the Judiciary Act (Cth) does not seem to affect the matter. More recently the High Court proceeded on the basis that the members of the Australian Secret Intelligence Service were bound by State criminal law for acts done in the course of their duty.[52] There was, however, no discussion of the general issue of the immunity of the Commonwealth.

Assuming that a State cannot make the Commonwealth or its servants or agents liable for an offence and that, as suggested, section 64 of the Judiciary Act (Cth) is not relevant, that does not prevent section 64 applying to any civil suit brought against the Commonwealth for breach of statutory duty. This was decided by the New South Wales Supreme Court in Strods v Commonwealth[53] and was approved by the High Court in the Evans Deakin Case.

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50 See the definition of 'Suit' in section 2 of the Judiciary Act 1903 (Cth) and compare the definition of 'Cause' which 'includes any suit, and also includes criminal proceedings'.

51 (1925) 36 CLR 170.

52 A v Hayden (1984)156 CLR 532.

53 [1982] 2 NSWLR 182.

Apart from the remaining areas of immunity noted above, it seems that much of what the proponents of the resolution passed at the Constitutional Convention desired has been achieved as a result of judicial interpretation of section 64 of the Judiciary Act. The present position can, of course, be altered by the Federal Parliament; but that is also the case under the proposed alteration which would be subject to section 109. We understand that the Commonwealth has under active consideration the extent to which the Commonwealth should seek immunity from the operation of State laws. The considerations that the Commonwealth will have to take into account in determining this matter will be no different whether or not the Constitution is altered in the manner proposed. The effect of any resulting legislation will be substantially the same.

We recommend therefore that no alteration to the Constitution be made in this respect.

The issue of the immunity of the Commonwealth is also affected by two exclusive legislative powers of the Commonwealth in section 52, namely, to make laws with respect to 'all places acquired by the Commonwealth for public purposes' (in section 52(i.)) and 'Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth' (in section 52(ii.)).

The effect of the exclusive power of the Commonwealth in relation to 'places' on the operation of State laws has been alleviated by the enactment of the Commonwealth Places (Application of Laws) Act 1970 (Cth) which provides, with some exceptions, for the assimilation of State law except where such law is inconsistent with federal law. The Act, however, does not affect any immunity that arises for reasons other than the exclusivity of the power in section 52(i.). At the Brisbane (1985) session of the Australian Constitutional Convention, resolutions were passed to the effect that if the 'inter-change of powers' proposal were not implemented, federal power in respect of places and departments

in section 52 should in effect be made concurrent powers.[54] This matter is dealt with in Chapters 5 and 10 of this Report, with further consideration in Chapter 10 of our Final Report. Similarly, a resolution to remove from section 114 the immunity of Commonwealth and State property from taxation by the other level of government is discussed in relation to the financial powers of the Commonwealth in Chapter 11.

Federalism and the content of federal and State powers

In addition to the doctrine of the immunity of instrumentalities, the early High Court evolved another principle of constitutional interpretation known as the doctrine of reserved powers. This doctrine was based on an inference, from the list of powers given to the Commonwealth, that legislative powers over certain subjects were exclusively vested in the States. The existence of these 'reserved powers' of the States formed the major premise of reasoning in construing the breadth of the various subjects of federal power. Unless the contrary intention appeared, the federal powers were construed so as not to impinge on this State field. Therefore, where it was possible to give a broad or narrow interpretation to a particular subject of federal power the narrower interpretation was chosen if the broader one would have involved straying into what the Court believed was the reserved State legislative jurisdiction.

The difficulty with the doctrine was determining what matters were within the State reserved powers because the Constitution did not (except in some minor cases) confer any express powers on the States, but merely left them with the undefined residue. On some occasions the Court relied on an inference from the subject matter of section 51(i.) - 'Trade and commerce with other countries, and among the States' - that the State Parliaments had exclusive power to make laws with respect to intra-State trade. It followed that no other subject of federal power would be so interpreted as to impinge significantly on this implied reserved

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54 ACC Proc, Brisbane 1985, vol I, 420.

power, unless the contrary intention clearly appeared. It was in this manner that the term 'trademarks' in section 51(xviii.) was held not to include a mark indicating that the members of a trade union had produced a product to which a mark was affixed.[55] Similar reasoning was used to hold that the corporations power in section 51(xx.) had a narrower meaning that it might otherwise have been given.[56]

In other cases, however, it was made clear that the 'reserved power' was not confined to intra-State trade. In Peterswald v Bartley[57] and R v Barger[58] the doctrine was used to invalidate federal laws that affected manufacturing (which the Court has consistently held is not within the concept of 'trade and commerce'). On these occasions the majority judges referred to all 'domestic affairs' of a State as being reserved. In R v Barger the taxation power of the Commonwealth was held not to authorise the levying of an excise on the manufacture of agricultural equipment when it was coupled with an exemption for employers who provided certain conditions of employment to their employees. Chief Justice Griffith said that:

> the power of taxation ... was intended to be something entirely distinct from a power to directly regulate the domestic affairs of the States, which was denied to the Parliament.[59]

This doctrine was - like the immunity of instrumentalities - overthrown by the decisions in the Engineers' Case, and no judge has purported directly to rely on it since. In the State Banking Case,[60] for example, Dixon J, while using the notion of

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55 Attorney-General for NSW v Brewery Employes Union of NSW (Union Label Case) (1908) 6 CLR 469.

56 Huddart, Parker & Co Proprietary Ltd v Moorehead (1908) 8 CLR 330.

57 (1904) 1 CLR 497.

58 (1908) 6 CLR 41.

59 id, 69.

60 (1947) 74 CLR 31.

'federalism' in arguing for a degree of immunity of State Governments from certain federal laws, made it clear that he was not proposing that the express powers of the Commonwealth were to be read down in the light of State residuary power preserved by section 107. Indeed, he declared that the reserved powers doctrine 'lacked a foundation in logic'.[61]

For about 60 years there was a general adherence (at least verbally) to the view that federal powers should not be construed having regard to any 'reserved powers' of the States, and that is still the view of the majority of the Court. In recent years, however, some judges have suggested that federal considerations might be relevant at times in determining the content of, at any rate, some powers of the Commonwealth. In Gazzo v Comptroller of Stamps (Vict)[62] Gibbs CJ declared that 'in considering whether a law is incidental to the subject matter of a Commonwealth power it is not always irrelevant that the effect of the law is to invade State power; that of course would not be relevant if the law were clearly within the substantive power expressly granted.'[63] In Actors and Announcers Equity Association v Fontana Films Pty Ltd (Actors Equity Case)[64] Gibbs CJ, with whom Wilson J agreed, rejected a particular interpretation of the corporations power, having regard to the 'proper reconciliation between the apparent width of section 51(xx.) and the maintenance of the federal balance which the Constitution requires.'

Other judges have attacked what they see as a revival of the reserved powers doctrine, and the notion of 'federal balance'. They argue that one cannot determine from the Constitution what are subjects of State exclusive power beyond concluding that that power contains whatever remains after properly construing the

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61 id, 83.

62 (1981) 149 CLR 227.

63 id, 240.

64 (1982) 150 CLR 169, 182.

extent of federal power.[65] The difficulty with the notion of 'federal balance', it is argued, is that in the absence of any express powers given to the States it is difficult to know what are 'balanced', unless it is the functions that the States are performing at any particular time.[66]

The Government of Queensland, in its submission to the Commission relating to the recommendations of the Advisory Committee on the Distribution of Powers, supported the doctrine of '"federal balance" as a legitimate and absolutely essential tool of constitutional interpretation.' It argued that unless the High Court had regard to the ability of the States to exercise their basic functions, the State legislatures would become 'empty shells' and the federal framework of government would be subverted.[67]

It is not for us to enter into this argument as to the principles of constitutional interpretation. Whether and how judges can discover a particular balance from the structure and terms of the existing Constitution is of relevance to us only insofar as it is necessary for us to determine the existing state of the law and its probable development. Our task is to examine the existing division of powers - recognising that it changes and evolves in time by judicial interpretation - and consider whether we should make recommendations for its alteration. Does the concept of a federal state assist in this determination?

A number of submissions have suggested that the concept is of direct relevance in relation to the financial powers of the States and Commonwealth, and the extent of the external affairs power of the Commonwealth. We consider these matters in Chapters 10 and 11 respectively. Leaving them aside for the moment, we

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65 Actors Equity Case (1982) 150 CLR 169, 207 (Mason J); Koowarta v Bjelke-Petersen (1982) 153 CLR 168, 241 (Murphy J); Tasmanian Dam Case (1983) 158 CLR 1, 221 (Brennan J).

66 See (1986) 60 Australian Law Journal 653.

67 Queensland Government S3172, 16 December 1987, 6.

can say that we do not consider that the federal principle provides any clear guidance in deciding whether a power over a particular area of social life should be assigned, or denied, to the Commonwealth.

In discussing the essential features of a federal state we referred to the distribution of powers between the two spheres of government. What those powers should be is a very important issue and we are required to examine it (taking into account also Local Government and self-governing Territories) under paragraph (c) of our Terms of Reference. The Advisory Committee on the Distribution of Powers has listed a number of factors that we believe are useful in determining these issues.[68]

But, whatever may be the proper criteria for determining whether the Constitution should be altered to provide or deny to the Commonwealth a particular area of power, we are unable to appreciate how a theory of federalism or federal balance can give any guidance in that task. It is not possible to determine a distribution of powers, generally speaking, from the fact that a federal state is to be created or maintained. It could not for example be effectively argued that if the Commonwealth were denied power with respect to divorce, trading corporations, or industrial arbitration any federal principle would have been breached. Similarly, if the Commonwealth had been given express power over criminal law, public works, or agriculture (as in Canada) it would be difficult to conclude that Australia had ceased to be a federation.

This is not to deny, of course, that the community's view of good government or prevailing social values may have been influenced in many cases by historical considerations and the traditional functions performed by the Federal and State Governments. On other occasions the traditional practices might be seen to inhibit desirable social and political objectives. In other words the issue in most cases is what <u>sort</u> of a federal state is desirable rather than whether or not we should have one.

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[68] Powers Report, 2, para 1-3, 217-8 (Appendix F).

Accepting that the concept of federalism in itself cannot provide a criterion for determining a division of powers, it is argued that it does require that the States have substantial, or not insubstantial, power. Formally, the States retain power (subject to constitutional limitations) over all subjects relevant to their State except the few that are made exclusive to the Commonwealth, such as customs and excise, the raising of armies (unless the Federal Parliament consents) and Commonwealth places. Where, however, the State power is concurrent with that of the Commonwealth, a State law made in exercise of the power is subject to being overridden by federal law under section 109. This particular view of federalism requires a degree of exclusive power in the States.

From time to time argument occurs as to whether any particular country is 'federal' despite provisions for the entrenchment of the existence of the States and the autonomy of their institutions, because the area of State power is relatively insignificant. As Professor Sawer has said 'the question of federalism or no federalism becomes in practice whether the area of the autonomy is sufficient to be worth considering'.[69]

It is undoubted that over the past three decades or so the Commonwealth has, by virtue of judicial interpretation of the Constitution, been found to have powers that were once thought not to be within its area of responsibility. But it cannot be said that Australia has reached the point where the legislative and executive powers of the States are insignificant and that, as a consequence, there is any doubt that Australia is a federal state. Much of the law taught in Australian law schools, for example, is in large part untouched by federal statutes, consisting mainly of common law or State statutory law. This includes the law of contract, torts, criminal law, land law, conflict of laws, State administrative law, principles of equity, police law, Local Government law, occupational health and safety, town planning law and so on.

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69 G Sawer, Modern Federalism, op cit, 106.

While the Commonwealth has power to enter some of these areas to a greater or lesser degree, none of them can be comprehensively covered by federal legislation under the present state of constitutional interpretation or any reasonable prediction of what it is likely to be. In many of these and other areas, therefore, it is likely that the States will retain the primary role and the Commonwealth a secondary one, in the absence of any alteration to the Constitution.

We indicated earlier that we were putting to one side for purposes of our analysis the external affairs power. There are those who would accept what has been said above as the situation up to 1983, but who argue that,as a result of the decision in the Tasmanian Dam Case,[70] the external affairs power now has the potential to destroy all independent State functions and powers other than those preserved by the implied federal restrictions, dealt with above. This view is summed up by the statement of Gibbs CJ that 'The external affairs power differs from the other powers conferred by section 51 in its capacity for almost unlimited expansion.'[71] The construction of this power has given rise to public debate and we have received a number of submissions with regard to it. We will consider them in Chapter 10 of the Final Report.

The financial provisions of the Constitution, including the possibility of an interpretation of the taxation power in section 51(ii.) to cover State taxation, raises issues that more directly concern the functioning of the States as independent units of the federation. They have been the subject of recommendations of the Australian Constitutional Convention. This matter will be examined in detail in Chapter 11 of the Final Report.

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70 (1983) 158 CLR 1.

71 id, 100.

Discrimination against out-of-State residents

Section 117 provides:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

The reference to a 'subject of the Queen' was intended to exclude aliens from the benefit of this section. Apart from that, section 117 is clearly inspired by the federal principle. While it provides an individual protection or guarantee, its focus is on the relationship between a State and the people of other States. Its object does not include protection for the resident of a State against the Government of that State, as one would find in, say, a Bill of Rights. As Quick and Garran said: 'It is assumed that the resident subjects of the Queen will be the most favoured people and the special object of State consideration and solicitude.'[72] It is appropriate therefore that section 117 should be discussed in the context of an examination of federalism, rather than in relation to the broader issue of individual rights against Governments, which is dealt with in Chapter 9.

In the few cases that have been decided involving section 117 the High Court has taken a very narrow approach which, in many situations, permits the States to evade the object of the provision. In Davies and Jones v Western Australia[73] the High Court held valid legislation that discriminated against persons who were not 'bona fide residents of and domiciled in' Western Australia in its application to a plaintiff who was not resident or domiciled in that State. The Court rejected the argument that residence and domicile of choice were in practical reality so similar that they should be treated as amounting to the same thing.

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72 Quick and Garran, 960.

73 (1904) 2 CLR 29.

The narrow and technical construction was further emphasised in Henry v Boehm.[74] In that case the Court considered South Australian admission rules for legal practitioners which provided (a) that an applicant for conditional admission, previously admitted elsewhere, must have resided in South Australia for three months continuously immediately before the filing of his application, except in the case of a person who ordinarily resided in or was domiciled in the State, and (b) that absolute admission would be granted one year later if during the period since conditional admission the applicant had 'continuously resided' in South Australia. The majority of the Court (Barwick CJ, McTiernan, Menzies and Gibbs JJ; Stephen J dissenting) upheld the rules on the ground that all persons whether permanently resident in South Australia or not had to satisfy the residential requirements. A resident in South Australia for the purposes of section 117 might be in fact residing in Victoria, as the plaintiffs were.[75]

The Royal Commission on the Constitution in 1929 expressed the view that cases such as Davies and Jones v Western Australia were not 'within the spirit of section 117' and they recommended adding to the end of section 117 a provision preventing a State, in imposing taxation, from discriminating against a person who was resident or domiciled in another State.

It is clear that the above decisions have resulted in section 117 having a very narrow impact. Indeed, many believe that the provision has been robbed of much of its vitality and purpose. While section 117 has been successfully applied to invalidate certain blatant provisions,[76] in other cases it can be avoided by various techniques.

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74 (1973) 128 CLR 482, followed by the Supreme Court of Queensland in Re Street (1987) 74 ALR 604.

75 For a trenchant criticism of this case see D Rose, 'Discrimination, Uniformity and Preference' in L Zines (ed) Commentaries on the Australian Constitution (1977) 219-29.

76 Australian Building Construction Employees' Etc Federation v Commonwealth Trading Bank (1976) 2 NSWLR 371; Commissioner of Taxes v Parks (1933) SRQ 306; Re Loubie (1985) 62 ALR 139.

To achieve the object of preventing less favoured treatment of out-of-State residents it seems to us that it is desirable to ensure that the notion of 'resident' in section 117 should not be confined to permanent residence. Mr Dennis Rose has suggested that the issue that arises out of cases such as Davies and Jones and Boehm could be dealt with by altering section 117 to include persons who are permanently or temporarily resident or domiciled in other States.[77] We agree with him.

Such an alteration may not take care of all the possibilities of States endeavouring to favour their own people. It is not possible, however, particularly in a Constitution, to make detailed provision for every ingenious device that Governments may produce. In the long run it will be for the High Court to construe the provision in a manner that will ensure that its object is not undermined.

We see no reason to confine the protection to 'subjects of the Queen' or to Australian citizens. Also, having regard to our general approach throughout this Report in matters relating to the Territories, we believe that the protection should be extended to persons in and from the Territories.[78]

Section 117 as proposed would not prevent a residential period being prescribed for enrolment as an elector in a State electoral division or municipality. It might be argued however, that where the entire State is one electorate section 117 might be breached if a period of residence in the State was required as a condition of enrolment. We recommend, therefore, that section 117 should

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77 D Rose, 'Discrimination and Preference' in Constitutional Reform and Fiscal Federalism, Centre for Research on Federal Financial Relations, (1987), 61.

78 We received few submissions concerning section 117. The most detailed submission came from Mr Charles Lowe, who suggested changes which would have gone beyond what we recommend and were aimed at providing a means for gradually bringing about the creation of uniform laws in the States: S2195, 5 June 1987; S2290, 2 July 1987; S3966, 21 September 1987; S2759, 24 October 1987; S3967, 17 February 1988; S3300, 22 February 1988.

be qualified by permitting a law providing for reasonable residency requirements as a condition of enrolment as an elector.

We **recommend** that section 117 be omitted and the following provision be substituted:

> 117. (1) A person who is resident, temporarily resident or domiciled in any State or Territory shall not be subject in another State or Territory to any disability or discrimination on the ground or substantially on the ground of that residence, temporary residence or domicile.
>
> (2) Sub-section (1) of this section is not infringed by a law that imposes reasonable conditions of residence as a qualification for an elector.

The Constitution and State systems of government

It has been argued at times and in submissions to the Commission - notably by the Governments of Queensland and Tasmania - that the procedure in section 128 of the Constitution should not be used to alter the Constitution to affect the machinery of government in each State or to confer on the people of a State rights or guarantees in relation to their State Government.

The argument is as follows: The Federal Constitution is concerned with the creation, organisation and functioning of the Commonwealth and its institutions. The States and their governmental frameworks were not brought into existence by the Constitution. Their governmental organs and the functioning of those organs are left to State laws to control and regulate. So far as the States are concerned, therefore, the provisions of the Constitution are, and should be, confined to such matters as the distribution of legislative, executive and judicial powers among the Commonwealth and the States and the effect of State action on the people of other States. Any other provisions should be limited to the structure of federal institutions and restrictions on federal powers.

Those who adopt this view regard such issues as individual rights against State authorities, the right to vote and the value of the vote in State elections, responsible government in the States and the appointment and dismissal of State judges as of concern only to the Government and people of each State. They are of no legitimate interest or concern to the people of the Commonwealth as a whole.

In support of this approach, reference is made to section 106 of the Constitution, which provides:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

The Constitution, generally speaking, does not lay down rules relating to the organisation and functioning of State Parliaments, Governments or courts. Also, a number of constitutional provisions that might be regarded as individual rights are applicable only in respect of federal laws. These include the right to trial by jury (section 80), to freedom of religion (section 116) and to just terms for the acquisition of property (section 51(xxxi.)). There are limitations on the exercise of State governmental power, but these are designed to protect the people of, or trade affecting, other States, such as section 117, which was examined earlier, and section 92, which guarantees the freedom of inter-State trade.

That is not to say that the Constitution does not impinge at all on the operation of State institutions. Section 12, for example, gives a State Governor the function of issuing writs for an election of senators for the State. Section 15 imposes a duty on State Houses of Parliament in relation to the filling of casual vacancies in the Senate. Section 120 requires every State to make provision in its prisons for the detention of persons accused or convicted of federal crimes. Section 77 empowers the Federal Parliament to invest State courts with federal jurisdiction. The fact remains, however, that the internal

organisation of the States and the rights of their people are largely untouched by the Constitution.

For present purposes, the issue is not whether section 128 extends legally to controlling State governmental systems. We will examine section 128 in Chapter 13 of the Final Report and we conclude, as do most commentators, that it encompasses alterations to the Constitution dealing with these matters. The argument is rather that such action would destroy or impair the federal nature of the Constitution or, alternatively, would be fundamentally opposed to the scheme of union which provided the basis for the agreement by the people of the several colonies to federate.

We find it difficult to understand how constitutional provisions imposing limitations on the powers, or affecting the structures, of all Governments in Australia can be regarded as opposed to the concept of a federal society. The purpose of provisions of that nature is to protect the people, not to rearrange the distribution of power between the Federal and State Governments. For example, a provision extending section 80 of the Constitution to trials for State offences or one requiring just terms for the acquisition of property by a State would not increase the power of the Commonwealth. Both the Commonwealth and the States would be bound by similar provisions.

There is certainly nothing in the nature of a federal constitution that is contrary to the presence of provisions relating to democratic rights, individual rights or governmental procedures in the State sphere. Indeed all the federal constitutions with which we are most familiar have provisions concerning these matters, including those of the United States, India, Canada and the Federal Republic of Germany.

The second argument against alteration of the Constitution in these respects is based primarily on historic considerations and, therefore, on conditions peculiar to Australia. Most of the Framers of the Constitution were colonial politicians.

Naturally, their main concern was the creation, power and restrictions on power of the new polity. The immediate task did not require the dismantling of the colonial constitutions and their reformulation as State constitutions in the Federal Constitution. It was sufficient to continue in force the framework of government existing in each colony, subject to any changes made necessary by the union of those colonies. It is also the case that most of the Framers, while willing in some respects to protect their people from actions of the Commonwealth, and to entrench structural features of the Commonwealth, were not anxious to impose similar limitations or forms on their own Governments as States of the federation.[79]

What the Framers did recognise, however, was that they were creating a constitution for future generations, who would, in turn, be entitled to determine their form of government. They, therefore, devised section 128 of the Constitution.

Consequently, our task in considering what alterations should be made to the Constitution cannot be confined to the values held by the Framers, or by the people, at the end of the last century. That is not, of course, to suggest that many of their values and policies are not still those of the Australian people; others, however, may not be. Some events and some alterations made to the Constitution reflect a different attitude from that which prevailed at the Constitutional Conventions of the 1890's. From the viewpoint of the issue we are considering, the most significant is the control of all the governmental borrowing in Australia by a national body, the Loan Council (section 105A). Other changes include Australia's independence from Great Britain and federal responsibility for a wide range of social services (section 51(xxiiiA.)) and for Aboriginal peoples (section 51(xxvi.)). The participation of the people of the Territories in referendums to alter the Constitution

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79 L Zines, 'The Federal Balance and the Position of the States' in G Craven (ed), The Convention Debates 1891-1898 (1986) vol VI, 79-81.

(section 128) and the constitutional recognition of political parties for the purpose of filling casual vacancies in the Senate (section 15) provide other examples.

In any case, the Framers certainly did not limit section 128 in any way, and they further declared that section 106 was 'subject to this Constitution', which includes section 128.[80] Quick and Garran suggested that it was possible to regard the State constitutions as receiving their authority from the Constitution of the Commonwealth. They said:

> By force of [section 106.] it may be argued that the Constitutions of the States are incorporated into the new Constitution, and should be read as if they formed parts or Chapters of the new Constitution. The whole of the details of State Government and Federal Government may be considered as constituting one grand scheme provided by and elaborated in the Federal Constitution.[81]

There are differences of opinion on this issue, as a matter of law.[82] But the fact that it was stated as a plausible construction, contemporaneously with the commencement of the Constitution, is clear evidence against the view that State constitutions were regarded, from a policy viewpoint, as beyond the appropriate scope of constitutional alteration under section 128.

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80 While section 106 continues State constitutions 'until altered in accordance with the Constitution of the State', it is clear that the latter phrase was inserted to prevent any argument that State constitutions were frozen as at 1900 and could not be altered by the State in the usual manner (Con Deb, Melbourne 1898, vol I, 645). It had nothing to do with section 128, which authorises alterations of any provision of the Constitution, which, of course, includes section 106.

81 Quick and Garran, 903.

82 It was supported by Barwick CJ in New South Wales v Commonwealth (Seas and Submerged Lands Case) (1975) 135 CLR 337, 372 and Murphy J in Bistricic v Rokov (1976) 135 CLR 552, 566. The opposite view was expressed by the Supreme Court of Western Australia in Western Australia v Wilsmore [1981] WAR 179.

In our view, the question comes back to whether the electors of the nation as a whole can have a sufficient interest to justify referring these matters to them under section 128 of the Constitution. We answer that question in the affirmative. Whether an alteration should be made in any particular case is, of course, a different issue. The circumstances of the States and the value of diversity and experimentation may weigh against a new constitutional provision. We consider, however, that examination of such a possible alteration should not be precluded merely because it would affect State Governments, Parliaments or courts.

If, as all would agree, the people at a referendum could determine to deprive the Commonwealth or States of a power by transferring it to the other Government, it is hard to understand why, for example, they should not, if they saw fit, deprive all Governments of any particular power, such as the making of a law to interfere with freedom of speech or religion or to deprive people of the right to vote. Whether such constitutional alterations would be desirable is, for present purposes, irrelevant.

A Constitution is, in part, concerned with the broad social and political values of the nation. Many have pointed out, both in literature and in submissions to the Commission, that national interest, need or concern should not be equated with federal power or federal policies. The nation, it is argued, can at times be better served by recognising the diverse needs and desires of the people of the States, considered severally. We believe there is much in this argument, but it is necessary to distinguish it from the matters we are at present considering, namely, submissions that the Constitution should include provisions reflecting fundamental values to which, it is said, the Australian people adhere, and to which <u>all</u> Governments should be subjected.

Of course, those who claim that a provision gives effect to a matter of concern nationally may be proved wrong by the results

of a referendum. Those results may also indicate that the electors would prefer the States not to be subject to restrictions in the Constitution, whatever may be the position or relation to the Commonwealth. That, however, is different from saying that the people of Australia, acting in accordance with section 128 of the Constitution, have no sufficient interest to determine the question.

It is appropriate here to note some matters of a more subsidiary nature relating to practical difficulties in applying some constitutional restrictions to the Commonwealth and not to the States. Experience has shown that to limit federal power and not State power can result in inter-governmental arrangements designed to avoid the limitation. As indicated in Chapter 9 this has occurred in relation to the acquisition of property. The provision for just terms for acquisition by the Commonwealth, required by section 51(xxxi.), was avoided by an arrangement with a State for it to acquire land needed for a soldier settlement scheme, on other than just terms, by using funds supplied to the State by the Commonwealth under section 96 of the Constitution.[83]

If provisions protecting individual rights, binding only the Commonwealth, were added in the Constitution, attempts at avoidance could increase. As the legislative power of the States is largely concurrent with that of the Commonwealth, the Federal Government, instead of proposing federal laws, might arrange with the States to deal with the matter, and so avoid the restriction on power.

In our view, there is nothing in the Constitution, in federal theory, in historic understanding, or in policy considerations that prevents us from examining issues related to State organisations of government or individual and democratic rights in State spheres of responsibility.[84]

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83 Pye v Renshaw (1951) 84 CLR 58.

84 Issues of this nature are examined in Chapters 4, 6, 7 and 9.

AUSTRALIA'S STATUS AS AN INDEPENDENT NATION

Paragraph (a) of our Terms of Reference requires the Commission, among other things, to report on the revision of the Constitution to 'adequately reflect Australia's status as an independent nation'.

Historical development

The Australian States were, by the time of federation, self-governing colonies of Great Britain. They had been given constitutions by the Imperial Parliament. Under these constitutions the local Parliaments and Governments were left to manage their own affairs in local matters without interference from the Imperial authorities. In relation to those matters the Governor of the colony was required to act, by virtue of constitutional practice, on the advice of colonial ministers. In matters of Imperial concern the Governor was, however, responsible to the Imperial Government. In the last two or three decades of the nineteenth century the number of matters regarded as of Imperial significance was reduced. Generally speaking, by the time of federation, the Australian colonies had complete self-government except in fields of defence, foreign affairs and merchant shipping.

For the purposes of international law the British Empire was one unit or 'nation'. The Imperial Government was responsible to other nations for the observance within the whole Empire of treaties and other rules of international law. The colonies, therefore, had no power, for example, to enter into treaties, declare war and peace and send or receive ambassadors. It was no answer to a complaint to Britain from a foreign country that the act complained of was committed by the Government of a self-governing colony.

Provisions in all the colonial constitutions provided for the 'reservation' or 'disallowance' of legislation enacted by the colonial legislatures. The Governor might be instructed (or

might choose), when presented with a colonial Bill, to 'reserve' it for Her Majesty's pleasure. What this meant was that it would be referred to the British Government to consider whether it should be allowed to become a law. In 1907 an Imperial Act - the Australian States Constitution Act 1907 - set out classes of laws that were required to be reserved. In addition, the Queen, that is the British Government, could 'disallow' legislation passed by colonial parliaments within, usually, two years of its enactment. Upon being disallowed an Act ceased to be a law. By 1900 these powers of the British Government were exercised only in rare cases where Imperial or foreign interests were involved, such as laws which discriminated against the people of other countries (usually Asians or Africans).

The British Parliament retained power to make laws for Australia; indeed the Australian Constitution was one such law. By virtue of the Colonial Laws Validity Act 1865 (Imp), the colonial parliaments could not validly enact a law which was repugnant to an Imperial law that was expressed to operate within the colony. By 1900, however, the British Government pursued a policy of not making laws for the self-governing colonies on matters outside Imperial concern, unless the colonial Government requested it.

A further Imperial institution that bound all the colonies was the Judicial Committee of the Privy Council to which appeals could, in certain circumstances, be taken from the highest courts of the colonies. In form this was an appeal to the Queen, but it was in fact an appeal to a court of judges appointed by the Lord Chancellor, a British Minister.

The creation of the Commonwealth of Australia by the union of the six Australian colonies did not in itself change the status of Australia or its relationship with the United Kingdom. The restrictions referred to above on the power of colonial Governments and legislatures continued, generally speaking, to apply to both the States and the Commonwealth. The same was true of the other great Dominions of the Crown, which by 1910 included Canada, New Zealand, South Africa and Newfoundland.

Section 74 of the Constitution of the Commonwealth, however, prevented appeals going to the Privy Council from the High Court in most constitutional cases (that is, those concerning the boundary between the powers of the Commonwealth and those of the States or between two or more States) unless the High Court of Australia certified that the case should go to the Privy Council. It also gave the Parliament of the Commonwealth the power to further limit appeals from the High Court. Any proposed law to that effect was required to be reserved 'for Her Majesty's pleasure', which in reality meant the approval of the British Government.

The Australian Constitution also contained provisions which, while they could not be given their full application because of Australia's status as part of the Empire, were seen by later judges to contain the potentiality of full nationhood. These included the power of the Parliament of the Commonwealth to make laws with respect to the defence of Australia (section 51(vi.)) and external affairs (section 51(xxix.)). Barwick CJ described this situation as follows:

> Whilst the new Commonwealth was upon its creation the Australian colony within the Empire, the grant of the power with respect to external affairs was a clear recognition, not merely that, by uniting, the people of Australia were moving towards nationhood, but that it was the Commonwealth which would in due course become the nation state, internationally recognised as such and independent. The progression from colony to independent nation was an inevitable progression, clearly adumbrated by the grant of such powers as the power with respect to defence and external affairs. Section 61, in enabling the Governor-General as in truth a Viceroy to exercise the executive power of the Commonwealth, underlines the prospect of independent nationhood which the enactment of the Constitution provided.[85]

The evolution toward nationhood of the British Dominions proceeded rapidly as a result of World War I, in which Australia and the other British countries played a prominent part. The first major step toward self-government in foreign affairs

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85 Seas and Submerged Lands Case (1975) 135 CLR 337, 373.

occurred at the Peace Conference of 1919. The Dominions had separate representation equivalent to that of other non-major powers. They signed the Peace Treaty, became members of the League of Nations, and were given mandated territories under the authority of the League.

The Imperial Conference of 1926 resulted in the famous 'Balfour Declaration' which declared that the United Kingdom and the Dominions 'are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'. It was also stated that 'every self-governing member of the Empire is now the master of its own destiny'.

As a result of this resolution it was further declared (a) that the Governor-General was no longer a representative or agent of the British Government; (b) that the United Kingdom Government would not advise the King on Dominion matters against the views of the Dominion Government; and (c) that the Dominion Government had full power to enter into treaties, appoint ambassadors, etc, in its own right. In any case when action of the King was required, the King would act on the advice of the Dominion Government.

The above resolutions were put into effect without any change of the law. There remained, however, some other legal disabilities on the Dominions, which conflicted with the broad scope of the Balfour Declaration, and which had to be removed by Imperial enactment. The Parliaments of the Dominions could not make laws contrary to Acts of the Imperial Parliament which operated in the Dominions, because of the provisions of the Colonial Laws Validity Act (Imp). There was also some doubt as to whether the Dominion Parliaments could make laws operating outside their territories. These restrictions were abolished by the Statute of Westminster 1931 (Imp) (sections 2 and 3) subject, in the case of Australia, to the adoption of the Act by the Parliament of the

Commonwealth. This was done by the Statute of Westminster Adoption Act 1942 (Cth), to operate from the outbreak of World War II, that is, 3 September 1939.

The legislative supremacy of the United Kingdom Parliament remained, but section 4 of the Statute of Westminster 1931 (Imp) provided that no Act of the United Kingdom Parliament should extend to a Dominion as part of its law unless it expressly declared that the Dominion had requested and consented to its enactment. Sections 8 and 9 of the Statute of Westminster 1931 (Imp) ensured that the power given to the Parliament of the Commonwealth to repeal or amend Imperial laws operating in Australia did not extend to overriding the Constitution.

In relation to World War II, Australia acted as if it were bound by the declaration of war by Great Britain against Germany and did not issue a separate declaration. Similarly the Australian Government assumed we were at war when Italy declared war against Great Britain on 10 June 1940. The Dominions of Canada and South Africa issued separate declarations of war in both cases. In respect of the declarations of war against Finland, Hungary, Rumania and Japan in 1941, a separate Australian declaration of war was made. The King, on the advice of the Australian Government, purporting to act under section 2 of the Constitution, assigned power to the Governor-General to make these declarations.

On the other hand, in 1951 the Commonwealth adopted the view that the Governor-General had the necessary authority to declare peace with Germany without any specific delegation from the Queen. The Solicitor-General, Professor KH Bailey, advised that the Governor-General could exercise all prerogatives relating to peace and war and that the assignment to declare war in 1941 was legally unnecessary.

It is clear from these events, and recognition by the world community, that at some time between 1926 and the end of World War II Australia had achieved full independence as a sovereign

state of the world. The British Government ceased to have any responsibility in relation to matters coming within the area of responsibility of the Federal Government and Parliament.

Effect of independent nationhood

The sovereign status of Australia resulted in the rejection of earlier colonial restrictions on the interpretation of the powers of the Commonwealth. It has been declared by a number of High Court judges that the Governor-General, as the Queen's representative, possesses the prerogatives of the Crown relevant to the Federal Government's sphere of responsibility, which includes, for example, all matters relating to external affairs.[86]

The development of Australian nationhood did not require any change to the Australian Constitution. It involved, in part, the abolition of limitations on constitutional power that were imposed from outside the Constitution, such as the Colonial Laws Validity Act 1865 (Imp), and restricting what otherwise would have been the proper interpretation of the Constitution, by virtue of Australia's status as part of the Empire. When the Empire ended and national status emerged, the external restrictions ceased, and constitutional powers could be given their full scope.

Sir Garfield Barwick has described the result, in relation to the Framers' purpose in drafting the Constitution as follows:

> The Constitution was not devised for the immediate independence of a nation. It was conceived as the Constitution of an autonomous Dominion within the then British Empire. Its founders were not to know of the two world wars which would bring that Empire to an end. But they had national independence in mind. Quite apart from the possible disappearance of the Empire, they could

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86 eg Barton v Commonwealth (1974) 131 CLR 477, 498 (Mason J); Victoria v Commonwealth and Hayden (1975) 134 CLR 338, 406 (Jacobs J); New South Wales v Commonwealth (1975) 135 CLR 337, 373 (Barwick CJ).

> confidently expect not only continuing autonomy but approaching independence. This came within 30 years. They devised a Constitution which would serve an independent nation. It has done so, and still does.[87]

As a result of federal legislation all appeals to the Privy Council from Australian courts exercising federal jurisdiction were abolished in 1968 (Privy Council (Limitation of Appeals) Act 1968) (Cth). All appeals from any decision of the High Court (other than those where a certificate might be granted under section 74 of the Constitution) were terminated by the Privy Council (Appeals from the High Court) Act 1975.

The growth to full national status, of course, did not affect the position of the Commonwealth as a community under the Crown. While the preceding events dissolved most of the constitutional links with the British Government, those with the Sovereign remain.

Indeed the notion of the Crown pervades the Constitution. The preamble recites that the people of the named colonies had agreed to unite in a Federal Commonwealth under the Crown. The Queen is empowered by section 2 of the Constitution to appoint a Governor-General who 'shall be Her Majesty's representative'. Section 61 of the Constitution vests the executive power of the Commonwealth in the Queen and declares that it is exercisable by the Governor-General as the Queen's representative.

These powers are, of course, consistent with British constitutional practice, exercised on the advice of Australian ministers (except in those very rare cases which are said to come within the 'reserve powers' of the Crown). On those occasions when the Queen acts in her own capacity, such as in appointing the Governor-General, she also acts on the advice of Australian Ministers, rather than British ones, in accordance with the principle established at the Imperial Conference of 1926.

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87 PH Lane, The Australian Constitution (1986) viii.

The position of the Queen as the Sovereign of a number of independent realms was recognised at a conference of Prime Ministers and other representatives of the nations of the Commonwealth in December 1952 where it was agreed that each country should adopt a form of Royal title suitable to its own circumstances. As a result, the legislation of each country of the Commonwealth (other than Pakistan which expected to become a Republic) included for the first time a reference in its Royal Style and Titles to the particular country which enacted the legislation.

The Royal Style and Titles Act 1953 (Cth), therefore, for the first time referred to the Queen as 'Elizabeth the Second, by the Grace of God of the United Kingdom, Australia and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith'. As a result of amendments made in 1973 the present Royal Style and Titles in Australia are 'Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth.'

The disappearance of the British Empire has therefore meant that the Queen is now sovereign of a number of separate countries such as the United Kingdom, Canada, Australia, New Zealand and Papua New Guinea, amongst others. As Queen of Australia she holds an entirely distinct and different position from that which she holds as Queen of the United Kingdom or Canada. The separation of these 'Crowns' is underlined by the comment of Gibbs CJ in Pochi v Macphee[88] that 'The allegiance which Australians owe to Her Majesty is owed not as British subjects but as subjects of the Queen of Australia.'

The States and the Australia Act

The evolution outlined above related to Australia's sovereignty in international law and relations and to the independence of the Federal Government. For many decades after the attainment of

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88 (1982) 151 CLR 101, 109.

Australian nationhood, however, the States of Australia remained restricted by rules and procedures that were relics of the Imperial past. In this respect they were unique in that those restrictions did not apply to the central or regional Governments of any other country that was an independent member of the Commonwealth of Nations.[89] Some of these restrictions were as follows:

(a) The States remained subject to the Colonial Laws Validity Act 1865 (Imp). The result was that a number of United Kingdom Acts passed in the last century or earlier this century were binding on the States, so they could not alter them. In order to change the law it was necessary to ask the British Government to introduce a Bill in the United Kingdom Parliament.

(b) State courts exercising State jurisdiction remained subject to appeals to the Privy Council. This right could not be abolished by State legislation. It resulted in the situation that a litigant who lost in a State court could often appeal either to the Privy Council or the High Court, depending on his or her view as to which court would be more likely to decide in that person's favour. The party who had won in the State court had no such choice. As the High Court was not bound by Privy Council decisions, the system of precedents threatened to become chaotic. If High Court decisions differed from those of the Privy Council, State courts were in great difficulty as to which decisions they should follow.[90]

(c) The State Governments could not give advice to the Queen on State matters. In relation to such matters as the appointment of a Governor or the assent to Bills on

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89 Although the Canadian Constitution did not until 1982 contain provisions for its own amendment.

90 Viro v R (1978) 141 CLR 88.

matters within the State's area of responsibility that were required to be 'reserved' for the Queen's assent, the advice to the Queen had to be formally that of a United Kingdom Minister of State.

(d) There was some doubt as to the extent to which the States could make laws that had extra-territorial operation.

These restrictions were all abolished by the Australia Act 1986. There are two versions of that Act. One was passed by the Parliament of the Commonwealth under section 51(xxxviii.) of the Constitution, which confers on the Parliament of the Commonwealth the power to make laws with respect to:

> The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

All the State Parliaments enacted legislation consenting to the enactment of the federal statute.

The Parliament of the Commonwealth then enacted a law under section 4 of the Statute of Westminster 1931 (Imp) requesting and consenting to the enactment by the United Kingdom Parliament of a law in almost identical terms with the Australian version of the Australia Act 1986 (Cth). The United Kingdom Parliament enacted the legislation requested. Both the Australian and British Acts came into force at the same time on 3 March 1986. Thus, by joint action of all the Parliaments of Australia and the United Kingdom, the legislative, executive and judicial institutions of the United Kingdom ceased to have any power, responsibility or jurisdiction in respect of Australian affairs. Constitutional government in Australia, in all its aspects, was brought into line with that of all other members of Commonwealth of Nations hat recognise the Queen as Head of State.

The main provisions of the Australia Act, so far as they are relevant to the independence of Australia, are as follows:

(1) The power of the British Parliament to legislate for Australia is terminated (section 1). Consequently the provisions of the Statute of Westminster 1931 (Imp) relating to a 'request and consent' to the enactment of laws by the British Parliament are repealed (section 12).

(2) The States are given power to make laws repugnant to Imperial legislation, and the application of the Colonial Law Validity Act 1865 (Imp) to the States is terminated (section 3).

(3) The Governor of a State is declared to be Her Majesty's representative. All the powers and functions of the Queen are exercisable 'only' by the Governor except those to appoint, and terminate the appointment of, the Governor. However, the Queen is not precluded from exercising any of her powers when she is personally present in the State. Advice to the Queen on State matters is required to be tendered by the Premier (section 7).

(4) Provisions for disallowance and reservation of State legislation are abolished (sections 8 and 9).

(5) It is declared that 'Her Majesty's Government in the United Kingdom shall have no responsibility for the government of any State' (section 10).

(6) Appeals to the Privy Council are abolished (except where, as stated in section 74 of the Constitution, the High Court grants a certificate in relation to certain constitutional questions. No such certificate has been given since 1912.) (section 11).

(7) The States are given power to make laws that have extra-territorial operation. The State Parliaments have the power

to make any laws for the peace, order and good government of the State which might have been exercised by the United Kingdom Parliament (section 2).

(8) The increased legislative power given to the States does not affect the operation of the Commonwealth of Australia Constitution Act 1900, the Constitution or the Statute of Westminster 1931 (Imp).

(9) The Australia Act and what remains of the Statute of Westminster 1931 (Imp) can be repealed or amended only by (a) a Federal Act which has the concurrence of all the State Parliaments, or (b) alteration to the Constitution, under section 128, conferring power on the Commonwealth.

It is unnecessary for our purposes to examine the power of the Parliaments of the Commonwealth and the United Kingdom to enact each of the Australia Acts. The extent of the power of the Parliament of the Commonwealth under section 51(xxxviii.), upon which the Federal Act relies, has not been fully explored by the High Court. That was the reason for the enactment of legislation by both the Australian and British Parliaments. It seems clear that, on one basis or the other, the Australia Act is part of the law of Australia.

Historically, as the enacting clause of the Commonwealth of Australia Constitution Act 1900 states, the Constitution derived its authority from the principle of subservience to the British Parliament. As that Parliament no longer has any authority in Australia, the legal basis of the Constitution no longer rests on any paramount rule of obedience to that institution. The legal theory that sustains the Constitution today is its acceptance by the Australian people as their framework of government. The Federal Parliament and Government are, themselves, created by the Constitution. It is our fundamental law.

Accepting, therefore, that Australia is in every respect an independent nation, both politically and legally, are there any

alterations to the Constitution that are required to 'adequately reflect' this fact?

Some provisions of the Commonwealth of Australia Constitution Act 1900, including the Constitution, are based on the assumption that Australia is a dependency of Great Britain. This assumption was accurate at the time of the Constitution's enactment but it is no longer so. There has been doubt expressed as to whether, under section 128 of the Constitution, it is possible to alter the preamble and the first eight sections of the Commonwealth of Australia Constitution Act, known as the 'covering clauses'. We have concluded that such alterations can be made under section 128.[91]

The enacting clause

The enacting clause of the Commonwealth of Australia Constitution Act 1900 declares that the Act is 'enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same.' A similar clause was omitted from the British North America Act 1867 (now called the Canadian Constitution Act) by the Statute Law Revision Act 1893 of the United Kingdom. The purpose seems to have been to facilitate the reprinting of British Acts.[92]

As explained above, the British Parliament is no longer part of the Australian constitutional system. It cannot therefore be said that the authority of the Constitution now rests on the will of that Parliament. It could be argued, therefore, that the

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91 See Chapter 3 under the heading 'Bases for altering the preamble and covering clauses'.

92 Memorandum relating to Statute Law Revision, 1891 (c-6420) LXIII 873 at 878. Section 1 of the Act provided that the omissions and repeals effected by Statute Law Revision Act should not affect the binding force, operation or construction of the Act affected. We do not consider such a provision is necessary in the case of an omission of the enacting clause of the Commonwealth of Australia Constitution Act 1900.

enacting clause gives a false impression of the present legal basis of the Constitution. It could give the impression to a reader who is uninformed by history or the provisions of the Australia Act (which are not part of the Constitution) that Australia is still subject to the will of the legislature of the United Kingdom. The Constitution Acts of most of the States now contain only enacting clauses that refer to the Parliament of the State concerned.[93]

We believe therefore that the enacting clause should be omitted and we **recommend** accordingly.

'The Crown of the United Kingdom of Great Britain and Ireland'

Of more practical moment, however, are references to the 'Crown' or 'The Queen' of the United Kingdom. The preamble declares the agreement of the people to unite 'under the Crown of the United Kingdom of Great Britain and Ireland'. Covering clause 2 of the Commonwealth of Australia Constitution Act 1900 provides that: 'The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.' 'The Queen' is referred to in covering clauses 3 and 5 and, in the Constitution, in sections 1-4, 58-61, 64, 68, 74, 122, 126, 128, and the Schedule to the Constitution.

As discussed earlier, the sovereignty of the United Kingdom in 1900 referred to the sovereignty of the entire empire of that country. There was in law and in fact no distinct Monarch of Australia, Canada, New Zealand, etc. There was just the one and indivisible sovereign of all parts of the Queen's dominions. When the Queen, as distinct from the Governor-General or a Governor, acted in relation to either the United Kingdom or overseas possessions of the Crown she acted on the advice of ministers of the United Kingdom. The Crown, therefore, was one Imperial Crown. That is no longer the case. The sovereignty of each of the countries that recognise Queen Elizabeth II as their

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93 Western Australia and Tasmania are exceptions.

Queen is separate and distinct from that of any other country. Whether in domestic or foreign affairs the 'Crown of the United Kingdom' may pursue quite different policies from that of the Crown of Australia. The Queen's advisers are different in each case. The reference to the United Kingdom is therefore a source of confusion and does not reflect the position of the Crown in Australia today.

The Advisory Committee on Executive Government[94] recommended against changing the preamble or covering clause 2. The Committee's reason was that it was unlikely that if the Monarchy was to survive in Australia, it would do so if it involved the designation of any person other than the Monarch of the United Kingdom; so, in its view, while a reference to the Queen as Queen of Australia 'might be appropriate', there was 'no practical need' for the change.

We are unable to accept fully the Executive Committee's recommendation. First, our Terms of Reference require us to report on the revision of the Constitution to 'adequately reflect Australia's status as an independent nation'. We consider that covering clause 2 gives the impression that our Monarch must be chosen according to the law of another country and, further, it can mislead a person to the view that the institution of Monarchy in Australia is not an entirely separate institution from the Monarchy in the United Kingdom. It can hardly be said, therefore, that covering clause 2 reflects Australia's independent status. The reverse is the case.

Secondly, accepting for present purposes the Executive Committee's view that the Monarchy in Australia would not survive if the person holding the position of Sovereign in Australia was different from that in the United Kingdom, we do not understand how this conflicts with ensuring that the Constitution reflects existing legal and political reality.

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94 Executive Report, 8.

The Australian Constitutional Convention at the Hobart (1976) session resolved that covering clause 2 be replaced by a provision referring to the Queen in the sovereignty of Australia.[95]

We recommend, accordingly, that:

(a) in covering clause 2 the words 'the United Kingdom' be omitted and the word 'Australia' be substituted; and

(b) in the Note to the Schedule to the Constitution the words 'the United Kingdom of Great Britain and Ireland' be omitted and the word 'Australia' be substituted.[96]

Succession to the Throne

The Act of Settlement 1701 (Imp), which regulates Royal succession, requires that the Monarch be a member of the Church of England. The Executive Committee stated that 'this is certainly not appropriate to Australian conditions, and it certainly seems inconsistent with the spirit of section 116 of the Constitution'. They refrained, however, from recommending any change, and added: 'If any action were taken on this matter, it might be undertaken as part of the agenda of Commonwealth Heads of Government.'[97]

As a result of the Australia Act 1986 (Cth) (and before that the Statute of Westminster 1931 (Imp), unless there was a 'request and consent') no alteration of the law of Royal succession by the United Kingdom Parliament can operate in Australia. Subject to consideration of covering clause 2 of the Commonwealth of Australia Constitution Act 1900, therefore, if Britain changed

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95 ACC Proc, Hobart 1976, 140-4.

96 In any case we point out that the 'United Kingdom of Great Britain and Ireland' ceased to appear in the British Royal style and titles in 1953. 'The United Kingdom of Great Britain and Northern Ireland' was substituted.

97 Executive Report, 8.

its rules as to Royal succession, Britain and Australia could have different Monarchs. It might be argued, however, that covering clause 2 of the Commonwealth of Australia Constitution Act 1900 requires Australia to have as its Sovereign the King or Queen of the United Kingdom. That is to say, even though a change to the law of the United Kingdom would not operate of its own force in Australia, covering clause 2 would automatically apply it to Australia.

We do not accept that view. It is inconceivable that in 1900 any attempt would have been made to provide for a separate law of Royal succession for Australia as distinct from the Empire as a whole. Covering clause 2 did not enact, but assumed, the existence of the Royal succession law operating in Australia, namely an Imperial law governing an Imperial crown. Covering clause 2 merely embodied an accepted principle of statutory interpretation that the reference to the reigning Monarch extended to her heirs and successors according to law, and was not confined to Queen Victoria.

This reasoning is, we think, confirmed by action taken in relation to the British North America Act. Section 2 of that Act was similar to covering clause 2 of the Commonwealth of Australia Constitution Act 1900. It was repealed by the Statute Law Revision Act 1893 of the United Kingdom, which altered many other Acts. The reason for the repeal appears to have been the enactment of the Interpretation Act 1889 of the United Kingdom which provided that in any Act references to the sovereign or the Crown should, unless the contrary intention appeared, be construed as references to the sovereign for the time being.[98]

It follows that if Britain altered the law of Royal succession it would not operate in Australia, despite the existence of covering clause 2 of the Commonwealth of Australia Constitution Act 1900, nor is it possible, since the Australia Act 1986 and repeal of section 4 of the Statute of Westminster 1931 (Imp), for the

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98 52 & 53 Vict 1889 Ch 63 section 30.

Commonwealth to request and consent to British legislation, as Canada did in relation to the abdication of King Edward VIII.[99] The alteration we have suggested to covering clause 2 of the Commonwealth of Australia Constitution Act 1900 would of course put an end to any argument to the contrary.

No express power is given in the Constitution to make laws as to Royal succession. At present there are three possible bases of authority to make such laws. First, the power may be said to be derived from the existence of the Commonwealth as a national Government. Many High Court judges have recognised that the Commonwealth possesses powers which, while not expressly granted, are inherent in the fact of it being the national Government of Australia.[100] It may be that this implied power would support federal laws relating to Royal succession. It is not in competition with State power, there is no Imperial power and the throne is now clearly a national institution. Secondly, on the reasoning of some judges in Kirmani v Captain Cook Cruises Pty Ltd [No 1][101] such a law could be supported under section 2 of the Statute of Westminster 1931 (Imp) which grants power to the Parliament of the Commonwealth to repeal or amend any Imperial law (other than the Commonwealth of Australia Constitution Act 1900 and the Constitution) which is not within the exclusive authority of the States. Thirdly, it may be possible for the Commonwealth, with the consent of all the States, to amend the law of Royal succession under section 51(xxxviii.) of the Constitution.

The members of the Executive Committee did not express a view on the Commonwealth's power to deal with the succession to the throne, confining themselves to the issue of Royal style and titles. They did, however, refer to the opinion of others that

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99 KH Bailey, 'The Abdication Legislation in the United Kingdom and in the Dominions' (1938) 3 Politica 1, 17-8; L Zines, The High Court and the Constitution, op cit, 280-3.

100 Victoria v Commonwealth & Hayden (1975) 134 CLR 338.

101 (1985) 159 CLR 351.

the Commonwealth had such power.[102] The Executive Committee did not recommend any alteration relating to legislative power with respect to Royal succession. In not doing so, the members were no doubt influenced by their expressed view that it was not practical to envisage Australia as a Monarchy with a sovereign different from that of the United Kingdom.

If, however, the United Kingdom altered the rules of succession, as occurred during the abdication of 1936, those rules would not apply to Australia. On the assumption made by the Advisory Committee, a Federal Government and Parliament might, in those circumstances, wish to bring the rules in line with those of the United Kingdom. While, as explained above, we believe that, on one basis or another, the Commonwealth would probably have the legislative power, the position should be made clear.

Connected with succession to the Throne is the issue of regency. The need for the appointment of a regent arises during the Sovereign's minority or incapacity or (in the case of the United Kingdom) her temporary absence from the realm.[103] We consider that the legislative power of the Commonwealth should extend to these matters.

We recommend, therefore, that it would be more appropriate to the status of Australia as an independent nation for the Constitution to confer on the Parliament of the Commonwealth an express power to make laws with respect to succession to the Throne, and regency, in the sovereignty of Australia.

Reservation and disallowance

Sections 58, 59 and 60 of the Constitution provide as follows:

> 58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his

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102 Executive Report, 7-8.

103 Regency Act 1937, Regency Act 1953 (Imp).

> discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.
>
> The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.
>
> 59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.
>
> 60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

As mentioned above, provisions in colonial constitutions for reservation and disallowance were designed to ensure Imperial surveillance of colonial legislation. The convention in 1900 was that the Queen would in relation to such matters act on the advice of a British minister. This convention was changed at the Imperial Conference of 1926 which made it clear that the Queen would act in conformity with the views of the Dominion Government.

Some of the submissions made to the Commission and some public statements of various persons suggest that the provisions for reservation of Bills for the Queen's assent and the power of disallowance by the Queen provide a safeguard in extreme cases against harmful legislation. As explained above, that is not so. The Monarch's duty in such cases, recognised by all, including the Queen herself, is to act on the advice of the appropriate Government, which in this case is the Federal Government. Whatever might be comprised in 'the reserve powers of the Crown', it clearly does not include the power of the Queen to refuse assent to a Bill duly passed or to disallow a law against ministerial advice. This was clearly recognised when the Australia Act 1986 repealed provisions for reservation and

disallowance in respect of State legislation. As we have indicated, the purpose of those provisions related to circumstances that no longer exist.

Further, section 59 as it exists is in fact a danger to parliamentary government and democratic institutions. It enables a Federal Government to advise the Queen to disallow a law that it is unable to have repealed by the Parliament of the Commonwealth.

The Australian Constitutional Convention resolved at the Hobart (1976) session that section 59 should be repealed.[104] At the Adelaide (1983) session of the Convention it was further resolved that the power of reservation in section 58 should be repealed.[105] The Advisory Committee on Executive Government recommended the removal of the power of reservation in section 58 and the repeal of sections 59 and 60.[106] Since that Report, the Government of Queensland has supported those aspects of the Advisory Committee's recommendations.[107]

We recommend, therefore:

(a) that section 58 be omitted and the following provision substituted:

> 58. (1) Subject to sub-section (2), when a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, the Governor-General shall, on being so advised by the Federal Executive Council, assent to it in the Queen's name.
>
> (2) The Governor-General in Council may return to the House in which it originated a proposed law so presented to him and may transmit with it any amendment that the

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104 ACC Proc, Hobart 1976, 207.

105 ACC Proc, Adelaide 1983, vol I, 321.

106 Executive Report, 9.

107 Government of Queensland S3290, 4 February 1988.

Governor-General in Council recommends and the Houses may deal with the recommendation; and

(b) that sections 59 and 60 be repealed.[108]

The Executive Committee recommended that section 58 be altered to provide simply that a Bill 'shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent.'[109] In our above recommendation we have not adopted the view of the Executive Committee. We consider that the power to return a Bill to the Parliament to correct errors is of practical benefit.[110]

The only provision of the Constitution which expressly requires reservation of a Bill is that contained in section 74 dealing with Bills to limit appeals from the High Court to the Privy Council. This power has been exercised by the Commonwealth and all such appeals have been abolished except those for which a certificate of the High Court is required under the first paragraph of section 74.[111] We will deal with this question in Chapter 6 of the Final Report.

(Other provisions which do not relate to Australia's status as an independent nation, but which are in other respects outmoded or expended, are considered in later Chapters of this Report.)

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108 The reference to 'the Governor-General shall, on being so advised by the Federal Executive Council' in the proposed section 58 is in accordance with recommendations we make in Chapter 5.

109 Executive Report, 44.

110 The Government of Queensland saw no need for an alteration of the type proposed by the Advisory Committee. It pointed out that the power concerned would be exercised on ministerial advice. S3290, 4 February 1988, 31.

111 Privy Council Limitation of Appeals Act 1968; Privy Council (Appeals from the High Court) Act 1975.

PARLIAMENTARY GOVERNMENT IN AUSTRALIA

The Terms of Reference of the Commission required it to consider recommendations for alteration of the Constitution to 'adequately reflect Australia's status as ... a Federal Parliamentary democracy'. This assumes that Australia (a) has a system of parliamentary government, and (b) is a democracy. The two terms are not synonymous. Both Britain and the Australian colonies had a system of parliamentary government before the introduction of universal adult suffrage, which today would be regarded as essential to being a democracy. On the other hand, there are countries such as the United States which are democracies, but which do not have parliamentary government. It is proposed here to discuss the latter concept. The issue of democracy in Australia is dealt with in Chapter 4.

Professor O Hood Phillips, speaking of Great Britain, has said that parliamentary government

> expresses the idea that the Houses of Parliament, especially the Commons, claim the right to supervise every aspect of the administration. The government of the country is carried on by Ministers who sit in Parliament, and it is carried on through Parliament in the sense that Ministers submit their policies to the Houses for approval, they rely on Parliament to pass any laws that may be necessary to implement those policies, and they answer questions in the House concerning matters dealt with by their departments.[112]

The extent to which this description conforms to reality is discussed later.

Responsible government

Part and parcel of the notion of parliamentary government is 'responsible government', whereby the ministers are individually and collectively answerable to the Parliament and can retain office only while they have the 'confidence' of the lower House, that is, the House of Representatives in the case of the

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[112] O Hood Phillips, Reform of the Constitution (1970) 14-5.

Commonwealth and the Legislative Assembly or House of Assembly in the case of the States.

In general terms the governmental system in the federal sphere operates in the following manner: After a general election the Governor-General commissions a member of the Parliament to be Prime Minister. The person chosen is the leader of the party (or one of a coalition of parties) which obtained a majority of seats in the House of Representatives. If no party or coalition is in that position, then a commission will be offered to the person who the Governor-General thinks is able to obtain the general support or 'confidence' of a majority of that House. Other Ministers of the Government are appointed by the Governor-General on the 'advice' of the Prime Minister from among the members of Parliament. Although termed 'advice', it is never rejected by the Governor-General.

The nominations of the Prime Minister will depend upon the rules of his or her political party. In the case of the Australian Labor Party, for example, the members of Parliament of that Party (the caucus) vote on who should be Ministers, and the Prime Minister chooses the portfolios each Minister will hold. In the case of a coalition (Liberal/National Party) Government the nominations and portfolios may be the subject of an agreement between the two parties or between the leaders of the two parties. Since 1956, except during the years 1973, 1974 and 1975, about half the Ministers have constituted the Cabinet. The Governor-General plays no part in those appointments. (The nature of the Cabinet is described below.)

The Ministry, which comprises all the Ministers and constitutes 'the Government', exercises all the powers of Government authorised by law. At common law a significant number of powers and responsibilities of Government are conferred on 'the Crown'. Some of these are called 'prerogatives'. These powers include the conduct of foreign affairs, such as the negotiation, conclusion and ratification of treaties, the making of war and peace, and the prerogative of mercy. Other powers include

defence matters, Government expenditure and control of the public service and the defence force. Some of these matters are now regulated by Acts of Parliament. The Constitution confers specific powers on the Governor-General or 'the Governor-General in Council', such as the summoning and dissolution of Parliament, the issue of writs for a referendum, and the appointment of judges of federal courts. A great many Acts of Parliament also give specific powers to the Governor-General in Council relating to a wide variety of matters involving the making of regulations, the appointment to offices, and administrative decisions.

In these cases (and subject only to the rarest exceptions, discussed below) it is the Government of the day or a Minister of the Government who makes the decisions. While the Constitution or the Act concerned may require the signification of the Governor-General's assent, the Governor-General must, in the long run, accept the advice offered. It is the Government that accepts the political responsibility for those acts. Many Acts of Parliament in fact confer power directly on 'the Minister'.

As indicated above, various provisions of the Constitution confer power on 'the Governor-General', others on the 'Governor-General in Council'. The latter term is defined as the Governor-General acting with the advice of the Federal Executive Council.[113] This is explained below. For present purposes it is necessary to emphasise that (except in rare cases to be mentioned) the different forms in which vice-regal power is conferred does not affect the application of the principles of responsible government. In each case Ministers of the Government accept the responsibility, and in each case the Governor-General acts on Ministerial advice. The distinction merely affects the form in which the advice is given and the formal steps that must be taken on the presentation of that advice.

For example, section 68 of the Constitution provides that 'The command in chief of the naval and military forces of the

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[113] Section 63 of the Constitution.

Commonwealth is vested in the Governor-General as the Queen's representative.' In an address to the Joint Services Staff College in 1983, the present Governor-General, Sir Ninian Stephen, made it clear that under that provision the position of commander in chief was purely ceremonial and that in military, as in civil, matters the Governor-General has no independent discretion.[114]

In carrying out all these duties and powers the Government is said to be 'responsible' to the House of Representatives. Just as the Government is formed from those who have 'the confidence' of that House, so the House can cause the dismissal of the Government by expressing its lack of confidence in various ways; for example, by express resolution or by denying 'supply' (that is, authority to expend public funds for running the Government).

According to the doctrine of responsible government, Ministers are collectively and individually responsible for their actions and policies. What this means is that all Ministers must be regarded as equally responsible for, and bound by, the decisions of the Government. Whatever views they may have expressed in the Cabinet they must publicly support Government policy. A Minister who feels unable to do so is under an obligation to resign. If such a person does not resign the Prime Minister can cause the Governor-General to terminate his or her commission as a Minister. There have been many occasions in Australian history, however, where public Ministerial disagreement has not led to these consequences.[115]

Within the Government the most important and powerful body is the Cabinet. The most important and powerful person is the Prime Minister. Quick and Garran had this to say of the Cabinet:

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114 Sir Ninian Stephen, 'The Governor-General as Commander-in-Chief' (1984) 14 Melbourne University Law Review, 563.

115 S Encel, Cabinet Government in Australia, (2nd ed, 1974) Ch 12.

> The principle of the corporate unity and solidarity of the Cabinet requires that the Cabinet should have one harmonious policy, both in administration and in legislation; that the advice tendered by the Cabinet to the Crown should be unanimous and consistent; that the Cabinet should stand or fall together. The Cabinet as a whole is responsible for the advice and conduct of each of its members. If any member of the Cabinet seriously dissents from the opinion and policy approved by the majority of his colleagues it is his duty as a man of honour to resign. Advice is generally communicated to the Crown by the Prime Minister, either personally or by the Cabinet minute. Through the Prime Minister, the Cabinet speaks with united voice. The Cabinet depends for its existence on its possession of the confidence of that House directly elected by the people, which has the principal control over the finances of the country.[116]

The provisions of the Constitution

The features set out above of our political system are not, except in minor respects, provided for in the Constitution. They are regarded by most people as part of the 'conventions of the Constitution' as distinct from the law of the Constitution (the notion of 'conventions' is discussed later). Justice Mason (now the Chief Justice) in the course of a judgment of the High Court referred to the conventions with which we are concerned this way:

> ... ministerial responsibility means (1) the individual responsibility of Ministers to Parliament for the administration of their departments, and (2) the collective responsibility of Cabinet to Parliament (and the public) for the whole conduct of administration.... The principle that in general the Governor defers to, or acts upon, the advice of his Ministers, though it forms a vital element in the concept of responsible government, is not in itself an instance of the doctrine of ministerial responsibility. It is a convention, compliance with which enables the doctrine of ministerial responsibility to come into play so that a Minister or Ministers become responsible to Parliament for the decision made by the Governor in Council, thereby contributing to the concept of responsible government.... Conformably with this principle there is a convention that in general the Governor-General or the Governor of a State acts in accordance with the advice tendered to him by his Ministers and not otherwise ....[117]

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116 Quick and Garran, 705-6.

117 FAI Insurances Ltd v Winneke (1982) 151 CLR 342, 364-5.

Nowhere in the Constitution is there to be found, either at all or in clear terms:

(a) the duty of the Governor-General to appoint a Government that has the confidence of the House of Representatives;

(b) the duty of the Governor-General to act on the advice of Ministers;

(c) the power of the House of Representatives to get rid of the Government, or the general answerability of the Government to the legislature;

(d) any mention of the Cabinet, the Prime Minister, or the notion of collective responsibility.

The Parliament and the Executive are referred to as two separate organs of government, the first having vested in it the legislative power (section 1) and the second the executive power (section 61).

In relation to the Executive Government, the main provisions of the Constitution are as follows:

> 61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.
>
> 62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.
>
> 63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.
>
> 64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

> Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.
>
> After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

Other provisions give the Governor-General specific powers, for example, section 5 relating to the summoning and dissolution of the House of Representatives; section 57, dealing with the dissolution of both the Senate and the House of Representatives and the convening of a joint sitting of the two Houses; sections 58 and 59, assent to Bills; section 68, the command of naval and military forces; section 72, the appointment of federal judges and section 128, the submission of proposed alterations to the Constitution to a referendum.

The Federal Executive Council referred to in the above provisions is not the Cabinet. It is a purely formal body required to give legal effect to Cabinet or Ministerial decisions and appointments. Indeed it is rare for more than two or three Ministers to be present at its meetings. No argument or discussion takes place there relating to the determination of policies. As Mr Justice Dixon said, a decision of the Governor-General in Council is merely 'the formal legal act which gives effect to the advice tendered to the Crown by the Ministers of the Crown.'[118]

The only provision that hints at our system of parliamentary government, outlined above, is that in section 64 which requires that no Minister of State shall hold office for a longer period than three months unless that person becomes a member of Parliament. Nearly all the elements and mechanism of parliamentary government are therefore missing from the Constitution, and rest largely on traditional rules and

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118 Australian Communist Party v Commonwealth (1951) 83 CLR 1, 179.

principles derived largely from British practice. So far as the express provisions of the Constitution are concerned, a person unfamiliar with our history and political development and practices would deduce that the Governor-General had enormous discretionary power similar to that claimed by the early Stuart kings in England. Such a person could also deduce that the Government and the Parliament are separate institutions similar to the separation that exists between the Government (or the Parliament) and the judiciary.

This is where the concept of constitutional conventions becomes important. The above provisions of the Constitution were inserted on the assumption that certain conventions would operate, namely those principles of parliamentary government and Ministerial responsibility which have been described above.

Generally speaking, constitutional conventions are not enforced by the courts. They are, none the less, regarded as imposing duties on those to whom they are directed. Most of the conventions with which we are concerned were the result of about 250 years of evolution of British parliamentary government. As they are the result of growth and change, conventions may vary in strength and clarity. Some will be more fluid and flexible than others. Argument may also take place as to whether a particular practice is just that, or whether, having regard to its place in the scheme of things, past acknowledgement of it as a rule of conduct and the consequences for the government of the country of not following it, the practice has become a convention. The argument, however, is not resolved in the courts.

Some rules, however, are firm, and clear and regarded by all as obligatory. It is with these that we are mainly concerned.

The Constitution, for example, requires an Act of Parliament to have received the assent of the Governor-General. It is the traditional view that the duty of the Governor-General to act on the advice of the appropriate Minister to assent to a Bill that has been passed by both Houses of Parliament rests on the

conventions of the Constitution. If the Governor-General refused, the courts could not, on this view, enforce that duty as the Constitution does not prescribe it. The courts would be forced to declare that the Bill had not become law. In those circumstances the Governor-General would probably be replaced by action of the Queen on the advice of the Prime Minister acting under section 2 of the Constitution.

Indeed, the principle that the Governor-General cannot refuse to assent to a Bill because of his or her personal views is so well accepted as fundamental that Professor Sawer has suggested that 'it is likely enough that such action on the part of the Governor-General would be treated as evidence that he had gone mad, and that his removal on that ground alone would be endorsed by the Queen.'[119] While the courts could not enforce this conventional duty of the Governor-General, however, the example has little to do with reality. The strength of these widely accepted practices rests on the basis of political and social power and general acceptance. A Governor-General who persisted in acting on personal political views would not be able to retain a Government for long and would eventually incur the opposition of all the political parties in the country.

An alternative view, relying in the main on sections 62 and 64, treats the incorporation of responsible government into the Constitution as having a legal as opposed to a merely conventional effect. This view would treat Governors-General as bound in law to exercise their powers to assent to laws as they were advised and not otherwise.

It proceeds upon the basis that the essential of responsible government is the responsibility of the Ministry to the Parliament for the advice tendered, at least in this respect, to the Crown. It proceeds then to point out that this responsibility postulates that for assent so given the Crown assumes no responsibility; that, accordingly, the introduction of

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[119] G Sawer, Federation under strain (1977) 184.

responsible government as a constitutional imperative demands that the place of the Crown in the legislature is to assent or withhold assent to legislation in accordance with Ministerial advice. It is then said that the first paragraph of section 58 refers both to the Governor-General's discretion and to the Governor-General being subject to the Constitution, that that paragraph follows the provisions of the Act for the Government of New South Wales and Van Diemen's Land, 1842 (5 and 6 Vic c.76 section 31),[120] a provision which preceded responsible government in those areas, and that the reference to the Governor-General's discretion is not open to the construction that in point of law a legal right to disregard Ministerial advice was intended to be conferred.

As mentioned earlier, parliamentary government requires a Government to resign if it has lost the confidence of the House. This is not a principle that is enforceable by the courts. It is generally recognised that this is one situation where a Governor-General could and should act on his or her own account to dismiss a Government with a view to a commission being given to a new Prime Minister who did have such confidence or with a view to obtaining advice to dissolve the House and call for a general election. If a Governor-General did not do so for any reason, it is clear that sooner or later the courts would be brought in to deal with acts on behalf of the Government that were illegal. Funds to carry on the Government would cease because the House would refuse to pass appropriation Bills. If Ministers attempted to spend public money that had not been appropriated for running the governmental service, they would be in breach of the law.

The courts and responsible government

Although the judiciary does not directly enforce these principles of responsible government, their existence is seen as so fundamental and obvious that they have often been relied on by

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120 Quick and Garran, 688.

the High Court in construing the Constitution and statutes and in developing the common law. The operation of responsible government is regarded as a social and political fact that must obviously have been in the minds of the Framers (when they drafted the Constitution) or Parliament when it considered legislation. Similarly in developing judge-made law, the courts cannot shut their eyes to such a significant institution as responsible government.

In the Engineers' Case,[121] for example, the Court justified its decision not to follow United States doctrines, by stating that Australia had, but the United States did not have, a system of responsible government. Decades later, Chief Justice Barwick declared that 'Sections 62 and 64 of the Constitution introduced responsible government: on the one hand, leaving aside most exceptional circumstances, the Crown acts on the advice of its Ministers and, on the other hand, the Ministers are responsible to the Parliament for the actions of the Crown.'[122] In another case he stated that 'unlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility.'[123]

In the field of administrative law, the High Court has recently altered the earlier expressed view that a court could not examine the purposes of a vice-regal representative in exercising a statutory power. As it had been accepted that such review was available in the case of a power given to a Minister, the existence of responsible government made the earlier view irrational. As the Court stated, the Governor or Governor-General would always be acting on the 'advice' of Ministers.[124]

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121 (1920) 28 CLR 129.

122 Seas and Submerged Lands Case (1975) 135 CLR 337, 364-5.

123 Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1, 24.

124 The Queen v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170; FAI Insurances Ltd v Winneke (1982) 151 CLR 342.

The Senate and responsible government

It has been stated above that the responsibility owed by the Government is to the House of Representatives. It is necessary, however, to consider, the power and function of the Senate. Since proportional voting for the Senate was introduced at the 1949 elections, senators have often belonged to parties which are not represented in the House of Representatives. Since July 1962, except for the period from 1976 to June 1981, Government senators have been outnumbered by senators who are not members of the Government party or parties.[125] .

From the commencement of Federation, the Senate has not claimed any joint part in the determination of the political composition of the Government. It was accepted from the beginning that that issue was one for the majority of the House of Representatives.

This is not declared in the Constitution in express terms, although there are a few provisions which point in some degree to primacy of the House of Representatives. These provisions all relate to Bills concerned with taxation or the appropriation of money. Section 53 requires taxation and appropriation Bills to originate in the House of Representatives. Unless the Government, therefore, had the support of a majority of that House, it could not even begin to obtain the funds necessary for carrying on the functions of government. That section also prevents the Senate from amending taxation Bills or Bills appropriating money for 'the ordinary annual services of the Government'; nor can it amend any Bill so as to increase any proposed charge or burden on the people. Even in relation to those Bills, the Senate may make suggestions for amendments. No appropriation Bill can be passed without a recommendation from the Governor-General, which in practical terms means the

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125 Proportional representation means that, within practical limits, the distribution of elected candidates is in proportion to the popular vote in each State. This can result in the election of senators who are not members of political parties or who are members of parties which have no members in the House of Representatives

Government (section 56). This provision ensures that the Executive Government has sole responsibility over national expenditure.

Nevertheless, in the field of legislation generally the powers of the Senate are great. Apart from the use of the deadlock provisions,[126] Acts of Parliament require the assent of both the House of Representatives and the Senate. Although some disagree, the predominant view is that this applies to all Bills, including those that the Senate cannot amend. The lack of power to amend Bills does not affect the Senate's power to reject or fail to pass such Bills.

While the Government will nearly always be assured of having its legislation passed by the House of Representatives, that will not necessarily be the case in respect of the Senate which, because of the different basis and method of election, may not contain a majority of Government supporters. Instances of bargaining and compromise, leading to amendments being accepted by the Government, are by no means rare. All parties have used the Senate to pursue their political ends, having regard to what they perceive as electoral advantages.

Generally, the inability to have legislation passed means that the Government's policies which require legislation must be tempered to the parliamentary wind. But that does not affect its ability to carry on as a Government in exercise of its other common law and statutory powers, while it retains the confidence of the House of Representatives.

The situation is different, however, in respect to appropriation and taxation Bills. It is a cardinal rule of all constitutions based on the British model that a Government cannot expend public funds that have not been appropriated by the Parliament for the purposes laid down in the Appropriation Acts. This rule is

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126 section 57, which is discussed in Chapter 4 under the heading 'Relationship between the Senate and the House of Representatives'.

expressed in sections 81 and 83 of the Constitution which provide:

> 81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.
>
> ....
>
> 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

Also, it is a fundamental feature of our constitutional system that taxation can only be levied by or under the authority of an Act of Parliament.

The issue arises in its starkest form when failure of the Senate to pass an appropriation Bill for the ordinary services of government is not caused by disagreement with any of the detailed provisions of that Bill, but is performed solely to force the Government to resign. The difficulty is in reconciling this use of power with the undoubted principle that it is the House of Representatives that determines the political complexion of the Government. A vote of no confidence in the House of Representatives can cause the resignation or dismissal of a Government, but a vote of no confidence in the Government passed in the Senate has no such effect.

The Framers debated at length the issue of reconciling the traditional notion of responsible government with the existence of a democratically elected upper House with power to refuse to pass appropriation and taxation legislation. Some considered that the two were incompatible and that responsible government should give way to the need, as they saw it, of a strong Senate. Others argued that the concept of responsible government was so fundamental to the British and Australian approach to government that the Senate would be most unlikely to use its power to cause a Government to be driven from office in the face of its support by a majority of the House of Representatives. In the end, the

Framers did not resolve the issue, leaving it to future generations to do so.[127]

The issue can arise at two particular points in the financial year, which extends from 1 July in one year till 30 June in the following year. The practice is for a Government to introduce a set of appropriation Bills - 'supply' - in April or May to cover government services from 1 July to 30 November following and in August or September to introduce a set of appropriation Bills - 'The Budget' - to cover government services from the preceding 1 July to the following 30 June. If the Senate does not pass supply by 30 June or the Budget by 30 November the Government cannot meet its financial commitments.

The situation came to a head when the House of Representatives election in December 1972 brought about the first change of Government for 23 years. In April 1974 the Leader of the Opposition announced that his colleagues in the Senate would vote against the supply Bills for the period from July to November of that year. The Prime Minister thereupon advised the Governor-General to dissolve both Houses of Parliament on the basis that six other Bills had been twice rejected by the Senate and had satisfied the requirements of section 57 relating to double dissolutions.[128] The double dissolution procedure takes at least five months to complete and thus was not applicable to the appropriation Bills.

Reserve powers of the Crown

The 'reserve powers' of the Crown refer to those powers in the exercise of which the Governor-General retains a personal

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127 B Galligan, 'The Founders' Design and Intentions Regarding Responsible Government' in P Weller and D Jaensch, Responsible Government In Australia (1980) 1-10.

128 One of the Bills was later held not to have satisfied the requirements of section 57: Victoria v Commonwealth and Connor (PMA case) (1975) 134 CLR 81.

discretion; that is the Governor-General can act without, or contrary to, Ministerial advice.[129]

The reserve powers of the Crown are, therefore, seen as an exception to the fundamental principle of responsible government that the Crown acts on the advice of Ministers. Events which occurred in 1975 raised one aspect of the scope of these powers.

At elections in May 1974, the Government received more votes than the Opposition in both Houses and won more seats in the House of Representatives than the Opposition, but neither the Government nor the Opposition won a majority in the Senate. On 15 October 1975 the Leader of the Opposition announced that his Senate colleagues would not pass the Budget Bills 'until the Government agrees to submit itself to the judgment of the people'. On 16 October the Senate so resolved and on 22 October and 5 November persisted in its attitude, on all three occasions by a majority of one vote. On 11 November the Governor-General terminated the appointments of the Prime Minister and all Ministers on the ground that they could not obtain supply.

The Leader of the Opposition accepted a commission to form a Government on condition that he would advise a double dissolution on the basis of 21 Bills which had been twice rejected by the Senate and which he advised had satisfied the requirements of section 57. In fact, the Senate passed the Budget Bills before the two Houses were dissolved. If the Senate had rejected or failed to pass only the Budget, there could not have been a double dissolution; there could have been an election for the House of Representatives alone. Even if the Government had won that election it might still not have been able to secure the passage of the Budget through the Senate.

As mentioned above, the Governor-General, in dismissing a Prime Minister who had the confidence of the House of Representatives, claimed to act on the basis of a principle that a Government that

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[129] Executive Report, 38.

could not obtain the supply necessary to carry on the functions of government was required to go to the people. This action gave rise to public controversy.

The fundamental principle that the Crown acts on the advice of its Ministers may not operate where a Government is defeated at an election for the House of Representatives or where it loses the confidence of the House of Representatives. In such cases the Governor-General may give a commission as Prime Minister to a person who in his or her view is likely to have the confidence of the House.

Another occasion on which it is suggested that the Governor-General can dismiss the Government is in the case of illegal actions by the Government. In 1932 the Governor of New South Wales dismissed the State Government because of alleged illegal acts. His actions have been criticised on the ground that the courts had not pronounced on the matter of the alleged illegality. On the other hand, there seemed to be a prima facie case and the Premier, when asked to establish that his acts were legal, refused to do so.[130]

There has been considerable discussion as to whether the Governor-General may refuse a dissolution of the House of Representatives in mid-term when advised by the Prime Minister. No such advice has been refused since 1909. In any case, a Governor-General would have great difficulty refusing such advice where no alternative Government was possible and where the Ministry was not prepared to remain in office in the face of a refusal by the Governor-General to accept advice to dissolve.

The problem also arises regarding the Governor-General's power to refuse advice to dissolve both Houses under section 57 of the Constitution. This involves two issues, first, whether the conditions prescribed in section 57 have been satisfied and,

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[130] HV Evatt, The King and his Dominion Governors (1936) Ch 19.

secondly, whether the advice to dissolve should be accepted.[131] Again, there would be difficulty for a Governor-General where the Ministry was not prepared to remain in office in the face of a refusal by the Governor-General to accept advice to dissolve.[132]

Many of these matters, other than the events of 1975, were the subject of resolutions of the Australian Constitutional Convention.

Resolutions of the Australian Constitutional Convention

In 1985 the Australian Constitutional Convention agreed to the recognition and declaration of a number of principles and practices that should be observed as conventions of the Constitution.[133] They are as follows:

A. The basic principle is that the Ministry has the confidence of the House of Representatives.

B. Following a general election in which the Government is defeated, the Governor-General, having taken the advice of the outgoing Prime Minister as to the person who the outgoing Prime Minister believes can form a Ministry that has the confidence of the House of Representatives, appoints as Prime Minister the person who, in his opinion, can form a Ministry that has the confidence of the House of Representatives.

C. If the Prime Minister resigns, the Governor-General, having taken the advice of the resigning Prime Minister as to the person who the Prime Minister believes can form a Ministry that has the confidence of the House of Representatives, appoints as Prime Minister the person who, in his opinion, can form a Ministry that has the confidence of the House of Representatives.

D. If the Prime Minister dies in office, the Governor-General, having taken the advice of the next most senior Minister as to the person who that Minister believes can form a Ministry that has the confidence of

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131 PH Lane, 'Double Dissolution of Federal Parliament' (1973) 47 Australian Law Journal 290; L Zines, 'The Double Dissolutions and Joint Sitting' in G Evans (ed) Labor and the Constitution 1972-1975, 1977, 218-22.

132 Executive Report, 37-9.

133 ACC Proc, Brisbane 1985, vol I, 415-7.

the House of Representatives, appoints as Prime Minister the person who in his opinion can form such a Ministry.

E. If following a defeat in the House of Representatives, the Prime Minister, acting in accordance with Practice F, advises the Governor-General to dissolve the House of Representatives or to send for the person who the Prime Minister believes can form a Ministry that has the confidence of the House of Representatives, the Governor-General acts on the advice.

F. In advising the Governor-General for the purpose of Practice E, the Prime Minister acts in accordance with the basic principle that the Ministry should have the confidence of the House of Representatives and if, in his opinion, there is another person who can form a Ministry which has the confidence of the House of Representatives, he advises the Governor-General to send for that person.

G. The Governor-General appoints and dismisses other Ministers on the advice of the Prime Minister.

H. The resignation of a Prime Minister following a general election in which the government is defeated or following a defeat in the House of Representatives terminates the commissions of all other Ministers, but the death of a Prime Minister or his resignation in other circumstances does not automatically terminate the commissions of the other Ministers.

I. The Governor-General dissolves the House of Representatives only on the advice of the Prime Minister.

J. When a Prime Minister who retains the confidence of the House of Representatives advises a dissolution of the House of Representatives, the Governor-General acts upon that advice.

K. The Governor-General, having satisfied himself on the advice of the Prime Minister that the conditions in section 57 of the Constitution have been met and that a double dissolution should be granted dissolves both Houses of the Parliament simultaneously on the advice of the Prime Minister.

L. All advice tendered by the Prime Minister to the Governor-General in connection with a dissolution of the House of Representatives or a dissolution of both Houses of Parliament and the Governor-General's response thereto, should be committed to writing and published before or during the ensuing election campaign.

M. In advising a dissolution, the Prime Minister must be in a position to assure the Governor-General that the government has been granted sufficient funds by the Parliament to enable the work of the administration to be carried on through the election period or that such funds will be granted before the dissolution.

N. Subject to the requirements of the Constitution as to the sittings of Parliament, the Governor-General acts on prime ministerial advice in exercising his powers to summon and prorogue Parliament.

O. In advising a prorogation, the Prime Minister must be in a position to assure the Governor-General that the government has been granted sufficient funds by the Parliament to enable the work of the administration to be carried on through the period of prorogation or that such funds will be granted before the prorogation.

P. The Governor-General, having satisfied himself on the advice of the Prime Minister that the conditions in section 57 of the Constitution have been met, acts on prime ministerial advice in exercising his power to convene a joint sitting of the members of the Senate and of the House of Representatives.

Q. The Governor-General acts only on the advice of the Prime Minister in submitting a proposed law for the alteration of the Constitution to the electors, whether the proposed law has been approved by both Houses or by one House only.

R. In the exercise of his constitutional powers and responsibilities, the Governor-General always has the right to be consulted, to encourage and to warn in respect of Ministerial advice given to him.

Inter-governmental arrangements

In one respect the Constitution cuts across the principles of responsible government (and, it might be added, federalism). Section 105A of the Constitution gives constitutional force to the Financial Agreement of 12 December 1927 as varied from time to time. This is an agreement to which the Commonwealth and the States are parties, and relates to borrowing by the Commonwealth and the States. Section 105A authorised the Governments concerned to enter into the agreement. Sub-section (4) provides that it can be varied or rescinded by the parties. Thus unanimous agreement is required. Under sub-section (5), the agreement is binding upon the Commonwealth and the States

notwithstanding anything contained in the Constitution and laws of the Commonwealth or in those of the States.

The agreement created the Loan Council on which each Government is represented. With some exceptions, the only Government borrowing that can take place is that approved by the Council. This takes out of the hands of all Parliaments in Australia the power to regulate or control an important area of Government finance. It was, however, a step deliberately taken for reasons of coordinating borrowing so that competitive action by the Governments concerned would not put up interest rates, and so that greater economic efficiency would be achieved.

The extent to which the Agreement is an exception to ordinary principles of federalism and responsible government is illustrated by the attempt by the Premier of New South Wales to repudiate his Government's contractual obligations. Under the Agreement, New South Wales was required to pay an amount to the Commonwealth in respect of interest owing on State debts. By virtue of the Financial Agreement, the Commonwealth was obliged to pay to the creditors the amount due. The Premier refused to reimburse the Commonwealth, arguing that the economic depression required repudiation of the debts for the duration of the crisis. The Parliament of the Commonwealth enacted legislation to seize State revenues in order to discharge the State's obligation to the Commonwealth. This action was held valid by the High Court.[134]

It has, however, been argued that cooperative governmental arrangements in general make it difficult for Parliaments, and in particular State Parliaments, to exercise that oversight and control over their Executive Governments that is supposed to be assured under the doctrine of responsible government. Some co-operative arrangements between the Commonwealth and the States are designed to ensure uniformity of legislation and, perhaps, administration of laws.

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[134] Garnishee Case (1932) 46 CLR 155.

On other occasions, the purpose may be to create a body which will have powers conferred by both Federal and State Parliaments, either because of the lack of power in any level of government alone to deal with a specific problem, or because of the desire by the Federal Government to cooperate with State administrations rather than have its own body supersede them. The latter approach might be preferred either for reasons of 'federal policy' or for perceived greater efficiency and economy.

The types of agreements resulting in legislative and administrative programs are many and their effect on parliamentary control varies greatly.[135] The subject can be best illustrated by brief reference to the uniform companies and securities scheme established by an agreement of 22 December 1978 between the Commonwealth and the States. This scheme has the following elements:

(a) The Commonwealth enacted legislation and made regulations relating to companies and the regulation of the industry that applied to the Australian Capital Territory.

(b) Each State Parliament enacted laws to apply the provisions of that legislation to its State.

(c) There was established by the Federal Act, a Ministerial Council for Companies and Securities consisting of a Minister from the Commonwealth and each State. Its functions are to keep the legislation under review and to supervise the cooperative scheme. In many cases its resolutions are by simple majority.

(d) A National Companies and Securities Commission is established to administer the scheme. Its members are appointed by the Governor-General on the nomination of the

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135 The whole subject has been examined by Dr Cheryl Saunders in 'The Impact of Inter-governmental Arrangements on Parliament', Papers on Federalism 1, Intergovernmental Relations in Victoria Program 1984.

Council. Most of the discretions that, under earlier State legislation, were exercised by State Ministers are within the authority of the Commission. In respect of most matters the Commission is subject to the direction of the Council only. The Commonwealth and States share the cost of the Commission.

(e) Much of the day-to-day administration is conducted by the State and Territorial officers who administered the former State and Territory legislation. But they are subject to the direction of the Commission.

(f) Under the agreement, the Commonwealth is obliged to secure amendments to the legislation approved by the Council. Any amendments made by the Commonwealth automatically apply to the States under existing legislation (except for minor regulations adapting the Federal Act to State circumstances).[136]

The effect of this scheme on the ordinary processes of responsible government of the Commonwealth and the States is very great, although somewhat greater for the States. Insofar as decisions are made by a majority of the Council, official action within a State or Territory may be contrary to the wishes of the responsible Minister in that State or Territory. He or she is not, with Ministerial colleagues, 'politically responsible' in the normal sense; therefore, the Minister's relationship to Parliament is outside the normal course.

Similarly, the Commission is not responsible to any particular Minister or Government that is in turn responsible to a specific Parliament. This causes difficulty in respect of review by parliamentary committees of the States because the Commission is created by federal law, even though it exercises powers conferred by State law. Above all, there may be a tendency for a Minister

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[136] The power of the Commonwealth to make laws with respect to corporations will be discussed in Chapter 11 of our Final Report.

to avoid criticism in Parliament by emphasising the joint nature of the scheme. While some of these consequences for parliamentary supervision and Ministerial responsibility can be alleviated, the fact remains that there can be considerable tension between the desirable goal of Federal-State cooperation and the effective implementation of the principles of parliamentary government.

The decline of Parliament

It has often been argued that the system of responsible government as described above does not operate as suggested to put Parliament in a position to control the Executive. It is asserted that the power position is precisely the reverse, namely the Government in fact controls the House or Houses which contain a majority of its supporters. This is a result of a number of factors, including the discipline of modern political parties, the extension of statutory power given to the Government, Ministers, officials and statutory bodies as a result of the expansion and increasing complexity of governmental affairs, and the power of the Prime Minister to cause the dissolution of Parliament and a general election.

The growth and the modern centralised organisation of political parties results in a situation where it is more realistic to say that the party, rather than the House of Representatives, determines who shall be Prime Minister. Insofar as members of Parliament outside the Ministry have an effect on policy, this is effected by debate and discussion within the caucus of the governing party rather than in the Houses. It has been suggested also that recent decades have seen the ascendancy of the Prime Minister over the Cabinet, partly as a result of the Prime Minister's power to obtain a dissolution of the House.

Political parties, highly organised and centralised, are now as much part of our political system as the formal organs of government. They received, for the first time, a modicum of reference in the Constitution as a result of the Constitution

Alteration (Senate Casual Vacancies) 1977, which altered section 15 of the Constitution relating to the filling of casual vacancies in the Senate.

Whatever effect political parties have on the working of government institutions they are a social fact and are not likely to change as regards their centralised form and disciplinary control as long as we have a system that unites the legislative and executive branches of government. In any case, political parties are the only machinery we have for the formulation of policies that can be presented to the people for democratic choice. Any investigation of the operation of parliamentary government must begin with recognition of these social facts. In fact, one cannot identify a parliamentary democracy which does not operate on the basis of political parties. The High Court has recognised that members of Parliament were organised in political parties long before the Constitution was adopted, and that the method of voting for candidates by reference to a group or ticket now adopted in federal elections reflects political realities.[137]

Some steps to make the executive branch of government more accountable have, over the past decade and a half, occurred in the establishment of a 'committee system' in the Senate. Senators from both sides of politics have taken an active and vigorous part on Senate committees investigating the Executive Government, the administration and public authorities.

The institution of the ombudsman, as an independent officer whose function it is to investigate complaints of the public against governmental officials, might be regarded, in part, as strengthening the opportunity for parliamentary control. If the ombudsman believes a person is justified in complaining of governmental action and the department or agency concerned remains obdurate or will not accept the view of the ombudsman, the latter may report the matter to Parliament. Generally

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[137] McKenzie v Commonwealth (1984) 57 ALR 747.

speaking, however, it cannot be said that the Federal Parliament, has used the reports of the ombudsman to exert its influence on the Executive Government. The opportunity to do so, however, remains.

Nevertheless, most of the checks on the Executive that have been developed in recent times have not involved any strengthening of parliamentary control. Instead new institutions have been created, such as in the federal sphere, the Administrative Appeals Tribunal. The responsibility of the Executive to the people has also been enhanced by federal and some State legislation providing for freedom of information.[138] At the same time the courts have, over the past two decades, greatly expanded their power to review executive and administrative action and to reduce the power of the Executive to refuse, in the course of litigation, to disclose documents and other information on the ground that to do so would not be in the public interest. The tendency, therefore, has been to look outside Parliament to supervise and control the Executive.

RECOMMENDATIONS

We recommend as follows:

(a) It is unnecessary to alter section 51(xx.) of the Constitution so as expressly to prohibit discrimination against State statutory corporations.

(b) The Constitution should not be altered so as to provide expressly that every legislative power of a State shall, subject to section 109, extend to the Commonwealth.

(c) Section 117 of the Constitution should be omitted and the following provision substituted:

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[138] eg Freedom of Information Act 1982 (Cth).

117. (1) A person who is resident, temporarily resident or domiciled in any State or Territory shall not be subject in another State or Territory to any disability or discrimination on the ground or substantially on the ground of that residence, temporary residence or domicile.

(2) Sub-section (1) of this section is not infringed by a law that imposes reasonable conditions of residence as a qualification for an elector.

(d) The enacting clause of the Commonwealth of Australia Constitution Act 1900 should be omitted.

(e) The words 'the United Kingdom' and 'the United Kingdom of Great Britain and Ireland' should be omitted from covering clause 2 of the Commonwealth of Australia Constitution Act 1900, and the Note to the Schedule to the Constitution, respectively. The word 'Australia' should be substituted in each case.

(f) There should be added to section 51 of the Constitution the following paragraph:

(xxxviiiA.) Succession to the Throne, and regency, in the sovereignty of Australia:

(g) Section 58 of the Constitution should be omitted and the following provision substituted:

58. (1) Subject to sub-section (2), when a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, the Governor-General shall, on being so advised by the Federal Executive Council, assent to it in the Queen's name.

(2) The Governor-General in Council may return to the House in which it originated a proposed law so presented to him and may transmit with it any amendment that the Governor-General in Council recommends and the Houses may deal with the recommendation.

(h) Sections 59 and 60 of the Constitution should be repealed.

CHAPTER 3. PREAMBLE AND COVERING CLAUSES

This Chapter is concerned with those parts of the Commonwealth of Australia Constitution Act 1900 which precede the Constitution proper (that is, the Constitution contained in section 9 of the Act). More particularly it is concerned with the preamble and what are known as the covering clauses - sections 1-8 of the Act. Attention is also given to the recommendation of the Advisory Committee on Individual and Democratic Rights that a separate preamble be inserted at the beginning of the Constitution proper.

PREAMBLE

Recommendations

We **recommend**:

(i) against altering or repealing the preamble to the Commonwealth of Australia Constitution Act 1900; and

(ii) against the inclusion of a preamble to the Constitution proper.

Current position

Existing preamble. The Commonwealth of Australia Constitution Act contains the following preamble:

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:
>
> And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

In The Annotated Constitution of the Australian Commonwealth (1901) Quick and Garran noted that the preamble contains eight 'separate and distinct affirmations or declarations', namely:

(i) The agreement of the people of Australia.

(ii) Their reliance on the blessing of Almighty God.

(iii) The purpose to unite.

(iv) The character of the Union - indissoluble.

(v) The form of the Union - a Federal Commonwealth.

(vi) The dependence of the Union - under the Crown.

(vii) The government of the Union - under the Constitution.

(viii) The expediency of provision for admission of other Colonies as States.[1]

Of these only the third, fifth, seventh, and eighth are also expressed elsewhere in the Act. Quick and Garran wrote that the remaining four:

> have, therefore, to be regarded as promulgating principles, ideas, or sentiments operating, at the time of the formation of the instrument, in the minds of its framers, and by them imparted to and approved by the people to whom it was submitted. These principles may hereafter become of supreme interest and importance in guiding the development of the Constitution under the influence of Federal Statesmen and Federal Electors.[2]

The origins of the preamble are found in the preamble of the Commonwealth Bill of 1891. A revised version was further altered by representatives at sessions of the Australasian Federal Convention of 1897-8 and, following the suggestions of the legislatures of all but one of the colonies and receipt of numerous petitions, the reference to reliance on the blessing of Almighty God was included in 1898.[3]

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1 Quick and Garran, 286.

2 ibid.

3 id, 204-5, 283-301.

Legal effect of the preamble. Quick and Garran suggested that the four 'promulgating principles, ideas, or sentiments' contained in the preamble to the Commonwealth of Australia Constitution Act 1900:

> may also be of valuable service and potent effect in the Courts of the Commonwealth, aiding in the interpretation of words and phrases which may now appear comparatively clear, but which, in time to come, may be obscured by the raising of unexpected issues and by the conflict of newly evolved opinions.[4]

There has been little judicial discussion of that preamble and it has not been relied on in the interpretation of the substantive provisions of the Constitution.

Quick and Garran were aware of the limited legal effect of a preamble to an Act of Parliament. As they noted, it can state the general object and meaning of a Parliament in passing the legislation and so:

> it may be legitimately consulted for the purpose of solving an ambiguity or fixing the connotation of words which may possibly have more than one meaning, or determining the scope or limiting the effect of the Act, whenever the enacting parts are, in any of these respects, open to doubt. But the preamble cannot either restrict or extend the legislative words, when the language is plain and not open to doubt, either as to its meaning or its scope.[5]

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4 id, 286. Apparently Mr HB Higgins argued in favour of including s 116 in the Constitution on the basis that the reference to Almighty God in the preamble might have yielded by implication a power in the Federal Parliament to legislate upon the topics mentioned in the section. See Attorney-General (Vict); Ex rel Black v The Commonwealth (1981) 146 CLR 559, 612 (Mason J); CL Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4 Melbourne University Law Review 41, 53-5.

5 Quick and Garran, 284.

This view has been confirmed by the High Court.[6] Chief Justice Gibbs (with whom Aickin and Wilson JJ agreed) said, in Wacando v The Commonwealth, that, if the words of a section in an Imperial Act applying in Australia are plain and unambiguous, their meaning cannot be cut down by reference to the preamble.[7] In the same case, however, Mason J said:

> But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object. There is, however, one difficulty in seeking to restrict the generality of the operative provision by reference to a suggested restriction expressed in the preamble: it is that Parliament may intend to enact a provision which extends beyond the actual problem sought to be remedied. Recognition of this difficulty led Viscount Simonds in Attorney-General v. Prince Ernest Augustus of Hanover ... to say 'that the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it'.[8]

An illustration of how some have suggested the preamble to the Commonwealth of Australia Constitution Act 1900 might be used is found in the arguments about whether a State may secede from the Commonwealth.[9] The fact that the only direct reference to the question of unilateral secession appears in the preamble (the agreement of the people to 'unite in one indissoluble Federal Commonwealth') has led some to argue that the preamble

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6 eg Bowtell v Goldsbrough, Mort & Co Ltd (1905) 3 CLR 444, 451 (Griffith CJ).

7 (1981) 148 CLR 1, 15-6; see also Southern Centre of Theosophy Inc v South Australia (1979) 145 CLR 246, 258 (Gibbs J).

8 id, 23. The fact that the enacting words go further than the preamble is not in itself a reason for resorting to the preamble to limit their operation: Attorney-General v Prince Ernest Augustus of Hanover (1957) AC 436, 463.

9 The matter is discussed in detail by Dr Gregory Craven in Secession: the ultimate States right (1986).

constitutes an effective and express prohibition of the unilateral secession of an Australian State.[10]

The possibility of a State attempting to secede was considered at the Australasian Federal Convention late last century. It was decided that the Commonwealth of Australia Constitution Act 1900 should recognise the indissolubility of the Commonwealth in the preamble and hence outside the substantive provisions of the Constitution. The delegates to the Convention would have been well aware that a preamble to a statute has the status of a 'preliminary flourish', only to be used as an aid in the interpretation of the statute in certain very limited circumstances, and so would have been an inappropriate place in which to express any serious principle or provision.[11]

Although there has not been a case where the High Court has had to grapple with the issue, there are references to the expression 'one indissoluble Federal Commonwealth' in various judgments. Occasionally judges seem to have ascribed some significance to it. For example, Menzies J wrote, 'A constitution providing for an indissoluble Federal Commonwealth must protect both Commonwealth and States',[12] and Barwick CJ asserted that, 'The Constitution, unless altered in a constitutional manner, was intended to be permanent, just as the union of the people of the colonies "in one indissoluble Federal Commonwealth" upon the terms of the Constitution was intended to be permanent.'[13] Generally speaking, the words have been recited by judges of the High Court and Privy Council to describe the result of the union of the people of the colonies. They have not been relied on to support the conclusion that the Federal Commonwealth is

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10 eg C Enright, Constitutional law (1977) 52-3; PH Lane, An Introduction to the Australian Constitution (2nd edn, 1977) 233.

11 See Craven, op cit, 20-30.

12 Victoria v Commonwealth (1971) 122 CLR 353, 386; see also 395 (Windeyer J).

13 Queensland v Commonwealth (1977) 139 CLR 585, 592.

indissoluble.[14] Nor have the words of the preamble been relied on to resolve questions about the meaning of other provisions of the Constitution.

Issues

Four main issues concerning the preamble have been raised during this review of the Constitution:

(a) Should the existing preamble be retained?

(b) Is it appropriate and desirable to have a preamble to the Constitution, in addition to the existing preamble to the Commonwealth of Australia Constitution Act 1900?

(c) If it is appropriate and desirable to add a preamble, what should the preamble contain?

(d) What would be the legal effect, if any, of that preamble?

Advisory Committee's recommendation

The Advisory Committee on Individual and Democratic Rights recommended that a preamble be inserted in the Constitution.[15] The Committee did not advocate deletion of the opening words of

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14 It is clear from the substantive provisions of the Constitution and from the status of the Constitution as binding law that there is no unilateral right of a State to secede. For relatively recent examples of descriptive references to 'one indissoluble Federal Commonwealth' see China Ocean Shipping Co v South Australia (1979) 145 CLR 172, 182 (Barwick CJ), 236 (Murphy J); Hematite Petroleum Pty Ltd v Victoria (1983) 151 CLR 599, 660 (Deane J); Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1, 197 (Wilson J), 207 (Brennan J). Isaacs J referred in 1909 to 'the pious aspirations for unity contained in the preamble to the Constitution': Federated Saw Mill etc Employes of Australasia v James Moore & Son Proprietary Ltd (1909) 8 CLR 465, 535.

15 Rights Report, xix-xx, 30, 72, 104.

the Commonwealth of Australia Constitution Act 1900.[16] Rather, it suggested the inclusion of recitals at the start of the Constitution proper, presumably to follow the opening words of covering clause 9.

The Advisory Committee was concerned that, despite developments since Federation, the present preamble does not reflect the change in Australia's status as a nation independent of the United Kingdom. The preamble is part of an Imperial Act. Although the Commonwealth of Australia Constitution Act 1900 'originally derived its force as a matter of legal technicality' from its enactment by the Parliament of the United Kingdom, the Advisory Committee argued that 'that technicality is now legally as well as politically irrelevant'.[17] The Advisory Committee also observed that 'the legitimacy of the Australian Constitution derives from its origins as an instrument approved directly by the people, for the purpose of creating a new nation.'[18]

The recommendation was made because the Committee considered that 'the preamble of the Constitution should embody the fundamental sentiments which Australians of all origins hold in common.'[19] It recommended a new preamble in the following terms:

> . Whereas the People are drawn from a rich diversity of cultures yet are one in their devotion to the Australian traditions of equality, the freedom of the person and the dignity of the individual;
>
> . Whereas Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership;

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16 See id, 30.

17 ibid. For a discussion of the developments leading to legislative independence see Chapter 2 of this Report and G Lindell, 'Why is Australia's Constitution binding? - The reasons in 1900 and now, and the effect of independence' (1986) 16 Federal Law Review, 29.

18 ibid.

19 id, 30.

- Whereas the Australian people look to share fairly in the plenty of our Commonwealth;

- Whereas Australia is a continent of immense extent and unique in the world demanding as our homeland our respect, devotion and wise management.[20]

Submissions

Numerous submissions were received by the Commission in response to the Advisory Committee's proposed preamble. Some gave it general support. Others opposed it, preferring to do no more than retain the preamble to the Commonwealth of Australia Constitution Act 1900. Some supported the inclusion of a new preamble, though not necessarily in the terms suggested by the Advisory Committee. One person suggested that it be a 'piece of prose that is simple, concise and easily learnt by rote' so that school children could be taught to recite at least part of 'our most important document'.[21]

Some were critical of the preamble recommended by the Advisory Committee because, in their view, it was 'too wordy and pretentious',[22] or because the terms were unclear, undefined and subject to varying interpretations or were inappropriate for a Constitution.[23] Some suggested it was unnecessary and, rather than promoting unity, could prove to be divisive.[24]

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20 id, xix-xx, 30, 104.

21 Mr Cyril Marshall S3082, 15 November 1987.

22 Kelly Crombie S2946, 4 November 1987; see also AP O'Donnell S2210, 4 June 1987, who favoured a republican preamble written in simple, unequivocal language; NH Barnfield S2907, 29 October 1987.

23 Mr David Bensley S3119, 2 December 1987; Country Women's Association of Australia S3090, November 1987; AC Stewart S2904, 3 October 1987.

24 eg Soroptomist International of Western Australia S2899, 28 October 1987; NH Barnfield S2907, 29 October 1987; Country Women's Association of Australia S3090, November 1987; Mr David Bensley S3119, 2 December 1987.

Many submissions were received from people expressing concern or protesting about what they thought was a proposal to remove from the preamble reference to reliance on 'the blessing of Almighty God' and unity 'under the Crown'.[25] Although these submissions were made as a result of a misunderstanding of what the Advisory Committee recommended, they show that for many people these notions are either the major underpinnings of our Constitution or at least cherished sentiments. It is clear that, in the same way as there was substantial support at the end of last century for the inclusion of reference to reliance on God, there would be considerable opposition to any attempt to remove the reference to God from the preamble.

The idea of unity under the Crown (now the Queen of Australia) is so central to the scheme and substantive provisions of the Constitution that its removal from the preamble would not be practicable or desirable. The Queensland Government (whose submission was made on the basis that the existing preamble would be replaced) also argued that the proposed preamble did not fully recognise another element contained in the existing preamble, namely, 'The sovereignty of the People and the fact that the Constitution was and is founded on their will and continued concurrence'.[26]

There were some submissions that the preamble suggested by the Advisory Committee was incomplete or inadequate. The main point of most of these was that any preamble should contain a provision declaring the equal rights of women and men.[27] The National

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25 eg Australian Catholic Bishops' Conference S2610, 9 September 1987; Christian History Research Institute S2671, 14 October 1987; Queensland Government S3069, 17 November 1987, and numerous individuals.

26 Queensland Government S3069, 17 November 1987.

27 eg National Women's Consultative Council S2542, 11 December 1987; Ms C Niland, President, NSW Anti-Discrimination Board S3077, 20 November 1987; Justice Elizabeth Evatt S205, 13 October 1987; The Women Members of the South Australian Parliament S3011, 29 October 1987; NSW Women's Advisory Council to the Premier S3207, 29 January 1988.

Women's Consultative Council argued that a statement of commitment in the preamble to equality of the sexes would be '"an act of good faith and symbolic importance" in redressing the historic and current discrimination against women in Australia.'

Ms Carmel Niland, President of the Anti-Discrimination Board of NSW, submitted that men and women 'form the two great divisions of the human race' and such a reference to the need for equality 'makes the point that we both have contributed to "the plenty of our Commonwealth".' The women members of the South Australian Parliament[28] submitted that a Constitution reviewed in the late twentieth century 'should surely incorporate equality of men and women as an important principle.' In their view, recognition of the equality of men and women is of equal significance to the recognition of Aboriginal prior ownership and the diversity of cultures which have formed this nation.[29]

These submissions were not limited to recommending inclusion of a statement of equality in the preamble, but also called for inclusion of a substantive constitutional right to equality and a

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28 The eight women represent both the major political parties and both Houses.

29 The submissions also drew attention to the Convention on the Elimination of All Forms of Discrimination Against Women (to which Australia is a party), Article 2(a) of which provides:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (a) To embody the principle of the equality of men and women in their national constitutions ... .

The Convention is a Schedule to the Sex Discrimination Act 1984 (Cth).

federal legislative power with respect to equality and non-discrimination.[30]

Aboriginal peoples and the preamble. The part of the recommended preamble to attract most comment was the statement:

> Whereas Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership....

By way of background to this recital, the Committee drew attention to the opening words of the existing preamble, 'Whereas the people...'. The Committee noted that '[t]hese words reflect a fundamental compact between the Australian people of the colonies joining together in a federation'.[31] Owing to restrictions in most colonial electoral laws, few Aboriginals could have been parties to that compact, even though they are all subject to the Constitution and to the laws of the Commonwealth and of the States of Territories in which they respectively reside.[32] The Constitution, in section 51(xxvi.), originally gave the Federal Parliament power to make laws with respect to:

> The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws: (emphasis added).

It also provided, in section 127:

> In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

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30 See also Womens Electoral Lobby S2724, 21 October 1987; E Fisher, Womens Electoral Lobby S2525, 18 October 1986. The matter of constitutional guarantees of equality rights and freedom from discrimination will be dealt with in Chapter 9 of our Final Report.

31 Rights Report, 70.

32 Coe v Commonwealth (1979) 24 ALR 118, 129 (Gibbs J); see also Re Phillips; Ex parte Aboriginal Development Commission (1987) 72 ALR 508.

In May 1967 both section 127 and the parenthetic clause in section 51(xxvi.) were removed with the approval of 91% of the electors voting at the referendum, the largest majority in the history of referendums. Those alterations gave the Federal Parliament increased power to make laws with respect to Aboriginals, and Aboriginals are now counted as 'people of the Commonwealth'. The Committee was concerned, however, that the existing preamble makes no reference to Aboriginals. The preamble should, in the Committee's view:

> acknowledge the historical truth of the settlement of Australia by Europeans in 1788. It is appropriate to recognise in the preamble that prior to the arrival of European settlers, Australia was owned by the Aboriginal people. Such recognition in the Constitution would be an act of good faith and symbolic importance in furthering reconciliation between Aboriginal and non-Aboriginal Australians.[33]

The argument in favour of a provision in the form suggested by the Committee can be supported by contrasting history with the legal doctrine that, at the time of European colonisation, the land now known as Australia was terra nullius.

According to that doctrine the colony was 'desert and uncultivated', a term which includes 'territory in which live uncivilized inhabitants in a primitive state of society'.[34] Consequently courts have proceeded on the basis that the colony was 'settled' (the land, being desert and uncultivated, was claimed by right of occupancy) rather than a 'conquered' or 'ceded' colony. The legal consequence is that all English laws applicable to the colony were immediately in force upon its foundation. By contrast, the laws of a conquered or ceded colony would have remained in force until altered.[35]

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33 Rights Report, 72.

34 Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case) (1971) 17 FLR 141, 201 (Blackburn J).

35 ibid.

In the 1971 Gove Land Rights Case and other cases, courts generally have accepted that the attribution of the colony to the 'settled' class is a matter of law which is not to be questioned upon a reconsideration of the historical facts.[36] Two High Court judges, however, have suggested that, in the absence of any decision which is binding on that Court, it may be argued that the lands were acquired by conquest.[37]

A number of submissions were made to the effect that, as a first step, there should be constitutional recognition that the land now known as Australia was used and occupied by Aboriginal peoples who had their own systems of laws which governed their relationships with each other and regulated their links with different tracts of land. Such a statement would set the record straight without fundamentally altering the basis on which the legal system, and hence the government of Australia, rests.[38] Some submissions recommended further that there be recognition of substantive pre-existing and continuing Aboriginal rights.

Some submissions were made in support of part of a preamble in the terms suggested by the Advisory Committee,[39] in the hope that it might operate as a safeguard for the interests of Aboriginals in the future.[40]

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36 id, 202-3, 242-4, 249, citing Cooper v Stuart (1889) 14 App Cas 286 (Privy Council); Coe v Commonwealth (1978) 18 ALR 592, 596 (Mason J); Coe v Commonwealth (1979) 24 ALR 118, 129 (Gibbs J, with whom Aickin J agreed); Re Phillips; Ex parte Aboriginal Development Commission (1987) 72 ALR 508 (Neaves J); see also Wacando v Commonwealth (1981) 148 CLR 1, 27-8 (Murphy J); Gerhardy v Brown (1985) 159 CLR 70, 149-50 (Deane J).

37 Coe v Commonwealth (1979) 24 ALR 118, 136 (Jacobs J), 137-8 (Murphy J).

38 See comments in Coe v Commonwealth (1978) 18 ALR 592, 596-7 (Mason J); Coe v Commonwealth (1979) 24 ALR 118, 128-9 (Gibbs J, with whom Aickin J agreed).

39 eg Hon F Arena MLC S2505, 15 December 1986; Ms Elizabeth Sprigg S3094, 23 November 1987; Mr Bernard O'Driscoll S2745, 22 October 1987; Ms C Niland S3077, 20 November 1987.

40 Mrs GM McDevitt S3124, 29 November 1987.

Other submissions, critical of the Advisory Committee's recommendation, can be divided into four broad categories.

First, there were those which argued that the words did not go far enough towards recognising the position in 1788 and since then. For example, it was argued that the expression 'previously owned' implied that the Aboriginals' ownership had effectively ceased at some time when, in their view, it subsists today.[41]

Secondly, there were those who argued that the suggested words misrepresented the historical or legal position at and since 1788.[42]

Thirdly, some people argued that to include such words in a preamble to the Constitution would be divisive rather than representative of the beliefs of most Australians,[43] and so would not assist Aboriginals.[44]

Fourthly, it was submitted that such a preamble would have undesirable legal consequences. One academic lawyer argued, for example, that it would make Australia probably the only nation in the world to acknowledge in its basic law that its legal title to

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41 eg ACT Council of Social Services Inc S2717, 21 October 1987. In correspondence after the publication of the Rights Report, Committee members suggested that some modification to the words would be acceptable. Mr Keneally and Mr Purcell said that this part of the proposed preamble could read 'Whereas Australia is an ancient land traditionally owned and occupied by Aboriginal peoples who never ceded that ownership' and Mr Castan said he could see the benefit of replacing 'previously owned' with 'traditionally owned'.

42 eg A Richardson S2915, 29 October 1987; Mr David Bensley S3119, 2 December 1987; FW Garbett S2936, 31 October 1987; Mr Michael Warren S2856, 28 October 1987; RJ Robinson S2905, 27 October 1987; FM Shepherd S3237, 7 February 1988.

43 eg Mr Colin Gray S2693, 15 October 1987; AC Stewart S2904, 30 October 1987; Country Women's Association of Australia S3090, 20 November 1987; Mr Morris Roberts S2770, 22 October 1987.

44 eg Dr Christopher Gilbert S2824, October 1987; PE Pechey S3104, 24 November 1987; NH Barnfield S2907, 29 October 1987; Soroptomist International of Western Australia S2899, 28 October 1987.

its territory is allegedly doubtful.[45] The Queensland Government submitted that the suggested words could have concrete consequences, in particular some impact on the common law as expounded by Mr Justice Blackburn in the Gove Land Rights case.[46] In that Government's submission, this part of the suggested preamble is 'neither factual nor inspirational' and 'could be construed as a constitutional rejection of the terra nullius doctrine and lead to presumably unintended and unfortunate consequences.'[47]

We note, however, that the Federal Parliament and at least two State Parliaments have considered some formal acknowledgement of the prior ownership of land by Aboriginals.[48] A resolution was passed by the Senate on 20 February 1975[49] and another was introduced in, but not voted on by, the House of Representatives on 8 December 1983.[50] A preamble to proposed federal legislation is being considered.[51]

The scope of federal legislative powers will be analysed in Chapter 10 of our Final Report. At this stage we note that there are real difficulties in preparing an appropriate recital and

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45 Dr Christopher Gilbert S2824, 9 October 1987.

46 Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141.

47 Queensland Government S3069, 17 November 1987.

48 Two Acts contain relevant recitals: Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth), which recites that the Government of Victoria acknowledges a number of matters concerning traditional Aboriginal rights over certain land but that the Commonwealth does not acknowledge those matters, and Aboriginal Land Rights Act 1983 (NSW), which recites that land in the State of New South Wales was traditionally owned and occupied by Aborigines.

49 Hansard, 367-70, on a motion moved by Senator Bonner on 19 September 1974.

50 Hansard, 3485-6 (text), 3486-97 (speeches).

51 See policy statement of Minister for Aboriginal Affairs of 10 December 1987: Hansard, House of Representatives, 3152-61.

that words such as 'owned' and 'ceded' need to be carefully considered in this context.[52]

The range of criticisms indicates the sensitivity of these issues and problems inherent in preparing an appropriate preamble. Difficulties can be raised with respect to the other proposed recitals. For example, the Advisory Committee recommended commencing with the statement:

> Whereas the People are drawn from a rich diversity of cultures yet are one in their devotion to the Australian traditions of equality, the freedom of the person and the dignity of the individual....

We accept that 'the People' have been 'drawn from a rich diversity of cultures',[53] but recognise that within Australia there is debate about some of the multi-cultural aspects of our society.

Reasons for recommendations

We consider that a preamble to the Constitution in the same or similar terms to those recommended by the Advisory Committee would not confer any substantive rights, nor would it be relied on in interpreting other provisions of the Constitution or in limiting the use to which such provisions could be put. At most the preamble could be regarded in the same way as the preamble to

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52 See Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141, especially 268-73 (Blackburn J), and Gerhardy v Brown (1985) 159 CLR 70, 149-50 (Deane J).

53 At 30 June 1986, the preliminary estimated resident population of Australia of 15,973,900 comprised 12,576,000 Australian-born persons (78.7%) and 3,397,900 overseas-born persons (21.3%). The most common country of birth of overseas-born persons was the United Kingdom and Ireland (1,185,100 persons, 7.4%). Overseas born persons came from other European countries (1,173,200 persons, 7.3%), Asia (553,400 persons, 3.4%), America (120,300 persons, 0.7%), Africa (114,100 persons, 0.7%) and Oceania (251,900 persons, 1.5%): Estimated resident population by country of birth and sex: Australia, June 1986, Australian Bureau of Statistics, Catalogue No 3221.0.

any other Act, that is, as an aid only in the event of ambiguity in the substantive provisions of the Constitution.[54]

The use, if any, to which a preamble might be put must be considered in light of the broad approach taken by the High Court when interpreting the substantive provisions of the Constitution.[55] It is unlikely that the Court would take a different approach merely because of the inclusion of such a preamble, nor would an expansively worded preamble seem to add anything where the Court approaches the Constitution in this way.

The Committee's Report referred to the inclusion of 'fundamental sentiments' and 'common sentiments' in the preamble, and to the 'symbolic importance' of one aspect of it. We agree that any new preamble should rest on that basis. The range of criticisms of the proposed preamble indicates the difficulties of isolating 'the fundamental sentiments which Australians of all origins hold in common'[56] and stating them in a concise and 'inspirational' form.

Even if all the matters mentioned by the Committee are accepted, the question would be raised as to why other matters, which are important to many people and groups, are not referred to. The

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54 A reference in the preamble to some relevant matter will make evidence of that matter admissible in court: See Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd (1939) 61 CLR 735. The recital of facts in a preamble does not mean, however, that the recitals are conclusive evidence of those facts; they are prima facie evidence only: Dawson v Commonwealth (1946) 73 CLR 157, 175 (Latham CJ); Australian Communist Party v Commonwealth (1951) 83 CLR 1, 224 (Williams J), 243-4 (Webb J); see also 205-6 (McTiernan J), 263-4 (Fullagar J).

55 See the unanimous judgment of the High Court in The Queen v Coldham; Ex parte Australian Social Welfare Union (1983) 153 CLR 297, 314 where the Court gave its approval to the broad approach adopted by O'Connor J in Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association (1908) 6 CLR 309, 367-8; see also The Queen v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207, 225 (Full High Court).

56 Rights Report, 30.

suggestion to include a recital about sexual equality is one instance. Others may suggest that reference should be made to such things as our common language, our British cultural, legal and political heritage, our democratic institutions, triumphs over war and adversity, and our peaceful relations with other nations. In other words, there are real problems in knowing what to say and how to say it.

In summary, it seems to us that a preamble (which would almost certainly have to be approved as a separate question at a referendum) could be a source of passionate debate which would be a significant distraction from other substantive and more important proposals submitted to the electors.

Furthermore, it is undesirable to attempt to graft a preamble on the Constitution nearly ninety years after Federation, even though significant changes may be made to the Constitution as a result of our Reports. Had we been writing a new Constitution we may have been concerned to prepare an opening statement, though not in the terms suggested by the Advisory Committee.

For these reasons we recommend against the inclusion of an additional preamble to the Constitution and against any alteration of the preamble to the Commonwealth of Australia Constitution Act 1900.

THE COVERING CLAUSES

Recommendations

We **recommend** that the covering clauses of the Commonwealth of Australia Constitution Act 1900 be altered as follows:

(a) covering clause 5 should be altered by omitting all words appearing after the words 'laws of any State'; and

(b) covering clauses 7 and 8 should be repealed.

We have already recommended in Chapter 2 that covering clause 2 should be altered by omitting the words 'the United Kingdom' and substituting the word 'Australia'.

Present provisions

The covering clauses of the Commonwealth of Australia Constitution Act 1900 refer to sections 1-8 of that Act. Section 9 of the Act contains the Constitution proper. Although the Constitution was drafted in Australia by Australians,[57] it is still technically part of an Act of the Parliament of the United Kingdom.

The text of the covering clauses is as follows:

> 1. This Act may be cited as the Commonwealth of Australia Constitution Act.
>
> 2. The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.
>
> 3. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.
>
> 4. The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

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57 Section 74, relating to appeals to the Queen in Council, was the only exception.

5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

6. 'The Commonwealth' shall mean the Commonwealth of Australia as established under this Act.

'The States' shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called 'a State.'

'Original States' shall mean such States as are parts of the Commonwealth at its establishment.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

8. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

Issues

From time to time the question has been raised whether it is any longer appropriate for the Constitution of the Commonwealth of Australia to derive its legal force and effect from its enactment as part of an Act of the Parliament of the United Kingdom. It has generally been accepted that at the time the Australian federation was formed there was no other way of establishing a constitution for the federation than by having the constitution enacted as a statute of the sovereign Imperial Parliament. Some may take the view that it would be more consistent with

Australia's present status as a sovereign independent nation if the Constitution ceased to be part of a United Kingdom statute and that, accordingly, the preamble, the enacting words and the covering clauses of the Commonwealth of Australia Constitution Act 1900 should, somehow, be repealed. In Chapter 2 we have recommended the repeal of the enacting clause for the reasons there stated.

The total repeal of these parts of the Act would not, however, alter the facts of history about the genesis of the Constitution or about the constitutional theory which informed its making and which, for many years afterwards, sustained it as document having the status of a higher or basic law. Our view is that no useful purpose would be achieved by total repeal of the covering clauses, and that the clauses should be changed only to the extent that particular clauses or parts of them are demonstrably expended or outmoded.

There is still a question about whether the covering clauses can in any way be altered, either in accordance with the procedure laid down in section 128 of the Constitution for amendment of the Constitution proper, or in some other way. We are satisfied that the covering clauses can be altered and, moreover, can now be altered pursuant to section 128 of the Constitution. We give reasons for this conclusion at the end of this Chapter.[58]

Covering clause 5 - Operation of the Constitution and of laws of the Commonwealth

Recommendation

We **recommend** that covering clause 5 be altered by omitting all words appearing after the words 'the laws of any State'.

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58 See 'Bases for altering the preamble and covering clauses'.

Current position

The effect of covering clause 5 (which is set out earlier in this Chapter) is to make the Commonwealth of Australia Constitution Act and the laws made by the Federal Parliament under the Constitution binding on 'the courts, judges, and people of every State and of every part of the Commonwealth', notwithstanding anything to the contrary in the laws of a State. It also declares laws of the Commonwealth to be in force on British ships, excluding warships, 'whose first port of clearance and whose port of destination are in the Commonwealth.'

Covering clause 5 overlaps to some extent with section 109 of the Constitution, which provides that, where a valid federal law is inconsistent with a valid State law, the federal law prevails. But it goes further in making it clear that where a State or federal law conflicts with the Constitution, the latter prevails.[59]

The effect of the last part of covering clause 5 is to give the laws of the Commonwealth a geographical operation they might not otherwise have had. At the time the Constitution was brought into being, the Commonwealth of Australia was merely a colony of the United Kingdom and because of this it was thought to have very limited power to make laws which would operate outside the territorial limits of the Commonwealth. The last part of covering clause 5 overcame this assumed limitation in relation to the class of ships specified.

In the context of covering clause 5, the term British ship was held by the High Court to mean a public or private ship belonging to a British subject, including a British corporation.[60] On the other hand the reference in covering clause 5 did not mean that

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59 Brown v The Queen (1986) 160 CLR 171, 197 (Brennan J).

60 Merchant Service Guild of Australasia v Commonwealth Steamship Owners Association (1913) 16 CLR 664.

the laws of the Commonwealth could never apply to non-British ships.[61]

As a result of section 3 of the Statute of Westminster 1931 (Imp) and the Statute of Westminster Adoption Act 1942 (Cth), the Federal Parliament was recognised to have, as from 3 September 1939 and subject to the Constitution, full power to make laws having extra-territorial operation. It now seems to be accepted that the Federal Parliament has power under section 51(xxix.) - 'External affairs' - to make laws on any subject which operate outside the limits of Australia.[62] Consequently, the last part of covering clause 5 has ceased to have any real significance. As Windeyer J observed in 1959, 'To-day the only result of covering cl. 5 is that, as a matter of construction, any valid Commonwealth legislation prima facie applies in such ships,[63] whereas prima facie it does not apply elsewhere outside the territorial limits of the Commonwealth.'[64]

Reasons for recommendation

Since the Federal Parliament now has full power to make laws having extra-territorial operation, no useful purpose is served by the part of covering clause 5 which provides that 'the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth'. It should also be noted that the class of ships which would now be classified as British ships is much smaller than it would have been in 1900 and that with the disappearance of the concept of

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61 Ex parte Oesselmann (1902) 2 SR (NSW) 438.

62 New South Wales v Commonwealth (Seas and Submerged Lands Case) (1975) 135 CLR 337, 360 (Barwick CJ), 470 (Mason J), 497 (Jacobs J); Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1, 98 (Gibbs CJ), 172 (Murphy J), 255 (Deane J).

63 ie ships of the class specified in the clause.

64 The Queen v Foster; Ex parte Eastern and Australian Steamship Co Ltd (1959) 103 CLR 256, 309 (Windeyer J).

'British subject', doubts could arise over precisely what ships are 'British ships'.

The last part of covering clause 5 is, in our view, outmoded. Amendment of the covering clause by omitting all words after the words 'of any State' would in no way diminish the legislative powers of the Federal Parliament.

Covering clause 7 - Repeal of Federal Council of Australasia Act 1885

Recommendation

We **recommend** that covering clause 7 be repealed.

Current position

The Federal Council of Australasia was a legislative body established by the Imperial Parliament in 1885. It consisted of representatives of the colonies of Fiji, Queensland, Tasmania, Victoria and Western Australia, and for a short period South Australia. It was endowed with very limited powers to make laws for those colonies.[65]

The effect of covering clause 7 was to repeal the Act establishing the Federal Council but to continue in force those laws which had been passed by the Council and were still in operation at the time the Commonwealth was established. Had there not been a savings clause, the repeal of the Federal Council of Australasia Act would have meant that laws made by the Council would have ceased to operate.

The law-making powers given by the Constitution to the new Federal Parliament included all, or substantially all, of the

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65 The Acts enacted by the Federal Council of Australasia are listed in Quick and Garran, 377 and reproduced in GS Knowles, The Commonwealth of Australia Constitution Act (1936).

legislative powers previously invested in the Federal Council of Australasia. Additionally, the new Parliament was given a general power to make laws with respect to 'The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia' (section 51(xxxviii.)). And by the second paragraph of covering clause 7 the Parliament was given an express power to repeal any law of the Federal Council applying in any State.

Federal laws enacted since 1901 have repealed and superseded all of the laws of the Federal Council, except the Australasian Orders in Lunacy Act 1891.[66]

Previous proposals for reform

The covering clauses were reviewed by Standing Committee C of the Australian Constitutional Convention (and a Working Party of that Committee) in 1973-74, in the course of a more general review of the Constitution to determine which of its provisions could be regarded as expended or outmoded. The Committee recommended that covering clause 7 be repealed.[67] This recommendation was later endorsed at the Melbourne and Hobart sessions of the Convention, in 1975 and 1985 respectively.[68]

Reasons for recommendation

We recommend that covering clause 7 should be repealed. We note that, once the requisite steps have been taken to dispose of the

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66 54 Vic No 1.

67 ACC, Standing Committee C, Interim Reports to Executive Committee (Oct 1974) 10 (printed in ACC Proc, Melbourne 1975).

68 ACC Proc, Melbourne 1975, 114-9; ACC Proc, Hobart 1976, 140-4.

Australasian Orders in Lunacy Act 1891, the covering clause will become otiose.

The repeal of covering clause 7 will, of course, repeal the repeal in 1900 of the Federal Council of Australasia Act 1885, but that does not mean that the Act of 1885 will thereby be resuscitated. It is true that, under the common law, there is a presumption that when an Act repeals a prior Act which repealed an even earlier Act, the latest Act revives the Act first repealed. So if Act X is repealed by Act Y and Act Z repeals Act Y, it is presumed that Act Z has the effect of reviving Act X. But this presumption is rebutted if the subject-matter and terms of Act Z indicate an intention that Act X is not to be revived.[69]

We are in little doubt that the repeal of covering clause 7 would not be held to revive the Federal Council of Australasia Act 1885, but if it is thought desirable that the matter be placed beyond doubt, the proposed law to repeal covering clause 7 should expressly declare that the Federal Council of Australasia Act 1885 is not thereby revived.

Since the same doubt may arise in relation to other proposed laws involving repeal of sections or parts of sections of the Constitution or the Commonwealth of Australia Constitution Act 1900 it may be desirable to include in the Constitution a general provision dealing with the effect of alterations by way of repeals in order to negate the operation of common law rules relating to revival on repeal. The model for such a provision would be section 38(2)(a) of the United Kingdom Interpretation Act 1889 and its counterpart in section 7 of the Federal Acts Interpretation Act 1901.[70]

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69 Marshall v Smith (1907) 4 CLR 1617, 1634 (Barton J).

70 Although the Imperial Act of 1889 still has some bearing on the interpretation of the Commonwealth of Australia Constitution Act 1900 and thus the Constitution, we think there can be no doubt that laws to alter the Constitution which take effect under section 128 of the Constitution are not Acts for the purposes of section 38(2)(a) of the 1889 Act.

Another possible way of achieving the same result would be to amend the Acts Interpretation Act (Cth), prior to the introduction of any further Bills to alter the Constitution, to make it clear that the present provision on revival on repeals applies to proposed laws for alteration of the Constitution.

Covering clause 8 - Application of Colonial Boundaries Act 1895

Recommendation

We **recommend** that covering clause 8 be repealed.

Current position

The Colonial Boundaries Act 1895 is an Act of the United Kingdom Parliament which provides that:

> (1) Where the boundaries of a colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen by Order in Council or letters patent the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the colony.
>
> (2) Provided that the consent of a self-governing colony shall be required for the alteration of the boundaries thereof.[71]

The Act went on to define which colonies were to be regarded as self-governing colonies for the purposes of the Act. They included all of the Australian colonies which later became States of the Australian federation.

The effect of covering clause 8 of the Commonwealth of Australia Constitution Act 1900 was to delete the States from the list of self-governing colonies to which the Colonial Boundaries Act 1895 applied and to substitute in their place the Commonwealth of Australia.

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[71] Section 1.

The application of the Colonial Boundaries Act to the Commonwealth presents some problems. To appreciate them requires some knowledge of the antecedents of the Act and its purpose. At the time the Act was enacted, it was well understood that the prerogatives of the Crown extended to the acquisition of sovereignty over territories and to the enlargement of the boundaries of those of its colonies which were not self- governing. But it was also accepted that the Crown could not, under the prerogative, alter colonial boundaries if those boundaries had been defined by Act of Parliament. In such a case, any boundary alteration required another Act of Parliament.

Where a colony's boundaries had not been defined by Imperial legislation, the power of the Crown to alter those boundaries once the colony had been granted a representative legislature and self-government was more doubtful. One view was that the Crown could alter the boundaries of a self-governing colony with the consent of the colonial legislature. But others considered that the boundaries of such a colony could not be altered except by Act of the United Kingdom Parliament. In fact the boundaries of some self-governing colonies had been altered by Queen Victoria without the backing of Imperial legislation and in some cases had been altered notwithstanding that the original boundaries had been defined by legislation. Doubts were expressed about the validity of those alterations and it was to resolve those doubts that the Colonial Boundaries Act 1895 was enacted.[72]

The Act both ratified prior alterations of colonial boundaries by the Queen and authorised future alterations of the boundaries of self-governing colonies with the concurrence of those colonies, or, to be more exact, the concurrence of the colonial legislatures.[73]

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72 The history of the Act is described in Wacando v Commonwealth (1981) 148 CLR 1.

73 See Quick and Garran, 378-9.

It remains now to explain the nature of the problems which arise from the application of the Colonial Boundaries Act to the Commonwealth of Australia.

The first problem concerns the relationship between the Act and section 123 of the Constitution which deals with alteration of the limits of States of the federation. Section 123 empowers the Federal Parliament to alter the limits of a State but only with the consent of the Parliament of the State and with the approval of a majority of electors of the State voting on the question.[74]

An alteration of the boundaries of the Commonwealth of Australia could involve an alteration of the limits of a State or States, in which event the question would arise whether the alteration could be effected under the Colonial Boundaries Act or only in the manner prescribed by section 123 of the Constitution.

According to Dr Wynes, section 123 applies only to alteration of State limits; not to alterations of the boundaries of the Commonwealth. In his view, if the Federal Parliament were to consent to an alteration of the limits of the Commonwealth by the Queen, it would not be effecting any alteration of State limits but would be 'merely complying with the conditions precedent to the exercise of a power by a superior body.' The purposes of section 123 and the Act, Wynes thought, were different: 'sec.123 has nothing to do with the Colonial Boundaries Act; it is altogether alio intuitu'.[75]

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74 Section 123 reads:

> The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

75 W Anstey Wynes, Legislative, Executive and Judicial Powers in Australia (3rd ed 1962) 147.

In contrast, Quick and Garran, and more recently, Professor Lumb have suggested that section 123 qualifies both the Act and covering clause 8 so that if an alteration of the boundaries of the Commonwealth also involves alteration of the limits of a State or States, the State limits cannot be altered except in accordance with section 123. In Lumb's view, the effect of the Act is probably restricted to the alteration of the boundaries of Australia's external Territories.[76] But the Act could also apply to alterations of the boundaries of the 'internal' Territories of the Northern Territory and Jervis Bay other than those which affect State boundaries.

We prefer the view taken by Quick and Garran and by Lumb.

The Act presents some other problems. One is whether it has any application to Australia at the present time, and, if so, what that application is.

The Act presupposes the existence of a Royal prerogative to establish and vary boundaries of colonies, albeit a prerogative which does not extend to variation of boundaries fixed by statute or to variation of the boundaries of self-governing colonies without their consent. It supplies authority to the Queen to alter the boundaries of self-governing colonies, even when those boundaries have fixed by statute, provided that the legislature of the colony consents to the alteration. But it does not acknowledge that the legislatures of self-governing colonies might have an independent capacity to legislate to alter colonial boundaries. Indeed, at the time the Act was enacted, it was taken for granted that they did not.[77] And, for the purposes of the Act, the Queen meant the Queen in the sovereignty of the United Kingdom.

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76 Quick and Garran, 378-9; RD Lumb, The Constitution of the Commonwealth of Australia Annotated (4th ed, 1986) 35.

77 Wacando v Commonwealth (1981) 148 CLR 1.

It can be argued that, as far as the Commonwealth of Australia is concerned, the Act is, for all intents and purposes, a dead letter, and its continued application is justifiable only to give validity to certain pre-Federation variations of Australian colonial boundaries. The Commonwealth may still be a self-governing colony within the meaning of the Act, even though, by the Statute of Westminster 1931 (Imp), its status was upgraded to that of a Dominion to which later Imperial Acts referring to colonies did not apply (section 11).

But, as a result of Australia's growth to nationhood, it can no longer be said that the Royal prerogative to bring new territory within the sovereign domain of the Commonwealth of Australia is exercisable by the Queen in the sovereignty of the United Kingdom. This prerogative is now, under section 61 of the Constitution, exercisable by the Queen in the sovereignty of Australia, or by the Governor- General, in each case acting on Ministerial advice.[78]

The Federal Parliament, too, can now draw on several heads of federal legislative power, for example the external affairs power (section 51(xxix.)) and the Territories power (section 122), to extend or vary the territorial limits of areas under Australian sovereignty, because any former limitations on its capacity to make laws having extra-territorial effect were swept away by section 3 of the Statute of Westminster. It is also worth noting that section 121 gives the Federal Parliament a capacity to extend the boundaries of the Commonwealth by admitting as a new State a territory not previously within the sovereignty of the Commonwealth.

There is some uncertainty about whether, for the purposes of the Colonial Boundaries Act as modified by covering clause 8, the boundaries of the Commonwealth include the boundaries of

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78 See eg the Torres Strait Treaty concluded between Australia and Papua New Guinea (annexed to Torres Strait Fisheries Act 1984 (Cth)). This concerns sovereignty over islands and maritime boundaries.

Territories which are external to the continent of Australia. In both the Constitution and the covering clauses the term 'Commonwealth' is used in several different senses. In covering clauses 3, 4 and 6 the term refers to the political entity - the federation of States. Covering clause 5 seems to refer to the Commonwealth in a geographical sense.[79] The consent required for a boundary alteration under the 1895 Act, as modified by covering clause 8, is that of the Parliament of the Commonwealth. But what is not clear is whether a boundary alteration to which the Act applies includes an alteration to a boundary of a Territory of the Commonwealth, not affecting the limits of a State, or the placing of a new geographical area within the sovereignty of the Commonwealth.

We are inclined to think that any such action would nowadays be construed as involving an alteration of the boundaries of the Commonwealth and thus requiring the consent of the Federal Parliament. We note, however, that the High Court has recognised that, under the old Imperial regime, a distinction was drawn between an alteration of the boundaries of a self-governing colony by the Crown, and the annexation of territory by the Crown and placement of it under the administration of a self-governing colony. The latter was considered not to require the consent of the legislature of the colony because the annexed territory did not become part of the colony.[80]

These questions concerning Territories can now be regarded as academic. The Commonwealth does not need to rely on the Colonial Boundaries Act to achieve alterations to the boundaries of its Territories. It can acquire new Territories, pursuant to sections 61 and 122 of the Constitution, on its own initiative. It is free to accept or reject placement of territory under its

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79 See Spratt v Hermes (1965) 114 CLR 226, 246 (Barwick CJ).

80 Wacando v Commonwealth (1981) 148 CLR 1, 21-2 (Mason J).

authority by the Queen (section 122),[81] and since the adoption of the Statute of Westminster, no dependent Territory of the United Kingdom has been placed under Australian authority except by Act of the United Kingdom Parliament, enacted at the request and with the consent of the Government and Parliament of the Commonwealth.[82]

Reasons for recommendation

We have recommended the repeal of covering clause 8 from the Commonwealth of Australia Constitution Act 1900, and with it whatever further action is necessary to repeal the Colonial Boundaries Act 1895 so far as it applies to the Commonwealth of Australia, for several reasons. In summary they are these:

(a) The continued application of the Colonial Boundaries Act to the Commonwealth, on the basis that the Commonwealth is a self-governing colony of the United Kingdom, is not consistent with Australia's status as a sovereign, independent nation.

(b) Under the Constitution, the Commonwealth already has ample executive and legislative power to alter the boundaries of the Commonwealth.

(c) The co-existence of the Colonial Boundaries Act and the Constitution gives rise to uncertainty about the precise relationship between the two.

(d) The Colonial Boundaries Act has, as far as we know, never been relied upon as a means of altering the boundaries of the Commonwealth.

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81 The Act of acceptance has been that of the Federal Parliament. See eg Ashmore and Cartier Islands Acceptance Act 1933 (Cth); Australian Antarctic Territory Acceptance Act 1933 (Cth).

82 See eg Cocos (Keeling) Islands (Request and Consent) Act 1954 (Cth); Christmas Island (Request and Consent) Act 1957 (Cth).

Having regard to the opinions of the majority of the High Court in Kirmani v Captain Cook Cruises Pty Ltd [No 1][83] it would seem that under section 51(xxix.) of the Constitution and section 2 of the Statute of Westminster, 1931 the Federal Parliament already has power to repeal the Colonial Boundaries Act so far as it is part of the law of Australia. We recognise that repeal of the Act could give rise to doubts about the effectiveness of certain pre-Federation instruments affecting the boundaries of colonies which became States of the Australian federation, and more particularly, those instruments which were intended to be validated by the Colonial Boundaries Act.[84]

We therefore recommend that the Bill for the Act to repeal the Colonial Boundaries Act 1895 include a suitable savings clause.

Recommendations for alteration of section 123 of the Constitution are made in Chapter 7 of this Report.

Other covering clauses

Clause 2

The reasons why we have recommended that this clause should be altered have already been explained in Chapter 2 of the Report.[85] We there recommended that the clause be altered to read:

> The provisions of this Act referring to the Queen shall extend to Her Majesty's Heirs and Successors in the sovereignty of Australia.

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83 (1985) 159 CLR 351.

84 See Cantley v Queensland (1973) 1 ALR 329 and Wacando v Commonwealth (1981) 148 CLR 1.

85 Under the heading 'The Crown of the United Kingdom of Great Britain and Ireland'.

Clause 3

The principal effect of this clause was to enable Queen Victoria, acting on the advice of her Privy Council, to appoint a day on which the federation to be called the Commonwealth of Australia would come into being. The proclamation appointing that day was duly made on 17 September 1900,[86] and, as a result of it, the Federation came into being on 1 January 1901.

Once the proclamation was made in accordance with clause 3, it was not something the Queen could revoke or amend, and thus either prevent the federation coming into being or dissolve the federation once it had been established.[87] So in a sense the force of covering clause 3 is expended.

Although generally we recommend that provisions in the Constitution the force of which is expended should be repealed, we do not think that any good purpose would be served by the formal repeal of covering clause 3. Like the Working Party of Standing Committee C of the Australian Constitutional Convention which reported on expended and outmoded provisions in the constitutional instruments, we are conscious of the need 'to strike a balance between those who see the Constitution as a purely legal instrument, and between those who see it as a legal instrument but also an important historical document.'[88]

Clause 4

This clause is closely linked with clause 3. It contains several provisions:

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86 Commonwealth Statutory Rules 1901-1956, vol V, 5300.

87 See Palais Parking Station v Shea (1977) 16 SASR 350, 358 (Bray CJ), 367 (King J).

88 ACC, Standing Committee C: Interim Reports to Executive Committee (Oct 1974) 21 (printed in ACC Proc, Melbourne 1975).

(a) A declaration that the Commonwealth of Australia was to be established on the day appointed by the Queen in the proclamation made by her under clause 3.

(b) A declaration that the Constitution set out in clause 9 was to take effect on and after the day so appointed.

(c) Between the time of the passing of the Commonwealth of Australia Constitution Act 1900 (9 July 1900) and the day appointed for establishment of the Commonwealth (1 January 1901), the Parliaments of the colonies to be federated could make 'any such laws, to come into operation on the day so appointed,[89] as they might have made if the Constitution had taken effect at the passing of' the Commonwealth of Australia Constitution Act 1900. This provision in clause 4 was meant to empower the legislatures of the colonies destined to come into the federation to enact legislation which they had no power to make under their existing constitutions, but which they would have power to enact under the federal Constitution. Examples were the power under section 9 of the Constitution to make laws prescribing the method of choosing senators for the State, and for determining the times and places of elections of senators for the States; and the power under section 29 of the Constitution to make laws for determining the electoral divisions in each State for which members of the House of Representatives might be chosen, and the number of members for each division.

For the reasons we gave in relation to covering clause 3 we do not think that clause 4 should be altered or repealed. We note also that a number of sections in the Constitution take 'the

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89 ie, the day appointed under Clause 3.

establishment of the Commonwealth' as a reference point[90] so that, if clause 4 were to be repealed, it might still be necessary to include in the Constitution itself a provision specifying the date on which the Commonwealth was established and the Constitution took effect.

Clause 6

This clause defines the terms 'the Commonwealth', 'the States' and 'Original States'. It should, in our opinion be retained. Were it to be repealed, its provisions would need to be re-enacted (albeit in a modified form) as part of the Constitution proper.

BASES FOR ALTERING THE PREAMBLE AND COVERING CLAUSES

The orthodox view has been that nothing in the Commonwealth of Australia Constitution Act 1900 which precedes 'the Constitution', as set out in covering clause 9, can be altered by the procedure provided for in section 128 of the Constitution because section 128 relates only to alterations of the Constitution. 'This Constitution', it declares, 'shall not be altered except in the following manner:-'. The parts of the Act which precede 'the Constitution' are not part of that Constitution and for that reason, it has been argued, they are not provisions to which section 128 applies.

Until recently, it was generally assumed that the only way in which the preamble and covering clauses 1-8 of the Act could be altered was by an Act of the United Kingdom Parliament passed at the request and with the consent of the Government and Parliament of the Commonwealth.[91] But as a result of the enactment by the Federal and the United Kingdom Parliaments of the Australia Acts

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90 See sections 69, 70, 73(ii), 84-88, 96, 106 and 107. See also section 51(xxxviii.) which takes 'the establishment of this Constitution' as a reference point.

91 Statute of Westminster 1931, sections 4 and 9(3).

1986, the authority of the United Kingdom Parliament to legislate for Australia has been terminated. It cannot even legislate for Australia at the request and with the consent of the Government and Parliament of the Commonwealth.[92] The question therefore is whether we are left with provisions in the Commonwealth of Australia Constitution Act 1900 which are immutable - provisions which no one can validly alter or repeal. The answer must surely be 'No'.

The problem is: Who now has authority to alter or repeal those provisions? Or rather: Whose amendments or repeals of those provisions is the High Court of Australia most likely to recognise as legally effective?

One commentator has suggested that the way to alter or repeal the first eight covering clauses would be, first, for the Federal Parliament, at the request and with the concurrence of all State Parliaments, to legislate pursuant to section 15 of the Australia Act 1986 (Cth) to alter so much of that Act and the Statute of Westminster as prevents the United Kingdom Parliament legislating to alter or repeal those clauses. The next step would be for the Parliaments and Governments of the Commonwealth and the States to request and consent to the enactment of amending legislation.[93]

Having regard to the clear purpose of section 1 of the Australia Act 1986 (Cth) to terminate British legislative power in relation to Australia and section 1 of the Australia Act 1986 (UK) to abdicate such power, this proposal is hardly practical.

Another possible basis on which the covering clauses might be altered is section 51(xxxviii.) of the Constitution, the section relied upon to support the Australian version of the Australia Act. Section 51(xxxviii.) empowers the Federal Parliament to

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92 The effect of the Australia Acts is explained in Chapter 2 under the heading 'Australia's status as an independent nation'.

93 PH Lane, The Australian Constitution (1986) 2.

make laws with respect to the exercise of any power which, at the establishment of the Commonwealth, could be exercised only by the United Kingdom Parliament or by the Federal Council of Australasia. The power can, however, be exercised only at the request or with the concurrence of the Parliaments of all the States directly concerned. The power is also expressed to be subject to the Constitution, so any law made pursuant to it which conflicts with the Constitution is invalid.[94]

The reason why section 51(xxxviii.) might sustain a law to alter or repeal the preamble or covering clauses 1-8 of the Commonwealth of Australia Constitution Act is that, at the time the Constitution was established, these provisions could be altered only by the Parliament of the United Kingdom. They could not be altered by the Federal Parliament or by State Parliaments, or, so it would have to be argued, by the Federal Parliament and the Australian electors, pursuant to section 128 of the Constitution. A law of the Federal Parliament to repeal or alter the preamble or any of covering clauses 1-8 would, according to this argument, be a law with respect to the exercise within the Commonwealth of a power which at the establishment of the Constitution could be exercised only by the United Kingdom Parliament. But, depending on what the federal law provided, that law might still not be valid because it was inconsistent with the Constitution.

We consider it would be unsafe and unwise to rely on section 51(xxxviii.) as a basis for the alterations we have proposed.

Our reasons are as follows. Any law which changes the meaning or operation of the Constitution is a law to alter the Constitution. A law to alter covering clauses 2, 5 or 6 might clearly alter the operation and meaning of the Constitution. It could therefore not be enacted pursuant to section 51(xxxviii.). While the same argument cannot be made about the use of section 51(xxxviii.) to

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94 Section 51(xxxviii.) is set out in Chapter 2 under the heading 'The States and the Australia Act'.

repeal the enacting clause or covering clauses 1, 3, 4, 7 and 8, and while that section could possibly be relied on to give effect to some of our recommendations, our view of the operation of section 128 makes it more appropriate that the consent of the electors be obtained. This is because all of the provisions of the Commonwealth of Australia Constitution Act 1900 were enacted to create, explain, or give effect to, the Constitution or to make legislative changes that were necessary having regard to the establishment of the Commonwealth.

It is our opinion that, having regard to all matters that the High Court is likely to take into account in determining any question which might turn on who has authority to alter the preamble and covering clauses 1-8 of the Commonwealth of Australia Constitution Act 1900 it is both safe and proper to proceed on the basis that alterations to these provisions can be made, and should only be made, by constitutional alteration pursuant to section 128 of the Constitution. This section, from the establishment of the Commonwealth, gave to the Parliament and to the electors of Australia the power to alter the Constitution which had been formally enacted by the Imperial Parliament.

We now set out the reasons for our conclusion that alterations to the preamble, covering clauses 1-8 and also the enacting words in the Commonwealth of Australia Constitution Act 1900 can be made by the process of constitutional alteration provided for in section 128 of the Constitution.

The power conferred by section 128 to alter 'this Constitution' is not expressly limited as regards the subjects or content of laws for alteration of the Constitution. There is nothing in section 128 which expressly prohibits alterations to the Constitution which involve additions of sections to deal with matters which are not dealt with in the Constitution as enacted in 1900. Nor is there anything in section 128 which expressly prohibits alterations to the Constitution which relate to matters dealt with in the provisions of the Commonwealth of Australia Constitution Act 1900 which precede covering clause 9. There is,

for example, nothing in section 128 which expressly prohibits alterations of the Constitution which involve incorporation within the Constitution, with some changes, of definitions of words and phrases in the Constitution which are presently defined in the covering clauses.

If section 128 were to be construed as not permitting alterations to the Constitution at variance with the provisions in the Act which precede the Constitution, it could only be because the latter have the status of higher law - law paramount over laws made in accordance with section 128.

Section 8 of the Statute of Westminster, which has not been altered by the Australia Acts, might appear to give the preamble and covering clauses 1-8 the status of higher law, but the section does not have that effect. The section was enacted as a rider to section 2 of the Statute - a section designed to make it possible for the Federal Parliament to make laws which would override United Kingdom legislation which was expressed to apply to Australia or which applied by necessary intendment.

Section 8 of the Statute was meant to make it clear that nothing in the Statute should 'be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia...otherwise than in accordance with the law existing before the commencement of' the Statute. In other words, nothing in the Statute was to be construed as changing the law governing alteration of the Constitution or the Imperial Act by which the Constitution was enacted. So section 8 of the Statute did no more than preserve existing law about how the Constitution and the Constitution Act could be altered. At the least it ensured that the Federal Parliament could not use the powers given to it by section 2 of the Statute to make laws in disregard of the requirements of section 128 of the Constitution.

Section 8 of the Statute of Westminster did not introduce any new rules governing the construction of section 128 of the Constitution. The meaning and effect of section 128, like that

of any other section in the Constitution, has not been frozen in point of time by any Imperial Act or by judicial interpretation, and the High Court of Australia has on many occasions shown that it will interpret provisions of the Constitution in the light of changes which have taken place in the constitutional relationships between the United Kingdom and the Commonwealth of Australia. The relevant pronouncements by Justices of the High Court have, admittedly, been made only in relation to the ambit of federal legislative and executive powers, but those pronouncements are equally applicable to section 128 of the Constitution.[95] Section 128 now has to be interpreted in the light of the fact that under Australia Act 1986 (UK) the United Kingdom Parliament renounced authority to legislate for Australia.

An amendment or repeal of, or addition to, entrenched provisions relating to the organisation and powers of government in a country is, in its ordinary meaning, concerned with 'the Constitution'.

Our view merely leads to giving to the notion of 'alteration of the Constitution' the broad and natural meaning that the High Court has applied to any other expressions of power in the Constitution. In the past, limitations which were an inherent part of the Imperial system may have prevented the power being given its full scope.[96] The Constitution and the covering clauses were enacted by a superior law maker. They were therefore both higher law, binding by virtue of the Colonial Laws Validity Act 1865, with the difference that there was express

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95 See Commonwealth v Kreglinger & Fernau Ltd and Bardsley (1926) 37 CLR 393, 413 (Isaacs J); Attorney-General for Ontario v Attorney-General for Canada [1947] AC 127; New South Wales v Commonwealth (Seas and Submerged Lands Case) (1975) 135 CLR 337, 373 (Barwick CJ), 497 (Jacobs J); Bonser v La Macchia (1969) 122 CLR 177, 223 (Windeyer J); Kirmani v Captain Cook Cruises Pty Ltd [No 1] (1985) 159 CLR 351, 379-80 (Mason J), 441- 2 (Deane J).

96 There are no decisions to this effect however.

provision to alter the Constitution, but not the covering clauses.

Whatever may have been the position before 1986, section 1 of the Australia Acts has, in our view, the effect of doing away with the concept of the Constitution having an inferior status to any other law. It is anachronistic to base the fundamental nature of the Constitution on the Colonial Laws Validity Act 1865 (Imp). That Act merely defined the operation of the basic rule of the Imperial legal system that the will of the British Parliament was supreme throughout the Empire. That principle has gone, as far as Australia is concerned.

The Commonwealth of Australia Constitution Act 1900 (including the Constitution) remains part of our law. It was law because it was made by an external sovereign power (although, of course, that power acted in accordance with the will of the electorates in the colonies). It is now law because it is the constitutive instrument that creates the Commonwealth and defines the structure and powers of the organs of government in Australia.

As a result of these changes, the provisions for alteration of the Constitution operate to their full extent encompassing all matters relating to our mode of government.[97]

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97 For present purposes it is unnecessary to consider a possible limitation of power in section 128 arising from the provisions of section 15 of the Australia Act. See L Zines, The High Court and the Constitution (2nd edn, 1987) 271-3.

CHAPTER 4. THE PARLIAMENTS

INTRODUCTION

In our inquiry and report on revision of the Constitution, we are required by our Terms of Reference to make such recommendations for change as will, amongst other things, 'adequately reflect Australia's status as ... a Federal Parliamentary democracy' and 'ensure that democratic rights are guaranteed.' The salient features of the Australian federal parliamentary system have already been described in Chapter 2.

This Chapter of the Report deals with aspects of the parliamentary system which, in our view, are not entirely satisfactory and which should be the subject of laws for alteration of the Constitution. Some of the recommendations we make need to be read in conjunction with recommendations contained in Chapter 5, 'The Executive Government of the Commonwealth', and in Chapter 8 which deals, inter alia, with new States.

In this Chapter we also, as required by our Terms of Reference, make recommendations for revision of the Constitution to 'ensure that democratic rights are guaranteed'. We discuss the general question of what rights can be regarded as democratic rights and then consider how they should be constitutionally protected.

Although our recommendations relate primarily to the Federal Parliament, some of them also affect the Parliaments of the States and the legislatures of the Territories of the Commonwealth. The Federal Constitution does not, at present, control the structures of the Parliaments of the States. It does, however, limit the legislative powers of those Parliaments and makes the exercise of certain powers by the Federal

Parliament conditional on the consent of State Parliaments.[1] It also gives State Parliaments certain powers to enact laws governing Senate elections and empowers the Houses of State Parliaments to choose senators to fill casual vacancies in the Senate.

For reasons we have set out in Chapter 2,[2] we have concluded that there is nothing in the Constitution which precludes alteration of the Constitution, in accordance with the procedures laid down in section 128, to include provisions which impinge upon existing State and Imperial legislation to do with the structures of State Governments. Nor do our Terms of Reference preclude us from making recommendations for alteration of the Constitution which would affect internal State constitutional arrangements. On the other hand, we have proceeded on the basis that our Terms of Reference do not permit us to make recommendations for alteration of the Constitution which impinge on existing constitutional arrangements within the States, and which are now exclusively the province of the State Parliaments, unless the alterations to be recommended can be justified as necessary for, or instrumental to, the maintenance of 'a Federal Parliamentary democracy', or ensuring 'that democratic rights are guaranteed'.

In the preparation of this Chapter of the Report we have been assisted by the reports of several of the Advisory Committees appointed by the Attorney-General. The particular matters reported on by those Committees which are dealt with in this Chapter are:

(a) the Senate's powers in relation to 'supply', which was the subject of recommendations by the Advisory Committee on Executive Government;

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1 See, for example section 51 (xxxvii.) and (xxxviii.) and sections 123 and 124.

2 Chapter 2 under the heading 'The Constitution and State systems of government'.

(b) recommendation of money votes to the Parliament, which was also the subject of a recommendation by that Committee; and

(c) constitutional guarantees of democratic rights, which were the subject of several recommendations by the Advisory Committee on Individual and Democratic Rights.

For the most part, however, the matters dealt with in this Chapter are ones which did not come within the purview of the Advisory Committees. The principal matters dealt with are:

(d) the right to vote and parliamentary elections;

(e) meetings of parliaments;

(f) the composition of the Houses of the Federal Parliament;

(g) the maximum term of the Federal Parliament and the circumstances in which the term of a particular Parliament may be brought to an end before the expiry of its maximum term;

(h) senators' terms of office;

(i) the role of States in the election of senators, including the enactment of legislation governing Senate elections, the issue of writs for Senate elections, and the filling of casual vacancies in the Senate;

(j) the powers of the Senate and the House of Representatives inter se, particularly as regards taxing and expenditure measures;

(k) procedures for resolution of disagreements between the two Houses of the Federal Parliament;

(l) qualifications and disqualifications of members of the Federal Parliament; and

(m) privileges of the Federal Parliament.

This Report deals with all but the last two of these matters.[3]

Other matters which concern the Federal Parliament but which have been dealt with in Chapter 2 of the Report rather than in the present Chapter are:

(n) assent to Bills;

(o) reservation of Bills for the Queen's personal assent; and

(p) disallowance of Federal Acts.[4]

DEMOCRATIC RIGHTS AND PARLIAMENTARY ELECTIONS

Introduction

Our Terms of Reference required us to consider what changes should be made to the Constitution to ensure that it 'adequately reflect Australia's status as ... a Federal Parliamentary democracy', and 'that democratic rights are guaranteed.' The main features of the federal parliamentary system in Australia have already been described in Chapter 2. Here we are concerned primarily with the question of how democratic rights should be constitutionally guaranteed.

But what are democratic rights? More fundamentally, what constitutes a democracy?

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3 The last two matters will be dealt with in our Final Report.

4 Chapter 2 under the heading 'Reservation and disallowance'.

Democracy, like other forms of government, has to do with power relationships - the power which different people, in different capacities, have over one another. What distinguishes a democracy from other forms of government is that the people who are to be governed have an opportunity to decide, freely and at regular intervals, who is to have authority to govern them and according to what policies. The people express their choices by voting at periodic elections of candidates for legislative office, and sometimes other governmental offices as well. The franchise - entitlement to vote - in a democratic system is broadly based and each elector has only one vote.

Essential elements of representative democracy, Stephen J has said, include 'the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected.'[5] But, he pointed out, 'the particular quality and character of the content of each one of these three ingredients of representative democracy ... is not fixed and precise.' The franchise, for example, may be defined in many different ways; electoral systems may vary 'and no one formula can preempt the field as alone consistent with representative democracy.'[6] In truth, Stephen J concluded:

> representative democracy is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that generic description. The spectrum has finite limits and in a particular instance there may be absent some quality which is regarded as so essential to representative democracy as to place that instance outside those limits altogether; but at no one point within the range of the spectrum does there exist any single requirement so essential as to be determinative of the existence of representative democracy.[7]

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5 Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1, 56.

6 ibid.

7 id, 57.

A democratic system of government is commonly thought to require a good deal more than the basic elements described above. The electoral system has to ensure that electors are able to vote freely so that 'neither the incumbent government nor any other group can determine the electoral result by means other than indications of how they will act if returned to power.'[8] Those who compete for governmental office must have the facility to organise for that purpose, to communicate freely with those whom they wish to persuade - to let them know what they think is deficient in the performance and policies of the present incumbents of Government, and what they themselves propose to do if they are elected to office.

These same freedoms of association and expression must be accorded to people who, while they do not aspire to governmental office, have claims to make of Governments, grievances to express and opinions about who is best qualified to govern. There must, Jeremy Bentham once said, be security for every person to 'make known his complaints' and for 'malcontents' to 'communicate their sentiments, concert their plans, and practise every mode of opposition short of actual revolt'.[9]

Whether or not freedoms such as freedom of expression, assembly and association should be constitutionally guaranteed is a matter we will deal with in Chapter 9 of the Final Report. We will deal with it there as part of a broader consideration of whether there should be an entrenched set of constitutional rights and freedoms. Our concern here is rather with those proposed rights which, in Australia, seem to be commonly regarded as distinctively democratic in character, and with associated questions such as whether there should be a universal requirement that members of legislatures be directly elected. Prior proposals for alteration of the Constitution to guarantee democratic elections suggest that the rights which are generally

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8 J Lively, Democracy (1975) 43.

9 A fragment on government, ed W Harrison (1948) 94-5.

regarded as distinctively democratic are the right to vote in parliamentary elections and the right of electors to have their votes accorded the same value as the votes of other electors - the one vote one value principle. Given that our Terms of Reference required us to report on revision of the Constitution to 'ensure that democratic rights are guaranteed', the main questions we have had to consider are:

(a) the scope of the guarantees; and

(b) whether the guarantees should apply to all spheres of government.

In considering those questions we have had regard not merely to the law operating in Australia and its development, but also to the law in other comparable countries, especially those in which democratic rights are constitutionally protected. Since Australia is a party to the International Covenant on Civil and Political Rights of 1966 and has thereby undertaken to adopt such measures as may be necessary to give effect to the rights recognised in the Covenant, we have also had regard to the provisions of that international instrument.[10] For present purposes the most relevant provisons are Articles 2 and 25. Article 25, when read in conjunction with Article 2, provides that every citizen shall have the right and opportunity, without any distinction as to 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' and 'without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and

(c) To have access, on general term of equality, to public service in his country.'

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10 Australia signed the Convention in December 1972 and ratified it in August 1980.

The right to vote

Recommendations

We recommend that the Constitution be altered to provide that:

(i) the laws made by the Federal and State Parliaments and by the legislature of a Territory prescribing qualification of electors shall provide for enfranchisement of every Australian citizen who has attained the age of eighteen years;

(ii) the Federal and State Parliaments and the legislature of a Territory may make entitlement to vote dependent on compliance with reasonable conditions as to:

- residence in Australia or in a part of Australia or in a Territory, in the case of federal elections; or

- residence in the State or Territory, or a part thereof, in the case of State and Territorial elections; or

- enrolment;

(iii) the Federal and State Parliaments and the legislature of a Territory may make laws disqualifying from voting Australian citizens who have attained the age of eighteen years who:

- are incapable of understanding the nature and significance of enrolment and voting by reason of unsoundness of mind; or

- are undergoing imprisonment for an offence;

(iv) in choosing a member of a House of a State Parliament or of a legislature of a Territory, each elector shall vote only once; and

(v) section 41 of the Constitution be repealed.

We have also recommended that section 25 of the Constitution should be repealed. That is dealt with later in this Chapter.

The recommendations we have made in relation to the qualification of electors preserve the present constitutional requirement that each elector shall vote only once in elections where senators and members of the House of Representatives are chosen.

Current position

Nowhere in the Constitution is the right to vote in parliamentary elections, federal or State, or in elections for Territorial legislatures, effectively guaranteed. Sections 7 and 29 provide that the Senate and House of Representatives shall be composed of senators and members who are directly chosen by the people. Section 30, read together with section 51(xxxvi.), empowers the Federal Parliament to prescribe the qualifications of electors of members of the House of Representatives. Under section 8 any person who is qualified as an elector of members of the House of Representatives is also qualified as an elector of senators. Both sections 8 and 30 require that in choosing senators and members of the House of Representatives, 'each elector shall vote only once.'

Section 41 of the Constitution provides:

> No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

At first sight this section might appear to grant a right to vote. But in 1983 the High Court held that it does not have that effect.[11] The section has to be read in conjunction with sections 8 and 30 which declare that, until the Federal Parliament otherwise provides, the qualification of electors of senators and members of the House of Representatives 'shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of the Parliament of the State'.

According to the High Court, section 41 means that even when the Federal Parliament enacted legislation to prescribe qualifications of electors, those who, by State laws, were then entitled to vote at elections of the more numerous House of the State, could not be prevented by the Commonwealth from voting in federal elections. The only purpose of section 41 'was to ensure that those who enjoyed the constitutional franchise [under sections 8 and 30] should not lose it when the statutory franchise was enacted. The statute was to govern the subsequent acquisition of the right to vote at federal elections.'[12] But once the Commonwealth Franchise Act 1902 came into force, 'no person could acquire the right to vote at federal elections save in accordance with its terms'.[13] So for practical purposes section 41 is now a dead letter and the Constitution does not effectively guarantee anyone a right to vote.

The Commonwealth Franchise Act 1902 granted the franchise to all British subjects who had attained the age of 21 years and who had been resident in Australia for at least six months. Persons of certain races, including Aboriginals, were disqualified;[14] likewise persons of unsound mind and certain criminal offenders were disqualified. In 1911 further legislation was enacted to

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11 The Queen v Pearson; Ex parte Sipka (1983) 152 CLR 254.

12 id, 279 (Brennan, Deane and Dawson JJ).

13 ibid.

14 Unless entitled to enrol under section 41 of the Constitution.

make it compulsory for qualified electors to be enrolled as electors. Voting did not, however, become compulsory until the general elections of 1925, pursuant to the Commonwealth Electoral Act 1924.

Since 1902 there have been numerous changes to the legislative provisions defining the federal franchise. The most important were the enfranchisement of Aboriginals in 1962[15] and the reduction of the minimum voting age in 1973 from 21 to 18 years.

Prior to 1962, Aboriginals had not been entitled to be enrolled and to vote as federal electors unless they were entitled to enrol as electors and to vote in elections for the more numerous House of the Parliament of the State in which they resided. In two States, Queensland and Western Australia, persons with a preponderance of Aboriginal blood had no such right and were thus not eligible to be enrolled as federal electors.

While the 1962 amendments secured Aboriginals the right to be enrolled as federal electors, they did not make enrolment compulsory. This was in accordance with a recommendation of the Select Committee that enrolment should not become compulsory until a significant number of eligible Aboriginals were in fact enrolled. Enrolment did not become compulsory until 1983.

Aboriginals continued to be disqualified from enrolling as State electors in Queensland and Western Australia until 1966 and 1962 respectively. Enrolment and voting were not, however, made compulsory until 1971 in Queensland and 1983 in Western Australia. Although in all the other States, except South Australia, Aboriginals were both qualified and required to enrol as State electors,[16] the requirement to enrol had not been

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15 Commonwealth Electoral Act 1962, section 2; following a report from a Select Committee of the House of Representatives on the Voting Rights of Aborigines.

16 In South Australia, enrolment of all qualified electors was optional.

strictly enforced. In consequence many Aboriginals who were qualified to enrol did not do so and did not exercise their franchise.

This state of affairs has to a large extent been rectified as a result of the amendment of the Commonwealth Electoral Act in 1983 to make enrolment of qualified Aboriginals as federal electors compulsory. Aboriginals in New South Wales, Victoria, South Australia and Tasmania will now be automatically enrolled as State electors at the same time as they are enrolled as federal electors.

In Queensland and Western Australia, State electoral rolls are still compiled by State officials. Between late 1979 and 1984, Western Australian law made the process of enrolment sufficiently difficult to deter many Aboriginals from enrolling. Whereas at the time the law was changed in 1979 there were only 5,000 more electors on the federal electoral rolls than on the State rolls, within 15 months the disparity had risen to 42,000. Most of the electors omitted from the State rolls were Aboriginals. When the provisions discriminating against Aboriginals were removed in 1983, it became possible to use the same claim card for enrolment on both the federal and State rolls. Queensland is now the only State in which separate enrolment claims are required for State elections.

Aboriginals in the Northern Territory now have the same rights to enrol and vote as electors of the Territory legislature as other residents of the Territory. This has not always been the case. During the 1950's, section 22 of the Northern Territory Electoral Regulations made it practically impossible for them to enrol and vote. The regulations provided that Aboriginals who were wards, as defined by the Welfare Ordinance, could neither enrol nor vote. The practice was to have nearly all Aboriginals declared wards before they attained voting age. In August 1960 the Minister for the Territories admitted that 15,277 persons had been declared wards under the Ordinance, all except one being

Aboriginals. None had appealed to the Wards Appeal Tribunal for revocation of the declarations of wardship.

The qualifications for enrolment as federal and State parliamentary electors are now similar. Subject to specified disqualifications and residence requirements, all persons who have attained the age of 18 years[17] and are Australian citizens are entitled to enrol as electors and, once having enrolled, to vote. British subjects (or persons who would be British subjects if the Australian Citizenship Act 1948 were in force on a specified date) who are not Australian citizens, are also entitled to enrol if they were enrolled as electors on a specified date or within a certain time of a specified date.[18]

Under federal, New South Wales, Victorian and Western Australian law, persons who are, under the federal Migration Act 1958, prohibited non-citizens or holders of temporary entry permits are disqualified from enrolling as electors.[19]

Under South Australian, Tasmanian and Western Australian law, unsoundness of mind is a disqualification.[20] Under federal and Victorian law, unsoundness of mind is not per se a

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17 NSW and Western Australia reduced the minimum voting age to 18 years in 1970, South Australia in 1971 and the other States in 1973.

18 There are slight variations in the formulations of the 'British subject' qualification. See Commonwealth Electoral Act 1918, section 93(1)(b)(ii); Parliamentary Electorates and Elections Act 1912 (NSW), sections 20-1; Elections Act 1983 (Qld), section 21; Constitution Act 1934 (SA), section 33; Constitution Act 1934 (Tas), sections 28 and 29; Constitution Act 1975 (Vic), section 48; Electoral Act 1907 (WA), section 17(1).

19 Commonwealth Electoral Act 1918, section 93 (7)(a); Parliamentary Electorates and Elections Act 1912 (NSW), section 21(b); Constitution Act 1975 (Vic), section 48; Electoral Act 1907 (WA), section 18(d).

20 Constitution Act 1934 (SA), section 33(2); Constitution Act 1934 (Tas), section 14(2); Electoral Act 1907 (WA), section 18(a); see also section 18(c).

disqualification. A person is disqualified from enrolling only if 'by reason of being of unsound mind', he or she 'is incapable of understanding the nature and significance of enrolment and voting'.[21] In Queensland the corresponding disqualification is being 'mentally ill - and incapable of managing ... [one's] estate'.[22] In New South Wales it is being a temporary patient, a continued treatment patient, or a protected person within the meaning of the Mental Health Act 1958 (NSW), or a person under detention under Part VII of the Act.[23] In the Northern Territory, insanity is not a disqualification.

There are considerable variations in the laws governing the entitlement of prisoners to enrol as electors. In Tasmania any person in prison under conviction is disqualified from enrolling, regardless of the offence or of the length of the sentence.[24] In South Australia, on the other hand, the disqualification of prisoners was, in 1976, removed altogether. Under federal law a person is disqualified if he or she 'has been convicted and is under sentence for an offence punishable under the law of the Commonwealth or of a State or Territory by imprisonment for 5 years or longer'.[25] Victoria has a like provision.[26] In contrast, in New South Wales, Queensland and Western Australia, a prisoner is disqualified only if he or she is serving a sentence for a specified term of years; in New South Wales and Western Australia, twelve months or more; in Queensland six months or more.[27]

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21 Commonwealth Electoral Act 1918, section 93(8)(a).

22 Elections Act 1983 (Qld), section 23(a).

23 Parliamentary Electorates and Elections Act 1912 (NSW), section 21.

24 Constitution Act 1934 (Tas), section 14(2).

25 Commonwealth Electoral Act 1918, section 93(8)(b).

26 Constitution Act 1975 (Vic), section 48.

27 Parliamentary Electorates and Elections Act 1912 (NSW), section 21; Electoral Act 1907 (WA), section 18(c); Elections Act 1983 (Qld), section 23(b). In Western Australia a person is also disqualified if subject to an order, direction or sentence to be detained or kept in any kind of custody or prison under specified sections of The Criminal Code (WA).

Under federal and Victorian law a person is disqualified from enrolling as an elector if convicted of treason or treachery under a law of the Commonwealth, State or Territory and not pardoned.[28] Attainder of treason is also a disqualification in Western Australia.[29]

Previous proposals for reform

In March 1968 Senator Murphy was granted leave to introduce a Bill for Constitution Alteration (Democratic Election of State Parliaments), which proposed to insert a new section 106A in the Constitution:

> The Houses of Parliament of the States shall be composed of members directly chosen by the people of the States under a system which shall provide that every citizen, unless disqualified by a law of the State as an infant, person of unsound mind, or prisoner, shall be entitled to vote and, so far as practicable, each vote shall be of equal value.

Senator Murphy gave his second reading speech in November 1968, but no debate took place and no vote was taken.

In 1974 the Constitution Alteration (Democratic Elections) Bill was passed by the Houses of the Federal Parliament and put to referendum. The proposed law to alter the Constitution was designed to entrench two principles in the Constitution: the right to vote in federal and State parliamentary elections and one vote one value. We are concerned here only with the right to vote; the one vote one value principle is dealt with later in this Chapter.

As regards the right to vote, what was proposed in 1974 was, first, that section 30 be altered by adding at the end of it the following paragraph:

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28 Commonwealth Electoral Act 1918, section 93(8)(c) and section 93(10); Constitution Act 1975 (Vic), section 48.

29 Electoral Act 1907 (WA), section 18(c).

> Laws made by the Parliament for the purposes of this section shall be such that every Australian citizen who complies with any reasonable conditions imposed by those laws with respect to residence in Australia or in a part of Australia and with respect to enrolment and has attained the age of eighteen years is, subject to any disqualification provided by those laws with respect to persons of unsound mind or undergoing imprisonment for an offence, entitled to vote.

Secondly, it was proposed that a new section be added after section 30 to provide, inter alia, that:

> 106A. Each House of the Parliament of a State or, where there is only one House of the Parliament of a State, that House, shall be composed of members directly chosen by the people of the State in accordance with an electoral system under which, at a general election of members of that House -
>
> (a) every Australian citizen who complies with any reasonable conditions imposed by law with respect to residence in Australia or in the State or a part of the State and with respect to enrolment and has attained the age of eighteen years is, subject to any disqualification provided by law with respect to persons who are of unsound mind or are undergoing imprisonment for an offence, entitled to a vote, and to one vote only; ....

It was further proposed that section 75 of the Constitution be altered to give the High Court original jurisdiction in matters arising under certain sections of the Constitution, including sections 30, 41 and 106A, and to give electors standing to invoke that jurisdiction.

Opponents of the proposed law to alter the Constitution objected primarily to the clauses dealing with the one vote one value principle. In the referendum campaign much less attention was given to the right to vote aspects of the Bill. The proposed law was approved by 47.23% of electors nationwide, but was defeated in all States except New South Wales.

At the Adelaide (1983) session of the Australian Constitutional Convention another democratic elections proposal (moved by the

Premier of Western Australia, Hon Brian Burke), again seeking to guarantee the right to vote and one vote one value, was debated but was rejected by 47 votes to 35.[30] As in the 1974 referendum campaign, the criticisms of the proposal were directed principally to the guarantee of one vote one value. The right to vote proposal differed slightly from the 1974 proposal since it made no reference to the possible disqualification of prisoners. What was proposed was simply that:

> ... every Australian citizen over the age of eighteen years who is of sound mind and who complies with reasonable residence conditions imposed by law shall have the right to vote at elections for the Houses of the Commonwealth Parliament and the Houses of Parliament of the States and Territories.

Another Constitution Alteration (Democratic Elections) Bill was introduced in the Senate in 1985 and re-introduced in 1987, on both occasions by Senator Macklin (Australian Democrats). This proposed law for alteration of the Constitution is similar to the proposal put to referendum in 1974 and, like it, is concerned with both the right to vote and one vote one value. As regards the right to vote what is proposed in the 1987 Bill is:

(a) section 41 be repealed;

(b) the following paragraph be added at the end of section 30:

> Laws made by the Parliament for the purposes of this section shall be such that every Australian citizen who complies with any reasonable conditions imposed by those laws with respect to residence in Australia or in a part of Australia and with respect to enrolment and has attained the age of 18 years or such lower age as the Parliament may determine is, subject to any disqualification provided by those laws with respect to persons who are of unsound mind or are undergoing imprisonment for an offence, entitled to vote, but nothing in this paragraph prevents the Parliament from making laws permitting voting by other persons who were, immediately before the

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30 ACC Proc, Adelaide 1983, vol I, li and 199.

commencement of the Constitution Alteration (Democratic Elections) 1987, entitled to vote;

(c) the following new section be added after section 106:

106A. Each House of the Parliament of a State or of a self-governing Territory or, where there is only one House of the Parliament, that House, shall be composed of members directly chosen by the people of the State or Territory.[31]

In the choosing of members of a House of the Parliament of a State or self-governing Territory, each elector shall vote only once.[32]

In this section:

'Parliament', in relation to a self-governing Territory, means that the body, other than the Parliament of the Commonwealth, for the time being having power to make laws for the peace, order and good government of the Territory:

'self-governing Territory' means a territory, or 2 or more territories, referred to in section 122 of this Constitution where, apart from the powers of the Parliament of the Commonwealth, the power to make laws for the peace, order and good government of the territory or territories is exclusively vested in a body the members of which are chosen by the people of the territory or territories.

In December 1985 the Senate referred the 1985 proposed law to the Joint Select Committee on Electoral Reform. The Committee did not present a report prior to the dissolution of both Houses in June 1987. In October 1987 the Senate referred the 1987 proposed law to the Joint Committee on Electoral Matters. The Committee has not yet presented its report.

Advisory Committee's recommendations

Among the questions considered by the Advisory Committee on

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31 There follows a paragraph similar to the proposed addition to section 30.

32 There follow two paragraphs enshrining the one vote one value principle.

Individual and Democratic Rights were whether the right to vote should be constitutionally guaranteed and likewise the one vote one value principle. In relation to the former the Committee recommended that the Constitution be altered as follows:

(a) Delete section 30 and substitute a new section in the following terms:[33]

> 30. All citizens who are of or over the age of 18 years are qualified to be electors of members of the House of Representatives.

(b) Add the following provision:

> 106B. All citizens who are resident in a State and are of or over the age of 18 years are qualified to be electors of members of the Parliament....

In addition the Committee recommended 'that the status of citizen should be provided for and protected in the Constitution' by the addition of the following provision:

> 126A. All persons who are:
>
> (i) born in Australia;
>
> (ii) natural-born or adopted children of an Australian citizen;
>
> (iii) naturalised as Australians
>
> are citizens of Australia and shall not be deprived of citizenship except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.[34]

The reasons given by the Committee in support of its recommendations in relation to the right to vote were 'that voting is a fundamental democratic right which should be

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33 Rights Report, 103.

34 id, 104. The Committee also recommended that section 51(xix.) be altered to make it clear that the Federal Parliament has power to make laws with respect to citizenship.

protected by the Constitution so that in no circumstances can it be eroded by laws passed by the Parliament.'[35]

The Committee was 'not convinced by the argument that a constitutional guarantee is quite unnecessary because existing franchise laws throughout Australia are adequate.' It pointed out that it is 'Implicit in this argument ... that Federal and State parliaments will never seek to alter or erode existing voting rights.' Equally the Committee was 'not persuaded by the argument that voting in State elections should be a matter for the State Parliaments. In a democracy, the right to vote is so fundamental that it should be guaranteed to the people at each level of government'.[36]

Under the Committee's proposals, every Australian citizen who attained the age of 18 years would be qualified to be an elector of members of both the Federal Parliament and the appropriate State Parliament. No Parliament would have power to disqualify persons meeting these qualifications, even on grounds such as incapacity to understand the nature and significance of enrolment or voting by reason of unsoundness of mind, or imprisonment for criminal offences. The Committee's reasons for denying the Parliaments this power were:

> (a) as to unsoundness of mind - 'permitting persons to be disenfranchised on the basis of unsoundness of mind is open to abuse. Insofar as the exercise of the right to vote is concerned confinement to a hospital or a restraint on liberty are not the proper tests to apply. Any test should relate to the extent of a person's incapacity in understanding the nature and significance of enrolment and voting. In the circumstances the Committee believes that it is neither appropriate nor desirable in an enlightened society to retain such a disqualification;'[37]

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35 id, 84.

36 ibid.

37 id, 87.

(b) as to imprisonment - 'Society's approach to the treatment of offenders has changed significantly since the end of the nineteenth century. Since then methods of dealing with offenders have become more complex. The emphasis has shifted to rehabilitation of offenders as useful members of society rather than meting out harsh penalties in retribution for wrongs inflicted on society. Notwithstanding this there are difficulties in determining whether an offence is punishable for a year or longer. In addition there are the practical problems in tying the disqualification to a specific term of imprisonment not the least of which is the difficulty of determining whether a sentence in fact meets the prescribed period. ... it is unacceptable to deny such a fundamental right as the right to vote to a person on the basis of imprisonment because:

- it is a relic of the old common law concept of civil death, a concept which is inappropriate in a modern democracy;

- it amounts to double deprivation of some offenders;

- it is inconsistent with the rehabilitative aspect of imprisonment, and

- its practical effect is to condone the operation of laws which allow some prisoners to vote but not others, depending variously on the jurisdiction, the statutory penalty for the offence or the specific term of imprisonment.'[38]

The Committee considered that the Federal Parliament should not have power to make the right to vote conditional on residence in Australia, though it seems that the Committee contemplated that the Parliament should continue to have power to legislate so as to require that a qualified elector be resident in the electorate for which he or she enrols.[39]

It is not, however, entirely clear from the Committee's Report what would be the constitutional basis for federal legislation conditioning the right to vote on enrolment as an elector and requiring residence in the electorate for which an elector enrols

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38 id, 86-7.

39 id, 87.

if section 30 of the Constitution were to be altered in the way the Committee proposed.

Under the Committee's proposed section 106B residence in a State remains one of the qualifications to be an elector of the State.[40]

Submissions

Many submissions were received on the right to vote. The overwhelming majority of these favoured the entrenchment of the right to vote in the Constitution on the ground that it is the essential prerequisite of democratic citizenship. Democracy is concerned with the concept of equal participation in the political process and the right to vote is fundamental to that concept.[41] It is also fundamental to responsible government. Citizens for Democracy argued that the right to vote is an expression of popular sovereignty: 'democratic rights ensure, or provide some guarantee that other rights will be respected by responsible government.'[42] Senator Tate said he considered the right to vote to be absolutely paramount: 'it is the right of a person to engage in the election of those who will exercise supreme law-making power in our society.'[43] It was asserted that

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40 cf the passage in the Report where the Committee observed that:

> Some State franchises have for many years included a residence requirement, usually three months. There is no strong basis for retaining such residential requirements when citizenship is the basic nationality criterion and persons are required to be resident in the electorate for which they enrol. Indeed a residential qualification can totally prevent enrolment for transitory workers and prisoners. ibid.

41 DH Lewis S1260, 18 February 1987.

42 Ms Zetlin, Citizens for Democracy S3528, 2 December 1986.

43 Senator Michael Tate S712, 1 November 1986.

the right to vote is required if the representative character of Federal and State Parliaments is to be maintained.[44]

It was noted in the submissions that the Constitution at present includes no safeguards of the rights of voters. According to the Proportional Representation Society, 'There is nothing in the Constitution to prevent a future government from legislating for less satisfactory electoral arrangements than those that we have now'.[45] A number of submissions suggested that there is a real possibility, particularly in State elections, that a group may be denied the vote at some time in the future. Their conclusion was that the right to vote should be protected by a powerful constitutional guarantee.[46]

Some submissions, while supporting the constitutional entrenchment of the right to vote, canvassed concerns on a variety of issues. For example, it was argued that there should be a correlative right not to vote.[47] WGS Smith said that our political rights arise out of man's capacity for reason and choice; these rights are abrogated when they are allied to compulsion.[48] D Bone said that compulsory voting inflates the number of informal votes and so devalues the voice of the serious voter.[49] On the other hand, P Smyth argued that the right to vote should entail a corresponding duty to vote and, therefore, compulsory voting should be entrenched in the Constitution.[50]

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44 Associate Professor Peter Hanks S0369, 27 January 1987.

45 Mr J Wright, Proportional Representation Society S3643, 25 October 1986.

46 R Russell S1103, 16 February 1986; D Brand S1865, 14 April 1987.

47 R de Fegely S3222, 16 February 1987; BE McMillan S252, 10 September 1986; D Bone S1947, 24 April 1987; P D Scott-Maxwell S287, 24 September 1986; F Imray S1489, 10 March 1987; S Holme S2569, 1 December 1987.

48 WGS Smith S3326, 7 March 1988.

49 D Bone S1947, 24 April 1987.

50 P Smyth S1259, 17 March 1987.

The need for political education for the citizen was also expressed.[51]

Other submissions dealt with specific issues relating to voter-eligibility. The Australian Society for the Study of Intellectual Disability and the Australian Association of Special Education said that intellectually disabled persons should have a right to vote.[52] The right of prisoners to vote was also advocated.[53] PV Wardrop said it would, inter alia, 'ensure a greater accountability of those in power for the conditions inmates face'.[54]

In a detailed submission, the Australian Electoral Commission said the relevant formulation in Senator Macklin's 1985 Constitution Alteration (Democratic Elections) Bill was a good model, but suggested that it should be modified in four ways:

(a) the guarantee should apply to natural born and/or naturalised Australians, rather than to 'Australian citizens';

(b) treason should be retained as a possible ground for disqualification;

(c) under the proposed guarantee of the right to vote, 'Parliament would still have the power to impose reasonable conditions of residence; however there is no

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51 Dr RJ Brown MHA S296, 23 June 1987; BE McMillan S252, 10 September 1986; BJ Joyce S2553, 30 November 1987.

52 Australian Society for the Study of Intellectual Disability and the Australian Association of Special Education S761, 4 December 1986.

53 Offenders' Aid and Rehabilitation Service of South Australia S421, 22 October 1986; V G Breadon S149, 25 June 1986; John Mewton S3209, 16 February 1987; George Zdenkowski S3374, 24 March 1988.

54 PV Wardrop S742, 11 December 1986. Only one submission actively opposed prisoners' voting rights: AJ Dunn S3229, 16 February 1987.

guidance in the Bill as to what conditions might be regarded as reasonable.' As the 'scope of the power to impose residential qualifications could give rise to real problems' it would be preferable overall 'for the rules regarding "reasonable conditions ... with respect to residence" to be spelt out explicitly in the Constitution, rather than being left to the High Court'; and

(d) Parliaments should have the power to make laws allowing voting by any persons to whom the general guarantee does not apply.[55]

Almost all those submissions opposing a constitutional guarantee of the right to vote did so in relation to a general antipathy to the entrenchment of rights in the Constitution.[56] The Queensland Government said that the extension of the right to vote to the States would constitute an intrusion into an area fundamental to the existence of the States as political entities.[57]

The right to vote in Canada and the United States

In considering whether the right to vote in parliamentary elections should be constitutionally guaranteed, and, if so, to whom and on what terms, it seemed to us desirable to have regard to the experience of other comparable countries whose constitutions protect the right to vote. The countries whose experience in this regard seemed most relevant were Canada and the United States of America.

United States. The United States Constitution does not confer on any one a right to vote. 'The right to vote, per se', it has

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55 Australian Electoral Commission S1200, 28 August 1986.

56 The Tasmanian Government S1361, 30 March 1987; B Francis S370, 30 September 1986; EA Greer S3132, 29 December 1987; JM Miller S67, 23 April 1986.

57 The Queensland Government S3069, 25 November 1987.

been said, 'is not a constitutionally protected right'.[58] On the other hand, the Constitution does impose a number of inhibitions on what Governments can validly do in deciding who is qualified to be an elector of members of an elective legislature and who is disqualified.

Section 2 of Article I provides that electors for members of the House of Representatives in each State 'shall have the qualifications requisite for Electors of the most numerous branch of the State legislature'.[59] This provision means that the States have power to determine who may vote in elections of members of the House of Representatives.

But various amendments to the Constitution have placed restrictions on this power and also on the power to legislate in relation to the State franchise. For example the Fifteenth Amendment (1870) declared that, 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.' The Nineteenth Amendment (1920) imposed a similar prohibition on discrimination on the ground of sex. The Twenty-Fourth Amendment (1964) prohibited denial of voting rights on the ground of failure to pay any tax. The Twenty-Sixth Amendment (1971) declared that 'The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.'

In all of these amendments the United States Congress was empowered to enforce the prohibition by appropriate legislation.

The provision in the Constitution which has proved to be the most important in the protection of rights to vote has been Section 1 of the Fourteenth Amendment (1868). This provides, inter alia,

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58 San Antonio Independent School District v Rodriguez, 411 US 1, 35 n.78 (1973).

59 cf Australian Constitution, sections 8 and 30.

that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' This equal protection clause has been interpreted to mean that when the members of a legislature are to be elected, then prima facie every citizen has a constitutionally protected right to participate in the election of those members on an equal basis with other citizens within the jurisdiction.[60] Laws which confer and define voting rights, but which discriminate between classes of citizens, must therefore 'be carefully and meticulously scrutinized' by the courts.[61]

The United States Supreme Court has upheld laws which limit the right to vote to persons who satisfy reasonable residential requirements.[62]

The Court has also upheld literacy tests so long as they are not used to promote discrimination,[63] but the Congress has since banned the use of such tests.[64]

Disenfranchisement of persons who have been convicted of felonies has been held permissible, but largely because of the implied sanction of this disqualification in Section 2 of the Fourteenth Amendment.[65] But a State law denying the right to vote to persons convicted of 'any crime ... involving moral turpitude' has been held unconstitutional on the ground that it operated in

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60 Dunn v Blumstein, 405 US 330, 336 (1972).

61 Reynolds v Sims, 377 US 533, 562 (1964).

62 For example, a requirement of fifty days' residence was upheld, (Marston v Lewis, 410 US 679 (1973); Burns v Fortscon, 410 US 686 (1973)) but a law providing that a person be resident in the State for a year in order to be entitled to vote in State elections has been held to impose an unreasonable requirement. (Dunn v Blumstein, 405 US 330 (1972)).

63 Lassiter v Northampton County Board of Elections, 360 US 45 (1959); Alabama v United States, 371 US 37 (1962); Louisiana v United States, 380 US 145 (1965).

64 Voting Rights Act 1965 - upheld as an exercise of Congress's power under the Fifteenth Amendment - Oregon v Mitchell, 400 US 112, 131-4 (1971).

65 Richardson v Ramirez, 418 US 24 (1974).

a discriminatory way against black persons.[66] In another case, State authorities were held to have acted unconstitutionally when they refused to provide to prisoners who were legally qualified to vote any facilities which would enable them to exercise their voting rights.[67]

Canada. In Canada the right to vote has been guaranteed by section 3 of the Canadian Charter of Rights and Freedoms 1982. This provides:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly ...

Section 3 is, however, qualified by section 1 of the Charter which provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It has been held that section 1 allows for laws which restrict voting rights with reference to age, mental capacity, residence and enrolment so long as those restrictions are reasonable.[68] Restriction of the right to vote in Provincial elections to persons resident in the Province during the preceding six months has been regarded as reasonable;[69] likewise with restriction of the right to vote in elections for the legislature of the Yukon Territory to persons resident in the Territory over the preceding twelve months.[70]

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66 Hunter v Underwood, 85 L Ed 2d 222 (1985).

67 O'Brien v Skinner, 414 US 524 (1974).

68 Re Scott and Attorney-General of British Columbia (1986) 29 DLR 4th 545 (BCSC).

69 Re Storey and Zazelenchuk (1984) 36 Sask R 103 (Sask CA).

70 Reference Re Yukon Election Residency Requirement (1986) 27 DLR 4th 146 (YTCA).

Several cases have come before the courts in which prisoners have alleged unconstitutional denial of their rights under section 3 of the Charter and in most of them the law or practice complained of has been held unconstitutional. Prison officials were held to have acted contrary to section 3 when they refused to allow prisoners on remand and awaiting sentence to vote in Provincial elections.[71] Denial of the right to vote to persons on probation has also been held to contravene section 3.[72] In two cases it was held to be contrary to section 3 to deny the right to vote to persons serving sentences of imprisonment.[73] But there is an earlier case in which the Supreme Court of British Columbia took a different view.[74] The reasoning in support of these different views will be examined later in this Chapter when we explain our own recommendations.

Another effect of section 3 of the Charter has been to make it obligatory for legislation on elections to provide for absentee voting by those who are eligible to vote.[75]

Finally, it is worth noting that the right to vote conferred by section 3 relates only to voting in elections of members of legislative assemblies. It does not extend to voting in plebiscites,[76] or in elections of members of Local Government councils.[77]

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71 Re Maltby et al And Attorney-General of Sasketchewan (1983) 143 DLR 3rd 649 (Sask Q B); appeal dismissed (1984) 13 CCC 3d 308.

72 Re Reynolds and Attorney-General of British Columbia (1982) 143 DLR 3d 365 (BCSC); affirmed 11 DLR 4th 380 (BCCA).

73 Levesque v Attorney-General of Canada (1985) 25 DLR 4th 184 (FCTD); Badger et al v Attorney-General of Manitoba (1986) 30 DLR 4th 108 (Man QB).

74 Re Jolivet and Barker and The Queen and Solicitor-General of Canada (1983) 7 CCC 3d 431.

75 Re Hoogbruin et al and Attorney-General of British Columbia (1985) 24 DLR (4th) 718, (1986) 2 WWR 700, 70 BCLR 1 (CA).

76 Re Allman et al and Commissioner of the Northwest Territories (1983) 144 DLR 3d 467 (NSTSC); affirmed on other grounds, 8 DLR 4th 230 (NSWTCA).

77 R v McKitka, BC Prov CT, 5 Nov 1986.

Proposed New Zealand Bill of Rights

In 1985 the Government of New Zealand published a White Paper setting out a Bill of Rights which would, if enacted, have the status of a higher law, that is, as a law according to which the validity of other laws would be adjudged. The proposed Bill of Rights was modelled on the Canadian Charter of Rights and Freedoms and, like the Charter, contained a clause designed to guarantee a right to vote in parliamentary elections. The proposed clause on voting rights provides as follows:

> 5. Electoral rights
>
> Every New Zealand citizen who is of or over the age of 18 years
>
> (a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot...[78]

Clause 3 of the proposed Bill of Rights is similar to section 1 of the Canadian Charter.

The reason why clause 5 relates only to voting in elections for the House of Representatives is, of course, that New Zealand is a unitary state and its Parliament is unicameral. The reference to 'equal suffrage' was intended to enshrine the one vote one value principle.

Reasons for recommendations

The right to vote in elections of legislatures is, in our view, a basic democratic right and one which merits constitutional protection. As the United States Supreme Court observed in Reynolds v Sims:[79]

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78 A Bill of Rights for New Zealand: A White Paper (1985).

79 377 US 533, 555, 562-3 (1964).

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.
> . . .
>
> It is a fundamental matter ... Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

The alterations to the Constitution which we propose are not in the form of grants of rights to vote. Rather they preserve the power of parliaments to make laws defining who shall be qualified to vote in parliamentary elections, and elections for Territorial legislatures, but make those powers subject to certain limitations.

One limitation, which is already contained in sections 8 and 31 and which we recommend be extended to States and Territories, is that in choosing members of a legislature, each elector shall vote once only. In other words, it is not open to a legislature to provide that some electors may cast more than one vote in the same election.

The more substantial limitation involved in our proposals is that any laws prescribing qualifications of electors must provide for enfranchisement of every Australian citizen who has attained the age of 18 years. In so providing, the legislature may make entitlement to vote dependent on compliance with reasonable conditions as to:

(a) residence in Australia or in part of Australia or in a Territory, in the case of federal electors;

(b) residence in the State or Territory, or a part thereof, in the case of State and Territorial electors;[80] and

(c) enrolment.

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80 See also our recommendations in relation to section 117 in Chapter 2.

What are reasonable conditions as to residence and enrolment would ultimately be for the High Court of Australia to decide. We have had regard to the Australian Electoral Commission's concerns about the use of the term 'reasonable'. We do not, however, think it desirable to include in the Constitution provisions which would, for example, prescribe required periods of residence. We note also that courts have, for a long time, had to interpret statutes which require that certain things be reasonable. We note also that in interpreting the Canadian Charter of Rights and Freedoms, courts have not experienced great difficulty in deciding whether residential qualifications are justifiable in a free and democratic society.

Were our proposals to be adopted they would not preclude legislatures from enfranchising persons who are not Australian citizens or from lowering the minimum voting age.

The question of whether Australian citizenship should be constitutionally protected we examine later in this chapter.[81]

A further limitation on legislative powers which our proposals entail is in regard to grounds on which a parliament can provide that persons who are otherwise qualified to vote are disqualified from voting. At present there are no constitutional constraints on who may be disqualified. Under our proposals, any legislature which wished to disqualify certain categories of Australian citizens of 18 years or over from voting could disqualify only:

(a) persons who are incapable of understanding the nature and significance of enrolment and voting by reason of unsoundness of mind; and

(b) persons who are undergoing imprisonment for an offence.

Persons of unsound mind. The terms of the provisions we propose correspond with those presently employed in section 93(8)(a) of

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81 Under the heading 'Citizenship'.

the Commonwealth Electoral Act 1918 and section 48 of the Constitution Act 1975 (Vic). The provision would not allow, as the Constitution Alteration (Democratic Elections) Bills of 1973, 1985 and 1987 would have done, a legislature to prescribe unsoundness of mind per se as a disqualification. For a person of unsound mind to be disqualified it would be necessary for the legislature prescribing the disqualification to state also that the disqualification applies only where, by reason of unsound mind, a person is unable to understand the nature or significance of enrolment and voting.

Precisely how it should be established that a person is disqualified on this ground would be for the legislature to determine. We note that, in its Second Report, the Joint Select Committee on Electoral Reform has recommended amendment of provisions of the Commonwealth Electoral Act 1918 to give greater protection to persons who are at risk of being removed from the electoral rolls on grounds of mental illness.[82]

Prisoners. Our recommendations would, if adopted, permit a legislature to disqualify persons who are undergoing imprisonment for a criminal offence. We are not saying that such persons should be disqualified; merely that we think that legislatures should have power to disqualify on this ground if they think fit. Such a power would have been preserved under the Constitution Alteration (Democratic Elections) Bills of 1973, 1985 and 1987.

We have concluded that the power should be preserved because we recognise that the question of whether prisoners should be disenfranchised is one on which opinions are divided. That they are divided is shown by cases which have arisen under the Canadian Charter of Rights and Freedoms.

In most of the Canadian cases it has been held that disenfranchisement of prisoners is not demonstrably justified in a free and democratic society. However, in one case it was held

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82 PP 1/1987, paras 3.36-3.47.

that it was so justified - not because prisoners are unfit to vote, or as an additional penalty, but rather because the right to vote was thought to involve 'more than the right to cast a ballot'. It meant rather 'the right to make an informed electoral choice reached through freedom of belief, conscience, opinion, expression, association and assembly - that is to say with complete freedom of access to the process of "discussion and the interplay of ideas" by which public opinion is formed.' Persons undergoing imprisonment for sentences were, because of the controls it is necessary to impose on them to preserve order and discipline in prisons, denied the freedoms 'necessary for the making of a free and democratic electoral choice ...'.[83]

In a subsequent case, another Canadian court conceded that disenfranchisement of prisoners could, in some circumstances, be justified in a free and democratic society. Reference was made to the fact that although in some democratic systems (eg Norway, Sweden and Denmark) it is not an automatic disqualification, in many others imprisonment for offences is, in some circumstances, a disqualification. In the opinion of the court, what cannot be demonstrably justified in a free and democratic society is a blanket disenfranchisement of prisoners - disenfranchisement irrespective of the length of the sentence and irrespective of whether the offence is one of absolute liability or involves proof of mens rea.[84]

We note that, in its Second Report, the Joint Select Committee on Electoral Reform has recommended[85] complete repeal of section 93(8)(b) of the Commonwealth Electoral Act 1918 - the provision which disqualifies from enrolment and voting any person who has been convicted and is under sentence for an offence punishable by imprisonment for 5 years or longer. The Committee drew attention

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83 Re Jolivet and Barker and the Queen and the Solicitor-General of Canada (1983) 7 CCC 3d 431, 433-4; see also 436.

84 Badger v Attorney-General of Manitoba (1986) 30 DLR 4th 108, 113-4.

85 PP 1/1987, paras 3.48-3.58.

to practical difficulties which this provision has raised. One of these is that prison authorities are aware only of the actual sentences imposed on prisoners, not of the maximum sentence for the offence of which a prisoner has been convicted.

The Committee also drew attention to some other unsatisfactory features of the present law, for example, lack of consistency in the laws prescribing penalties; the fact that some offences which can be serious are punishable only by fine; and the fact that a person is regarded as still under sentence even though he or she has been released from custody under licence. A majority of the Committee concluded that section 93(8)(b) 'can apply in an inconsistent and inequitable way and serves no useful purpose'. It was of the opinion:

> that an offender once punished under the law should not incur the additional penalty of loss of the franchise ... a principal aim of the modern criminal law is to rehabilitate offenders and orient them positively toward the society they will re-enter on their release ... [T]his process is assisted by a policy of encouraging offenders to observe their civil and political obligations.[86]

Many may agree with that view, but we cannot assume that it is one that would be generally shared. It is largely for this reason that we recommend that it should be open to legislatures to disqualify from enrolment and voting persons undergoing imprisonment for offences.

Under our proposed alterations to the Constitution, it would not be open to legislatures to disqualify persons who are still, technically, under sentence but who have been released from custody. It would also not be open to legislatures to disqualify persons merely because they had been convicted of an offence, even for serious offences or ones which, like treason, have traditionally been treated as ones for disqualification.

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86 id, para 3.57.

We have noted in Chapter 2 the argument that such matters as the right to vote in State elections are of concern only to the Government and people of each State. We have set out our response to that argument: essentially it is that constitutional provisions guaranteeing basic democratic rights in relation to all Governments in Australia are consistent with the concept of a federal society.

Our object with regard to the qualification of electors is to entrench in the Constitution a basic principle of representative democratic government. It is the rights of people we seek to protect, not those of Governments or States. Our proposals, which largely reflect existing arrangements, lay down minimum requirements and impose minimum limitations. They do not impose uniform arrangements on the States. They are, however, a recognition of the fact that a federal system entails cooperation between its component parts. As a result of the interdependence of Federal and State Governments the Australian people as a whole have a concern for the maintenance of representative government in individual States.[87] The proposals we recommend are appropriate to a federal society and consistent with the guarantees that exist in the Constitutions of other major federal countries.

Models considered. In considering how the right to vote should be constitutionally protected we have had regard to the various Constitution Alteration (Democratic Elections) Bills, the Advisory Committee's recommendations, and relevant provisions in other constitutions, notably those of Canada and the United States. We have also had regard to Australian law and its development.

In form, the alterations we propose are much the same as clauses in the Constitution Alteration (Democratic Elections) Bills. We have not adopted the very simple formulations recommended by the

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87 This interdependence is evident in the joint action required by Federal and State Parliaments under section 15 of the Australia Act 1986 and the Federal-State Financial Agreement which is underwritten by section 105A of the Constitution.

Advisory Committee, because they do not, in our view, make sufficient allowance for the imposition of reasonable conditions as to residence and enrolment, or reasonable disqualifications from enrolment and voting.

Although in Chapter 9 of the Final Report we shall recommend inclusion in the Constitution of a new Chapter on rights and freedoms, modelled to some extent on the Canadian Charter of Rights and Freedoms, we have concluded that, on balance, it would be preferable for provisions on the right to vote not to be incorporated in that Chapter, but to be dealt with separately. The reasons which led us to this conclusion were:

(a) There could be much greater support for constitutional protection of voting rights than for a much more comprehensive chapter guaranteeing individual rights and freedoms.

(b) Having regard to Canadian experience, it seemed to us better that permissible limitations which legislatures may impose on the right to vote should be spelled out in the Constitution rather than left to be determined by courts according to an open-ended standard such as whether the limitations are demonstrably justified in a free and democratic society.

Section 41. We have explained earlier that the right to vote guaranteed by this section of the Constitution no longer guarantees to any living person a right to vote in federal parliamentary elections. The section is, in fact, a dead letter. It is for this reason that we recommend that the section be repealed.

Compulsory Voting

The requirement that a person who is qualified to be an elector must enrol as an elector and vote in parliamentary elections is, in every case, a requirement imposed by statute. Voting in

parliamentary elections was first made compulsory in Queensland in 1918. It was made compulsory in 1924 in federal elections. By 1944 voting in parliamentary elections was compulsory in all of the States.

We make no recommendations on whether enrolment and voting should or should not be mandatory. Australia is, we recognise, one of the few countries in which enrolment and voting is required of those who enjoy the franchise. While we agree that compulsion to enrol and vote is not a necessary element of a democratic system of government, we accept that it is not something which is demonstrably inconsistent with democratic principles. Those who originally supported the idea of compulsory voting did so mainly for the reason that it would ensure more or less perfect competition between political parties at the polls and thus guarantee that the parliaments were truly representative of popular opinion.

Compulsory voting is, however, defended on another, more fundamental ground, namely that the right to vote in elections of persons who are to exercise powers of Government should be conjoined with an obligation to exercise that right. In other words, all of the claims made in support of a right to participate in the choice of persons who will have powers of Government - powers to impose all manner of legal compulsions - are legitimate only if the claimants are fixed with a responsibility to so participate.

Given that the matter of compulsory enrolment and voting is still controversial, and not central to the maintenance of a democratic governmental system, we have concluded that it is not appropriate to recommend any alterations to the Constitution which would either (a) entrench a principle that persons eligible to be electors should both enrol and vote, and be penalised if they do not; or (b) entrench a principle that persons eligible to be enrolled and to vote as electors shall not be compelled to enrol or vote.

One vote one value

Recommendations

We recommend that the Constitution be altered to provide as follows:

(i) The number of enrolled electors in the electoral divisions where members of the House of Representatives or the legislatures of a State or Territory are chosen shall not vary by more than 10% above or below the relevant quota prescribed for that division.[88]

(ii) Federal, State and Territorial electoral divisions shall be determined at such times as are necessary to ensure that the number of electors in each division is consistent with the prescribed quota for that division.

(iii) A federal electoral division shall not be formed out of parts of different States. A division may be formed out of different Territories, out of parts of different Territories or out of a Territory and part of another Territory.

(iv) The number of members of the House of Representatives to be chosen in each federal electoral division shall be the same.

(v) In the absence of an applicable law for a federal or Territorial electoral division, a particular State or Territory respectively shall be one electorate. Where State electoral divisions do not comply with the prescribed quota, the State shall be one

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88 This principle is referred to hereafter as 'one vote one value'.

electorate and the method of choosing members of a House of a legislature shall be, as nearly as practicable, the same as the method of choosing senators for the State.

(vi) State and Territorial electoral divisions shall be consistent with their prescribed quota at the time when those divisions are determined.

(vii) A formula to ensure that the principle of one vote one value is maintained for State electoral divisions where two or more members are to be chosen shall be prescribed in the Constitution.

(viii) The number of members of a legislature of a Territory to be chosen in each Territorial electoral division shall be the same.

We also recommend no change to the existing provision:

(a) in section 24 that each Original State is entitled to representation by at least five members in the House of Representatives; and

(b) in section 7 that each Original State is entitled to equal representation in the Senate.

Current position

The principle of one vote one value means that each vote in a democratic election should have approximately the same weight in determining the outcome. This requires that members of the legislature represent approximately the same number of electors.

The principle of one vote one value is not entrenched in the Constitution. The only sections which might be said to bear upon the matter are:

> 24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.
>
> 29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.
>
> In the absence of other provision, each State shall be one electorate.

In Attorney-General (Cth); Ex rel McKinlay v Commonwealth (McKinlay's Case) (1975),[89] the High Court held by a majority[90] that one vote one value for federal electoral divisions is not implied by the phrase 'directly chosen by the people of the Commonwealth' in the opening paragraph of section 24. The majority was not prepared to follow the interpretation which the United States Supreme Court gave to the corresponding words in Article 1, Section 2, Clause 1 of the United States Constitution in Wesberry v Sanders (1964).[91]

Warnings were sounded in McKinlay's Case against too great a divergence in numbers between electoral divisions.[92] However, the majority held that neither the Constitution's language nor its history required adherence to the principle of one vote one

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89 135 CLR 1.

90 Barwick CJ, McTiernan, Gibbs, Stephen, Mason and Jacobs JJ; Murphy J dissenting.

91 371 US 1. The relevant clause reads:

> 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States....

92 135 CLR 1, 36 (McTiernan and Jacobs JJ). The Court also held that a redistribution was required after a new determination of the number of members of the House of Representatives to be chosen for each State: id, 34 (Barwick CJ).

value.[93] Section 29 was said to be the provision which deals specifically and comprehensively with electoral divisions.[94]

While the principle of one vote one value is not entrenched in the Constitution, the Federal, New South Wales, Victorian and South Australian Parliaments have all passed laws to ensure that electoral divisions contain approximately equal numbers of electors, with an allowable variation of 10% above or below the average. (Henceforth this is referred to as ± 10% tolerance.)

Federal electoral divisions. At the joint sitting in August 1974, section 19 of the Commonwealth Electoral Act 1918 was amended to allow departures of no more than 10% above or below the quota for the distribution of a State or Territory into federal electoral divisions where members of the House of Representatives are chosen. Between 1902 and 1974 a ± 20% tolerance had been allowed.[95] In 1974 there was also a reduction in the number of the considerations required to be taken into account by the Distribution Commissioners when reapportioning electoral boundaries.[96]

These reforms were incorporated in the 1984 amendments to the Commonwealth Electoral Act 1918.[97] Section 59(2)(b) specifies that a redistribution shall occur within a State when one-third of the electoral divisions within it no longer comply with a ±

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93 Barwick CJ maintained that the relevant phrase in section 24 means only that the election of members should be direct and not indirect and that it shall be by popular election (id, 21).

94 id, 61 (Mason J).

95 Commonwealth Electoral Act 1902, section 16.

96 Five criteria to guide the Commissioners were established in section 19, namely, community of interests, including economic, social and regional interests; means of communication and travel; the trend of population changes; physical features; and existing boundaries.

97 Section 66(3)(b) of the Act specifies ± 10 % as the maximum deviation from the quota allowed at the time of a redistribution.

10% tolerance. The 1984 reforms embody two further major principles:

(a) that a redistribution should remain in force for two general elections, though not for more than seven years; and

(b) that growing electoral divisions should at the time of the redistribution be given lower than average enrolments and shrinking divisions higher than average enrolments. In this way, the average will be achieved midway between redistributions.

By legislation, therefore, the Federal Parliament has ensured that elections where members of the House of Representatives are chosen comply with the principle of one vote one value. However, these arrangements may be repealed by legislation.

State electoral divisions. In New South Wales and South Australia a ± 10% tolerance for State electoral divisions where members of the Legislative Assemblies are chosen, is an entrenched provision of their respective Constitutions.[98] Regular redistributions of electoral boundaries are also provided for in these Constitutions.[99] In Victoria the ± 10% tolerance for the Legislative Assembly and the Legislative Council is part of the Electoral Commission Act 1982.[100] Arrangements for the Tasmanian House of Assembly follow federal electoral divisions and so adopt a ± 10% tolerance.

In the other States, and in relation to the Tasmanian Legislative Council, there are wide disparities in the size of electoral divisions. In Queensland, the Electoral Districts Act 1985 (Qld) established four electoral zones, each with a different

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98 Constitution Act 1902 (NSW), section 28; Constitution Act 1934-1975 (SA), section 77. In both cases, for elections where members of the Legislative Councils are chosen the States are treated as one electorate.

99 Sections 27 and 82 respectively.

100 Section 9(2); section 5 provides for regular redistributions to maintain the prescribed quota for electoral divisions.

prescribed quota of electors.[101] The quotas for the four zones are:

South Eastern Zone	19,357
Provincial Cities Zone	18,449
Country Zone	13,131
Western and Far Northern Zone	9,386

A ± 20% tolerance from the quota for that particular zone is permitted in three of the electoral zones. There is no equivalent limitation operating in the Western and Far Northern Zone. Queensland's zoning system inflates the value of the rural vote. As at December 1987 the electorates for the Queensland Legislative Assembly with the highest and lowest number of electors were Logan with 25,398 and Roma with 8,256.

As at January 1988, the electorates for the Tasmanian Legislative Council with the highest and lowest numbers of electors were Pembroke with 18,878 and Gordon with 5,424. No specified quota operates in relation to these electoral divisions, nor do the electoral laws prescribe the timing of redistributions.

At the time the Advisory Committee on Individual and Democratic Rights reported in June 1987, reforms were being introduced in Western Australia in relation to elections for the Legislative Assembly and Legislative Council. These reforms are embodied in the Acts Amendment (Electoral Reform Act) 1987 (WA) and the Electoral (Procedures) Amendment Act 1987 (WA). Their purpose was to reduce the disparities between rural and urban electoral divisions which had arisen as a result of the policy of district zoning. However, sizeable disparities remain in enrolments per

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101 Section 14 of the Act sets out the conditions under which either a complete or partial redistribution may be made to maintain the applicable quota for a zone.

member of the Western Australian Parliament.[102] There are six electoral regions operating in Western Australia for both the Legislative Assembly and the Legislative Council. Each of these regions has a different electoral quota and within each a ± 15% tolerance is permitted.[103] As at November 1987 the electorates for the Western Australian Legislative Assembly with the highest and lowest number of electors were Maylands with 22,374 and Murray with 9,002.[104] The ratio between metropolitan and country enrolments per member after the reforms is:

Legislative Assembly	1.88 : 1
Legislative Council	2.77 : 1

Prior to reform the ratio was:

Legislative Assembly	8.5 : 1
Legislative Council	11 : 1

The reforms represent a significant step towards the concept of one vote one value.

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102 This is despite the Western Australian Government's commitment to the principle of one vote one value. It has sought to introduce appropriate legislation on a number of occasions, notably the Acts Amendment (Constitution and Electoral) Bill of 1983, the Acts Amendment (Fair Representation) Bill of 1984 and the Electoral Amendment Bill of 1985. The first two were defeated in the Legislative Council and the third lapsed after a disagreement between the Houses when the Legislative Council would not permit the printing of party names on ballot papers. The legislation enacted in 1987 was a compromise package of proposals for reform.

103 Electoral Districts Act 1947-85 (WA), section 6; section 2A provides for regular redistributions.

104 A similar comparison cannot be made for the Legislative Council as the electoral regions do not choose the same number of Council members. However, an indication of the existing disparities can be gained from the following figures : both the East Metropolitan region and the Mining and Pastoral region elect 5 Legislative Council members - as at November 1987 the first had 196,592 electors, the second only 60,545.

Territorial electoral divisions. Section 14 (a) of Electoral Act 1980 (NT) allows for a ± 20% tolerance in the size of electoral divisions for the election of members of the Legislative Assembly.[105] The average quota for each electoral division is 2,800-2,850 electors. As at 22 January 1988 the electorates with the highest and lowest numbers of electors were Palmerston with 4,147 and Braitling with 2,467.

Position in other countries. In considering whether one vote one value should be constitutionally entrenched, it seemed to us desirable to note the current position in other countries with comparable electoral systems.

We have noted that the United States Supreme Court has held that Article 1, Section 2, Clause 1 of the Constitution means that 'as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's'.[106] It has also been held that the constitutional provision of one vote one value for districts in the State legislatures is required by the Fourteenth Amendment's guarantee of 'equal protection of the laws'.[107] Thus, one vote one value is entrenched in the American Constitution. Indeed, in Kirkpatrick v Preisler[108] the Supreme Court further held that, for congressional districts, no fixed population variance was small enough to be dismissed as

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105 The ± 20% to tolerance was originally established in section 13 of the Northern Territory (Self-Government) Act 1978. Section 12 of the Electoral Act 1980 (NT) states that the Administrator may direct the Distribution Committee to divide or redivide the Territory into proposed electoral divisions; the Act does not prescribe regular redistributions.

106 Wesberry v Sanders 376 US 1(1964).

107 Gray v Sanders 372 US 368 (1963); Reynolds v Sims 377 US 533 (1964); Swann v Adams 385 US 440 (1967); Kilgarlin v Hill 386 US 120 (1967).

108 394 US 526 (1969).

negligible. Absolute equality was required.[109]

The concept of equal suffrage is employed in section 5 of the proposed New Zealand Bill of Rights.[110] The commentary on that proposed legislation notes that 'equal suffrage' does not require an exact equality of population for electorates. However, it adds that the present ± 5% tolerance allowed under section 17 of the Electoral Act (itself an entrenched provision) is already one of the narrowest in Western democracies.[111]

The equal value of a vote is not guaranteed in the Canadian Charter of Rights and Freedoms. In Canada the main consideration has been to solve the problems associated with gerrymandering, that is, with the manipulation of electoral district boundaries designed to favour one political grouping.[112] Thus, the concern has been to establish impartial Boundary Commissions, rather than to impose a uniform standard of equal suffrage in all the Provinces.[113]

In the United Kingdom separate quotas are maintained for England, Northern Ireland, Scotland and Wales. There, historical claims of nationhood have been regarded as overriding the argument for strict adherence to the principle of equal suffrage.

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109 In Karcher v Daggett 462 US 725 (1983) the Court overturned New Jersey electoral boundaries with a population difference of only 0.69%. The key case with regard to the election of State legislatures and Local Government districts is Connor v Finch 431 US 407 (1977), which required justification for deviation greater than ± 5%.

110 Cited fully in 'The Right to vote' part of this Chapter.

111 A Bill of Rights for New Zealand: A White Paper (1985), 78.

112 This can occur even if electoral divisions are equal in population size.

113 RK Carty, 'The Electorial Boundary Revolution in Canada', XV, American Review of Canadian Studies, 1985, 273. Carty suggests (at 286) that the 'continuing poor apportionment of Canadian legislatures might be challenged in the courts as a violation of a citizen's right to vote' under section 3 of the Charter of Rights and Freedoms.

Issues

Six main issues concerning the principle of one vote one value are:

(a) Is one vote one value a fundamental principle of political equality?

(b) Would a ± 10% tolerance ensure the realisation of that principle in practice?

(c) Is the ± 10% tolerance the most suitable formula available?

(d) Is it appropriate to extend one vote one value to all State and Territorial electoral divisions by constitutional alteration?

(e) Should variations greater than ± 10% be permitted for relevant geographic, demographic or economic factors?

(f) Should the relevant electoral quotas be calculated in terms of population or electors?

Previous proposals for reform

1959 **Joint Committee on Constitutional Review**. The Committee, which comprised eight members of the House of Representatives (four from the Australian Labor Party and two each from the Liberal and Country Parties) and four Senators (two Liberal and two Labor), unanimously recommended that section 29 of the Constitution be altered to require, for the purposes of House of Representatives elections, that:

(a) States be divided into electoral divisions containing approximately equal numbers of electors, with an allowable variation of ± 10%;

(b) electoral divisions be reviewed at least once in every ten years; and

(c) the establishment of an Electoral Commission for each State.[114]

Constitution Alteration (Democratic Election of State Parliaments) 1968. We have noted[115] that in 1968 Senator Murphy introduced the Constitution Alteration (Democratic Election of State Parliaments) Bill to alter the Constitution to provide that for State elections 'so far as practicable each vote shall be of equal value.' The proposal was not voted upon.

Constitutional referendum. Among the four proposals submitted to the electors in May 1974 was the Bill for Constitution Alteration (Democratic Elections). The proposal was that 'the number of people in each division ... shall be, as nearly as practicable, the same'.

The proposal was approved by 47.23% of all the electors and by a majority of electors in New South Wales.

Australian Constitutional Convention. At the Hobart (1976) session of the Convention a proposal based on the 1959 Joint Committee's recommendation, but extending the principle to apply also to the States, was put forward by Hon G Scholes. It was not debated or voted on.[116]

At the Perth (1978) session a proposal was foreshadowed by Hon LF Bowen, the Deputy Leader of the Federal Parliamentary Labor Party, to entrench in the Constitution a ± 10% tolerance for federal, State and Territory electoral divisions. It was not debated.[117]

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114 1959 Report, 52.

115 Under the heading 'The right to vote' above.

116 ACC Proc, Hobart 1976, lxxv.

117 ACC Proc, Perth 1978, lv.

At the Adelaide (1983) session, the 1978 proposal was considered and rejected by 47 votes to 35 along party lines. The motion was moved by the Premier of Western Australia, Hon B Burke. He argued that, while ours is a federal system in which regional, cultural and geographic differences should be recognised, there are some matters which must be treated uniformly. He said that the right to vote and one vote one value are matters of this kind.[118] In that debate, Mr Bowen said he recognised the disabilities of distance, but maintained that these were much less severe than at the time of Federation. Also, he noted that many Australians suffer disadvantages other than those associated with isolation.[119]

Delegates opposing the motion argued that entrenchment of one vote one value would offend against the principle of States' rights. Further, its application would lead to the creation of electorates which 'ignore community of interest or the capacity of a single member of Parliament to adequately represent the electorate.'[120]

At Brisbane in 1985 Mr Burke listed a proposal on the agenda which sought to alter the Constitution in the form, or to the effect, of the Constitution Alteration (Democratic Elections) Bill introduced by Senator Macklin (Australian Democrats) on 17 April 1985. This Bill provides that the number of electors in federal and State electoral divisions shall be 'as nearly as practicable, the same'. The Bill's proposals were approved by 39 votes to 29.[121] On 23 September 1987 Senator Macklin's Bill was reintroduced into the Federal Parliament in a revised form. The

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118 ACC Proc, Adelaide 1983, vol I, 181.

119 id, 182.

120 id, 186, Mr NF Moore, Western Australia.

121 One argument used in opposing the proposal was that the formula, 'as nearly as practicable, the same', was radically deficient. A Queensland delegate, Hon N Harper, said 'it is nebulous to the extreme and opens up a Pandora's box of interpretational problems.' ACC Proc, Brisbane 1985, vol I, 294.

'as nearly as practicable' formula was supplemented with a ± 10% tolerance. On 28 October 1987, on Senator Macklin's motion, the Bill was referred to the Joint Committee on Electoral Matters for inquiry and report.

Advisory Committee's recommendation

The Advisory Committee on Individual and Democratic Rights recommended in relation to federal electoral divisions that a new section 24A be added in the Constitution in the following terms:

> 24A. The number of electors in each electoral division who may vote for each member shall not vary by more than 10 per cent.[122]

The Committee also recommended that the one vote one value principle be extended to the States with a new section 106A being added in the Constitution in the following terms:

> 106A. Where a State is divided into electoral divisions the number of electors in each electoral division who may vote for each member of a House of Parliament in a State shall not vary by more than 10 per cent.[123]

The formulation adopted by the Committee for the proposed new sections 24A and 106A would seem to recommend a ± 5% tolerance for federal and State electoral divisions. It is our understanding, gained from other comments made in the Committee's report, that, in fact, it intended to propose a ± 10% tolerance for these electoral divisions.

The Committee acknowledged that its recommendation was controversial, particularly in relation to State electoral divisions. The Committee noted that there had been many

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[122] Rights Report, 103.

[123] ibid.

submissions for and against one vote one value from all parts of Australia. However, after analysing the arguments on both sides, the Committee came to the view that 'legislators are elected by voters, not farms or cities or economic interests'.[124] The unique concerns and interests of rural electors should not be expressed in terms of an unequal representation. The Committee concluded: 'The representation of interests is achieved in the democratic process by the operation of pressure groups representing particular interests ranging across a broad spectrum, which of course includes the vital role of the rural sector.'[125] The problems of distance should not be addressed by distorting the fundamental principles of democracy.

The Committee also considered the issue of States' rights in this context. In the Committee's view, the democratic process itself must entail equality of voting by all the electors in a State. 'Unless the system itself is democratic the claim that it should be "left to each State to determine its own system" has no validity.'[126]

Submissions

The issue of one vote one value attracted many submissions, reflecting a variety of views and perceptions on the processes of democracy. Many argued strongly for one vote one value, others were equally trenchant in opposing it. Three main arguments were canvassed against the principle of one vote one value:

(a) **One vote one value ignores the unique geographic, demographic and economic factors in Australia and it will operate to the detriment of rural areas.** A number of submissions raised the issues associated with the problems of distance, noting the special difficulties faced by those representing large country electoral

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124 id, 81.

125 id, 81-2.

126 id, 83.

divisions. One vote one value would, it was argued, only exacerbate those difficulties.[127] The Soroptomist International of Western Australia said a ± 10% tolerance would create enormous electorates and that no amount of communication aids would solve the problems of representation.[128] In one submission it was suggested that one vote one value would mean fewer capital works being inaugurated in the country,[129] while others said it would enable the city to impose its will on rural people.[130] Another point was that one vote one value takes no account of the fact that the vast majority of the country's income is derived from the less populated areas.[131] Essentially, the argument was that, while the imposition of strict mathematical quotas for electoral divisions may have certain theoretical attractions, it does nothing to address the aspirations of people in isolated areas of Australia.[132]

(b) **The constitutional imposition of one vote one value in the States is an infringement on the authority of the States and is contrary to the spirit of Federation.** The Queensland Government was adamant that this principle is reflected in section 106 of the Constitution ensuring the constitutional authority of

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127 D Williams S2827, 29 October 1987; Joan Chambers S3212, 16 February 1987; H. Brownsdon S3079, 15 November 1987; PE Pechey S3104, 24 November 1987.

128 Soroptomist International of Western Australia S2899, 29 October 1987.

129 DJ Barker S3045, 11 November 1987.

130 A Richardson S2915, 29 October 1987; G Hardie S2699, 17 October 1987.

131 Dame Raigh Roe S640, 2 December 1986; Graham Sivyer S3186, 26 January 1988.

132 The Queensland Government S3069, 25 November 1987; Country Women's Association of Australia S3090, 20 November 1987; The Government of the Northern Territory S2493, 12 September 1987.

the States, particularly with regard to matters as important as democratic rights.[133]

(c) **One vote one value is not entrenched in the Constitution of any comparable democracy.** Colin Fisher MLA (NSW) submitted that neither England, Canada, America nor Japan operate according to this view of fair representation.[134] The Queensland Government presented figures indicating wide disparities between electoral divisions in the United Kingdom.[135]

Two main arguments were canvassed on behalf of the principle of one vote one value:

(a) **Political equality is the essence of democracy and one vote one value is a basic requirement of equal representation.** The view was expressed in many submissions.[136] It was said that one vote one value is a precondition of legitimacy for any representative legislative body,[137] and that as nearly as practicable the vote cast by one citizen should have the same weight as a vote cast by another citizen.[138] It was submitted that the principle is an assertion of an individual right which should override the claims of States' rights;[139] that principle should be entrenched

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133 The Queensland Government S3069, 25 November 1987.

134 Colin Fisher MLA S2396, 17 August 1987.

135 The Queensland Government S3069, 25 November 1987.

136 HH Jackson S1399, 26 March 1987; Law Association for Asia and the Pacific (Lawasia) S956, 16 February 1987; Australian Federation of Business and Professional Women Inc S2057, 11 May 1987; Danuta Kozaki S926, 16 February 1987; Queensland Council for Civil Liberties S784, 26 November 1986; New South Wales Council for Civil Liberties S400, 25 October 1986.

137 Associate Professor Peter Hanks S369, 10 October 1986.

138 Senator Tate S712, 1 November 1986.

139 Bayside Citizens for Democracy S706, 8 December 1986.

in the Constitution;[140] and that it should apply equally to federal, State and Territorial electoral divisions.[141]

(b) **Electoral zoning systems are discriminatory and contrary to the spirit of democracy.** A number of detailed submissions were received putting the case against electoral zoning systems, in particular as they operate in Queensland.[142] One submission which did not support the one vote one value concept conceded that zonal arrangements in Queensland cannot be justified on the basis of democracy.[143] Detailed criticism of the electoral zoning system in Western Australia was also received.[144]

Several submissions supporting the one vote one value concept expressed the view that a ± 10% tolerance would not of itself produce the desired result. They submitted that only an electoral system based on proportional representation would achieve the goal of equal suffrage.[145] The Australian Electoral Commission suggested that the Constitution should also incorporate mandatory procedures to ensure that electorates do not vary by more than 10%. The procedures would include regular redistributions, a tolerance of no more than 10% from the quota, roll maintenance and special provisions for the Tasmanian

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140 R Tomasic S3486, 22 November 1986.

141 B Holderness-Roddam S476, 7 November 1986.

142 Citizens for Democracy S2944, 8 November 1987; Senator Margaret Reynolds S788, 4 December 1986; Queensland Branch of the ALP S779, 2 December 1986; Mr LA Duhs S507, 2 December 1986.

143 RF Diamond S754, 10 December 1986.

144 JH Taplin S2401, 24 August 1987.

145 JK Luker S3314, 22 February 1988; Italian Federation of Migrant Workers and Families S1241, 7 March 1987; Mr J Wright, Proportional Representation Society S3643 25 October 1986; Conservation Council of South Australia S698, 18 October 1986; Dr RJ Brown MHA S296, 23 June 1987; Dorothy Davies S2948, 31 October 1987; Mr EW Haber S2462, 31 August 1987.

Legislative Council.[146] The Western Australian Government noted that section 106A as recommended by the Advisory Committee would not apply to the multi-member electorates in that State.[147]

Reasons for recommendations

In our view, one vote one value is a fundamental principle of democracy. There can be no valid classification of people or electors in a way that abridges the right of equal representation. Any attempt, however well-intentioned, to weight the vote in one electoral division against that in another, for reasons of economic or geographic interest, contradicts the ideals of democracy. It is an error, in our view, founded on a mistaken understanding of the nature and purpose of representative government.

We recognise that one vote one value is a controversial issue in Australia. As the evidence suggests, perceptions of the democratic process vary considerably. However, we believe one vote one value is right in principle. Further, we are concerned with what is appropriate for Australia. We appreciate the problems of distance experienced in isolated areas. But these are less significant now and can be overcome largely by such things as providing elected representatives with appropriate transport and communication facilities and electoral allowances. Besides, the same arguments could be used on behalf of those Australian citizens who suffer other disadvantages, such as poverty. The fundamental principle is that parliamentary democracy is concerned with the representation of electors. As the United States Supreme Court observed in Reynolds v Sims:[148]

> Legislators represent people, not trees or acres. Legislatures are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those

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146 Australian Electoral Commission S1199, 29 August 1986.

147 The Western Australian Government S3352, 26 February 1988.

148 377 US 533, 567 (1964).

> instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system ... if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.

The principle of one vote one value is consistent with democratic theory. A ± 10% tolerance represents a reasonable application of that principle. A ± 10% tolerance already applies in elections for members of the House of Representatives. It is also established in a majority of the States for State electoral divisions. What we are recommending, therefore, is an extension of an established principle to all State and Territorial electoral divisions. In a federation the political rights of all citizens should be as nearly as practicable the same. We recommend, therefore, that the principle of one vote one value for federal, State and Territorial electoral divisions be entrenched in the Constitution.

We accept that the value of Tasmanian votes is inflated by the requirement in section 24 of the Constitution that Original States, irrespective of population, shall have a minimum of five representatives in the House of Representatives. In our view, this is an appropriate arrangement in a federal scheme. So, too, is the provision in section 7 which ensures equal representation in the Senate to all Original States. Both these arrangements should continue.

We acknowledge the arguments in those submissions which sought to include detailed provisions in the Constitution to ensure that electorates do not vary by more than ± 10%. We have also discussed the possibility of providing for a constitutional Electoral Officer to fix electoral boundaries for federal, State and Territorial electoral divisions in order to avoid gerrymanders. However, although we accept the importance of procedural matters, our considered opinion is that it is not appropriate at this time to include such matters of detail in the

Constitution. It is better to leave these to the Parliaments concerned, at least for the time being.

We **recommend** that the Constitution require that electoral divisions be determined at such times as are necessary to ensure that the ± 10% tolerance is maintained. The formulation we propose would not impose precise time limits on how often electorate sizes should be reviewed. Nevertheless, we do not believe it will give rise to any problem which cannot be resolved by the courts. We think that the High Court would take an approach similar to that adopted in McKinlay's Case (1975). The clear intent of the provision we recommend is that redistributions will occur at regular and appropriate intervals. The consequence of not complying with the ± 10% tolerance for federal, State or Territorial electoral divisions would be an election held with the whole State or Territory as one electorate.

We believe that, for reasons of practicality, any provision to entrench the principle of one vote one value in the Constitution should refer to the number of electors and not persons in an electorate. We also **recommend** that the word 'elector' be defined in the Constitution. For these purposes an elector shall mean an enrolled elector. In our view, the only reliable way of determining the number of persons entitled to vote in an electoral division is by reference to the electoral rolls.[149] We have proceeded on the assumption that compulsory enrolment will continue.

We acknowledge the problem raised by the Western Australian Government that section 106A, as recommended by the Advisory Committee, would not apply to multi-member electorates in that State.[150] Clearly, a ± 10% tolerance should also apply to those

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149 We note that this approach is consistent with 'interpretation' provisions in federal, State and Territorial electoral Acts.

150 We assume that the Advisory Committee intended to propose a ± 10% tolerance for State electoral divisions.

electoral divisions in a State or Territory where more than one member of a legislature is chosen. We recommend an appropriate provision to achieve this.

We accept that a ± 10% tolerance will not of itself ensure the realisation of the principle of equal suffrage. It does not, for example, address the problem of gerrymanders. However, it will correct the gross discrepancies that exist now. Very importantly, the ± 10% tolerance is the best practical formulation of a general principle. It avoids the interpretational problems associated with the phrase 'as nearly as practicable, the same'. Perhaps absolute equality is not achievable. Our aim is to entrench a reasonable standard of political equality in the Constitution. Although some of us would prefer to set a ± 5% tolerance, we agree that the ± 10% tolerance is an acceptable guarantee at this time.

Summary of reasons for recommendations

We believe one vote one value is an essential principle of democracy. It is fundamental to a sense of meaningful participation in Australia's democratic polity. The principle of one vote one value should be entrenched in the Constitution for electoral divisions where members of the House of Representatives or the legislatures of a State or Territory are chosen.

Section 25

Recommendation

We **recommend** that section 25 of the Constitution should be repealed.

Current position

Section 24 of the Constitution provides that the number of members of the House of Representatives from each State is determined by reference to the number of people in that State.

Section 25 of the Constitution provides that, for the purposes of section 24:

> if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

The section is based on Section 2 of the Fourteenth Amendment of the United States Constitution. Its purpose was to encourage the States to enfranchise the emancipated negroes after the Civil War by reducing the federal representation of the States if they failed to do so.[151]

According to Quick and Garran, section 25 was designed for the same purpose. It causes races which are discriminated against in the State's franchise laws to be excluded from the section 24 calculations, thereby diminishing the number of seats in the House of Representatives to which the State concerned would otherwise be entitled under section 24.

The High Court has held that section 25 recognises that people might constitutionally be denied the franchise on the ground of race.[152]

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151 Quick and Garran, 456.

152 McKinlay's Case (1975) 135 CLR 1, 44 (Gibbs J).

Previous proposals for reform

Constitutional referendum. A proposal to repeal section 25 was included in the Constitution Alteration (Democratic Elections) Bill of 1974 which was approved by 47.23% of all the electors and by a majority of electors in New South Wales.

The Australian Constitutional Convention. At Melbourne in 1975 and at Hobart in 1976 the Convention resolved that section 25 'with all its implications, ought to be repealed'.[153] Section 25 was considered to be an outmoded provision.

Section 25 was among the provisions included in the Bill, Constitution Alteration (Removal of Outmoded and Expended Provisions), agreed to by the Senate by an absolute majority without dissent on 13 October 1983 and by the House of Representatives by an absolute majority with 3 dissentients on 17 November 1983. The Bill was not submitted to the electors.

In 1985 and again in 1987 Senator Macklin (Australian Democrats) introduced the Constitution Alteration (Democratic Elections) Bill. Clause 2 of the Bill provides for the repeal of section 25. In his second reading speech Senator Macklin described the section as 'an archaic and objectionable provision.'[154]

Advisory Committee's recommendation

The Rights Committee recommended that section 25 should be repealed. The Committee regarded the section as 'odious and outdated' and considered that it would permit a State Parliament so minded to create 'whites only' or 'blacks only' electorates. In the Committee's view, section 25 presents a chilling analogy with the current electoral system in South Africa. It concluded:

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153 ACC Proc, Melbourne 1975, 174; Hobart 1976, 206.

154 Hansard, 23 September 1987, 531.

> It is a leftover from the racial intolerance of the nineteenth century and is a standing temptation to a State to discriminate on the grounds of race. Although the provision is not being used by any State at the present time, it is unacceptable and dangerous to democracy to retain such a provision in the Australian Constitution.[155]

Submissions

Several submissions were received calling for the repeal of section 25.[156] Mr Jeremy Long, then the Commissioner for Community Relations said that, while the intention of the provision is no doubt benign, it would seem unnecessary and undesirable to have such an archaic provision retained in the Constitution.[157] Other submissions were more openly critical. For example, the Ethnic Affairs Commission of New South Wales said that section 25 'must be omitted from any future Constitution, because, inter alia, it confers the Commonwealth with a right to negatively discriminate on racial grounds'.[158]

On the other hand, Stephen Souter argued that section 25 is one of the three provisions in the Constitution which seeks to impose some form of constitutional guarantee of civil liberties on the States (the other two being sections 92 and 117). He disagreed with the Advisory Committee's view that section 25 would permit racially segregated electorates and concluded that the Committee misread both the intention of the provision and the way it works

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155 Rights Report, 74.

156 PH Bailey, Human Rights Commission S190, 22 November 1986; South Australian Ethnic Affairs Commission S2208, 20 May 1987; National Aboriginal and Islander Legal Services Secretariat S114, 10 July 1986; NSW ALP Immigration and Ethnic Affairs Policy Committee S1253, 17 March 1987; Franca Arena MLC (NSW) S895, 3 February 1987; The Queensland Government S3069, 25 November 1987.

157 Mr Jeremy Long, Commissioner for Community Relations S694, 4 December 1986.

158 Ethnic Affairs Commission of NSW S3362, 8 January 1987; Betty Oliver, Ethnic Communities Council (NT) S868, 28 January 1987.

and jumped to the conclusion that section 25 is opening the floodgates to apartheid.[159]

Reasons for recommendation

We believe that section 25 is an outmoded provision of the Constitution. We acknowledge that the section may be considered objectionable. However, section 25 does not have the sinister implications suggested in the report of the Advisory Committee. Section 25 should be repealed because it is no longer appropriate to include in the Constitution a provision which contemplates the disqualification of members of a race from voting.

We have recommended that the right to vote and the principle of one vote one value should be entrenched in the Constitution. Section 25 contradicts the spirit and substance of these provisions. It is archaic and we **recommend** that it should be repealed.

Direct elections

Recommendations

We **recommend** that the Constitution be altered to provide that:

(i) each House of a Parliament of a State shall be composed of members directly chosen by the people of the State;

(ii) the legislature of a Territory shall be composed of members directly chosen by the people of the Territory; and

(iii) this requirement shall not apply to the filling of casual vacancies.

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159 S Souter S2656, 7 October 1987.

The recommendations we have made in relation to election of senators and members of the House of Representatives preserve the present constitutional requirements that senators and members of the House of Representators shall be directly elected.

Current position

The Constitution contains no provisions regarding the composition of the Houses of State Parliaments and no provisions regarding the manner in which members of those bodies are to be chosen. These matters are governed exclusively by State law. The Constitution does, however, require that senators for a State are to be directly chosen by the people of the State, and that 'The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth (sections 7 and 24). The one exception to the general principle that members of the Federal Parliament shall be directly elected is contained in section 15, which provides for the filling of casual vacancies in the Senate by a joint resolution of the Houses of State Parliaments.

A requirement that members of a legislative body be chosen directly by the people means simply that the members are to be 'chosen directly by popular vote, and not by some indirect means, such as by the Parliament or Executive Government of a State, or by an electoral college.'[160]

Members of the State Parliaments are all elected, and, in every case, directly elected. Except in New South Wales, this has been the position for a long time. Until as late as 1933, the Legislative Council of New South Wales was a nominated chamber. Between 1933 and 1978 it was elected on a rotation basis by an electorate made up of members of the Legislative Assembly and the Legislative Council, including the retiring members of the

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160 Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1, 44 (Gibbs J).

Council. Since 1978 it has been directly elected by the electors of the State.

Casual vacancies in the State Parliaments are also, in most cases, filled by direct elections. Casual vacancies in the Legislative Council of South Australia are filled at joint sittings of both Houses, in much the same way as casual vacancies in the Senate are filled.[161] Casual vacancies in the Legislative Council of New South Wales may also be filled in this way, but only if it is not possible to fill the vacancy by a recount of votes cast at the previous election.[162] Where a casual vacancy arises in the Tasmanian House of Assembly, any person who was a candidate at the elections at which the former incumbent was elected may nominate as a candidate. There is then a recount of votes cast at the previous election. But if the vacancy cannot be filled because there are no candidates available who belong to the same party as the prior incumbent, the leader of the relevant party may request an election.[163]

Except in Western Australia, the principle of direct elections is not entrenched in any of the State Constitutions.[164]

When, in exercise of its powers under section 122 of the Constitution, the Federal Parliament establishes a legislature for a Territory, it is not obliged to provide for direct election of members by the people of the Territory. It may provide for a legislature similar to the kind of legislature which was commonplace in the Australian colonies prior to the grant of self-government, that is to say, one in which some or all of the members are officials of the Executive Government or nominees of that Government. There have been Territorial legislatures so constituted, but today all of these legislatures are composed of

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161 Constitution Act 1934 (SA), section 13.

162 Constitution Act 1902 (NSW), sections 22C and 22D.

163 Electoral Act 1985 (Tas), sections 231-3.

164 Constitution Act 1889 (WA), section 73(2).

members who are directly elected by the electors of the Territory.

Previous proposals for reform

We have noted above that in 1968 Senator Murphy introduced the Constitution Alteration (Democratic Election of State Parliaments) Bill to alter the Constitution to provide that 'The Houses of Parliament of the States shall be composed of members directly chosen by the people of the States ...'. The proposal was not voted upon.

In the Bill for the Constitution Alteration (Democratic Elections) in 1974 there was a provision that 'Each House of the Parliament of a State or, where there is only one House of the Parliament of a State, that House, shall be composed of members directly chosen by the people of the State ...' As has already been mentioned, that Bill went to a referendum but was not approved by the requisite electoral majorities.

A similar provision was included in the Constitution Alteration (Democratic Elections) Bills introduced in 1985 and 1987 by Senator Macklin (Australian Democrats). The relevant provision in those Bills differed from the corresponding provision in the 1974 Bill in that it provided that legislatures of self-governing Territories also should be composed of members chosen directly by the people of the Territory. The term 'self-governing Territory' was defined.

Senator Macklin's proposals were supported in principle at the Brisbane (1985) session of the Australian Constitutional Convention.[165]

Issue

'Nothing could be more fundamental', Isaacs J once observed,

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[165] ACC Proc, Brisbane 1985, vol I, 424.

'than the directly elective character of the two Houses.'[166] But he was speaking only of the Houses of the Federal Parliament. The question is whether the Constitution should require that the Houses of State Parliaments and the legislatures of the Territories be directly elected.

Reasons for recommendations

In our view, it does not make a great deal of sense to introduce into the Constitution provisions to guarantee rights to vote in parliamentary elections, and to entrench provisions relating to the value of votes, without including at the same time a further provision to require that the members of the legislatures shall be chosen directly by the people. The three principles seem to us to go hand in hand; in accordance with our Terms of Reference, they are fundamental to ensuring and advancing the democratic rights of the Australian people as citizens.

We are not, however, persuaded that State Parliaments and Territorial legislatures should be precluded from enacting legislation to provide for the filling of casual vacancies by methods other than the holding of by-elections. Since section 15 of the Constitution makes an express exception to the general requirement that senators and members of the House of Representatives shall be directly elected, the absence of an express proviso to a constitutional requirement that members of State Parliaments and Territorial legislatures are to be directly elected would probably be interpreted to mean that casual vacancies in those legislatures could only be filled at by-elections or, perhaps, by recount of votes cast at the prior election. If that were the case, present arrangements for the filling of casual vacancies in the Legislative Councils of New South Wales and South Australia would be unconstitutional.

We note that, in the United States, the various provisions in the Constitutions of the States which protect voting rights have been held not to preclude the enactment of legislation which provides

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166 Vardon v O'Loghlin (1907) 5 CLR 201, 213.

for the filling of casual vacancies in a legislative chamber otherwise than by direct election,[167] for example, by appointment by a State Governor or by the political party with which the prior incumbent was affiliated. Such legislation, it has been said, involves 'no fundamental imperfection in the functioning of democracy.'[168] It 'serves the legitimate purpose of ensuring that vacancies are filled promptly, without the necessity of the expense and inconvenience of a special election'. Though it may have some effect on the right of citizens to elect the members of the legislature, that effect is minimal.[169]

We agree with these sentiments and accordingly **recommend** that the general rule that the members of State Parliaments and Territorial legislatures be directly elected by the people should not apply to the filling of casual vacancies in those legislatures.

Citizenship

Recommendation

We **recommend** that section 51 of the Constitution be altered to give the Federal Parliament an express power to make laws with respect to nationality and citizenship. We recommend that this alteration be by the addition of the words 'nationality, citizenship' to section 51(xix.) so that this paragraph would read:

> (xix.) Nationality, citizenship, naturalization, and aliens:

We do not, however, **recommend** insertion in the Constitution of a section, as recommended by the Advisory Committee on Individual and Democratic Rights, to define who are Australian citizens and

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167 Rodriguez v Popular Democratic Party, 457 US 1 (1982).

168 Valenti v Rockefeller, 292 F Supp 851, at 867 (SDNY 1986).

169 Rodriguez v Popular Democratic Party, 457 US 1, 12 (1982).

to protect Australian citizens against deprivation of citizenship.

Current position

The Constitution does not expressly grant to the Federal Parliament a power to make laws with respect to nationality or citizenship. Section 51(xix.) provides that the Federal Parliament has power to make laws with respect to: 'Naturalization and aliens'. Nowhere in the Constitution is there any reference to Australian citizens or Australian citizenship. Reference is, however, made to subjects of the Queen.[170]

While the Federal Parliament has not been granted an express power to make laws with respect to nationality and citizenship, it has been assumed that the Parliament does have such a power. The power is either implied in section 51(xix) or is one of the implied national powers. Its exercise by the Federal Parliament, by enactment of the Australian Citizenship Act 1948 (originally entitled the Nationality and Citizenship Act 1948), has certainly not been called into question in any case before the High Court of Australia.

The reasons why the Federal Parliament was not given an express power to make laws with respect to nationality and citizenship are purely historical. At the time of Federation and for many years after, Australia was regarded merely as a colony of the United Kingdom. The concepts of Australian nationality and citizenship were unknown. For constitutional purposes persons were either subjects of the Queen or aliens. Whether a person had the status of a subject of the Queen - a British subject - was determined mainly by the common law. The primary rule of the common law was stated by Sir William Blackstone in his Commentaries on the Laws of England as follows:[171]

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[170] See sections 34 and 117.

[171] 18th ed, vol I, 366.

> Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it.

The common law and statutory modifications of it permitted aliens to become British subjects by naturalization - a process which required some governmental act. Section 51(xix) of the Constitution granted to the Federal Parliament a plenary power to make laws on that subject.

The establishment of the status of being a British subject as something separate and distinct from that of being a citizen of Australia came about as a result of the enactment of the British Nationality Act 1948 (UK) and the Nationality and Citizenship Act 1948 (Cth). 'The principles to which this legislation gave effect were that the peoples of each of the countries of the Commonwealth [of Nations] should have separate citizenship, but that all citizens of Commonwealth countries should have the common status of British subjects.'[172] Subsequent Australian and United Kingdom legislation has accentuated the difference between the two concepts and has also introduced further refinements. For example, a person who has the status of a British subject under Australian law is not necessarily a British subject under United Kingdom law and vice versa. A person who is, under Australian law, a subject of the Queen in right of Australia may not, under United Kingdom law, be a subject of the Queen in right of the United Kingdom.

Advisory Committee's recommendations

The Advisory Committee on Individual and Democratic Rights recommended that section 51(xix.) of the Constitution be altered to include a reference to citizenship. It also recommended the addition of a section to define who are Australian citizens and to provide that citizenship could not be taken away except in

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[172] Pochi v Macphee (1982) 151 CLR 101, 108 (Gibbs CJ).

accordance with a procedure which complied with the principles of fairness and natural justice.[173]

Submissions

The submissions we received generally agreed with the proposal to extend the power in section 51 (xix.) to nationality and citizenship. They also generally agreed with the Advisory Committee's proposed section 126A.[174] The Queensland Government, however, argued not that the proposals were wrong in principle, but that they were not absolutely necessary and hence, should not be pursued.[175]

Many submissions pointed out that the concept of citizenship is of major importance to democratic rights - both the right to vote and the right to stand for Parliament. For this reason, it was submitted, the Constitution should define and guarantee 'the concept of what is an Australian'.[176]

Some also suggested[177] that all references to 'British subjects' should be omitted from the Constitution, and be replaced by the expression 'Australian citizens'.

There were, however, other submissions[178] which opposed the Rights Committee's proposed definition of who are Australian citizens on the ground that it does not recognise a particular existing class of Australian citizens: that is, British subjects

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173 Rights Report, 86.

174 eg K Crombie S2946, 4 November 1987; RJ Ross S2719, 20 October 1987.

175 The Queensland Government S3069, 25 November 1987.

176 Ethnic Communities Council of NSW S926, February 1987; see also P Thomas S3434, 8 November 1986; S Souter S1177, 8 March 1987; CM Pennings S35, 18 February 1986.

177 Hon Franca Arena MLC S2505, 15 December 1986; see also B Oliver S868, 28 January 1987.

178 HS Spence S3262, 12 February 1988 and JRS Kelly S3277, 16 February 1988.

who had been resident in Australia for at least five years prior to the commencement of the Australian Citizenship Act 1948. If the new section had the effect of depriving such people of their citizenship, it was argued, this would be in violation of their human rights.[179]

Some submissions objected to section 126A, in the form proposed by the Advisory Committee, on the ground that it would provide for deprivation of citizenship. People were especially concerned about deprivation of citizenship in times of war.[180] Others argued for a guarantee against deprivation of citizenship in any circumstances.[181] The Public Interest Advocacy Centre argued that the provision would be open to abuse, and did not accept 'that the deprivation of citizenship is a necessary or desirable power in the Commonwealth'.

Reasons for recommendation

Although we are in no doubt that the Federal Parliament already has power to make laws with respect to nationality and citizenship, we think it desirable that the power should be expressly conferred rather than left to implication.

We agree with the Advisory Committee that the notion of 'a subject of the Queen' is no longer appropriate for constitutional purposes[182] and other of our recommendations involve omission of the expression in the sections in which it occurs.[183] Those suggested alterations do not, however, mean that the Federal Parliament would be deprived of power to make laws under which a

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179 We accept that that was certainly not its intent.

180 NSW ALP Immigration and Ethnic Affairs Policy Committee S1253, 17 March 1987; Franca Arena S2505, 15 December 1986; D Kozaki S926, 14 February 1987.

181 Public Interest Advocacy Centre S3098, 24 November 1987; Republican Party of Australia S3382, 25 October 1985.

182 ibid.

183 In Chapter 2 under the heading 'Discrimination against out-of-State residents'.

person's rights and privileges depend on the person having the status of a British subject or a subject of the Queen.

The alterations of the Constitution we recommend in relation to qualifications of electors[184] and of senators and members of the House of Representatives[185] would, if adopted, introduce into the Constitution for the first time the concept of Australian citizenship. There is, we recognise, force in the argument that where a constitution guarantees certain rights to citizens, those rights are more amply protected if citizenship is also guaranteed to defined classes of persons. But for reasons which we explain below, we are not persuaded that it is necessary to provide a constitutional definition of who are Australian citizens. We do not, therefore, endorse the Advisory Committee's recommendation that the Constitution be altered by addition of a provision in the following terms:

> All persons who are:
>
> (i) born in Australia;
>
> (ii) natural-born or adopted children of an Australian citizen;
>
> (iii) naturalised as Australians
>
> are citizens of Australia and shall not be deprived of citizenship except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.[186]

The effect of this provision would be that any person within the specified categories would automatically be an Australian citizen. A person could not, however, become a naturalised Australian except in accordance with laws made by the Parliament. The Parliament could also make laws specifying circumstances in which a person could be deprived of citizenship. Those laws would, however, have to provide for a procedure which complied with the principles of fairness and justice.

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184 Under the heading 'The right to vote'.

185 This will be dealt with in Chapter 4 of the Final Report.

186 Rights Report, 86.

The intention of the Advisory Committee was, we understand, that an Australian citizen should not be deprived of citizenship except by an official act, pursuant to legislation, after a procedure which accords with the principles of natural justice. So a person could not be validly deprived of citizenship by a statute which stated that citizenship was automatically lost on the happening of a certain event, for example, service in enemy armed forces, or voluntary acquisition of the citizenship of a foreign country. On the other hand, the Committee seemed to envisage that the Parliament could legislate to make it possible for an Australian citizen to renounce Australian citizenship.

In considering the section proposed by the Advisory Committee we have had regard to how that section would or might affect the present laws about citizenship as enacted in the Australian Citizenship Act 1948. We thought it desirable to do so because if we were to endorse the Committee's recommendation, or to propose another provision to guarantee citizenship, we should be in a position to indicate precisely how existing law would be affected by the proposed alteration of the Constitution. We would also need to justify whatever changes in existing law that alteration would involve. Our detailed analysis of the existing legislation and of how it would or might be affected by the constitutional provision recommended by the Advisory Committee is set out in Appendix I.

Our reasons for not endorsing the Committee's proposed alteration of the Constitution are:

(a) The proposed alteration would, if adopted, effect substantial changes in Australian citizenship law and would do so mainly by enlargement of the classes of persons who acquire citizenship by birth, descent and adoption. But no case has been shown why Australian citizenship should be extended in the manner the Committee has proposed.

(b) Enlargement of the classes of persons who acquire Australian citizenship by birth, descent and adoption, as proposed by the Committee, would inevitably increase the number of cases in which persons would acquire dual nationality and be confronted with the many real problems which that concept raises. Many more persons, lacking any real connection with Australia, would be endowed with a citizenship neither wanted nor valued, and which, until formally renounced, could prove embarrassing.

(c) The proposed alteration of the Constitution could be read as an exhaustive statement of how Australian citizenship may be acquired and of who can now be recognised as an Australian citizen. Unlike the legislation which has been enacted in the past to amend the law relating to acquisition of Australian citizenship, the proposed alteration to the Constitution does not include any express provisions to safeguard the status of persons whose citizenship has been determined by prior law: for example, that of persons born in Australia, but who did not, according to the law in force when they were born, acquire Australian citizenship. Nor does it safeguard the position of the classes of British subjects accorded Australian citizenship under Part IV of the Australian Citizenship Act 1948.

(d) Although we do not dissent from the broad proposition that an Australian citizen should not be deprived of citizenship except by due process and on grounds specified by Act of Parliament, we do not think it advisable to deprive the Parliament of power to enact laws which provide for automatic loss of citizenship on the occurrence of specified events. In our view there should not be an inflexible constitutional requirement that involuntary expatriation cannot occur unless

(a) an official determination has been made that a statutory ground exists for terminating citizenship; or

(b) the determination has been made after compliance with a procedure satisfying principles of fairness and natural justice.

Many of the causes which are accepted as legitimate causes for deprivation of citizenship[187] are not ones which can be administered by a process involving notice to the individual that an expatriating cause has arisen and inviting that individual to 'defend' himself or herself against a proposed decision to terminate citizenship. Most of the statutory causes for deprivation of citizenship are rather ones the existence of which would be controverted only if an individual asserted a right or privilege limited to citizens (for example, the right to enrol and vote as an elector), or resisted performance of a duty imposed on citizens (for example, compulsory military service). In such cases, the question of whether the individual was, or was not, at the relevant time an Australian citizen could be decided by a court of law and so decided by 'due process'.

(e) At present, deprivation of Australian citizenship by official act can occur only by a Ministerial order pursuant to section 21 of the Australian Citizenship Act 1948. The High Court has an entrenched jurisdiction to review any such Ministerial order. Although such review is not a review on the merits, the grounds for review could include such matters as that account had been taken of irrelevant considerations, or

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187 eg voluntary acquisition of the citizenship of another country or renunciation of citizenship by service in its armed forces at a time when that country is at war with Australia.

> that a breach of the requirements of natural justice had occurred.[188]

While we accept that citizenship is an important matter, we do not think it is something that is suitably conferred and protected by one relatively short constitutional provision of the kind which has been proposed by the Advisory Committee.

It is true that the United States Constitution contains a very short provision guaranteeing citizenship. Section 1 of the Fourteenth Amendment provides, inter alia, that -

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

But there are several important differences between this provision and that which the Advisory Committee has proposed. They are:

(a) The classes of persons who are guaranteed citizenship by the United States provision are not as wide as the classes of persons who would be accorded citizenship under the section proposed by the Committee. They do not include persons born in the United States of parents who enjoy diplomatic immunity because those persons are regarded as not being within the jurisdiction of the United States. They do not include persons born outside the United States of parents who are United States citizens, or persons adopted by United States citizens. And the citizenship of naturalised citizens of the United States is constitutionally protected only if they were naturalised in the United States.

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188 Our later recommendations in Chapter 6 would ensure that some court would always have jurisdiction in the matter.

(b) The provision means that all people born or naturalised in the United States etc cannot have their citizenship taken away involuntarily. In contrast, the Rights Committee's proposal would not prevent citizenship being taken away, but it would impose procedural safeguards in relation to doing so.

We have had regard to a number of more modern constitutions in which citizenship has been defined and protected. Those which are most relevant to Australia's circumstances contain very lengthy and detailed provisions on citizenship. Examination of them has reinforced our view that constitutional definition and protection of Australian citizenship cannot be satisfactorily dealt with in the way proposed by the Advisory Committee.

Enforcement of democratic rights

Recommendation

We recommend that the Constitution be altered by the inclusion of the following provision:

> 127A. Any person who claims that his rights have been infringed by a breach of, or a failure to comply with, section eight, thirty, one hundred and seven B or one hundred and twenty-two D of this Constitution may apply to a court of competent jurisdiction for an appropriate remedy.

The object of this proposed section is to make it clear that persons who claim that their rights under the proposed sections on qualifications of electors have been infringed have standing to sue for whatever legal remedy is appropriate.

Current position

At present, there are several ways in which persons who claim to be qualified to vote in parliamentary elections may seek the aid of the courts to enforce what they claim to be their rights or to obtain remedy for denial of their rights.

Since the landmark English case of Ashby v White in 1703,[189] it has been recognised that if an electoral officer wrongly denies the right to vote to a qualified elector, the officer is liable to pay damages, but only if it is proved that the denial of the right was malicious.[190] This common law remedy is, as Isaacs J pointed out in Kean v Kerby,[191] 'practically worthless'. Malice can rarely be proved and the remedy 'gives no real or effective protection to the elector's right politically: it gives no security that his political opinions will not be disregarded.'[192]

Where a person's complaint is of wrongful refusal of enrolment as an elector, remedy may be sought by a suit for a declaration of right or by an application for a writ of mandamus or like order to compel enrolment.[193]

Where it can be shown that denial of a right to be enrolled or to vote has affected the result of an election, then by statute the election may be declared void by a court of disputed returns.[194] Recourse to such a tribunal, it has been said, affords 'real and effective protection to electors in maintaining their right of franchise.'[195]

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189 2 Ld Raym 938.

190 Drewe v Coulton (1787) 1 East 563: 102 ER 17; Cullen v Morris (1819) 2 Stark 577; 171 ER 741; Tozer v Child (1857) 7 E & B 377; 119 ER 1286.

191 (1920) 27 CLR 449, 460.

192 ibid.

193 As in The Queen v Pearson; Ex Parte Sipka (1983) 152 CLR 254.] There are also statutory remedies. [See eg Commonwealth Electoral Act 1918, section 120.

194 See Commonwealth Electoral Act 1918, sections 353, 360; Parliamentary Electorates and Elections Act 1912 (NSW), sections 155, 164(3); Elections Act 1983 (Qld), sections 135, 151; Electoral Act 1985 (SA), sections 102, 107; Electoral Act 1985 (Tas), sections 214, 222; Constitution Act Amendment Act 1958 (Vic), sections 279, 287(3); Electoral Act 1907 (WA), sections 157, 164(3).

195 Kean v Kerby (1920) 27 CLR 449, 460 (Isaacs J).

Questions concerning electoral distributions may be raised for judicial decision by suits for declarations and injunctions, but as there has been some doubt whether individual electors have the requisite standing to sue in such cases, it has been customary, at least in federal cases, for the electors who wish to sue to bring what are called relator actions, that is, actions formally brought in the name of an Attorney-General, at the relation of a private person.[196] Such an action cannot, however, be brought unless the relevant Attorney-General consents to the action being brought in his or her name. Discretion to grant or refuse that consent is, legally, unfettered.

In McKinlay's Case in 1975,[197] Barwick CJ doubted whether an elector would have standing to sue for declarations in respect of an alleged breach of section 24 of the Constitution, but Murphy J, the only other Justice who expressed an opinion on the matter, took a contrary view.[198] It may be that under the liberalised tests of standing to sue which the High Court has developed in later cases,[199] the view of Murphy J would now be preferred.

Previous proposals for reform

The Constitution Alteration (Democratic Elections) Bill put to referendum in 1974, and the Constitution Alteration (Democratic Elections) Bills introduced by Senator Macklin in 1985 and 1987, contained a clause designed to give the High Court original jurisdiction in matters arising under, or involving the interpretation of, sections 7, 8, 9, 24, 29 (as amended) or 30

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196 See Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1; Attorney-General (NSW); Ex rel McKellar v Commonwealth (1977) 139 CLR 527; cf the following State cases where electors were recognised to have standing: McDonald v Cain [1953] VLR 411, 420, 427, 438-9 and Tonkin v Brand [1962] WAR 2, 15, 19, 21.

197 (1975) 135 CLR 1.

198 id, 26 (Barwick CJ), 76 (Murphy J).

199 See Australian Conservation Foundation v Commonwealth (1980) 146 CLR 493; Onus v Alcoa of Australia Ltd (1981) 149 CLR 27; Davis v Commonwealth (1986) 68 ALR 18.

(as amended) of the Constitution. The Court's original jurisdiction would also extend to matters arising under, or involving the interpretation of, several new sections on voting rights and on election of members of State Parliaments and the legislatures of self-governing Territories. The clause also provided that the new, entrenched original jurisdiction could be invoked by an elector or by a person to whose right to be an elector the matter related.

The primary purpose of the clause was to make it clear that electors and persons claiming the right to be electors could bring proceedings in the High Court in a range of matters affecting voting rights.

The law on standing to sue in constitutional cases and in other cases where public rights and duties are sought to be enforced was reviewed by the Australian Law Reform Commission in its 1985 report on Standing in Public Interest Litigation.[200] The Commission recommended enactment by the Federal Parliament of a Standing (Federal and Territory Jurisdication) Act[201] which would make it possible for anyone to sue for enforcement of public rights and duties under the Constitution or under federal or Territorial laws, subject to certain restrictions to prevent vexatious litigation. Were the proposed Act to be enacted, the standing of private individuals to sue for enforcement of the constitutional provisions to guarantee democratic rights which we recommend would be placed beyond doubt.

Canadian experience

As has already been mentioned, under section 3 of the Canadian Charter of Rights and Freedoms, the right to vote in parliamentary elections is guaranteed. Section 24(1) of the Charter provides that anyone whose rights or freedoms, as

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200 PP 406/1985.

201 A draft Bill for the Act was set out in Appendix A of the report.

guaranteed by the Charter, 'have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.'

This remedies section provides a firm constitutional basis for judicial enforcement of protected voting rights. In one case, it was relied upon by the court to justify grant of a remedy which would not have been available under the common law. In that case, the court enforced a prisoner's right to vote in Quebec elections by granting a writ of mandamus against officers of the Crown which required them to allow the chief electoral officer of the province to prepare, within the prison, a list of inmates having the necessary qualifications to vote and to establish a polling booth inside the prison. At common law, the writ sought would not have been available because the defendants were acting as Crown officers. But, according to the court, section 24 of the Charter, was overriding.[202]

Reasons for recommendation

In Chapter 6 of the Final Report, we will recommend that section 75 of the Constitution be altered to invest in the High Court original jurisdiction in any matter arising under the Constitution, or involving its interpretation. If this recommendation is adopted, the High Court would have an entrenched jurisdiction in any matter arising under, or involving the interpretation of, all the provisions in the Constitution to do with elections and voting rights.

In Chapter 9 of the Final Report we will recommend the inclusion in the Constitution of a series of provisions to guarantee certain rights and freedoms which are not, at present, given constitutional protection. These provisions would include a

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202 Levesque v Attorney-General of Canada (1985) 25 DLR (4th) 184, 192 (Trial Div of Federal Court); cf Badger v Attorney-General of Manitoba (1986) 30 DLR (4th) 108, a similar case where a mandatory remedy was denied on discretionary grounds.

section similar to section 24(1) of the Canadian Charter of Rights and Freedoms.

We consider that the provisions of the Constitution which are meant to protect individual rights to vote in parliamentary elections are of such great importance that the Constitution should also assure that persons who claim that their rights in that regard have been infringed have standing to seek an appropriate judicial remedy. What remedy will be appropriate will depend on the nature of the alleged violation of the individual's rights or of the alleged failure to comply with the relevant constitutional guarantee.

Meetings of Parliament

Recommendations

We **recommend** that section 5 of the Constitution be omitted and the following section be substituted:

> 5.(1) The Governor-General in Council may appoint such times for holding the sessions of the Parliament as the Governor-General in Council thinks fit.
>
> (2) The Governor-General in Council may, from time to time, by Proclamation or otherwise, prorogue the Parliament.
>
> (3) The Governor-General in Council may, subject to this Constitution, in like manner dissolve the House of Representatives.
>
> (4) After a general election of the House of Representatives, the Parliament shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.

The alterations to the Constitution which would be effected were this proposal to be adopted would be as follows:

(a) The power of the Governor-General to appoint times for holding sessions of the Parliament, to prorogue

Parliament and to dissolve the House of Representatives would be vested instead in the Governor-General in Council. The power to dissolve the House would, however, be subject to proposed section 28. This section would allow the Governor-General to dissolve the House within the first 3 years of its term, but only if the House had resolved that the Government did not have its confidence and the Governor-General was satisfied that it was not possible for a Government having the confidence of the House to be formed.[203]

(b) The present provision on the first meeting of the Parliament after the establishment of the Commonwealth would be omitted.

(c) The time within which the Parliament would be required to be summoned after a general election would not be, as at present, 30 days after the day appointed for return of writs, but 75 days after polling day.

We further **recommend** that the following sections be added to the Constitution:

110A. After a general election of the more numerous House of the Parliament of a State (or, if there is only one House of the Parliament of a particular State - after a general election of that House), the Parliament of the State shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.

122A. After a general election of the legislature of a Territory, the legislature shall be summoned to meet not later than seventy-five days after the date fixed for polling at the election.

Current position - Federal Parliament

Section 5 of the Constitution provides:

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[203] See below under the heading 'Term of the House of Representatives.

> The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.
>
> After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.
>
> The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

Section 6 provides:

> There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

The powers exercisable by the Governor-General under section 5 are powers which, in the United Kingdom, are exercisable by the Queen. In the United Kingdom they are prerogative powers, that is to say, powers conferred by the common law rather than by statute. In both Australia and the United Kingdom they are, by convention, exercised on Ministerial advice.

During the life of any one Parliament there may be more than one session during which the Houses sit to transact their business. The Governor-General, acting on the advice of the Prime Minister, decides when those sessions should be held, but after a general election the Parliament must be summoned to meet not later than 30 days after the date appointed for return of the writs. The Constitution does not limit the time which may be appointed for return of writs. This is a matter which is left to be prescribed by the Parliament and the Parliament is free to prescribe whatever limits it thinks fit.

Prorogation brings a parliamentary session to an end and has the effect of quashing incompleted proceedings, for example Bills not finally passed. It is different from an adjournment by one of the Houses. An adjournment merely suspends sittings. Until 1928 it was usual, following United Kingdom practice, to prorogue

Parliament before the House of Representatives was dissolved. Nowadays it is most unusual for the Federal Parliament to be prorogued. Instead the Houses merely adjourn. Therefore, in practice, there is only one session in the life of any one Parliament. This practice might seem to be inconsistent with section 6, but the general view is that this section does not require a separate parliamentary session each year; merely that no more than 12 months must elapse between one sitting and the next.[204]

A dissolution of the House of Representatives brings the life of a Parliament to an end, and members of that House thereupon cease to be members.[205] The Senate, however, remains in being and, on one view, can continue to transact business.[206]

Neither a dissolution of the House of Representatives nor a double dissolution pursuant to section 57 of the Constitution affects the tenure of those members of the Parliament who were, at the time of the dissolution, Ministers of State for the Commonwealth. They remain Ministers until they resign their Ministerial offices, are formally dismissed by the Governor-General, or cease to hold office by operation of the provision in section 64 of the Constitution that 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or member of the House of Representatives.'

The Constitution thus tolerates a state of affairs under which, for up to a period of 90 days, there need be no Federal Parliament although there is a Ministry which 'holds over' without renewal of its authority by formal commission of the Governor-General.

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204 JR Odgers, Australian Senate Practice (5th ed 1976) 619-20.

205 Those who renominate continue to receive their parliamentary allowances up to and including the day prior to the day fixed for the election - Parliamentary Allowances Act 1952, section 5(5).

206 Odgers, op cit, 621.

While the second paragraph of section 5 of the Constitution might appear to ensure that a Parliament will, and must, be summoned to meet very soon after the results of a general election are known, in fact it does not have this effect.

To understand how this can come about it is necessary to have regard to the various constitutional and legislative provisions which govern the parliamentary electoral process.

Where a general election is to be held, that process is formally begun by issue of writs for elections. In the case of elections of senators the writs are issued by State Governors, and in cases in which the Senate has been dissolved pursuant to section 57, the writs must be issued within 10 days from the proclamation of the dissolution (section 12). In the case of general elections for the House of Representatives, the writs are, under section 32 of the Constitution, caused to be issued by the Governor-General in Council and must be issued within 10 days from the expiry of the House or from the proclamation of its dissolution. The subsequent steps in the electoral process are governed by the Commonwealth Electoral Act 1918.

Under the Act, the final date for nomination of candidates for election may be 11 to 28 days after the date of the issue of the writ (section 156). The date for polling may be fixed as a day not less than 22 days and not more than 30 days after the final date for nomination of candidates (section 157). The day appointed for return of the writs must be not more than 100 days after their issue (section 159). Until 1987 it was 90 days. In result, polling day must be between 33 and 58 days after the issue of the writ, and the maximum time for return of writs after the appointed polling day is 67 days. The maximum period which can elapse between the issue of writs and the first meeting of a new Parliament is now 140 days, though in practice it is more likely to be 130 since writs are normally issued immediately after a dissolution of the House.

The statutory period for return of writs was increased in 1987 from 90 days to 100 days following presentation, in December 1986, of the Second Report of the Joint Select Committee on Electoral Reform. In its report the Committee quoted from a letter from the Prime Minister, Hon RJL Hawke, in which he had drawn attention to the effect of amendments to the Commonwealth Electoral Act in 1983 to increase the minimum period between the issue of writs and polling day from about 23 days to 33 days. The Prime Minister pointed out that, as a new Parliament had to meet no later than 120 days after issue of the writs, the amendments had meant that the maximum time between polling day and the first meeting of the Parliament had been reduced. He suggested that if the Act were amended to extend the time for return of writs from 90 days to 100 days, it would be possible to hold an election in mid to late November, without the need for Parliament to meet in early February.[207]

In recommending that the time for return of writs be extended in the way suggested by the Prime Minister, the Joint Select Committee noted that 'the manner in which Senate scrutiny is now conducted can mean, where there is a large number of candidates, a long delay before all Senate vacancies are filled.'[208]

Table 4.1 sets out the number of days which elapsed between:

(a) the dissolution of the House of Representatives (or a double dissolution) and the ensuing polling day;

(b) polling day and the first meeting of the new Parliament; and

(c) the dissolution and the first meeting of the new Parliament,

over the years 1969 to 1987.

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207 Report, PP 1/1987 para 5.9.

208 ibid.

Table 4.1 shows that, since 1969, the periods of time which have elapsed between the dissolution of a Parliament and the first meeting of the next Parliament have ranged between 57 days in 1969 and 118 days in 1984. The time which has elapsed between the end of one Parliament and the first meeting of the next Parliament does not appear to have had any necessary connection either with the state of the political parties after elections, or with the scope of the elections, that is, whether they were for the House of Representatives alone, for the House and the entire Senate, or for the House and half the Senate. A change of Governments occurred only after the general elections of 1972, 1975 and 1983. In those years, the time which elapsed between the dissolution of Parliament and the first meeting of the new Parliament varied considerably - 117 days in 1972-3, 98 days in 1975-6, and 77 days in 1983. Double dissolutions occurred in 1974, 1975, 1983 and 1987. In those years the country was without a Federal Parliament for 89, 98, 77 and 101 days respectively.

One factor which has clearly affected the timing of the first meeting of a new Parliament has been the date fixed for polling in the preceding elections. When elections have been held in early to mid December of one year, the first meeting of the new Parliament has not, since 1969, occurred before mid to late February of the following year.

TABLE 4.1

MEETINGS OF FEDERAL PARLIAMENT

DATE OF DISSOLUTION		POLLING DAY		1ST MEETING	DAYS FROM DISSOLUTION TO 1ST MEETING
1969 29 September	[26 days]	25 Oct (Reps only)	[31 days]	25 Nov	57
1972 2 November	[30 days]	2 Dec (Reps only)	[87 days]	27 Feb 1973	117
1974 11 April	[38 days]	18 May (DD)	[51 days]	9 July	89
1975 11 November	[32 days]	13 Dec (DD)	[66 days]	17 Feb 1976	98
1977 10 November	[30 days]	10 Dec (Reps, 1/2 Sen)	[73 days]	21 Feb 1978	103
1980 19 September	[29 days]	18 Oct (Reps, 1/2 Sen)	[38 days]	25 Nov	67
1983 4 February	[30 days]	5 March (DD)	[47 days]	21 April	77
1984 26 October	[36 days]	1 Dec (Reps, 1/2 Sen)	[82 days]	21 Feb 1985	118
1987 5 June	[36 days]	11 July (DD)	[65 days]	14 Sept	101

['DD' indicates dissolution of both Houses of the Federal Parliament; 'Reps only' refers to elections for the House of Representatives; 'Reps, 1/2 Sen' refers to elections for the House of Representatives and half the Senate respectively.]

Current position - State Parliaments

The constitutions of the Australian States contain provisions similar to sections 5 and 6 of the federal Constitution. Most do not, however, include a provision like that in the second paragraph of section 5 which requires the Parliament to be summoned to meet within a specified time after the return of writs for a general election.[209] The only States in which there is a statutory provision comparable with the second paragraph of section 5 are New South Wales and Tasmania.

In New South Wales, the Legislative Assembly must be summoned to meet not later than 7 days after the date appointed for return of writs. Writs must be issued within 4 days of the dissolution or expiry of the Assembly, and the day appointed for return of writs must be not later than 60 days after the issue of the writs or such later date as is fixed by a proclamation of the Governor published in the Gazette.

In Tasmania, writs must be issued within 10 days of the dissolution or expiry of the House of Assembly. The day for return of writs must be 60 days after the issue of the writs, but, as in New South Wales, there is power to extend this time. The Assembly must be summoned to meet no later than 90 days after the dissolution or expiry of the Assembly, though the Governor is empowered to extend the time, by proclamation, for a period of no more than 30 days.

In recent years, the period of time which has elapsed between polling day for State general elections and the first meeting of the new State Parliament has generally been shorter than that which has elapsed between polling day for Federal general elections and the first meeting of the next Federal Parliament.

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209 Constitution Act 1902 (NSW), sections 10, 11; Constitution Act 1867 (Qld), sections 3, 12; Constitution Act 1934 (SA), sections 6, 7; Constitution Act 1934 (Tas), sections 11, 12; Constitution Act 1975 (Vic), sections 20, 38, 41; Constitution Act 1889 (WA), sections 3, 4.

The intervals of time between polling day and the first meeting of the new State Parliament, in the last two general elections prior to 1988, are shown in Table 4.2.

TABLE 4.2
MEETINGS OF STATE PARLIAMENTS

State	Polling Date	Date of first sitting	Interval (Days)
NSW	19 Sept 1981	28 Oct 1981	39
	24 March 1984	1 May 1984	38
Qld	22 Oct 1983	22 Nov 1983	31
	1 Nov 1986	12 Feb 1987	103
SA	6 Nov 1982	8 Dec 1982	31
	7 Dec 1985	11 Nov 1986	66
Tas	15 May 1982	15 June 1982	31
	8 Feb 1986	12 March 1986	32
Vic	3 April 1982	27 April 1982	24
	2 March 1985	3 April 1985	32
WA	19 Feb 1983	22 March 1983 *	31
	8 Feb 1986	10 June 1986	122

* The Assembly sat for only 3 days and adjourned until 26 July 1983

Practice in other countries

The Australian Constitution is based on parliamentary practice in the United Kingdom and on the Constitution of the United States. In Britain the Parliament is periodically dissolved and thereupon a new Parliament elected. In the United States the new Congress continues in existence for some weeks after the election date and is succeeded by the new Congress on the same day or soon afterwards.

We are indebted to the Australian High Commissioner in Britain for the following letter which the Clerk of the House of Commons sent him on 28 October 1987:

> The average interval between Parliaments in the United Kingdom since 1918 has been 38 days, and since 1945 the average has been 32 days. It is our custom for the proclamation which dissolves the old Parliament to appoint a day for the meeting of the new one, so everyone knows the position at the time of the General Election... We vote on a Thursday, and this year's experience of meeting on the following Wednesday was not untypical. Of course, our 'first past the post' electoral system allows us to know all the results by about mid-day on the Friday.
>
> A minimum interval of 20 days between Parliaments is prescribed, and in fact we need a little more than that for all the election formalities to be completed. There is no maximum interval laid down, but you will see that our practice is pretty uniform.
>
> There is power to defer the planned date for the first meeting of Parliament if circumstances should require it. This is effected by a further proclamation (on the advice of Ministers) under the Prorogation Act 1867. The power has only been used twice in this century: in 1900 and 1919.

We are indebted to the Australian Ambassador to the United States for the following information from the Clerk of the House of Representatives. The United States Constitution gave Congress the power to set the time for election of Senators and Representatives (Article I, Section 4, Clause 1.1). In 1872 Congress selected as the date for elections the Tuesday next after the first Monday in November in every even numbered year. Pursuant to Section 1 of the Twentieth Amendment, ratified in

1933, the terms of Senators and Representatives shall end at noon on 3 January following the election day. Pursuant to Section 2 of the Amendment, the first meeting of the new Congress shall begin at the same time 'unless they shall by law appoint a different day'. Congress has, as often as not, appointed a different day, the latest being 21 January 1971 and 15 January 1979.

Table 4.3 sets out the intervals of time between polling day and the first sitting of the Lower House of the Parliaments of New Zealand and Canada.

TABLE 4.3

PERIOD BETWEEN HOLDING
OF ELECTIONS AND FIRST SITTING
DAY OF LOWER HOUSE OF PARLIAMENT

NEW ZEALAND

POLLING DATE	FIRST SITTING DAY	PERIOD (DAYS)
26 Nov 1966	26 Apr 1967	103
29 Nov 1969	12 Mar 1970	82
25 Nov 1972	23 Jul 1973	237
29 Nov 1975	17 May 1979	173
28 Nov 1981	07 Apr 1982	130
14 Jul 1984	15 Aug 1984	30
15 Aug 1987	Not available	

CANADA

POLLING DATE	FIRST SITTING DAY	PERIOD (DAYS)
08 Nov 1965	18 Jan 1966	72
25 Jun 1968	12 Sep 1968	79
30 Oct 1972	04 Jan 1973	67
08 Jul 1974	30 Sep 1974	84
22 May 1979	09 Oct 1979	140
18 Feb 1980	14 Apr 1980	56
04 Sep 1984	05 Nov 1984	62

Issues

The basic issues are:

(a) Should the Constitution be altered to reflect the well established convention that the powers vested in the Governor-General by section 5 are exercised only on Ministerial advice?

(b) Should the Constitution be altered to limit the power of the Parliament to enact laws the effect of which make it possible for a meeting of Parliament not to be held for some considerable time after the expiry or dissolution of the House of Representatives? If so, how should the Constitution be altered?

(c) Should the Constitution be altered to include any provision whereby States and Territorial legislatures are similarly controlled in relation to meetings of their Parliaments and their legislatures?

Reasons for recommendations

We **recommend** that section 5 of the Constitution be reformulated for several reasons. First, the last paragraph relating to the meeting of the first Parliament after the establishment of the Commonwealth is clearly expended. Secondly, we consider that the powers which the section vests in the Governor-General are more appropriately vested in the Governor-General in Council. These are powers which are exercised on Ministerial advice and the Constitution should reflect this. The final change involved in the proposed new section 5 is the most important. It concerns the meeting of Parliament after a general election.

While we acknowledge that it should be left to the Parliament to legislate on matters such as the minimum and maximum time which must elapse between the issue of writs and polling day, and the time within which returns to writs must be made, it is, in our

view, desirable that the Constitution should ensure that after a general election, the Parliament is summoned to meet as soon as possible after polling day.

Sections 5 and 32 of the Australian Constitution were designed to limit the period that the nation would be without a Parliament. That intention has seriously miscarried because the Constitution leaves it to the Parliament to ordain the number of days to be specified in the writs for the elections for the return of those writs. Parliament can set and alter the number of days when and how it wishes by amending the Commonwealth Electoral Act 1918. This means that in the Federal Parliament, as in the State Parliaments, months can elapse between the last meeting of an old Parliament and the first meeting of a new Parliament.

In the meantime members of the new Parliament will not have been officially installed. Moreover, (a) the Government which had a majority in the former House of Representatives may not have a majority in the new House and it may or may not have resigned and accordingly a new Government may or may not have been installed, or (b) the Government which had a majority in the old House may still have a majority in the new House but may have new Ministers or Ministers who have changed portfolios. In all such cases the processes of representative government will have been suspended.

This particular aspect of our recommendation is closely linked with further recommendations in Chapter 5 of this Report relating to the terms of office of Ministers.[210] Adoption of those recommendations would mean that the Governor-General could not terminate the appointment of a Prime Minister unless the House of Representatives had passed a resolution that the Government no longer had the confidence of the House, and the Governor-General could not terminate the appointment of other Ministers except on the advice of the Prime Minister.

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210 Chapter 5 under the heading 'Appointment and terms of office of the Prime Minister and Ministers'.

In considering what is a reasonable maximum period of time allowable between polling day and the first meeting of Parliament after a general election, we have had regard to the operation of the existing law and the time which has elapsed between polling day and the first meeting of Parliament following the general elections held from 1969 to date.[211] On only two occasions (in 1972-73, and 1984-85) did the period exceed the 75 day period we have recommended. In both cases the elections had been held in early December.

Were our proposal to be adopted then, assuming the relevant provisions of the Commonwealth Electoral Act 1918 were to remain as they are, the maximum period which could elapse between the expiry or dissolution of the House of Representatives and the first meeting of Parliament after the election would be 143 days. The corresponding period under the Act and the Constitution, as they now stand, is 140 days.[212]

The reasons for limiting the period of time which may elapse between the day of polling in general elections and the first meeting of a new Parliament apply equally to State Parliaments and Territorial legislatures. We therefore recommend that the rule which applies to the Federal Parliament should also apply to these legislatures.

COMPOSITION OF THE FEDERAL PARLIAMENT

Recommendations

(i) The nexus between the size of the House of Representatives and the Senate should be broken, subject to the inclusion in the Constitution of

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211 Table 4.3.

212 Issue of writs - no later than 10 days after the expiry or dissolution of the House; return of writs - no later than 100 days after issue of writs; first meeting of Parliament - no later than 30 days after the day appointed for return of the writs.

provisions expressly limiting the size of both Houses of Parliament.

(ii) The number of senators for each Original State should be fixed at twelve.

(iii) The power of the Parliament to determine the number of members of the House of Representatives should be qualified by providing that the number of people represented by a member of the House of Representatives shall be not fewer than 100,000, subject to the present guarantee that, 'five members at least shall be chosen in each Original State' (section 24) and to our recommendations on the representation of Territories and new States.

(iv) The entitlement of Territories and new States to representation in the House of Representatives and the Senate should be prescribed in the Constitution.

(v) The Australian Capital Territory and Jervis Bay Territory should be treated as one Territory for the purposes of representation.

(vi) A Territory should be entitled to its own representative in the House of Representatives when its population is in excess of 50,000.

(vii) The number of members of the House of Representatives chosen in each new State and in each Territory which is entitled to be represented should be in proportion to the population of the new State or Territory, provided that at least two members of the House of Representatives should be chosen in the Australian Capital Territory and at least one member in a new State and in the Northern Territory.

(viii) Residents (being persons qualified to be enrolled as electors) of a Territory that is not entitled to be represented in the Parliament should be entitled to vote at an election of senators or members of the House of Representatives for or in a Territory on the mainland of Australia, as the Parliament provides.

(ix) Each new State and Territory should be entitled to representation in the Senate on the basis that it returns one senator for every two members whom it is entitled to return to the House of Representatives, subject to the following:

- a new State, the Australian Capital Territory and the Northern Territory should each be entitled to representation in the Senate by at least two senators;

- no new State or Territory should be entitled to be represented in the Senate by more than twelve senators.

This formula will produce the following results:

(a) <u>New States, Australian Capital Territory, Northern Territory</u>

Number of members of House of Representatives	Number of senators
1, 2, 3, 4 or 5	2
6 or 7	3
8 or 9	4
10 or 11	5
12 or 13	6
14 or 15	7
16 or 17	8

18 or 19	9
20 or 21	10
22 or 23	11
24 or more	12

(b) Representation in the Senate of Territories other than the Australian Capital Territory and the Northern Territory would be the same as in the above table except as set out below:

Number of members	Number of senators
1	0
2 or 3	1

Current position

The Senate

The composition of the Senate (with the exception of representation of Territories) is dealt with in section 7 of the Constitution which provides as follows:

> The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.
>
> But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.
>
> Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.
>
> The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

There were six senators for each State until 1949 when the number was increased to ten. The Representation Act 1983 (Cth) provided for a further increase to twelve. In addition, the Northern Territory and the Australian Capital Territory each return two senators, pursuant to the Senate (Representation of Territories) Act 1973 (Cth), making a total of 76 senators.

The size of the Senate and the House of Representatives is linked by the requirements of section 24, discussed below. This link is referred to as 'the nexus'.

House of Representatives

The composition of the House of Representatives (with the exception of the representation of Territories) is governed, for the most part, by section 24 of the Constitution which provides as follows:

> The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.
>
> The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-
>
> (i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:
>
> (ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.
>
> But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

Section 27 is also relevant. It provides:

> Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

This means that the Parliament may make laws changing the size of the House of Representatives, provided that:

(a) the nexus between the size of the two Houses requiring, as nearly as practicable, a 2:1 ratio between the number of members of the House of Representatives and the number of senators, is maintained;

(b) the members of the House of Representatives are directly chosen by the people of the Commonwealth;

(c) the number of members chosen in each State is in proportion to the population of the State; and that

(d) at least five members are chosen in each Original State.

The above provisos do not apply to members chosen in the Territories.

The first House of Representatives had 75 members which meant that there was, on average, one member for about every 50,000 people in Australia. By 1948, the population of Australia had doubled in size. The Representation Act 1948 (Cth) enabled the House of Representatives to be enlarged in 1949 to 121 members from the States. In compliance with the nexus requirement the number of senators was increased to 60. In 1983, the House of Representatives was enlarged to its present size of 148 members, an average of one member for approximately every 107,000 people. Again, this was accompanied by a proportionate increase in the number of senators from the States.

The number of members returned by each State is as follows:

New South Wales	51
Victoria	39
Queensland	24
Western Australia	13
South Australia	13
Tasmania	5

In addition, the Australian Capital Territory returns two members and the Northern Territory, one member.

Representation of Territories

The power of the Parliament to make laws with respect to Territories is set out in section 122 of the Constitution. It provides:

> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

The High Court has held that this section confers on the Federal Parliament a virtually unqualified power to make laws for the Territories. The power to provide for the representation of Territories 'in either House of the Parliament to the extent and on the terms which it thinks fit' is unfettered by the requirements of section 7[213] or section 24.[214] This means, amongst other things, that:

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213 Western Australia v Commonwealth (First Territories Representation Case) (1975) 134 CLR 201; Queensland v Commonwealth (Second Territories Representation Case) (1977) 139 CLR 585.

214 Attorney-General (NSW); Ex rel McKellar v Commonwealth (1977) 139 CLR 527.

(a) the nexus requirement does not apply to Territory senators and members;

(b) Territory senators and members need not be directly chosen by the people of the Territory; and that

(c) the number of members chosen in a Territory need not be in proportion to its population.

The Northern Territory has been entitled to return one member of the House of Representatives since the Northern Territory Representation Act 1922 but full voting rights were not conferred until the Act was amended in 1968. The Australian Capital Territory was granted representation in the House of Representatives by one member under the Australian Capital Territory Representation Act 1948 (Cth). The member had only limited voting rights until 1966 when full rights were conferred. Representation was extended to two members in 1973.[215]

The Australian Capital Territory and the Northern Territory were granted representation in the Senate (two senators each) by the Senate (Representation of Territories) Act 1973 (Cth). That Act was one of the Bills passed by the historic joint sitting of 1974 in accordance with section 57. The first senators for the Territories were elected on 13 December 1975. Legislation relating to Territorial representation was consolidated under the Commonwealth Electoral Act 1918 (Cth) in 1983.

The people of the Territories of Jervis Bay, the Cocos (Keeling) Islands and Christmas Island are included within the federal electoral divisions of the Australian Capital Territory or the Northern Territory. Of the remaining Territories - Ashmore and Cartier Islands, Australian Antarctic Territory, Coral Sea Islands Territory, Heard and McDonald Islands and Norfolk

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215 Australian Capital Territory (House of Representatives) Act 1973 (Cth).

Island - only Norfolk Island has a permanent population. It has no federal parliamentary representation.

Representation of new States

Section 121 deals with the admission or establishment of new States. It provides:

> The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

The Parliament is thereby empowered to determine the extent of representation of a new State in both Houses of Parliament and is not bound by the terms of sections 7 and 24 in so doing. The power to admit new States to the Commonwealth or to establish new States has not been used to date.

Previous proposals for reform

Joint Committee on Constitutional Review, 1959. In summary, the Committee recommended that the Constitution should be altered to provide that:

(a) The nexus between the size of the two Houses should be broken.

(b) The Parliament should have power to determine the number of senators, provided that the Original States:

- are equally represented, and
- have at least six and no more than ten senators.

(c) The power of the Parliament to determine the number of members of the House of Representatives should be subject to the qualification that there should be on average not fewer than 80,000 people for every member.

(d) The power of the Parliament to determine the number of members should be subject to the present proviso that each Original State should have at least five members.[216]

The Joint Committee made no recommendations on the representation of Territories or new States.[217]

A proposal along the lines recommended by the Joint Committee was put to a referendum in 1967 by the Coalition Government with the support of the Opposition. It was approved by 40.25% of all electors and by a majority in New South Wales alone.

Australian Constitutional Convention. The Melbourne (1975) and Hobart (1976) sessions of the Australian Constitutional Convention adopted resolutions which proposed the breaking of the nexus between the size of the House of Representatives and the Senate.[218] They recommended that, subject to the provision that each Original State should return at least five members, the power of Parliament to determine the size of the House of Representatives should be qualified by a requirement that, on average, each member would represent at least 85,000 people.

They also recommended that each State should have no fewer than ten senators. Unlike the Joint Committee, they did not recommend an upper limit on the number of senators for each State.

The representation of Territories and new States was debated at the Perth (1978) session of the Australian Constitutional Convention, but the question was referred to its Standing Committee for consideration and report.[219] The issues were eventually the subject of recommendations made by the Convention's Structure of Government Sub-Committee in the context of its report on breaking the nexus (see below), but the

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216 1959 Report, 6.

217 1959 Report, 6.

218 ACC Proc, Melbourne 1975, 173; ACC Proc, Hobart 1976, 204.

219 ACC Proc, Perth 1978, 192.

Convention did not make any substantive recommendations relating to them.

In 1983 Senator Macklin (Australian Democrats) introduced the Constitution Alteration (Parliament) Bill 1983. It reflected the Convention resolution except that it proposed a quota of no fewer than 100,000, rather than 85,000, in calculating the number of members of the House of Representatives to be returned in each State. It passed the Senate but was not debated by the House of Representatives. A Bill to the same effect was introduced by Senator Macklin on 23 September 1987 but has not proceeded beyond his second reading speech.

In its report to the Brisbane (1985) session, the Structure of Government Sub-Committee of the Australian Constitutional Convention recommended that the Constitution be altered to break the nexus subject to the following conditions:

(a) that the present weight of a senator's vote in relation to that of a member of the House of Representatives at joint sittings of the two Houses be preserved despite the breaking of the nexus, that is, it should remain in the ratio of one to two;

(b) that the number of people represented by a member of the House of Representatives would not be less than 100,000;

(c) that there be not less than the existing number of senators and not more than 100 senators; and

(d) that certain rules should apply to the maximum and minimum representation of Territories and new States in the Parliament.

The Brisbane session resolved:

> That the Report of the Structure of Government Sub-Committee on Breaking the Nexus between the sizes of the Houses of Parliament be noted.[220]

Joint Select Committee on Electoral Reform. In November 1985, the Committee issued its Report No. 1, Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament.[221] The Committee recommended that the entitlement to representation of Territories and new States should be prescribed in the Constitution. It recommended, however, that, initially, formulas for determining the entitlement of Territories should be enacted as provisions of the Commonwealth Electoral Act 1918. Broadly, the Committee proposed that:

(a) Territories should be entitled to representation in the House of Representatives in accordance with their population on similar principles to those applicable to the States, and

(b) entitlement in the Senate should be on the basis of one senator for every two members of the House chosen in the Territory, with a guarantee that the Australian Capital Territory and the Northern Territory retain at least their existing entitlement of two senators each.

Further, the Committee recommended that no new State should be admitted to the Federation on terms and conditions as to its representation more favourable than those the Committee recommended for Territories.

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220 ACC Proc, Brisbane 1985, vol I, 423.

221 PP 1/1986.

Submissions

Nexus

Only a small minority of submissions received favoured the retention of the nexus. One submission argued that it was essential in order to preserve the voting strength of the Senate.[222] Another said that 'it is vital to the Parliamentary process and the protection of the smaller States that the influence of the Senate be maintained.'[223]

Other submissions gave qualified support to the abolition of the nexus. NJ Murray submitted that the weight ratio given to the votes of the members of the respective Houses in joint sittings should remain unchanged, that members of the lower House should never represent fewer than 100,000 people and that there should be no reduction in the number of senators.[224] With these safeguards in place, the breaking of the nexus would pose no problem for democracy. Mr S Souter agreed that, if the nexus is to be removed, some other safeguard should be substituted to discourage changes in the size of either House for the purpose of political gain. He was particularly concerned about the effect of breaking the nexus on the power of the Senate to influence the outcome of a joint sitting under section 57.[225] On the other hand, I Smith expressed concern that the Senate might grow at a faster rate than the House of Representatives.[226] Otherwise, he supported the breaking of the nexus.

The submissions which favoured the breaking of the nexus can be divided into two categories: those which saw a problem with the nexus itself and those which proposed an alternative method of establishing the size of the Houses. NJ Parkes, JA Pettifer and

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222 J Moodie S3221, 16 February 1987.

223 AB Kelly S707, 4 December 1986.

224 S729, 7 December 1986.

225 S2013, 27 April 1987.

226 S3226, 16 February 1987.

DM Blake, former Clerks of the House of Representatives, expressed strong support for the recommendation of the Australian Constitutional Convention that the nexus be broken. They considered it 'quite unacceptable that future population growth justifiably calling for increased membership of the House of Representatives should necessitate a further increase in the number of senators.'[227] Mr Chris Miles MP submitted that twelve Senators for each State provided sufficient representation and that any higher number would involve unjustifiable expense.[228] M Smith argued along similar lines.[229] R Price MP gave unqualified support to the abolition of the nexus.[230]

Some submissions saw the problem not as the nexus itself, but that Australia is overgoverned.[231] They supported its abolition on the basis that it could lead to a reduction in the size of both Houses and smaller government.

Other submissions advanced a variety of suggestions for better ways of fixing the numbers of the Houses. BA Trivett suggested that it would be more realistic, given the historical context, to have a Senate of a fixed size, chosen by the House of Representatives for an indefinite term.[232] P Canet argued that the size of the Houses should be set on independent criteria: electorate size (that is, population) for the House of Representatives and a minimum and maximum number of senators.[233]

Representation

We received only a few submissions relating to the representation of Territories and new States in the Parliament.

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227 S60, 27 June 1986.
228 S197, 1 August 1986.
229 S84, 16 May 1986.
230 S179, 25 July 1986.
231 HE Carruthers S110, 16 June 1986; DW Hood S123, 20 June 1986.
232 S2012, 23 April 1987.
233 S610, 21 November 1986.

The Northern Territory Government submitted that new States should have complete equality of representation with Original States.[234] It said that it would only accept Statehood on equal terms, including represention in the Senate equal to that of the Original States. Similarly, the Law Society of the Northern Territory submitted that:

> Northern Territory statehood without general equality as to powers, duties and representation with the other states would seriously disadvantage residents of the new state. The federal nature of the Australian Constitution should not be departed from in the case of the new state of the Northern Territory.[235]

We also received a number of submissions on the question of separate representation for the Aboriginal people. The National Aboriginal and Islander Legal Services Secretariat argued that, because the interests of the component parts of the Commonwealth are safeguarded by the Senate, the Aboriginal people should be represented there, as an electorate, as if they were a State.[236] The Public Interest Advocacy Centre endorsed this view, arguing that this would be an important step towards redressing the inequalities which the Aboriginal people have faced for the last 200 years.[237] The Aboriginal Development Commission submitted that if a certain number of seats in the Senate were designated for Aboriginal representatives, Parliament would have ready access to expert opinion on laws affecting the Aboriginal people.[238]

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234 S3693, 6 November 1986.

235 S3669, 6 November 1986.

236 S114, 10 July 1986.

237 S3098, 24 November 1987.

238 S565, 21 November 1986.

Reasons for recommendations

Nexus between the size of the House of Representatives and the Senate

In reaching our decision to **recommend** the breaking of the nexus between the size of the two Houses of Parliament notwithstanding the failure of the 1967 referendum on this question, the Commission had regard to the resolutions in favour of the proposal passed by the Melbourne (1975) and Hobart (1976) sessions of the Australian Constitutional Convention, as well as the earlier recommendations of the Joint Parliamentary Committee.[239]

The Commission also had the benefit of the Structure of Government Sub-Committee's 1985 Report which included a closely argued paper by Mr GJ Lindell setting out the issues involved in breaking the nexus and the arguments in favour and against such a proposal.[240]

We consider that there is no necessary relationship between the size of the House of Representatives and the size of the Senate.

The role and function of the two Houses are different. The House of Representatives determines the Government, provides most of the Ministry and initiates the bulk of legislation. Its members, elected on the basis of population, are required to perform constituency work in their own electorates. Clearly, as the population increases, the size of electorates increases and the workload of individual members becomes heavier. An increase in the size of the House may therefore be considered desirable on the basis of population growth to enable members to represent their electorates adequately. In other words, a significant increase in population is a factor which may justify an increase in the size of the House of Representatives.

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239 ACC Proc, Melbourne 1975, 173; ACC Proc, Hobart 1976, 204.

240 Report, Appendix C, ACC Proc, Brisbane 1985, vol II.

Another factor which may justify an increase in the House is an increase in the size of the Ministry. If the Ministry is enlarged in order to cope with the growing complexity of Government business, the number of members of the Government party who, as members of the Executive, are pledged to support Cabinet decisions, might outweigh the number of members on the back bench, thereby reducing the role of Parliament. It may be considered desirable, therefore, to balance any significant enlargement of the Ministry with an increase in the size of the back bench.

The Senate is elected on the basis of equal representation of States rather than on the basis of population. Unlike members of the House, senators do not represent particular electorates but are drawn from the State as a whole.

Although the Senate does provide a number of Ministers from its ranks, the majority are drawn from the House of Representatives. In the present Parliament, eight out of thirty Ministers are senators - slightly more than 25% of the total Ministry. As a result, the Senate does not initiate as much legislation as the House of Representatives. It does, however, play a significant role, particularly through its committee system, not only in the legislative process but as a check on the Executive. Activities of its committees include the scrutiny of Bills, the examination of a broad range of policy issues, the review of regulations and by-laws made by the Executive and examination of the Government's estimates of expenditure. In our opinion, any increase in the size of the Senate should depend upon whether its numbers are adequate to perform its role effectively and whether Territories and, potentially, new States, are fairly represented, rather than following automatically from an increase in the size of the House or Representatives.

The fear has been expressed[241] that if the nexus is broken, there would be no safeguard against arbitrary or unnecessary increases in the number of members of Parliament. This view is presumably based on the assumption that Governments are loathe to increase the size of the Senate and therefore, so long as increases in the size of the House automatically involve a proportionate increase in the number of senators, Governments will only act with very good reason.

On the other hand, it has also been argued that the nexus requirement fosters unwarranted increases because necessary or desirable increases in the House must be accompanied by increases in the Senate, whether or not additional numbers are needed in the Senate.[242] On each of the two occasions (1949, 1983) on which the total number of members of the Parliament has been increased in accordance with sections 7 and 24 of the Constitution, the impetus has been a desire to increase the size of the House of Representatives rather than any wish to enlarge the Senate.

We believe it is important to provide some check on Parliament's capacity to increase its own size. We do not consider, however, that the nexus is the most effective safeguard against unnecessary increases. The most effective means of curtailing the size of the Parliament is to provide an express limitation in the Constitution which, at present, contains no express limits on the size of either House.

Another argument frequently raised against breaking the nexus is that it would inevitably lead to a reduction in the power and prestige of the Senate because Governments could increase the size of the House of Representatives but not the Senate.

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241 For example, in Constitution Alteration (Parliament) 1967: Argument against the proposed law: The Case for NO in the 1967 referendum; see Structure of Government Sub-Committee Report, 9, ACC Proc, Brisbane 1985, vol II.

242 Constitution Alteration (Parliament) 1967: Argument in favour of the proposed law: The Case for YES; see id, 5-8.

Proponents of this view argue that the Senate would eventually be dwarfed in size - and therefore importance - by the House.

We do not believe that the power and prestige of the Senate is dependent upon it always remaining half the size of the House of Representatives. The power of the Senate depends upon the powers given to it by the Constitution. Except in relation to certain categories of money Bills, the power of the Senate with respect to proposed legislation is equal to the power of the House of Representatives and is unaffected by its size. The United States Senate is a good example of an Upper House the power of which is undiminished by its small size vis-a-vis the Lower House. It has 100 senators, two from each of the 50 States, as compared with a House of Representatives of 435 members. While it is true that the United States Senate has powers which our own Senate does not possess, for example, its power of trying cases of impeachment and its duty to advise and consent on foreign affairs, the legislative power of the two Houses is much the same.

Any proposed legislation to increase the size of the Australian House of Representatives would be subject to amendment by the Senate and could not be passed without its approval.[243]

It has also been argued that, assuming the breaking of the nexus eventually leads to an increase in the size of the House of Representatives in relation to the size of the Senate, the position of the less populous States would be weakened 'in Party rooms (where much of the real power is exercised), in Cabinet and on Parliamentary committees.'[244] Although electors in the less populous States would continue to return the same number of senators as the larger States, the proportion of their representatives in the Parliament as a whole would be reduced if

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243 This is subject to one exception, that is, that a deadlocked Bill may be passed at a joint sitting of the House and the Senate. See below under the heading 'Disagreement between the Houses'.

244 Constitution Alteration (Parliament) 1967: Argument against the proposed law: The Case for NO; see id, 11.

the House, in which representation is based on population, were increased in size relative to the Senate.

Concern has also been expressed that if the size of the House of Representatives increases to more than twice the size of the Senate, any chance of the Senate influencing the outcome of a joint sitting will be removed.[245] Specifically, it has been argued that the position of the less populous States would be weakened if their views differed from the more populous States in a joint sitting, because their representation is stronger in the Senate than the House.[246]

Provision is made for a joint sitting as the final step in the procedure set out by section 57 of the Constitution for resolving deadlocks between the two Houses over proposed legislation. Broadly, a Bill must be twice passed by the House of Representatives and twice rejected by the Senate. The second rejection by the Senate must then be followed by the dissolution of both Houses, a third passage by the House and a third rejection by the Senate before a joint sitting can be held to vote on the disputed Bill. If it is passed by an absolute majority of the total number of members of the Senate and the House voting together, it is taken to have passed both Houses and, upon assent, becomes law.

We do not think that the argument about joint sittings is sufficiently strong to justify the maintenance of the status quo. First, there has only ever been one joint sitting - 1974 - and it is unlikely that there will be frequent joint sittings in the future. Secondly, in our view the outcome of a joint sitting would seldom depend upon the ratio of the sizes of the two

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245 See for example the dissenting report of Senator Wright in 1959 Report, Appendix B.

246 See also Constitution Alteration (Parliament) 1967: Argument against the proposed law: The Case for NO; see Structure of Government Report, February 1985, 11, ACC Proc, Brisbane 1985, Vol II.

Houses. The political party system operates in the Senate, just as it does in the House of Representatives. Assuming that proportional representation is retained for the election of senators, representation of the two major parties in the Senate will continue to be fairly evenly divided. Therefore, the outcome of joint sittings under the present system would, in most cases, depend only on the size of a Government's majority in the House of Representatives. As long as a Government had a significant majority in the House, whether or not it controlled the Senate, it would always be able to ensure the passage of a Bill at a joint sitting even if the nexus was retained and the Bill was opposed by all non-Government members and senators. Conversely, if a Government had only a narrow majority in the House and no majority in the Senate, a Bill opposed by non-Government members and senators would usually be defeated even if the House had been increased to more than twice the size of the Senate.

Accordingly, we have decided not to adopt the proposal of the Structure of Government Sub-Committee of the Australian Constitutional Convention that the nexus be broken subject to the condition that the present weight of a senator's vote in relation to that of a member of the House of Representatives be preserved.

We do, however, **recommend** that the joint sitting provision be altered to require a special majority which directly takes the interests of the States into account. This is dealt with below in the context of our proposals to alter the deadlock procedure.[247]

We **recommend** that the nexus between the size of the House of Representatives and the Senate be broken, subject to the inclusion in the Constitution of provisions expressly limiting the size of both Houses of Parliament.

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[247] Under the heading 'Disagreement between the Houses'.

Number of senators

We were initially attracted to the recommendation of the Structure of Government Sub-Committee in its report to the Brisbane (1985) session of the Australian Constitutional Convention that the power of the Parliament to alter the size of the Senate be restricted so that the number of senators could not be diminished, nor increased to more than 100 senators. However, we decided that to place an absolute limit on the size of the Senate was not compatible with our decision to recommend that the representation of new States and Territories in the Senate be in accordance with a formula linking it to the number of members a new State or Territory is entitled to return.

Under the Sub-Committee's proposal, the Senate could be increased by a maximum of 24 more Senate places. Under our recommended formula, Senate representation of Territories and new States could, in theory, extend beyond that figure. We think it important to retain some flexibility in relation to the size of the Senate, particularly as we cannot foresee future developments on Territories and new States.

We do not, however, see any need to allow for an increase in the number of senators for the Original States. Twelve each has been entirely adequate for the Senate to perform its role effectively. We recommend that the number of senators for each Original State be fixed at that figure.

Number of members of the House of Representatives

There have been a number of proposals to limit the size of the House of Representatives by providing that the number of people represented by one member shall not be fewer than a specified number. In 1959 the Joint Committee recommended an average of no fewer than 80,000 people; in 1975 and 1976 the Melbourne and Hobart sessions of the Australian Constitutional Convention recommended 85,000, and in 1985 the Convention's Structure of Government Sub-Committee recommended that no fewer than 100,000 people be represented by one member.

In our view, it is better to limit the size of the House by fixing a minimum number of persons for an electorate than by placing an absolute limit on the number of members. The former approach allows reasonable increases in line with population growth while prohibiting excessive increases. We consider the figure proposed by the Structure of Government Sub-Committee to be appropriate. Accordingly, we recommend that the number of people represented by a member of the House of Representatives shall be not fewer than 100,000, subject to the present guarantee in section 24 that, five members at least shall be chosen in each Original State and to our recommendations relating to the representation of Territories and new States.

Representation of Territories

As noted above, the Parliament of the Commonwealth has full power to determine the number of senators and members of the Territories. Further it has full power to determine the method of their election or appointment and their voting rights in the Parliament. By contrast, the entitlement to representation of the Original States is controlled by the nexus and is subject to other qualifications, for example, that representation in the Senate shall be equal and that representation in the House shall be in proportion to population, subject to a minimum representation of five members.

We have **recommended** that the nexus be broken but in its place we have proposed a fixed number of senators to represent each of the Original States and a limit on the power of the Parliament to increase the size of the House of Representatives. We do not think it is logical to prescribe the entitlement to representation of the Original States in the Constitution but to leave the entitlement of Territories completely open-ended.

Further, the unqualified nature of the Parliament's power under section 122 has given rise to the fear that it could be abused. Indeed, the possibility that a Government could swamp the Senate with senators from the Territories, thereby giving them a

disproportionate or dominant voice in the 'States' House' was used by the plaintiffs in the Territories Representation Cases[248] as an argument against a broad construction of section 122. This argument was accepted by some judges in the first Territories Representation Case but not by the majority. Mason J, for example, dismissed the argument as an

> exercise in imagination [which] assumes the willing participation of the senators representing the States in such an enterprise, notwithstanding that it would hasten their journey into political oblivion. It disregards the assumption which the framers of the Constitution made, and which we should now make, that Parliament will act responsibly in the exercise of its powers.[249]

The Joint Select Committee on Electoral Reform, however, in its report on the representation entitlement of Territories and new States considered it 'imprudent to dismiss the possibility so lightly.'[250] The Committee said:

> The Party balance in the Senate could easily be upset by a small manipulation in favour of one or other of the Parties to ensure control of that Chamber. The situation is exacerbated by the possibility of multiple voting and selection by means other than direct election by the people.
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> 4.11 Similarly, the control of either Chamber, in a tight numbers situation, could be affected by legislative change affecting the existing entitlement of the Territories, as for instance to remove voting rights of Territory representatives ... Nor does historical experience support the assumption that a Parliament can always be relied on to act responsibly.[251]

Although we favour the view that the political process and the nature of our institutions are sufficient in themselves to prevent such manipulation, we acknowledge that concern about

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248 Western Australia v Commonwealth (1975) 134 CLR 201; Queensland v Commonwealth (1977) 139 CLR 585.

249 134 CLR 201, 271.

250 Report, 19.

251 id, 50-1.

possible abuse is widely held and will continue to exist so long as the terms and extent of the entitlement of Territories to representation is open-ended. For this reason and for reasons of consistency, certainty and democratic principle we **recommend** that the entitlement of Territories to representation in the Senate and the House of Representatives be prescribed in the Constitution.

We do not think that the extent of the representation of Territories in the House of Representatives is problematic because we see no reason why the people of the Territories should not be represented in proportion to their population in the same manner as the people of the States are represented. All Australians who are qualified to be enrolled as electors should be entitled to be represented in the House of Representatives, 'the people's House', on the same basis. There is no reasonable justification for doing otherwise.

The only qualification we would make to that relates to the question of minimum representation. Section 24 provides, inter alia, that, 'five members at least shall be chosen in each Original State.' This provision has an effective operation only in relation to Tasmania, the population of which is not large enough to sustain five members. At Federation, Western Australia was in the same position. Quick and Garran note that, without the guaranteed minimum, Tasmania and Western Australia would have been entitled to only 2 or 3 members each in the House of Representatives. They said:

> This was considered such an insignificant representation that provision was made that there should be a minimum number of five members in each State.[252]

It is unlikely that the two least populous colonies would have agreed to join the Federation without the inclusion of such a provision.

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[252] Quick and Garran, 455.

Clearly, such an argument does not apply to the position of Territories today. At present two members are chosen in the Australian Capital Territory (including Jervis Bay) and one in the Northern Territory. The people of the other Federal Territories do not have separate representation. We think that the Australian Capital Territory and the Northern Territory should be guaranteed a continuing representation in the House of Representatives and should maintain at least their present entitlement.

Accordingly, we recommend that the number of members of the House of Representatives chosen in each Territory which is entitled to be represented should be in proportion to the population of the Territory, provided that at least two members are chosen in the Australian Capital Territory and one member in the Northern Territory. We also recommend that, as at present, the Australian Capital Territory and Jervis Bay Territory should be treated as one Territory for the purposes of representation. We recommend that the residents (being persons qualified to be enrolled as electors) of a Territory which is not entitled to its own representative in the Parliament should be entitled to vote at an election of members of the House of Representatives in a Territory on the mainland of Australia, as the Parliament provides. Further, we recommend that a Territory should be entitled to its own representative in the House of Representatives when its population exceeds 50,000.

The appropriate entitlement of Federal Territories to representation in the Senate is more difficult to determine. We noted above that the Joint Select Committee on Electoral Reform recommended that the Commonwealth Electoral Act 1918 should be amended to provide that entitlement of a Territory to representation in the Senate should be on the basis of one senator for every two members of the House chosen in the Territory, subject to a guarantee that the Australian Capital Territory and the Northern Territory retain at least their existing representation of two senators each.

The formula adopted by the Committee was based on a resolution sponsored by Hon IBC Wilson MP at the Perth (1978) session of the Australian Constitutional Convention[253] and a subsequent submission by him to the Committee. The rationale for the Wilson proposal is that the representation entitlement of Territories (and new States) would be more or less consistent with maintaining the nexus in size between the Senate and the House of Representatives. Even though the chain of causation would be reversed, that is, the number of senators for a Territory would be in proportion to the number of members, the final result would be that the total number of members of the House would be, 'as nearly as practicable, twice the number of senators'.

We have recommended that the nexus between the size of the Houses should be broken. Nevertheless, we think that the Joint Select Committee's proposal for the representation of Territories in the Senate should be adopted. It is both practical and equitable.

We have decided, therefore, to **recommend** that a formula based on membership of the House (which, in turn, is based on population) be prescribed to determine Territorial entitlement rather than recommend a fixed number of senators. We think it unlikely that, in the foreseeable future, the breaking of the nexus would result in the size of the House increasing to much more than twice the size of the Senate. If our recommendation to break the nexus is not accepted, membership of the House will remain, as nearly as practicable, twice the size of that of the Senate. In either event, we think that the fairest and most practical solution at the present time is to provide a formula for the entitlement of all Federal Territories on the basis of one senator for every two members, thereby taking population growth into account. This should be subject to a maximum representation of 12 senators and to the Australian Capital Territory and the Northern Territory maintaining their present entitlement of two senators each.

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253 This matter remained on the agenda of the Convention and was the subject of debate at the most recent session - see ACC Proc, Brisbane 1985, vol I, Agenda Item B8.

In effect, this will mean that the Australian Capital Territory and the Northern Territory will be entitled to a third senator when they have six members in the House of Representatives (that is, populations in excess of 600,000 if our recommendations are adopted). Other Territories will be entitled to one senator on reaching a population large enough to return two members to the House of Representatives (that is, at least 200,000 people). We recommend, however, that residents (who are qualified to be enrolled as electors) of a less populous Federal Territory which is not entitled to its own representation in the Senate, should be entitled to vote at an election of senators for a mainland Territory (in practice, the Australian Capital Territory or the Northern Territory), as the Parliament provides.

Representation of new States

A majority of the Joint Select Committee on Electoral Reform recommended, 'that no new State should be admitted to the Federation on terms and conditions as to representation in the Parliament, more favourable then those prescribed for representation of Territories in the Electoral Act.'[254]

A dissenting report was submitted by one member, Senator Macklin. He argued that, if implemented, the proposal put forward by the majority report would condemn the Northern Territory (the only Territory presently pressing for Statehood) to the status of a second class State. In relation to the Senate, the Northern Territory and any other new States would be 'denied the equality of representation as a State which is the constitutional principle upon which the Senate is founded.'[255]

In response to the latter argument, we note that the framers of the Constitution expressly confined the principle of equal representation in the Senate to 'Original States' (section 7). It was an essential ingredient for the union of the colonies into

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254 Report, 45.

255 Report, 56.

the Federation. Further, they empowered the Federal Parliament to determine the extent of a new State's representation in both Houses of the Parliament 'as it thinks fit' (section 121). Clearly, it was envisaged that the representation entitlement of a new State might not be the same as that of the Original States, therefore, there is no constitutional reason for insisting on a principle of equality of Statehood, at least in relation to representation in the Federal Parliament.

We do not think that the representation entitlement of new States should be left to the Federal Parliament. It should be prescribed in the Constitution for the same reason as those we have given above in recommending that Territorial entitlement should be so prescribed, namely, consistency, certainty and democratic principle.

We see no reason to provide that a new State should have an equivalent guaranteed minimum representation in the House of Representatives as the Original States have, nor equal representation in the Senate. As we have observed above, there were sound historical reasons for such provisions in relation to the Original States. None of these apply to new States. We think that, as for Territories, population size is the most rational basis for determining representation entitlement of new States in both Houses, subject to a guaranteed minimum representation of one member in the House of Representatives and two senators, and a maximum of 12 senators. The guaranteed minimum will ensure that a new State will be at least as well represented as the Northern Territory in the House, and at least as well represented as that Territory and the Australian Capital Territory in the Senate. The upper limit on the number of senators will ensure that representation of a new State in the Senate cannot exceed that which we have recommended for the Original States.

Therefore, we **recommend** that:

(i) The number of members of the House of Representatives chosen in a new State should be in proportion to its population, subject to a guaranteed minimum representation of one member.

(ii) A new State should be entitled to representation in the Senate on the basis that it returns one senator for every two members whom it is entitled to return to the House of Representatives, subject to a guaranteed minimum representation of two senators and a maximum representation of twelve senators.

CASUAL VACANCIES IN THE SENATE

Recommendations

We **recommend** no change to the procedure set out in section 15 of the Constitution for filling casual vacancies in the Senate except that special provision should be made in terms similar to section 15 for Territorial senators.

We **recommend** that the last four paragraphs of section 15, being transitional provisions, now be repealed as expended.

Current Position

The machinery for filling casual vacancies in the Senate is set out in section 15 of the Constitution which provides:

> 15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.

Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognised by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

Where -

(a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and

(b) before taking his seat he ceases to be a member of that party (otherwise than by reason of the party having ceased to exist),

he shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with section twenty-one of this Constitution.

The name of any senator chosen or appointed under this section shall be certified by the Governor of the State to the Governor-General.

Transitional provisions follow.

Background

The first vacancy in the Senate after the introduction of proportional voting in 1949 occurred in December 1951. The Prime Minister and the Premiers, of whom three were Labor and three Liberal, agreed that, whenever a casual vacancy occurred in the Senate, the replacement should come from the same party as the former senator. In its 1958 and 1959 reports the Joint Committee on Constitutional Review expressed the unanimous view that the:

> principle should continue to be observed without exception so that the matter may become the subject of a

> constitutional convention or understanding which political parties will always observe.[256]

On 10 February 1975 a Government senator resigned. Three days later the Senate passed a unanimous resolution:

> The Senate commends to the Parliaments of all the States the practice which has prevailed since 1949 whereby the States, when casual vacancies have occurred, have chosen a Senator from the same political party as the Senator who died or resigned.[257]

Nevertheless the places of the senator who had resigned and of another Government senator who died in June were filled by the Parliaments of their States by senators who did not belong to the Government party. Thus a change was brought about in the political complexion of the Senate elected in May 1974.

Section 15 was altered to its present form by the referendum on Constitution Alteration (Senate Casual Vacancies) in May 1977. The proposal was approved by 73.3% of all electors and by majorities in all States. It should be noted, however, that the Constitution still does not ordain procedures and principles for filling casual vacancies in the places of Territorial senators. It is a statutory procedure - Commonwealth Electoral Act 1918 (Cth), section 44 - which governs the filling of Senate casual vacancies in the Territories.

In 13 cases subsequent to the 1977 referendum casual vacancies were filled by State Parliaments by persons nominated by the parties of the former senators. Several of the new senators belonged to parties which did not have a majority in the Parliament of the State concerned. On 2 April 1987, however, when there was a policy conflict between the Federal Labor Government and the Tasmanian Liberal Government, Senator Grimes,

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256 1959 Report, 43.

257 Hansard 146, 147, 173.

a Minister, resigned and the Tasmanian Government declined to appoint a replacement who would support the policy of the Federal Government and oppose the policy of the State Government. On 8 May the Leader of the Federal Opposition, Hon John Howard, MP, stated:

> I believe that the person appointed to fill casual vacancies of this kind ought to be the person nominated by the retiring Senator's political party.
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> Until the current impasse is resolved the Opposition will continue to grant the Labor Party a pair in the Senate in relation to Senator Grimes' vacancy. This means that the voting strength of Labor in the Senate will not be diminished in any way.[258]

Issues

The issue thus arises as to whether it is necessary to alter section 15 or whether, on the contrary, parliamentary conventions sufficiently address its problems.

A second issue independently arises as to whether the Constitution should provide for the filling of vacancies in the case of Territorial senators. If the answer is yes, the issue arises as to what should be the precise terms of that procedure.

Submissions

On 23 June 1987 we wrote to the leaders of all major political parties in the Federal and State Parliaments and the Northern Territory Legislative Assembly seeking their views as to the adequacy of section 15 of the Constitution and any changes to it that seem appropriate.

We received seven letters in reply. Three supported changing

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[258] Press release, 8 May 1987.

section 15 of the Constitution.[259] Three submissions opposed change.[260] One submission noted problems with section 15 but did not specifically recommend that section 15 be altered.[261]

The following specific arguments were put in favour of retaining section 15 in its current form:

(a) Section 15 is an adequate limitation on State Parliaments. Any alteration could only lead to a minimal increase in certainty, and could never be foolproof.[262]

(b) Section 15 correctly reflects the convention applicable to filling casual Senate vacancies by requiring the Parliament of the former senator's State to choose the nominee of the former senator's party. To so alter section 15 would reduce the role of State Parliaments to 'rubber stamp' decisions taken outside of Parliament.[263]

(c) Despite problems with section 15 as it is, no possible changes amount to improvements without their own problems. Therefore no change is justified.[264]

The following specific arguments were put in favour of changing section 15:

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259 Senator J Haines (Leader, Australian Democrats) S2419, 27 August 1987; Hon E Kirkby, MLC (Australian Democrat, NSW) S2616, 1 September 1987; Hon J Cain (Premier of Victoria, ALP) S2623, 23 September 1987.

260 Hon S Hatton (Chief Minister, NT, Country-Liberal) S2772, 29 August 1987; Hon R Gray (Premier of Tasmania, Liberal) S3825, 24 August 1987; Hon B Burke (Premier of WA, ALP) S3826, 20 August 1987.

261 Hon RJL Hawke (Prime Minister, ALP) S3827, 2 November 1987.

262 Hon B Burke.

263 Hon R Gray.

264 Hon S Hatton.

(a) It is essential in our political system that the political balance of the Senate, determined by the electorate, is not disturbed by the unilateral decision of a State Government. The potential for this to occur still exists under the altered section 15 of the Constitution, as was recently demonstrated in the case of the casual vacancy in Tasmania. It is the view of the Victorian Government that the potential for such an incident to re-occur is unacceptable.[265]

(b) Ambiguities in the wording of the current section 15 can be and should be corrected. The only solution lies with a further alteration to section 15 to make it clear that the State Parliament's right to choose a successor is confined to the relevant party's nominee.[266]

The Commission also received some submissions from the general public, all implying by their suggestions that section 15 in its present form is inadequate.[267]

Reasons for recommendation

Substance of Section 15. The convention governing Senate vacancies is well understood and has been generally observed. It is quite unpersuasive to argue that a State Government should not have to appoint a candidate selected by internal party processes when, without widespread disapproval, the party candidates for general elections are selected in much the same way. Quite to the contrary, we regard the convention as meritorious given that it guards the democratic representation of parties in the Senate against disturbance by a Senate casual vacancy.

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265 Hon J Cain.

266 Senator J Haines and Hon E Kirkby.

267 AG Hordern S877, 28 January 1987; SS Gilchrist S2641, 30 September 1987; WJ Riley S2811, 23 October 1987; AR Pitt S3065, 23 December 1987; DJ Bull S36, 25 February 1986.

Despite the view that the terms of section 15 allow for its spirit to be frustrated we do not recommend that the section be altered other than by the repeal of the transitional paragraphs. We can see no change that will produce an impeccable and impregnable constitutional provision. Yet we are satisfied that its defects can be ameliorated by sensible, practical actions such as those taken by Mr Howard. We trust that his example will be taken as setting a proper principle and precedent.

Territories. A necessary corollary to our recommendation that the Constitution be altered to provide for representation of Territories in the Senate is that the Constitution be altered to expressly provide for a mechanism in substance similar to section 15 governing casual Senate vacancies in the case of Territorial senators.

Where the senator is elected to represent a Territory without an elected legislature, a joint sitting of the House of Representatives and the Senate should be convened to choose the person to fill the vacancy until the expiry of the Senate term. Where the senator is elected by a Territory with a single legislative House (such as the Northern Territory) that House should be convened to choose the person to fill the vacancy. Where the senator is elected by a Territory with two elected legislative Houses, a joint sitting of those Houses should be convened to choose the person to fill the vacancy. Like the current section 15, the casual vacancy provisions for Territorial senators should provide that a vacancy be filled by a person of the same party as the previous incumbent senator's party. Such alterations ensure, as far as possible, that casual vacancies be filled following the same principles, whether the vacancy involves a State or Territorial senator.

Expended Provisions. The last four paragraphs of section 15 are transitional provisions which are now expended. Therefore we **recommend** they be repealed.

TERMS OF THE FEDERAL PARLIAMENT

Recommendations

We recommend that the Constitution be altered to provide that:

(i) The maximum term of the House of Representatives shall be four years.

(ii) The House of Representatives shall not be dissolved within three years of its first meeting after a general election unless the House has passed a resolution expressing a lack of confidence in the Government and no Government can be formed from the existing House.

(iii) Senators chosen in the States shall hold their places for two terms of the House of Representatives except in the event of a double dissolution.

(iv) Senators chosen in the Territories shall hold their places for one term of the House of Representatives.

(v) The polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.

(vi) If, after the election of senators following a dissolution of the Senate but before the division of senators into two classes takes place, a senator dies, resigns or becomes disqualified, the division is to be made as if the place had not become vacant.

Introduction

The Constitution contemplates that there should be an election every three years for the whole of the House of Representatives and for half the Senate. In the first fifty years of Federation

there was only one separate House of Representatives election and one double dissolution. There was no separate Senate election. The triennial system developed serious distortions after World War I and has broken down since World War II. These failures of the Constitution have become critical when the former Opposition has taken office without a majority in the Senate, as in 1929, 1941, 1949, 1972 and 1983.

Between the first double dissolution in September 1914 and the second in April 1951 the terms of service of senators were taken to begin on 1 July 1914 and every third year thereafter: section 13. Elections to replace or re-elect senators could be made within one year before their terms were to expire. Elections for the places to be filled on 1 July in the years from 1935 to 1947 inclusive were held on the same day as the elections for the House of Representatives in the preceding August, September or October. Thus it came about that senators were elected as much as ten months before their terms were due to begin.

Another defect in the choosing of senators became apparent when a Government senator died in April 1946, over 14 months before the expiry of his term. The Parliament of his State chose an adherent of the Opposition to take his place.

A third defect was shown for long periods between 1919 and 1949 when the Government or Opposition held all but one, two or three of the places in the Senate. This defect was overcome at the 1949 elections, when the proportional system of voting was substituted for the preferential system. Since that time, senators who support the Government and those who support the Opposition have been much closer in number.

Since the 1949 elections there have been constant departures from the triennial system. Indeed, there have been more federal elections in Australia than there have been in the United States which has a fixed biennial system. After the 1951 election there was for the first time an election for the Senate alone in May 1953. For only the second time, there was an election for the

House of Representatives alone in May 1954. Elections were then held for both Houses in December 1955 and, at the intended three year intervals, in November 1958 and December 1961. In November 1963, however, the elections for the two Houses were again put out of kilter by holding an election for the House of Representatives alone. Thereafter elections for the Senate and the House of Representatives alternated at the end of 1964, 1966, 1967, 1969, 1970 and 1972.

The increase which was made in 1949 in the number of senators from six to ten for each State came to have the hitherto unforeseen consequence of making it easier for places to be won by independents and by members of parties not represented in the House of Representatives. The Chifley Government (July 1945-December 1949) was the last to enjoy a majority in the Senate throughout its term. The Menzies Governments which succeeded it did not secure a majority until the whole Senate was elected by proportional voting after the double dissolution in 1951 and did not retain a majority in the Senate after June 1962. The Holt, Gorton, McMahon and Whitlam Governments never had a majority in the Senate. The Fraser Government, elected in December 1975, did not have a majority after June 1981. The Hawke Government has never had a majority.

Following the election for the House of Representatives in December 1972 the new Government had to work with a Senate in which half the members had been elected in November 1967 with terms expiring at the end of June 1974. The other half had been elected in November 1970 with terms expiring at the end of June 1977. In April 1974 it was announced that the Opposition senators, including those whose terms were to expire on 30 June, would vote against the supply Bills which were to cover government services for the five months after 30 June.

In the Parliament elected after the double dissolution in April 1974 there was a recurrence of the defect exposed on the death of the Government senator who died in April 1946. We have described

above[268] the breaches of the convention with respect to the filling of casual vacancies which had operated after the introduction of proportional voting for the Senate.

Disputes between the Houses of the Federal Parliament made it possible for both to be dissolved in November 1975, February 1983 and June 1987. Meantime the number of senators for each State was increased from ten to twelve at the elections held in December 1984.

The position has thus been reached in Australia where no member of the Federal Parliament knows when he or she will next have to face the electors. Every senator and every candidate for the Senate knows that the six-year terms which the Constitution provides for senators has become an illusion. The last senators who served six-year terms were those who were elected on 5 December 1964 and who took their places on 1 July 1965. One may contrast the position in the United States where all members of both Houses of Congress know the precise date on which their next elections will be held. Since 1945 Australians have gone to the polls 22 times (See Table 4.4 below).

It is clear that legislative means, such as increasing the size of both Houses or changing the electoral system for the Senate, or administrative means, such as double dissolutions, have not sufficed to overcome the shortcomings we have described in the operation of Australia's bicameral Federal Parliament. Only one defect - the filling of casual vacancies - has been substantially overcome by altering the Constitution itself.[269]

Under the Constitution as it stands, a Prime Minister can virtually secure an election of the House of Representatives whenever he or she desires. Under the Constitution as it would have been altered by the Constitution Alteration (Simultaneous Elections) Bills of 1974, 1977 and 1984, a Prime Minister could

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[268] Under the heading 'Casual vacancies in the Senate'.

[269] See above under the heading 'Casual vacancies in the Senate'.

virtually have secured an election for the House of Representatives and half the Senate whenever he or she desired. Under the Constitution as it stands, a Prime Minister can virtually secure an election for the House of Representatives and the whole Senate at any time after the Senate has produced a section 57 situation by twice rejecting a Bill or Bills.

On the other hand, under the Constitution as it stands, whenever a Government does not have a majority in the Senate - as has been the case from mid-1962 to late 1975 and since mid-1981 - the Senate can virtually force the House of Representatives to face an election without itself facing one.

The alterations of the Constitution which we recommend are designed to extend the maximum duration of the Federal Parliament to four years from the first meeting of the House. This would accord with the terms for all State Parliaments except the Parliament of Queensland. The alterations which we recommend are also designed to preclude the dissolution of the House or the Parliament within three years after the first meeting. This would bring about a situation similar in principle to that which now applies in Victoria and South Australia. The Government could not procure an election for the House, with or without a full or half Senate election, within the first three years and the Senate could not procure an election for the House within the first three years.

In our proposals the sole exception to a minimum term of three years for the two Houses is where 'the House has passed a resolution that the Government does not have the confidence of the House and the Governor-General is satisfied that it is not possible for a Government having the confidence of the House to be formed'. This is an exceedingly unlikely circumstance; 3 October 1941 was the last occasion on which defeat on the floor of the House obliged a Government to resign and on that occasion a new Government was formed from the existing House.

Our recommendations on the terms of the Federal Parliament form only part of a scheme which we are proposing for the alteration of those sections in the Constitution affecting the Parliament. The other parts of the scheme concern the powers of the Senate with respect to proposed financial legislation and the procedure for resolving disputes between the two Houses over other proposed legislation. In essence, we **recommend** that:

(a) the Senate should not have power to reject or block a Government's money Bills (as defined) during the first three years of the term of the House of Representatives, and that

(b) the procedure for resolving deadlocks should be altered so that a double dissolution can only take place in the fourth year of the term of the House of Representatives.

These recommendations are corollaries of Recommendation (ii) above for a minimum term of three years. We have found it convenient, however, to deal with the detail of the proposals in separate sections.[270]

We believe that the scheme which we propose will substantially overcome the difficulties we have discussed above.

Current position

Section 28 of the Constitution provides that the House of Representatives is to have a maximum term of three years but may be dissolved sooner by the Governor-General.

Sections 7 and 13 of the Constitution provide that senators are elected for a term of six years, with half the number of Senate places becoming vacant every three years. (Neither of these

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[270] Under the heading 'Relationship between the Senate and the House of Representatives'.

sections applies to the senators chosen in the Australian Capital Territory or the Northern Territory who, pursuant to section 42 of the Commonwealth Electoral Act 1918, serve the equivalent of one term of the House of Representatives.)

The Senate can be dissolved only in special circumstances and then only if the House of Representatives is dissolved at the same time. The special circumstances arise when the two Houses cannot reach agreement over a proposed law passed by the House of Representatives: section 57.

Following the election of the whole Senate after a double dissolution, half of the newly elected senators must retire or seek re-election after serving only three years to enable the three year rotation system to continue. Section 13 leaves it to the Senate to divide the senators chosen for each State into two classes, one consisting of short term, the other of long term senators.

Section 13 also provides that Senate elections may be held at any time within one year before Senate places actually become vacant. (Elections for Territorial senators are held on the same day as general elections for the House of Representatives.[271]).

Previous proposals for reform

1929 Royal Commission on the Constitution. The Royal Commission recommended that the maximum term of the House of Representatives be extended from three years to four years. It did not recommend any change to the terms of senators.[272]

1959 Joint Committee on Constitutional Review. The Committee recommended that instead of serving six year terms:

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271 Commonwealth Electoral Act 1918, section 43.

272 1929 Report, 268.

> ...senators should hold their places until the expiry or dissolution of the second House of Representatives after their election, unless the Senate should be earlier dissolved under the provisions of section 57 of the Constitution.[273]

The Committee did not recommend any change to the length of the term of the House of Representatives.

Australian Constitutional Convention. The Hobart (1976) session of the Australian Constitutional Convention adopted a resolution which proposed that the Constitution be altered to ensure that Senate elections are always held at the same time as elections for the House of Representatives.[274]

The Adelaide (1983) session also supported simultaneous elections of the House and the Senate. Further, it recommended that the term of the House be extended to four years and that the term of senators be extended to twice the term of the House of Representatives.[275]

The Adelaide Convention rejected a proposal put forward by Federal Government delegates for a three year fixed term for the House of Representatives. A number of those opposing the proposal, however, favoured a four year fixed term.

Referendums. Proposals to introduce simultaneous elections for the House of Representatives and the Senate have been put to referendum and rejected on three occasions. The results were as follows:

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[273] 1959 Report, 34.

[274] ACC Proc, Hobart 1976, 204.

[275] ACC Proc, Adelaide 1983, vol I, 322.

Year	Federal Government	National vote in favour	States with majorities	Opposition attitude
1974	ALP	48.3	NSW	OPPOSE
1977	LIBERAL	62.3	NSW VIC SA	SUPPORT
1984	ALP	50.6	NSW VIC	OPPOSE

A Bill, Constitution Alteration (Fixed Term Parliaments) was introduced by the Opposition in the Senate on 11 November 1981 and was passed by an absolute majority on 17 November 1982. The Bill provided for elections of the House of Representatives to be held on a fixed date every three years. An early dissolution was allowed if the House passed a vote of no confidence in the Government (and no alternative Government could be formed), or in the event of a double dissolution pursuant to section 57 to resolve a deadlock over proposed legislation. In either case, however, the incoming Government would merely serve out the term of its predecessor, thus ensuring the restoration of the three year cycle.

The 1982 Opposition having become the Government, the new Attorney-General introduced a similar Bill in the Senate on 12 May 1983 but had it withdrawn from the notice paper on 21 September 1983.

A Bill to give effect to the resolution of the Adelaide Convention that terms of the House of Representatives be extended to four years and senators' terms be extended to twice the term of the House (Constitution Alteration (Parliamentary Terms) 1983) was passed by the Parliament but was not submitted to referendum.

In September 1987 Senator Macklin (Australian Democrats) introduced a Bill, Constitution Alteration (Fixed Term Parliaments) 1987, which, inter alia, provides for a qualified fixed term of four years for both the House of Representatives and the Senate. The Bill has not yet received a second reading.

Submissions

A wide range of submissions were received, the majority of them favouring some change to the status quo. Most submission dealt only, or principally, with the term of the House of Representatives.

A significant number of submissions favoured extending the term of the House to four years. The main argument put forward in favour of lengthening the term was that it would improve the quality of Government. In the words of Mr C Miles, MP (who favoured a five year term), it would 'produce more effective, long-term government and would enable Parliamentarians to concentrate on decision-making unaffected by possible electoral backlash.'[276]

Similarly, Mr E Mayer, Chairman of the Business Council of Australia (BCA), considered that, '... the primary benefit to be gained from a longer term is the inducement it gives to more responsible government decision-making.'[277] The BCA has, in fact, been actively campaigning for the introduction of a four year maximum term for the House because, in its view, the frequency of elections has had an adverse impact on Government economic policy-making which has, in turn, had an adverse effect on private sector planning and business confidence. Mr Mayer drew our attention to a survey conducted by the Roy Morgan Research Centre for the BCA in May 1987 which found that a majority of Australians in five of the six States would have voted in favour of extending the term from three to four years at that time.

Similar views to those of Mr Mayer were put forward by Dr NR Norman who wrote that, 'No provision of the Constitution seems to be more limiting or inimical to the development of appropriate economic policies than the provisions ... limiting the

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276 S197, 1 August 1986.

277 S902, received 9 February 1987.

parliamentary term to three years, or possibly much less ... This short and uncertain term militates against the development of bold but unpopular initiatives, most expecially in the areas of tax and industrial relations.'[278]

An opposing view was put by Mr PG Harvey, who favoured a shorter term than the present one. He submitted that:

> If the desire is for more responsible decision making, then that aim is more likely to be achieved by more frequent elections rather than less frequent ones. Lacking the security of three, four or five years in office, knowing they will have to face the electorate at frequent intervals, Governments will be far less likely to go off on extreme frolics of their own designed to satisfy their own supporters without regard to the wishes or the best interests of the people as a whole. The swing from one extreme to the other will necessarily be avoided: incremental change will become the name of the game.[279]

The major argument raised against extending the maximum term of the House of Representatives was that, given that it rarely runs its present maximum term now, any extension is unjustified. Mr S Souter, for example, argued that 'If governments are foolish enough to give in to crass political opportunism, we are all the poorer, but the onus is surely on the government to change its ways, not for the leash to be lengthened because it can't - or won't.'[280]

Another argument put by a number of people was that extending the period between elections would not serve the interests of

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278 S3688, 2 December 1986.

279 S1359, 24 March 1987.

280 S2014, 27 April 1987; others who shared similar views included: JJ Conway S0275, 15 June 1986; H Smallwood S0151, 4 July 1986; CM Murray S2371, 12 August 1987.

democracy. JR Lawrence[281] considered that it 'would represent a reduction in the power of the Australian people to remove a bad government from office.' Further, he considered that the view that Governments need longer terms in order to carry out unpopular policies is 'twisted logic' - 'the government is elected to administer and lead the nation in accordance with the wishes of the people, not in defiance of those wishes.'

A significant number of submissions favoured fixing the term of the House of Representatives and, of these, a majority were also in favour of extending the term to four years.[282] Some, however, wanted the three year term to be fixed[283] or partially fixed.[284] S Hancock[285] favoured a fixed three year term for members of the House of Representatives but proposed that they should be elected in a series of rolling by-elections. In her view, 'a healthy democracy needs to be worked and tested continually.' At least one person favoured a fixed term of less than three years.[286]

Mr S Souter suggested that the real problem is the instability of government under the Westminster system. He observed that, 'Adding one more year to the maximum period between elections is not likely to generate any great or lasting effect as long as the government is still in a position to defeat the intention by being able to call an early election or of being forced to one, or where its majority in Parliament is such that it is spending more time trying to preserve it than running the country.' In his view, 'The ultimate solution would be a total separation of executive and legislature,' but a 'next-best solution' would be

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281 S2741, 25 October 1987.

282 For example, NJ Parkes, JA Pettifer and DM Blake, former Clerks of the House of Representatives, S0060, 27 June 1986; Dr IA Furzer S0134, 23 June 1986; HR Byron S232, 19 August 1986; MD Reynolds S0136, 23 June 1986.

283 For example, AJ Marr S2951, 1 November 1987; AB Kelly S709, 4 December 1986.

284 L Foley S2887, 28 October 1987.

285 S2222, 9 June 1987.

286 PG Harvey S1359, 24 March 1987.

'a comprehensive package ... attacking the various aspects of the problem, such as early elections, length of term, and so on.'[287]

Of those advocating a fixed term, some specified that one or more exceptions should be made, for example, in the event of a loss of confidence and/or a deadlock and/or failure of the Senate to pass supply.[288] Mr H Paas considered that, in the event of an early dissolution over, for example, a deadlock, the new Parliament should only serve out the remainder of the previous term. This would be a strong disincentive against going to an early election 'just because a Government felt it would do better under the circumstances prevailing at the time.'[289]

A number of submissions favoured a fixed minimum term of three years and a maximum term of four years.[290] JHL Beament submitted that such a scheme, with different rules applying to each segment of the term would be too complicated. He proposed a system under which an election could not be held before the end of a term unless supported by a two thirds majority of the House.[291]

Comparatively few submissions were received on Senate terms or on whether elections for the two Houses should be simultaneous. Mr E Mayer of the BCA submitted that senators should serve for two terms of the House of Representatives, otherwise, if the House had a four year maximum term, it would be difficult for elections

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287 S Souter S2014, 27 April 1987.

288 For example, AJ Marr S2951, 1 November 1987; H Paas S1925, 22 April 1987; AB Kelly S709, 4 December 1986; NJ Parkes, JA Pettifer and DM Blake S0060, 27 June 1986.

289 S1925, 22 April 1987.

290 I Robertson S2720, 19 October 1987; Senator J Watson S2074, 6 May 1987; Fairfield City Council (subject to qualifications) S2076, 12 May 1987.

291 S2472, 5 September 1987.

to be held at the same time. This would result in more rather than fewer elections.[292]

Others, including three former Clerks of the House of Representatives,[293] proposed that the Senate term should be the same as that of the House of Representatives. Mr P Taft considered that this would 'guarantee the Senate's accountability and ensure that it better represents the electors' wishes.' In his view it is unjust that under the present system, because of the larger quota of votes needed, it is 'possible for a party with over ten percent popular support (over a million votes) to miss winning a seat altogether.'[294] Mr M Mackerras strongly favoured simultaneous elections of the whole House and the whole Senate. He considered the present system of rotation of senators an 'unfair farce' and set out a statistical analysis in support of his view.[295]

A few submissions opposed the introduction of simultaneous elections - Mr S Souter, for example, considered that, as the proposal had been rejected three times at referendum, the electorate's verdict should be accepted as final for at least the foreseeable future.[296] Mr C Miles, MP, submitted that the Senate is the States' House and 'should not be subject to tampering or manipulation by the Government of the day.' In his view, the threat of an election could influence decisions by senators.[297]

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292 S902, received 9 February 1987; others favouring a Senate term equal to two terms of the House included Senator J Watson S2074, 6 May 1987 and Fairfield City Council (which also proposed that the Senate be dissolved as well as the House, if it blocked supply) S2076, 12 May 1987.

293 NJ Parkes, JA Pettifer and DM Blake S0060, 27 June 1986.

294 S2651, 5 October 1987; JR Lawrence expressed a similar view, S2741, 25 October 1987.

295 S821, 19 November 1987.

296 S2016, 27 April 1987.

297 S197, 1 August 1986.

Term of the House of Representatives

Extension of the maximum term

As we have pointed out above, federal elections are held much more frequently than the Constitution requires. In the 42 years since the end of World War II, Australia has had 22 federal elections of one kind or another - eight combined House of Representatives and half Senate elections, five House of Representatives elections, four separate half Senate elections and five double dissolutions. The elections are listed in Table 4.4.

TABLE 4.4

FEDERAL PARLIAMENTARY ELECTIONS: 1946-1987

1946	28 September	House of Representatives and half Senate
1949	10 December	House of Representatives and half Senate
1951	28 April	Double dissolution
1953	9 May	Half Senate
1954	29 May	House of Representatives
1955	10 December	House of Representatives and half Senate
1958	22 November	House of Representatives and half Senate
1961	9 December	House of Representatives and half Senate
1963	30 November	House of Representatives
1964	5 December	Half Senate
1966	26 November	House of Representatives
1967	25 November	Half Senate
1969	25 October	House of Representatives
1970	21 November	Half Senate
1972	2 December	House of Representative
1974	18 May	Double dissolution
1975	13 December	Double dissolution
1977	10 December	House of Representatives and half Senate
1980	18 October	House of Representatives and half Senate
1983	5 March	Double dissolution
1984	1 December	House of Representatives and half Senate
1987	11 July	Double dissolution.

This means that Australians have gone to the polls for federal elections approximately once every two years since 1945. If State elections are taken into account, the frequency of elections is even greater.

Frequent elections mean short parliamentary terms. The average length of the term of the House of Representatives in the post World War II period has been just over two years. In our opinion that is too short a cycle to encourage good government in the form of long-term planning and proper implementation and

assessment of programs. A short electoral cycle tends to place pressure on Governments to adopt expedient short-term measures for the purpose of electoral success. Governments which fear electoral repercussions in the near future are notoriously reluctant to make hard decisions, however necessary or desirable they may be for the long-term benefit of the country.

A system which fails to provide an environment favourable to responsible long-term Government planning is likely to have an adverse effect on the private, as well as the public sector. The Business Council of Australia, which is advocating the introduction of a four year maximum term, argues that:

> A three-year electoral term usually generates a pattern whereby governments, if they stay three years, tend to spend their first year settling in; begin taking tough and far-sighted decisions in the second year; and then effectively shut up shop in the third year because it is getting too close to the next election. Such a 'stop-start'approach to economic management is very destructive to business planning and confidence.[298]

Elections are, of course, at the heart of a democratic system; but one of their purposes is to give authority to a Government to carry out its policies. Repeated elections after short periods defeat this object.

Frequent elections are also expensive. The Australian Electoral Commission estimates that the poll held in July 1987 cost taxpayers approximately $47 million. If short electoral cycles were in the best interests of the country the expense of holding the elections would not be too high a price to pay, but we believe the reverse to be true.

One of the original reasons for the provision of a maximum three year term for the House of Representatives was that the lower Houses of the colonial legislatures sat for three years. In

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[298] Business Council of Australia, Towards a Longer Term for Federal Parliament (1987) 10 (pamphlet).

1897, Sir George Turner, in arguing that an amendment to the draft Commonwealth of Australia Bill which changed the term of the House of Representatives from three years to four should be changed back again, said:

> .... our people - the people of Australia - have got used to the period of three years, the period for which their own members are elected; and they would hardly understand why we should increase the term to four years for members of the House of Representatives.[299]

This rationale for a three year term no longer exists. All State legislatures except Queensland have changed to a four year system and it is the Federal Parliament which is now out of step. Tasmania extended the term of its lower House to a maximum of four years in 1973, New South Wales in 1981, Victoria in 1984, South Australia in 1985 and Western Australia in 1987. In each case, State parliamentarians have seen four years as the optimum maximum period for the life of a Parliament. In New South Wales, where the amendment had to be approved by referendum, the proposal was supported by the electors with a 66% vote in favour. At the Adelaide session of the Constitutional Convention (1983) the vast majority of delegates, representing all major political parties, supported an extension of the maximum term.[300]

One of the most common arguments cited in support of the maintenance of the three year term is that it provides greater parliamentary accountability to the public. It is said that the longer the parliamentary term the greater the risk that Governments will become complacent and unrepresentative of current opinion.

We do not agree that increasing the parliamentary term by one year would decrease parliamentary accountability. Accountability is dependant upon many factors besides frequent elections,

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299 South Australia, Official Report of the National Australasian Convention Debates, Adelaide, 1897, 1031.

300 ACC Proc, Adelaide 1983, vol I, 145-179.

including openness of government, debate and questioning in the Parliament and freedom of the media. In any event we consider that, on balance, any perceived disadvantages of this sort are outweighed by the advantages of increased stability and the likelihood of better government.

Further, the vast majority of countries with a democratic system of government have four or five year terms. Of the 143 Parliaments listed as at 30 June 1985 with the Inter-Parliamentary Union in Geneva, only 12 have terms of three years while another three have shorter terms, leaving the remaining 128 with terms of four or more years.[301]

For the reasons outlined above, we adopt the recommendation of the Adelaide session of the Australian Constitutional Convention and recommend that the maximum term of the House of Representatives should be extended from three years to four years.

Three year minimum term

The extension of the maximum term to four years, without more, will not bring about stable government in Australia.

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301 Parliaments of the World: A Comparative Reference Compendium, I-P.U., 2d ed, 1986, Vol 1, 3-10. The countries with terms shorter than three year are Suriname (2.25 years), the United States (two years, coinciding with elections for State legislatures) and the United Arab Emirates (two years). With respect to the United States, although the lower House is elected for a two year term, the Executive Government, which is not a parliamentary Executive as in Australia, is elected for four years. Apart from Australia, those countries with three year term Parliaments are Angola, Bhutan, El Salvador, Mali, Mexico, Nauru, New Zealand, Samoa, Sweden, Tonga and Yemen. Among the 41 listed with 4 year terms are Belgium, Denmark, Finland, Federal Republic of Germany, Greece, Israel, Japan, Netherlands, Norway, Portugal, Spain and Switzerland. The 83 countries listed with five year terms include Canada, France, India, Ireland, Italy, Malaysia, Papua New Guinea, Singapore and the United Kingdom.

One feature of our political system which is detrimental to stable government is the Senate's power to deny funds to a Government which enjoys the confidence of the House of Representatives. In effect, this means that the Opposition can force a Government to resign before the end of its term whenever it can muster a majority in the Senate. This is incompatible with another feature of our political system - responsible government.

Prior to 1974 this problem was not regarded as particularly significant. For 73 years all major appropriation and supply Bills introduced by the Government of the day were passed by the Senate. That situation changed when the Opposition in the Senate threatened to refuse supply in 1974 and deferred a vote on the Budget Bills in 1975.

Another feature of our system of government which detracts from stability and predictability is that the House of Representatives may be dissolved before its maximum term by the Governor-General, acting on the advice of the Prime Minister. In other words, a Government has the power to determine when an election will be held. It may choose to run its full term or it may choose to call an early election. The last three House of Representatives first met on 25 November 1980, 21 April 1983 and 21 February 1985 and could have continued for three years from those dates. The Houses were dissolved on 4 February 1983, 26 October 1984 and 5 June 1987. The dates of Australian federal elections have been more frequent and less predictable than those of the countries with which Australia has closest relations, namely, Japan, the United Kingdom and the Federal Republic of Germany.

The possibility of an election before the end of a Government's maximum term often leads to a long period of speculation and rumour. The uncertainty generated by this can have harmful consequences for public administration, business and the community generally. Further, it distracts the Government and the Parliament from giving proper attention to carrying out their respective functions. Dealings with State Governments, overseas Governments and overseas corporations are also disrupted.

The power of the Government to determine when an election will be held gives it an electoral advantage over the Opposition because it can choose the time which it considers to be most favourable to its own chances of re-election.

A third element in the present system which is detrimental to stable government is that, in the event of a dispute between the two Houses over a Bill originating in the House of Representatives, the Prime Minister may, providing that certain conditions have been satisfied, advise the Governor-General to dissolve both Houses. By so doing, the terms of all senators are cut short, as is the term of the House of Representatives, and elections must be held. We discuss this in more detail below. For present purposes it is sufficient to point out that this feature of the procedure for dealing with legislative deadlocks provides yet another opportunity for the manipulation of parliamentary terms to serve party political interests rather than the interests of the nation.

One solution to these problems would be to introduce a qualified fixed term system under which elections could not be held before the expiry of the House of Representatives term unless a Government lost the confidence of the House of Representatives and no new Government could be formed from the existing House. Under such a system, so long as a Government retained the confidence of the House of Representatives, it could not call an early election and the Senate could not force it to hold one. The potential for opportunism in the timing of elections would be removed.

Although we think that such a scheme has considerable merit, we do not think that it would meet with sufficient acceptance to make it a practical proposition at this time. There are those who would see it as an emasculation of the Senate, others who would consider it an unwarranted interference with an important power of Government. Moreover, it lacks the flexibility of the present system.

We have therefore decided to **recommend** a scheme which combines the present maximum term system with a qualified minimum term. The House of Representatives should have a maximum term of four years but should not be dissolved within the first three years unless it passes a vote of 'no confidence' in the Government and no other Government can be formed from the existing House. This would guarantee a Government at least three years in which to concentrate on governing the country. In the fourth year the Government would still be able to call an election when it chooses. In that year the Senate, should it consider that circumstances warrant it, could exercise its power to veto the Government's money Bills in order to force an early election. In other words, neither the power of the Government to call an early election nor the power of the Senate to force one should be completely abolished but should be held in check for most of the Parliament's term so as to ensure a significant period of stable government. The power of the Government to dissolve both Houses in the event of a deadlock should also be restricted to the fourth year.

We believe that our proposal achieves a sensible balance between competing interests. If implemented, it would ensure longer terms and more stability and predictability than the present system, while allowing for more flexibility than under a fixed four year term.

In reaching this decision, we were influenced by the fact that both Victoria and South Australia have, in recent years, adopted a three year qualified minimum term with a four year maximum for the lower House. The Victorian Constitution Act 1975 was amended in 1984. It provided the following exceptions to a three year minimum term for the Legislative Assembly:

(a) rejection of supply by the Legislative Council;

(b) development of a deadlock over a Bill of special importance; and

(c) a vote of no confidence by the Assembly.

These exceptions permit but do not require an early dissolution.

The South Australian Constitution Act 1934 was amended along similar lines to Victoria's in 1985. The exceptions to the three year minimum term are:

(a) a vote of no confidence by the Assembly;

(b) defeat of a motion of confidence by the Assembly;

(c) rejection of a Bill of special importance by the Legislative Council; and

(d) a double dissolution in accordance with section 41 (which provides for the settlement of deadlocks).

As in Victoria these exceptions permit but do not require an early election.

The Commission's scheme goes further than its State counterparts by providing for an exception to the three year minimum term only in the event of a loss of confidence in the Government. We believe that to allow for further exceptions would defeat the main purpose of the proposal, that is, to ensure stable government and fewer elections.

One possible consequence of our proposals should be noted. What some regard as the decline of the real power of Parliament in relation to the Executive was discussed earlier in Chapter 2. One powerful weapon the Executive has over Parliament is the threat to advise a dissolution. If our recommendations are approved, therefore, one important factor operating against parliamentary control over the Executive will have been removed for three years of each four year term.

Accordingly we recommend that the Constitution be altered to provide that the House of Representatives shall not be dissolved within three years of its first meeting after a general election unless the House has passed a resolution expressing a lack of confidence in the Government and no Government can be formed from the existing House.

Terms of senators

Terms of senators from States

We have reached our decision to **recommend** that Senate elections be held at the same time as elections for the House of Representatives and that State senators serve the equivalent of two terms of the House (except in the event of a double dissolution) notwithstanding that this proposal has been put to referendum three times in recent years and has failed to attract the requisite majority on each occasion.[302] We do so because the reasons for putting the proposal to referendum were sound ones and, so far as we are concerned, remain convincing. Further, we believe that the defeat of the proposal, particularly on the most recent occasion, had very little, if anything, to do with its merits or lack of them. This is sufficiently illustrated by the fact that the party which put the proposal to the people in 1977 campaigned against its acceptance in 1984 although it had been endorsed again in 1983 by the Adelaide Convention. In 1977, with the support of all federal political parties, the proposal gained the support of 62% of the electors and achieved majorities in three States, leaving it one State short of the special majority required for alteration of the Constitution.

As set out above State senators serve six year terms with half the number of Senate seats becoming vacant every three years. Although the intention was to hold elections for half the Senate with elections for the House of Representatives at three yearly intervals, there is no requirement that the elections be held on

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[302] The results of the referendums are listed at p 330.

the same date. If the House of Representatives is dissolved early or, in some cases, in the event of a double dissolution, elections for the two Houses can easily fall out of kilter. This happened as a result of the early House election in November 1963 - it was followed by three separate half Senate elections (1964, 1967, 1970) and three separate House of Representatives elections (1966, 1969, 1972).

The disadvantages of the present system have been thoroughly canvassed in the past. They are that separate half Senate elections simply add to the frequency of elections with consequent disruption to government and expense to the taxpayer. The Australian Electoral Commission estimates that the cost of a separate half Senate election would be approximately $40.5 million and a separate House election approximately $43.5 million. By comparison, a combined House and half Senate election would cost about $47 million.[303]

Further, a separate half Senate election cannot change a Government but it can increase the chances of conflict between the two Houses. On 17 February 1977, in his second reading speech on the Constitution Alteration (Simultaneous Elections) Bill, Senator Durack, Attorney-General in the Fraser Government, remarked that simultaneous elections would provide a more satisfactory electoral basis upon which the Government of the country could proceed.[304] The same point was made by Senator Evans, Attorney-General in the Hawke Government, in his second reading speech on the Constitution Alteration (Simultaneous Elections) 1984 Bill.[305]

Another unsatisfactory feature of the present system is that the membership of the Senate at a given time may not be an accurate

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303 These estimates are based on the cost of the 1987 election for the House of Representatives and the Senate, and include public funding.

304 Hansard, 195.

305 Hansard, 13 June 1984, 2882.

reflection of the expressed wishes of the people. This is because, under section 13 of the Constitution, elections for half the Senate may be held up to one year before the Senate places actually become vacant.

An argument which has been raised in the past against simultaneous elections is that they will detract from the power and independence of the Senate. The Prime Minister, so the argument goes, would be given a power over the Senate which he does not now have and senators might be less likely to exercise their power to reject, defer or amend Government legislation if their action could be used to trigger an early election involving half the Senate as well as the House.

First, we think that acceptance of an argument of this sort presupposes a rather cynical attitude towards senators. We would expect them to deal with proposed legislation on its merits.

Secondly, if our recommendations are adopted, including the proposal for a qualified fixed term for the House of Representatives, the Government would not be <u>able</u> to call an early election for the first three years of its term, even if its legislative program were being frustrated by the Senate. In other words, senators' terms would still be at least as long as the present six years and may be up to two years longer. The only exception to that would be in the event of a double dissolution, but under the present system senators terms may also be cut short in that way. Indeed, under our scheme (as discussed below) restrictions will be introduced on the timing of double dissolutions which will have the effect of giving both members and senators greater security of tenure.

Senate elections could, of course, be held at the same time as general elections for the House of Representatives without altering the terms of senators for the States in the way we have proposed. For example, the terms of those senators could be reduced to the equivalent of one term of the House of Representatives. We have not considered this option because it

is unnecessary to achieve our principal object, that is, to avoid the effect of too frequent elections on the stability of government.

We recommend that the Constitution be altered to provide that:

(i) senators chosen in the States shall hold their places for two terms of the House of Representatives except in the event of a double dissolution, and

(ii) the polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.

Terms of senators from Territories

As discussed above[306] representation of Territories in the Parliament is treated quite differently in the Constitution from the representation of States. Under section 122 of the Constitution, the Parliament is empowered to provide for Territorial representation 'in either House of the Parliament to the extent and on the terms which it thinks fit.' We have noted above that, pursuant to legislation passed in reliance on that section, senators chosen in the Australian Capital Territory and the Northern Territory serve the equivalent of one term of the House of Representatives.

For reasons of certainty in the interpretation of the Constitution and consistency with the position of the States we have recommended that the Constitution should prescribe the entitlement of the Territories to representation in the Parliament. For the same reasons we recommend that the Constitution should prescribe the terms of senators for the Territories.

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306 Under the heading 'Composition of the Federal Parliament'.

We have considered whether to recommend that the terms of Territorial senators be altered to bring them into line with State senators. The Australian Capital Territory and the Northern Territory each return two senators, and are likely to continue to return that number for the foreseeable future. This means that if their terms were the same as those of State senators and the rotation system also applied to them, there would only be one position to be filled in each Territory at a half Senate election. In that situation the party which retained a majority, however small, in a Territory would hold both places; the electors of that Territory would be denied proportional representation. If that distortion were avoided by having both places filled at alternate elections, the electors of that Territory would be denied rotation. Given these problems, we have concluded that the term of Territorial senators should not be changed.

Accordingly, we recommend that the Constitution should be altered to provide that senators chosen in the Territories shall hold their places for one term of the House of Representatives.

The rotation of State senators

Section 13 of the Constitution provides, inter alia, for the rotation of Senate places following dissolution of the Senate and a subsequent election:

> [A]fter each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of **three years**, and the places of those of the second class at the expiration of **six years**, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

Under our proposed scheme, following dissolution of the Senate, senators of the first class would serve two terms of the House of Representatives and senators of the second class would serve one term.

As can be seen, section 13 provides that the Senate itself determines which senators serve the longer term, which serve the shorter term. Although this system is open to abuse, it had never caused any dispute until recently. The Senate has been dissolved six times since it was first elected in 1901. Following the full Senate election on each occasion, the Senate has divided senators into classes by placing the names of those elected in each State on a list in the order in which they were elected and giving those placed in the top half of the list the longer term and the other half the shorter term. This method was obviously fair under the 'first past the post' voting system, but with the introduction of proportional representation in 1948 it was less appropriate.

In 1983, the Joint Select Committee on Electoral Reform recommended that the practice be changed. It recommended that, 'following a double dissolution election, the Australian Electoral Commission conduct a second count of Senate votes, using the half Senate quota in order to establish the order of election to the Senate, and therefore the terms of election'.[307] The Committee considered that this method would be a fairer reflection of the priority and preferences indicated by votes than the old method. As a result of the Committee's recommendation, the Commonwealth Electoral Act 1918 (Cth) was amended to require the Australian Electoral Officer for each State to conduct a re-count using the half Senate quota.[308]

Following the 1987 double dissolution there was a dispute in the Senate over whether or not to use the new system. By a majority of 36 votes to 32, the Senate voted to divide into long and short term classes by using the old method.[309]

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307 First Report, September 1983, para 3.39.

308 Commonwealth Electoral Legislation Amendment Act 1983, section 109; Commonwealth Electoral Legislation Amendment Act 1984, Schedule 1, Part 1.

309 Hansard, 17 September 1987, 212.

We have considered whether the matter should be settled and future conflict avoided by recommending that the method for dividing senators into classes should be prescribed in the Constitution. We have concluded that it should not.

In our view, it would be extremely difficult, if not impossible, to prescribe an appropriate formula without referring to the 'Australian Electoral Commission' and concepts such as 'proportional representation' in the Constitution. As a matter of principle, we consider this to be undesirable. A Constitution should set out broad principles and structures - it is not the place for detailed procedural matters. By referring in the Constitution to specific bodies which are not an integral part of our system of government or to methods of voting, an unnecessary rigidity would be introduced into the system. On the other hand, if we recommended that the Constitution should be altered to ensure that senators are divided into classes on the basis of 'relative success' at the election, the problem would not be resolved. The recent Senate dispute was over which method for determining 'relative success' should be used.

Therefore, we have decided that the best option is for the matter to be left to the Senate, as it is under the present section 13 of the Constitution.

There is, however, another aspect of section 13 which needs to be mentioned. Under section 15 of the Constitution (which deals with casual vacancies in the Senate) if a senator's place becomes vacant 'before the expiration of his term of service', the Parliament of the State for which he was chosen 'shall choose a person to hold the place until the expiration of the term.' No specific provision is made in the Constitution for the situation where, following the election of senators after a dissolution of the Senate but before the division of senators into long and short term classes, the place of a newly elected senator becomes vacant, for example, by death, resignation or disqualification.

The 1959 Joint Committee on Constitutional Review recommended that this should be rectified by providing that the division of senators into classes should be made as if the senator's place had not become vacant. A provision to this effect was included in the 1974, 1977 and 1984 Constitution Alteration Bills providing for simultaneous elections of the House of Representatives and the Senate. Clause 4 of Constitution Alteration (Term of Senators) 1984 provided for a new section 13(8), as follows:

> (8) Where, since the election of senators for a State following a dissolution of the Senate but before the division of the senators for the State into classes in pursuance of this section, the place of a senator chosen at the election has become vacant, the division of senators shall be made as if the place of the senator had not so become vacant and, for the purposes of section 15 of this Constitution, the term of service of the senator shall be deemed to be, and to have been, the period for which he would have held his place, in accordance with this section, if his place had not so become vacant.

We agree that a provision in those terms is desirable and therefore **recommend** that if, after the election of senators following dissolution of the Senate but before the division of senators into classes, the place of a senator becomes vacant, the division is to be made as if the place had not become vacant.

ELECTORAL LAWS AND WRITS FOR ELECTIONS

Recommendations

We recommend that sections 9, 10, 11, 12 and 31 of the Constitution be repealed and that the following sections be substituted:

> 9.(1) The Parliament may make laws, subject to this Constitution, with respect to the election of senators but so that the method of choosing senators shall be the same for all the States and for the Territories that are entitled to be represented in the Senate.

(2) The polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.[310]

10.(1) The Governor-General in Council shall cause writs to be issued for the election of senators whenever the terms of service of senators are about to expire or have expired.

(2) The writs shall be issued within ten days of the expiry of those terms of service.

31. The Parliament may make laws, subject to this Constitution, with respect to the election of members of the House of Representatives but so that the method of choosing members shall be the same for all the States and for the Territories that are entitled to be represented in the House of Representatives.

Current Position

The sections in the Constitution which the new sections set out above would replace are as follows:

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

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[310] The recommendation reflected in this sub-section is dealt with under the heading 'Terms of senators' above.

> 31. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

A related provision, which appears in the last paragraph of section 7, provides that the 'names of the senators chosen for each State shall be certified by the Governor to the Governor-General'.

The main effect of these provisions is:

(a) The Federal Parliament has power to make laws relating to elections of senators and members of the House of Representatives, but, in the absence of federal laws, the laws in force in each State relating to elections for the more numerous House of the relevant State Parliament apply, as nearly as practicable. (State laws were declared to govern federal parliamentary elections, in the absence of federal laws on the subject, because, for the first elections for the Federal Parliament, there would have been no applicable federal laws.)

(b) Both the Federal Parliament and the Parliaments of the States have power to make laws prescribing the method of choosing senators, but, if the Federal Parliament legislates on this subject, its legislation overrides State legislation on the same subject. The method of choosing senators prescribed by federal laws must be uniform for all the States.

(c) The power to cause issue of writs for elections of senators for a State is vested exclusively in the Governor of the State. The Governor certifies the names of the senators chosen for the State to the Governor-General. In contrast, the power to cause writs for general elections of members of the House of

> Representatives is vested in the Governor-General in Council.[311]

The reason why the States were given the powers they presently have in relation to the election of senators is that, when the Constitution was being prepared in the 1890s, it was agreed that the Senate should be a House representative of States. In that House the federating colonies wanted to be equally represented. Initially the idea was that senators would not be chosen directly by the electors of a State but rather would be chosen by the Houses of the State they were to represent.[312]

Even though it was later decided that senators should be directly elected, it was accepted that States should be assured certain controls over the elections of their senators, namely, exclusive power to legislate on the times and places of elections of senators for the State, a concurrent power with the Federal Parliament to legislate on the method of choosing those senators, and exclusive powers in relation to the issue of writs for Senate elections.

The occasions for the issue of writs by State Governors pursuant to section 12 are:

(a) the expiration of the terms of senators as determined by the last paragraph of section 7 (providing for six year terms) and by section 13 (providing for the rotation of senators);

(b) the dissolution of the Senate pursuant to section 57; and

(c) a determination that an election of a senator is null and void.[313]

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311 Section 32.

312 Convention Debates, Sydney (1891) 599.

313 See Vardon v O'Loghlin (1907) 5 CLR 201.

The Constitution places limitations on the time within which writs for elections may be issued. When the Senate has been dissolved, writs must be issued within ten days of the proclamation of such dissolution (section 12). When vacancies arising by expiration of the terms of senators are to be filled, the writs must be issued within one year before the places are to become vacant. This limitation is implicit in section 13. The High Court has, however, accepted that an exception should be made where an election of a senator has been declared void and where a State proposes to hold another election. In that case the time limitation prescribed in section 13 does not apply.[314]

Even when circumstances have arisen which entitle a Governor to cause writs for Senate elections to be issued, it does not follow that the Governor is obliged to cause writs to be issued or can be compelled by judicial process to do so.[315] The power in this case is expressed in permissive terms.[316]

Further, it is relevant to note that section 11 takes into account the possibility of a State failing to provide for its representation in the Senate by providing that the Senate may proceed to the despatch of business, notwithstanding such failure.

Current State law governing Senate elections is not uniform but contains some common elements.[317] Its general effect is 'to invest the State Governor with power to fix the dates for

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314 Vardon v O'Loghlin (1907) 5 CLR 201, 209-10, 214-5.

315 The King v Governor of the State of South Australia (1907) 4 CLR 1497.

316 In contrast, the duty of Governors to notify the Governor-General of the names of senators chosen for a State is expressed in imperative words (sections 7 and 15).

317 See Senators' Elections Act 1903 (NSW); Senators' Elections (Amendment) Act 1912 (NSW); Senate Elections Act 1960 (Qld); Election of Senators Act 1903 (SA); The Election of Senators Act Amendment Act 1978 (SA); Senate Elections Act 1935 (Tas); Senate Elections (Times and Places) Act 1903 (Vic); Senate Elections (Times and Places) Act 1912 (Vic) Elections of Senators Act 1903 (WA).

nomination, polling and the declaration of the poll; to provide that polling shall take place at places appointed under the relevant law of the Commonwealth; to endorse the requirement already existing under the Commonwealth Electoral Act section 64[318] that polls must be held on a Saturday; and to prescribe identical times for such matters as the hours of the poll and nomination'.[319]

Under the Constitution it is possible for writs for the same set of Senate elections to be issued on different days in different States. It is also possible for the dates for polling in those elections to vary from State to State. There is certainly no guarantee that polling days in Senate and House of Representatives elections will coincide. Federal-State cooperation, however, has ensured that writs for Senate elections have been issued on the same day, or within about a week of one another, and always in time for polling days to be uniform.[320]

Odgers described the practice in relation to the issue of writs for Senate elections as follows:

> [T]he Prime Minister informs the Governor-General of the requirements of section 12 of the Constitution ... states that it would be desirable that the States should adopt the polling date proposed by the Commonwealth and requests the Governor-General to invite the State Governors to adopt the suggested date.[321]

Federal-State cooperation has also ensured that the polling days for general elections for the House of Representatives and for the Senate have been the same when the elections for the two Houses are concurrent.

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318 Renumbered section 158.

319 C Saunders and E Smith, Appendix G in Standing Committee D's Fourth Report to Executive Committee, 21, ACC Proc, Adelaide 1983, vol II.

320 id, citing Commonwealth Election and Referendum Statistics 1901-1975 (1976) 9.

321 JR Odgers, Australian Senate Practice (5th ed, 1976) 92.

Issues

The particular issues we have considered are these:

(a) Should the power to cause writs for Senate elections to be issued remain with the State Governors?

(b) Should it be made clear that, when an occasion arises for the filling of State places in the Senate, writs must be issued so that electors have an opportunity to choose the maximum number of senators for the State?

(c) If the Constitution were to be altered to require that writs for elections of senators shall be issued within a specified time, should section 11 be retained?

(d) Should provision continue to be made in the Constitution whereby State electoral laws are to apply to federal parliamentary elections in the absence of applicable federal laws?

(e) Should the Parliaments of the States retain any of their present powers to legislate on matters concerning election of senators for the State?

Previous proposals for reform

Australian Constitutional Convention. At the Adelaide session of the Australian Constitutional Convention in 1983, it was agreed that the following practice should be observed as a convention:

> (33) State legislation and executive action for determining the times and places of Senate elections pursuant to section 9 of the Constitution is co-ordinated with the comparable legislation and executive action of other States and with the electoral laws of the Commonwealth. The dates (being the same for all States) for receipt of nominations and polling in Senate elections are settled between the Governor-General and the State Governor, acting on the advice of their respective Governments. Suitable dates are first proposed by the Commonwealth and are adopted in formal

> advice to State Governors unless they are unacceptable in one or more States. A State Government does not refuse to accept the suggested dates except on the basis of a sound practical objection to the convenience of the dates. The Governors issue writs for Senate elections pursuant to section 12 of the Constitution in time for the elections to be held on the agreed date.[322]

Bills for alteration of the Constitution. Proposals for simultaneous elections have been designed to ensure that the terms of senators expire upon the expiry or dissolution of the House of Representatives. All these proposals have left the power to cause writs for election of State senators with State Governors, but they have sought to make it mandatory for writs to be issued within a specified time from the date on which the places in the Senate to be filled by popular election become vacant. The Bills for Constitution Alteration (Simultaneous Elections) 1974, 1977 and 1984 also proposed that the second paragraph of section 9 be deleted or altered so as to remove the exclusive power of the Parliaments of the States to make laws on these subjects.

Reasons for recommendations

Our recommendation that section 12 of the Constitution be repealed and replaced by a section empowering the Governor-General to cause writs for Senate elections to be issued, and our further recommendation that the exclusive power of the Parliaments to make laws for determining the times and places of elections of senators for the State, are integral to the recommendations we have already made in relation to the terms of senators and of members of the House of Representatives. Were those recommendations to be adopted, changes to sections 9, 11 and 12 along the lines we propose would, in our view, be largely consequential.

The section which we recommend should replace section 12[323] not

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[322] ACC Proc, Adelaide 1983, Vol I, 321.

[323] Section 10.

only vests the power to cause writs to be issued for election of senators in the Governor-General in Council. It also makes it obligatory for the writs to be issued whenever the terms of service of senators are about to expire or have expired. The writs must be issued within ten days of the expiry of those terms of service. This is to make it clear that States and Territories which, under the Constitution, are entitled to be represented in the Senate cannot be denied that representation by actions of the Federal Government. The duty to cause writs for election of senators to be issued would, we believe, be enforceable in the courts.[324]

Our recommendations here are not, however, contingent on adoption of the earlier recommendations referred to. It seems to us that there are no compelling reasons for distinguishing between the issue of writs for Senate elections and the issue of writs for elections of members of the House of Representatives, such that the power to issue the writs is vested, in the one case, in State Governors as advised by State Ministers, and, in the other, in the Governor-General in Council. Indeed the Australian Constitutional Convention's endorsement of what is tantamount to de facto unification of the powers indicates that the Constitution does not reflect what is generally accepted as a desirable state of affairs. What the Convention resolved in 1983 recognises that, although the Constitution permits States to determine the dates on which writs for Senate elections shall be issued, and likewise the dates of the polls, the primary responsibility for deciding these matters resides, and should reside, with the Federal Government.

Were section 12 of the Constitution to be altered in the way we recommend, there would be no point in retaining section 11.

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324 The reasoning in R v Governor of the State of South Australia (1907) 4 CLR 1497, which led the High Court to deny an application for a writ of mandamus to compel a State Governor to issue writs under section 12, would probably not apply were legal action taken to enforce the duty imposed by the provision we propose.

Section 11 presupposes that States may choose not to exercise their constitutional right to be represented in the Senate, or that, at a certain time, the processes for election of senators for a State may be incomplete. Under our proposals, States would have no choice in the matter except in relation to the filling of casual vacancies in the Senate.

We have also concluded that, irrespective of whether our previous recommendations under the heading 'Terms of Parliament' are adopted, the exclusive legislative power granted to the Parliaments of the State by the second paragraph of section 9 should be withdrawn. The scope of the exclusive power to make law determining times and places of Senate elections is not altogether clear, but, more important, its existence is no longer of much practical significance. The same applies to the concurrent power granted by the first paragraph of section 9 to make laws prescribing the method of choosing senators for the State. Whatever the scope of this power may be, federal legislative powers under sections 9 and 10 are sufficiently wide to enable to Federal Parliament to legislate on all matters relating to the election of senators for States, except those within the exclusive domain of the States. The federal powers have been exercised to the full and will, we are confident, continue to be so exercised.

We **recommend** the removal from the Constitution of the provisions in section 10 and 31, which make State laws applicable to federal elections, as nearly as practicable, in the absence of federal laws. These provisions are no longer necessary and ceased to have any practical significances as soon as the Federal Parliament enacted its own legislation.

The legislative powers which would be conferred on the Federal Parliament by proposed sections 9 and 31 are largely powers the Parliament already has. The sections would, in a sense, be no more than re-enactments of present provisions, minus outmoded and unnecessary elements. The powers they confer are, it should be noted, expressed to be subject to the Constitution. This means

that laws made in exercise of them must conform with other relevant provisions of the Constitution, for example, provisions to guarantee democratic rights. The proposed sections 9 and 31 also require that the methods prescribed for choosing senators and members of the House of Representatives must also be uniform. There could not, for example, be one set of laws for States and another set for Territories.

SIMULTANEOUS FEDERAL AND STATE ELECTIONS

Recommendation

We **recommend** that section 394(1) of the Commonwealth Electoral Act 1918 (Cth) should be repealed.

Current position

Since 1922 the Commonwealth Electoral Act 1918 has precluded State and Federal elections being held on the same day by providing:

> 394. (1) On the day appointed as polling day for an election of the Senate or a general election of the House of Representatives, no election or referendum or vote of the electors of a State or part of a State shall, without the authority of the Governor-General, be held or taken under a law of the State.

No general election for a State Parliament has been held on the polling day for an election of the Senate or a general election of the House of Representatives. In the case of State by-elections, authority has sometimes been refused and sometimes granted.

There are no constitutional inhibitions against holding general elections for several or all State Parliaments on a federal polling day. The following table demonstrates, however, that since World War II the only cases of simultaneous State elections occurred in New South Wales and Queensland in 1947, in New South Wales and South Australia in both 1956 and 1962, in Victoria and

South Australia in 1970 and in Western Australia and Tasmania in 1986.

TABLE 4.5

ELECTION DATES SINCE WORLD WAR II

(Elections for the Tasmanian Legislative Council take place every May. Where separate elections are held for other Legislative Councils and the Senate the dates are given in brackets. 'DD' indicates dissolution of both Houses of the Federal Parliament.)

Year	NSW	VIC	QLD	WA	SA	TAS	AUS
1945		10 Nov					
1946		(15 June)		(4 May)		23 Nov	28 Sept
1947	3 May	8 Nov	3 May	15 Mar	8 Mar		
1948				(8 May)		21 Aug	
1949		(18 June)					10 Dec
1950	17 Jun	13 May	29 Apr	25 Mar (6 May)	4 Mar	6 May	
1951							28 Apr DD
1952		(21 June) 6 Dec		(3 May)			
1953	14 Feb		7 Mar	14 Feb	7 Mar		(9 May)
1954				(8 May)			29 May
1955		28 May (18 June)				19 Feb	10 Dec
1956	3 Mar		19 May	7 Apr	3 Mar	13 Oct	
1957			3 Aug				
1958		31 May (21 June)		(10 May)			22 Nov
1959	21 Mar			21 Mar	7 Mar	2 May	
1960			28 May	(30 Apr)			
1961		15 July					9 Dec

1962	3 Mar			31 Mar (12 May)	3 Mar		
1963			1 June				30 Nov
1964		27 June				2 May	(5 Dec)
1965	1 May			20 Feb	6 Mar		
1966			28 May				26 Nov
1967		29 Apr					(25 Nov)
1968	24 Feb			23 Mar	2 Mar		
1969			17 May			10 May	25 Oct
1970		30 May			30 May	23 May	(21 Nov)
1971	13 Feb			20 Feb		22 May	
1972			27 May			22 Apr	2 Dec
1973	17 Nov	19 May			10 Mar		
1974			7 Dec	30 Mar			18 May DD
1975					12 July		13 Dec DD
1976	1 May	20 Mar				11 Dec	
1977			12 Nov	19 Feb	17 Sep		10 Dec
1978	7 Oct						
1979		5 May			15 Sep	28 July	
1980			29 Nov	23 Feb			18 Oct
1981	19 Sep						
1982		3 Apr			6 Nov	15 May	
1983			22 Oct	19 Feb			5 Mar DD
1984	24 Mar						1 Dec
1985		2 Mar			7 Dec		
1986			1 Nov	8 Feb		8 Feb	
1987							11 Jul DD
1988	19 Mar						

There would seem to be great administrative advantages in arranging State elections on the same polling day, at least in contiguous States. Such States have many common tasks and problems which uncoordinated election dates leave their governments too few opportunities to discuss.

Practice in United States of America

The frequency and unpredictability of federal and State election dates in Australia strikingly contrasts with the practice in the oldest federation, the United States of America. There, elections are held on firm dates in alternate years (the Tuesday after the first Monday in November in even-numbered years) for all political positions which are due to be filled in the federal sphere and in 45 of the 50 States. The President and most State Governors are elected for four-year terms, senators for six years and members of the House of Representatives and most State legislators for two years.

The joint election date is not laid down by the United States Constitution but has evolved in a cooperative process. Whatever criticisms are made of the workings of other aspects of the American federal system, all Americans seem content with having a predictable election date. This appears not only to have reduced the incidence of disagreements between the two Houses in Washington but in all the State capitals. It seems also to have reduced in the United States the federal-State 'buck-passing' which is encountered in all State and most federal election campaigns in Australia.

Reasons for recommendation

In Australia, State elections are often conducted as if they were federal by-elections. In the United States the parties have to conduct their federal and State election campaigns at the same time. They have to put forward coordinated federal and State policies. They have every incentive to promote cooperation rather than confrontation between the Federal Congress and the

State legislatures. It is difficult to conceive of political or administrative reasons which would make it improper or difficult to conduct federal and State general elections on the same day in Australia when for many generations they have been held on the same day in the United States.

Therefore, we recommend the repeal of section 394(1) of the Commonwealth Electoral Act 1918.

RELATIONSHIP BETWEEN THE SENATE AND THE HOUSE OF REPRESENTATIVES

Powers of the Houses with respect to money Bills

Recommendations

We recommend that the Constitution be altered by omitting sections 53 and 54 and substituting sections incorporating the following principles:

(i) A proposed law imposing taxation or appropriating revenue or moneys may not originate in or be amended by the Senate.

(ii) The Senate may not amend any proposed law that:

- imposes taxation or deals only with the imposition, assessment or collection of taxation; or

- appropriates revenue or moneys:

  - for the ordinary annual services of the Government;

  - for the construction of public works or buildings;

- for the acquisition of land; or

- for the acquisition of plant or equipment

or for two or more of those purposes.

(iii) The Senate shall, however, have power to amend an appropriation Bill mentioned in (ii) above so far as it appropriates revenue or moneys for a new purpose, that is a purpose:

. in respect of which revenue or moneys were not appropriated for expenditure in the previous financial year; or

. the accomplishment of which is not specifically authorised by law or is dependent upon the enactment of a proposed law.

(iv) A Bill shall not be taken to be one within any of the classes mentioned in (i) and (ii) above by reason only that it contains provisions for:

. the imposition or appropriation of fines or other pecuniary penalties; or

. the demand, payment or appropriation of fees for licences or for services under the proposed law.

(v) The Senate may not amend a proposed law so as to increase a proposed charge or burden on the people.

(vi) The Senate may request amendment of Bills it may not amend.

(vii) If a Bill which the Senate cannot amend becomes a law, a provision in it that deals with a matter which could have been the subject of amendment by the Senate is of no effect.

(viii) The first paragraph of section 55 should be omitted.

(ix) Subject to the foregoing, the Senate shall have equal power with the House of Representatives with respect to all Bills.

We further **recommend** that the Constitution be altered by the inclusion of sections to limit the power of the Senate to reject, or refuse to pass, Bills it cannot amend. In particular we recommend that the Constitution be altered to provide that:

(i) If at any time during the first three years of a Parliament the Senate rejects, or fails to pass, within 30 days of its transmission, a Bill it cannot amend, the Bill shall be presented for the Royal assent.

(ii) If, in the fourth year of a Parliament, the Senate rejects, or fails to pass, within 30 days of its transmission, a Bill it cannot amend, the Senate and the House of Representatives may be dissolved simultaneously by the Governor-General in Council.

(iii) If a Bill which cannot be amended by the Senate has not been rejected or passed by the Senate at the time the House of Representatives is dissolved, or the Parliament is prorogued, the above provisions shall not apply.

The recommendations are an integral part of the series of recommendations we make in relation to the terms of the House of Representatives, the terms of senators, termination of the appointment of a Prime Minister and the power to dissolve the Houses of the Parliament.

Current position

Constitutional Provisions. Section 1 of the Constitution states that the Federal Parliament shall consist of the Queen, a Senate and a House of Representatives. It vests the legislative power of the Commonwealth in that Parliament. Section 58 provides that a law proposed for enactment by the Parliament does not become law unless it is passed by both Houses of the Parliament and receives the Royal assent. A proposed law passed by one House, but not the other, cannot become law except as provided for in sections 57 and 128.

The Constitution also declares the general rule to be that in legislating, the Senate and the House of Representatives have equal powers; that is, both may propose laws for enactment and both may amend or reject Bills passed by the other House. This general rule is contained in the last paragraph of section 53 which states:

> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

The exceptions to the general rule which are set out in the preceding paragraphs of section 53 are:

(a) Bills appropriating revenue or moneys, or imposing taxation, must originate in the House of Representatives;

(b) the Senate cannot amend a Bill imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government; nor can it amend any Bill 'so as to increase any proposed charge or burden on the people';

(c) the Senate may, at any stage, return to the House of Representatives a Bill it cannot amend with a request that the Bill be amended.

'But', section 53 also declares,

> a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.[325]

Section 53 does not expressly require the approval of the Senate of Bills that it is prohibited from originating or amending, but the generally held view is that, subject to sections 57 and 128, every Bill must be passed by the Senate for it to become law. In other words, should the Senate reject or fail to pass such a Bill, the Bill as passed by the House of Representatives cannot become law even if it should receive the Royal assent.

From time to time there have been disagreements between the Senate and the House of Representatives about whether a Bill transmitted by the House was susceptible to amendment by the Senate[326] These disagreements have been resolved in various ways, for example, by the Senate simply requesting amendment, by the House agreeing to the Senate's amendment, or by the Senate not pressing its amendment.

There have also been differences over whether, if a Bill is one the Senate cannot amend, and the Senate requests its amendment, the Senate can then press its requests, not just once in any of the stages of the passage of the Bill, but on two or more occasions.[327] Since the only way in which a Government's money Bills can be enacted into law is to have them passed by the Senate, a Government must, in practice, take notice of repeated

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325 There have, from time to time, been differences of opinion about whether a bill does or does not fall into any of these categories. See JR Odgers, Australian Senate Practice (5th ed 1976) 372, 390-1; JR Pettifer, House of Representatives Practice (1981) 376-7.

326 id, 377-9.

327 Odgers, op cit, 406-10; Pettifer, op cit, 380-4.

requests for amendment by the Senate. If it does not accede to them, it risks total rejection of those Bills.

Section 53 is followed by two sections the object of which is to ensure that Bills which the Senate cannot amend do not include provisions which it can amend. Section 54 provides:

> The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

Section 55 provides:

> Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
>
> Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Judicial Review. Legislation alleged to infringe section 55 can be judicially reviewed and ruled invalid. Section 55 is not infringed by an Act which imposes taxation and which also includes provisions dealing with the imposition of taxation, for example, provisions on the rate of tax, provisions defining who is liable to taxation and in respect of what, and provisions for ascertaining the extent of the liability.

But if the Act contains other kinds of provisions, for example, provisions requiring returns to be made to tax officials, provisions imposing criminal penalties, or even provisions making taxpayers liable to pay additional tax if they fail to make returns, then these other provisions are invalid.[328] The provisions dealing with the imposition of taxation will, unless they offend against some other provision of the Constitution, be sustained. On the other hand, if an Act violates the second

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328 Re Dymond (1959) 101 CLR 11.

paragraph of section 55, the whole Act would probably be held invalid.[329]

No case has arisen in which a court has been required to rule on the validity of an Act on the ground that it was passed contrary to section 53 or 54, or to rule on whether a Bill is one the Senate cannot originate or amend. But there are High Court dicta that since these sections, unlike section 55, refer to 'proposed laws', rather than 'laws', they are non-justiciable. 'Whatever obligations are imposed by these sections', Chief Justice Griffith observed in 1911, 'are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a Court of law.'[330] Barton J concurred. The sections were, he said, 'merely directory'.[331]

Appropriation for ordinary annual services of the Government. While judicial decisions in contexts other than section 53 have dealt with the question of what is an Act to appropriate revenue or moneys[332] and what is a Bill imposing or dealing with taxation,[333] the question of whether a Bill is for appropriation of 'revenue or moneys for the ordinary annual services of the Government' has been left to be resolved by the Houses themselves. How the question is resolved may, of course, be affected by legal opinions.

In 1952 the Solicitor-General (KH Bailey) advised the Auditor-General that appropriation for expenditure on capital works could be classified as expenditure for ordinary annual

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329 Resch v Federal Commissioner of Taxation (1942) 66 CLR 198, 222; Collector of Customs (NSW) v Southern Shipping Co Ltd (1962) 107 CLR 279, 302, 306.

330 Osborne v Commonwealth (1911) 12 CLR 321, 336.

331 id, 352. See also 355 (O'Connor J); Buchanan v Commonwealth (1913) 16 CLR 315; 329 (Barton ACJ); Federal Commissioner of Taxation v Munro (1926) 38 CLR 153, 188 (Isaacs J).

332 See E Campbell, 'Parliamentary Appropriations' (1971) 4 Adelaide Law Review 145.

333 eg High Court decisions on section 55.

services.[334] Following this advice, a motion was moved in the Senate that capital expenditure should be regarded as being for the ordinary annual services of the Government. The Senate was equally divided and, accordingly, the motion was defeated.[335]

In 1961 the Solicitor-General (KH Bailey) gave further advice on what could be characterised as an appropriation for the ordinary annual services of the Government, this time to the Joint Committee of Public Accounts. He advised that

> 'the ordinary annual services of the Government' may be described as those services provided or maintained within any year which the Government may, in the light of its powers and authority, reasonably be expected to provide or maintain as the occasion requires through the departments of the public service and other Commonwealth agencies and instrumentalities. Accordingly, if the expenditure is to be incurred for an item which is itself such a service, it may be regarded, without more, as proper for inclusion in an ordinary Appropriation Bill.[336]

The Solicitor-General went on to say that, 'with the possible exception of certain types of grants', there were 'no legal objections to the inclusion in an ordinary annual Appropriation Bill of all the provisions' that were then 'customarily included in an annual Appropriation (Works and Services) Bill.' But, he added, 'insofar as questions of law are involved, they are matters to be determined by the Parliament, and not by the courts.'

In 1964 the supply and appropriation Bills were drafted in accordance with the advice of the Solicitor-General. The Senate passed the Bills, but not without strong opposition to the form in which they had been presented.[337] A Committee Appointed by

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334 PP 95 of Session 1951-3, 168-70; cf the contrary view of Isaacs and Rich JJ in Commonwealth v Colonial Ammunition Co Ltd (1923) 34 CLR 198, 220-1.

335 Odgers, op cit, 381-3.

336 PP 70/1961.

337 Hansard, Senate 12 May 1964, 1054-88; 25 August 1964, 207-8.

Government Senators on Appropriation Bills and the Ordinary Annual Services of the Government (the Cormack Committee) recommended that the new practice be abandoned.[338] Subsequently the Government agreed to present its supply and appropriation Bills substantially in the form recommended by the Committee.

Compact of 1965. What is known as the 'compact of 1965' was announced by the Treasurer in his second reading speech on Supply Bill No 1, 1965-6 on 13 May 1965.[339] Under that compact, the annual appropriation and supply Bills were to be divided into two main categories. The first category would comprise Bills for the ordinary annual services of the Government and would cover items such as public service salaries, administrative expenses, services provided by departments and defence expenditure. Bills in this category were accepted as being not subject to amendment by the Senate. The second category would comprise Bills to authorise expenditure on or for:

(a) construction of public works and buildings;

(b) acquisition of sites and buildings;

(c) items of plant and equipment clearly identifiable as capital expenditure;

(d) grants to States under section 96 of the Constitution;

(e) new policies not authorised by special legislation.

It was accepted that the Senate could amend Bills in this second category.

The Treasurer indicated that Bills of the first class - that is Bills for appropriation of revenue or moneys for the ordinary annual services of the Government - would include items for

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338 PP 55/1967.

339 Hansard, HR, 13 May 1965, 1484-5.

expenditure on policies which were new when the prior budget was introduced.

Budget cycle. The annual calendar for the main annual, appropriation Bills is now as follows:

Mid August - the Budget for period to 30 June

Appropriation Bill No 1 - ordinary annual services

Appropriation Bill No 2 - capital works, special purpose grants to States and the Northern Territory, etc

Appropriation (Parliamentary Departments) Bill - recurrent and capital expenditure of the Parliament.[340]

March - Additional Estimates for period to 30 June

Appropriation Bill No 3 - additional expenditure for ordinary annual services

Appropriation Bill No 4 - additional expenditure for purposes in Appropriation Bill No 2

Appropriation (Parliamentary Departments) Bill No 2 - additional expenditure

April-May - Supply for period 1 July-30 November

Supply Bill No 1 - ordinary annual services

Supply Bill No 2 - for the same purposes as Appropriation Bills Nos 1 and 4

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340 There have been separate Bills in this category since 1982-3. This practice was adopted following recommendations of the Senate Select Committee on Appropriations and Staffing.

Supply (Parliamentary Departments) Bill.[341]

Standing appropriations. In addition to the annual appropriation and supply Bills there are Bills for what are known as special or standing appropriations. These are to authorise expenditure for purposes other than the ordinary annual services of the Government, for specific or indeterminate periods. The amount to be appropriated may also be specific or indeterminate. Special or standing appropriations account for 70% of federal expenditure. They include expenditure on remuneration and allowances of members of Parliament, Ministers, judges and various other office holders; pensions and other income support payments; retirement benefits and superannuation payments; election funding; bounties and other subsidies; assistance to primary industry; debt charges; general revenue and special purpose grants to States; and financial assistance to local government.[342]

Recent history. The appropriation Bills which, at present, are regarded as being subject to amendment by the Senate are:

(a) all the annual appropriation and supply Bills except Appropriation Bills Nos 1 and 3 and Supply Bill No 1;

(b) Bills for grants to States under section 96 of the Constitution;

(c) Bills to appropriate moneys for the parliamentary departments;

(d) loan Bills; and

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341 The items in supply Bills are subsequently incorporated in the main appropriation Bills introduced in August.

342 The estimates of payments from special appropriations and the Acts containing those appropriations are set out annually in budget paper No 2. See The Commonwealth Public Account 1987-88 (PP 205/1987) 28-40.

(e) special appropriation Bills.

Up till the end of 1973 the Senate passed all of the Government's annual appropriation and supply Bills notwithstanding that in nineteen out of the seventy-two years of the Parliament, the Government did not have a majority in the Senate.[343]

In April 1974, the Leader of the Opposition announced in the House of Representatives that the Opposition would oppose the Government's appropriation Bills and that if, as he expected, they were also opposed in the Senate (in which the Government did not have a majority), the Government would be forced to an election. The Prime Minister replied that if the Senate rejected any money Bill, he would advise the Governor-General to dissolve both Houses. Following an indication by the non-Government parties in the Senate that they would defer consideration of the Bills until the Prime Minister agreed to a general election for the House of Representatives, the Prime Minister advised the Governor-General to dissolve both Houses under section 57 of the Constitution, on the ground that six other Bills satisfied the requisite conditions for a double dissolution. The Senate then passed the appropriation Bills and the Governor-General dissolved both Houses.

In October 1975, the non-Government parties in the Senate again resolved to defer consideration of financial measures - a loan Bill and Appropriation Bills Nos 1 and 2 - until the Government agreed 'to submit itself to the judgment of the people, the Senate being of the opinion that the Prime Minister and his

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343 A list of the annual appropriation and supply Bills passed by the Senate in those 19 years is set out in ACC, Standing Committee D, Special Report to Executive Committee: The Senate and Supply (1977) 43-5.

Government no longer ... [had] the trust and confidence of the Australian people ...'.[344]

On receiving the Senate's ultimatum, the House had resolved that the action of the Senate in delaying passage of the Bills 'for the reasons given in the Senate resolution is ... contrary to established constitutional convention ...'.[345] On being informed of this resolution, the Senate had passed a resolution defending its action. Its action was, it was asserted, 'a lawful and proper exercise within the terms of the Constitution of the powers of the Senate'.[346] It was further asserted:

(a) that the powers of the Senate were expressly conferred on the Senate as part of the Federal Compact which created the Commonwealth of Australia;

(b) that the legislative power of the Commonwealth is vested in the Parliament of the Commonwealth which consists of the Queen, the Senate and the House of Representatives;

(c) that the Senate has the right and duty to exercise its legislative power and to concur or not to concur, as the Senate sees fit, bearing in mind the seriousness and responsibility of its actions, in all proposed laws passed by the House of Representatives;

(d) that there is no convention and never has been any convention that the Senate shall not exercise its constitutional powers; and

(e) that the Senate affirms that it has the constitutional right to act as it did and now that there is a

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344 See Report of Standing Committee D, 23 June 1977, 7-8, ACC Proc, Perth 1978.

345 id, 10.

346 id, 11.

> disagreement between the Houses of the Parliament and a position may arise where the normal operations of government cannot continue, a remedy is presently available to the Government under section 57 of the Constitution to resolve the deadlock.

The House responded to the Senate's resolution by passing a resolution affirming its earlier stand, but in stronger and more specific terms. The events which ensued have already been described in Chapter 2 of this Report.[347]

Unresolved issues. It is clear that the Constitution raises a number of problems which are still unresolved and for which there is no clear answer.

The first problem is whether the Constitution even allows the Senate to veto the money Bills which, by section 53, it is prohibited from amending. Some commentators have argued that the Constitution, by implication and read in the light of relevant history, does not give the Senate that power.[348] Most have, however, taken the view that the Senate does, legally, have a power of veto. This view is supported by High Court dicta in the PMA Case of 1976.[349]

A second question is, assuming that the Senate does, legally, have power to veto Bills it cannot amend, were the Senate's actions in 1974 and 1975 in breach of constitutional convention? This question is, again, one on which opinions were, and still are, divided. Some have questioned whether there was an applicable convention. Others have, both then and since, differed over what convention required. For example, did convention require that the Senate refrain from exercising its

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347 For the chronology see Pettifer, op cit, 62-4.

348 These arguments are summarised in ACC, Standing Committee D, Special Report to Executive Committee: The Senate and Supply (1977) 31-5.

349 Victoria v Commonwealth (1976) 134 CLR 81, 121 (Barwick CJ), 143 (Gibbs J), 168 (Stephen J), 185 (Mason J).

power of veto only if the Senate objected to the finance Bills on their merits?

The disputation has shown that there are no universally accepted 'right' answers to the issues raised by the Senate's actions in 1974 and 1975. There is still disagreement about what the Constitution means and that disagreement is unlikely to be resolved by judicial decision. There is also disagreement about proprieties - about how legal power should be exercised. The only point on which there is general agreement is that the general issue about 'the Senate and supply' is, constitutionally, one of great importance because it goes to the heart of a federal system of responsible parliamentary government. Since 1975, all major political parties represented in the Federal Parliament have supported moves for revision of the Constitution to deal with the issue. They have not, however, agreed on what the solution should be.

We describe the recent proposals for revision of the Constitution, so far as it deals with the Senate and supply, later on in this part of the Chapter under the heading of 'Previous proposals for reform'.

Powers of other upper Houses over money Bills

In its report, the Advisory Committee on Executive Government observed:

> The Senate's power to reject supply and some of its other legislative powers are not shared by most upper houses operating in the parliamentary executive system. Indeed, the Australian Senate is a far more powerful upper house than is normal in most other countries which have systems of parliamentary government.[350]

The Committee referred to limitations on the powers of upper Houses in the United Kingdom and in New South Wales. It noted also that:

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[350] Executive Report, 22.

> Some countries, such as Sweden, New Zealand and Papua New Guinea, the Canadian provinces, the State of Queensland and the Northern Territory have either abolished their upper houses or have never had one. Others have considerably reduced the powers remaining to their upper houses.[351]

The Australian Senate is, in some respects, unique. Unlike the House of Lords in the United Kingdom, it is an elected chamber. Unlike the upper Houses in the Australian States, it is a chamber in which States are represented, and by equal numbers of senators. It differs from the Canadian Senate, the members of which are appointed rather than elected. It resembles the Senate in the United States Congress in that States are equally represented, but differs from it because the United States Senate operates under a presidential rather than a Westminster-type system.

We have nevertheless thought it desirable to have regard to the powers of certain other upper Houses in relation to money Bills, in particular those of the House of Lords and of the Legislative Councils in the States. We consider experience in the States is particularly relevant. In drafting the provisions of the Constitution relating to the powers of the Senate, the Founders were attentive to the problems which had already arisen in a number of the colonies concerning the powers of the upper Houses. Indeed, section 53 of the Constitution was based largely on a 'compact' which both Houses of the South Australian Parliament had agreed on in 1857. Provisions in the Constitution Acts of South Australia, Tasmania, Victoria and Western Australia are similar to sections 53-55 of the Federal Constitution, though in recent years there have been moves to alter them.

It is also worth noting that following the events of 1975 in the federal sphere, resolutions were passed in four of the State Parliaments expressing opinions on the propriety of withholding of supply. The Legislative Assemblies in New South Wales and Victoria passed resolutions which, in effect, supported the

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[351] ibid.

Senate's action.[352] In contrast both Houses of the South Australian Parliament and the Tasmanian House of Assembly condemned refusal of supply by an upper House.[353]

United Kingdom. Under the Parliament Act 1911 the House of Lords' power to amend and reject money Bills was removed entirely. Section 1 of the Act provides that if a money Bill has been passed by the House of Commons at least one month before the end of the session, and is not passed by the House of Lords without amendment within one month after its transmission to the Lords, the Bill shall, unless the House of Commons directs to the contrary, be presented for the Royal assent. The term 'Money Bill' is defined in sub-section 2 of that section to mean a public Bill which, in the opinion of the Speaker, contains only provisions dealing with certain subjects. These subjects include the imposition or regulation of taxation, supply and appropriations. The Speaker's certificate is indorsed on the Bill and once given is conclusive for all purposes.

New South Wales. Section 5 of the Constitution Act 1902 provides that all appropriation Bills shall originate in the Legislative Assembly. Section 5A, which was inserted in 1933,[354] provides:

> (1) If the Legislative Assembly passes any Bill appropriating revenue or moneys for the ordinary annual services of the Government and the Legislative Council rejects or fails to pass it or returns the Bill to the Legislative Assembly with a message suggesting any amendment to which the Legislative Assembly does not agree, the Legislative Assembly may direct that the Bill with or without any amendment suggested by the Legislative Council, be presented to the Governor for the signification of His Majesty's pleasure thereon, and shall become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill.

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352 NSW Debates (1975-76) No 35, 2583, 2588; Vic, 324 Debates (1975) 8042.

353 SA Debates (1975) 1855, 1887; Tas, Journals and Printed Papers of Parliament, Vol 192, Pt 1, 398.

354 The section is entrenched.

(2) The Legislative Council shall be taken to have failed to pass any such Bill, if the Bill is not returned to the Legislative Assembly within one month after its transmission to the Legislative Council and the Session continues during such period.

(3) If a Bill which appropriates revenue or moneys for the ordinary annual services of the Government becomes an Act under the provisions of this section, any provision in such Act dealing with any matter other than such appropriation shall be of no effect.

The term 'ordinary annual services' is not defined.

Other money Bills are treated in the same manner as ordinary Bills. This means that if they have twice been rejected by the Legislative Council, or if the Council fails to pass them within two months of transmission, and the deadlock cannot be resolved by other means, they may be submitted to a referendum. If they are approved by a majority of electors, they may be presented for the Royal assent.[355]

The class of Bills to which section 5A applies is much more narrow than the class of Bills to which the Parliament Act 1911 (UK) applies. It does not, for example, include taxation Bills.

A further point to be noted is that although the Constitution Act does not expressly prohibit the Council from amending money Bills, sections 5A implies that the Council cannot amend Bills appropriating moneys for the ordinary annual services of the Government, but may merely request amendments.

Victoria. The Constitution Act 1975 contains provisions similar to sections 53 and 54 of the Federal Constitution, but the class of appropriation Bills which the Legislative Council is prohibited from amending is wider than that referred to in section 53. The Council cannot amend any Bill to appropriate any

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[355] See section 5B.

part of the Consolidated Revenue Fund, but it may reject such a Bill.[356]

In 1984 the Constitution Act 1975 was amended to provide for a qualified fixed term for the House of Assembly and to change the fixed term of Legislative Councillors to a term of two Assemblies. Both the rejection of supply by the Legislative Council and the development of a deadlock between the Houses over 'a Bill of special importance' are exceptions to the new fixed term rule.

If the Legislative Council rejects or fails to pass 'a Bill dealing only with the appropriation of the Consolidated Fund for the ordinary annual services of the Government' within one month after its transmission to the Council, the Governor may dissolve the Assembly. A Bill of this type is defined not to include 'a Bill to appropriate monies for:

(a) the construction or acquisition of public works, land or buildings;

(b) the construction or acquisition of plant or equipment which normally would be regarded as involving an expenditure of capital;

(c) appropriation for services proposed to be provided by the Government which have not formerly been provided by the Government; or

(d) appropriation for or relating to the Parliament.'

The Act further provides for the Speaker to certify that a Bill is one which deals only with the appropriation of the Consolidated Fund for the ordinary annual services of the Government. The certificate is conclusive for all purposes.

With respect to other Bills, the Constitution Act now provides that, if the Council rejects a Bill passed by the Assembly and the Assembly resolves that it is a 'Bill of special importance'

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356 Section 62. Bills were rejected by the Council in 1947 and 1952.

and passes it for the second time, the Governor may dissolve the Assembly if the Bill is rejected again by the Council. A Bill is deemed to have been rejected if it is not passed within two months after transmission to the Council.

South Australia. The Constitution Act 1934 includes provisions similar to those in Victoria's Constitution Act relating to the powers of the Legislative Council over money Bills.[357] But it also makes it clear that non-observance of these provisions does not affect the validity of any Act assented to by the Governor.[358]

Following the dissolution of the Federal Parliament on 11 November 1975, both Houses of the South Australian Parliament resolved, on 12 November 1975, inter alia, that 'The Lower House of the Parliament grants Supply. The Upper House may scrutinise and suggest amendments to money Bills but should not frustrate the elected Government by refusing or deferring Supply'.[359]

In 1984 the Constitution Act was amended along the lines of the 1984 amendments to the Victorian Constitution Act. No distinction, however, was made between appropriation Bills and other Bills.

Western Australia. Under section 46 of the Constitution Acts Amendment Act 1899-1983 the powers of the Legislative Council over money Bills are restricted in much the same way as the Senate's are and, like the Senate, the Council may reject any money Bill it cannot amend. This power has never been exercised.

The Act makes no provision for resolution of disputes between the two Houses. The Royal Commission into Parliamentary Deadlocks, appointed in 1984,[360] has recommended that the Act be amended to

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357 Sections 59-64.

358 Section 64.

359 South Aust Parl, Debates (1975) 1855, 1887.

360 Royal Commission into Parliamentary Deadlocks, Report, 71-9.

include such provisions. Specifically it has recommended that a suspensory veto along the lines of section 5A of the Constitution Act of NSW should be adopted as the method which should be prescribed for overcoming deadlocks over supply Bills. With regard to other Bills (which would include other financial Bills, for example Bills imposing taxation and annual appropriation Bills other than supply) it recommended that a procedure based on section 57 of the Federal Constitution should be adopted to resolve deadlocks.

The recommendations of the Royal Commission have not been implemented to date.

Tasmania. The Constitution Act 1934 prohibits the Legislative Council from originating or amending an Act appropriating revenue for the ordinary annual services of the Government, income tax and land tax rating Bills. The Council may, however, reject any such Bill.[361] There are also anti-tacking provisions, and so much of an Act which contains items which offend against these provisions are declared to be of no effect. It is also provided that a Bill for appropriating moneys for the ordinary annual services of the Government shall not appropriate for a period in excess of one year.[362]

The Constitution Act provides no mechanism for resolving any dispute between the Houses over proposed laws. In 1981 the Royal Commission into the Constitution Act 1934 was established to inquire into the settlement of deadlocks. With respect to money Bills, its main recommendations were that:

(a) an appropriation or supply Bill confined to the ordinary services of the Government should be subject to Royal assent if not passed by the Legislative Council within six weeks of its transmission to that chamber;

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361 The Council withheld supply in 1948.

362 Sections 37-45.

(b) the proposed six week suspensory veto should apply to all Bills solely concerned with the appropriation of funds other than appropriation for new policies not authorised by special legislation or in respect of which funds have not been appropriated in the previous year. If a Bill appropriating funds contains other provisions, the Legislative Council's power should be the same as that in respect of any general legislation, provided that any amendment does not insert any provision for the appropriation of moneys or impose or increase any burden on the people;

(c) the proposed six week suspensory veto should apply to all Bills dealing with taxation.[363]

The recommendations of the Royal Commission have not been implemented to date.

Previous proposals for reform

Senate Select Committee on the Constitution Alteration (Avoidance of Dissolution Deadlocks) Bill 1950. The Committee recommended that if a money Bill (which was not defined) had not been passed by the Senate within two months of its receipt, the Bill should be referred to a joint sitting of the two Houses. If passed by an absolute majority of the members of the two Houses it should be presented for the Royal assent.[364]

Joint Committee on Constitutional Review 1959. The Committee recommended alteration of section 57 to make special provision for deadlocks between the two Houses over proposed laws which impose taxation and proposed laws for appropriation of revenue or moneys for the ordinary annual services of the Government. It proposed that the section be altered to provide that:

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363 See Report (1982) 49-57.

364 Senate Paper No S1 of 1950.

> A deadlock shall be deemed to arise between the two Houses of the Parliament in relation to a proposed law imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government where the House of Representatives, in any session, passes the proposed law and transmits it to the Senate for the concurrence of the Senate and, at the expiration of a period of thirty days after the date on which the proposed law is transmitted to the Senate, the Senate has not passed the proposed law and the session has not ended.[365]

Once a deadlock of this kind had arisen, the Governor-General in Council should be able to (a) convene a joint sitting of the two Houses to vote together on the proposed law as last passed by the House of Representatives, or (b) dissolve the Senate and House of Representatives simultaneously. If a joint sitting was convened and the proposed law was there approved by an absolute majority of the members of both Houses and half the total number of members of both Houses from a particular State, in at least half the States, the Bill should be deemed to have been passed by both Houses.

A Bill based on the Committee's recommendations was introduced in the Senate in 1964 but was not pursued.[366]

Australian Constitutional Convention. At the Hobart (1976) session of the Convention in 1976 two proposals dealing with the Senate's powers over money Bills were moved. The Hon EG Whitlam moved:

> that the Constitution be amended so as to remove the power of the Senate to reject, defer, or in any other manner block the passage of laws appropriating revenue or moneys, or imposing taxation.[367]

The Hon Sir Charles Court moved an amendment:

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365 1959 Report, 28.

366 The Constitution Alteration (Disagreement between The Senate and the House of Representatives) Bill of 1964.

367 ACC Proc, Hobart 1976, 98.

(a) that if the House of Representatives passes a proposed law appropriating revenue or moneys for the ordinary annual services of the Government and the Senate rejects it or fails to pass it within 30 days of it having been transmitted to the Senate the Governor-General shall forthwith dissolve the Senate and the House of Representatives simultaneously;

(b) that if after such dissolution the House of Representatives again passes the proposed law it shall be taken to have been duly passed by both Houses of Parliament and shall be presented to the Governor-General for the Queen's assent; and

(c) that during the period from the time of the commencement of the dissolution until after the House of Representatives next meets the Governor-General in Council may to the extent not otherwise provided by existing legislation authorise the drawing and expenditure of funds for the expenses of the election and the expenses necessary to maintain government in the meantime.[368]

After debate the Convention resolved that the motion and amendment be referred to Standing Committee D for consideration and report.[369]

The Committee received submissions from delegates and others, and commissioned four background papers. It presented its report to the Executive Committee of the Convention at the end of June 1977.[370] In the report the Committee canvassed the legal arguments for and against the proposition that the Senate has no power to reject supply, and the arguments for and against the existence of that power. It considered various proposals for constitutional amendment, and in particular the Whitlam and Court proposals. Draft amendments to give effect to those proposals were prepared. The Committee itself made no recommendations.

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368 ACC, Hobart 1976, 106-7.

369 id, 113.

370 Special Report to Executive Committee: The Senate and Supply.

The Court proposal was approved at the Perth (1978) session of the Convention by 50 votes to 39 votes. The voting was on party lines.[371] The Convention then agreed to refer the resolution to Standing Committee D for detailed drafting consideration.

A draft Bill prepared for and approved by the Committee[372] was endorsed by the Adelaide (1983) session of the Convention, but with the addition of a clause to define what classes of Bills were not to be classed as Bills appropriating revenues or moneys for ordinary annual services of Government. This clause mirrored the 1965 compact.[373]

The Bill was the basis for Constitution Alteration (Appropriation Bills) Bills introduced by Senator Rae in 1983 and 1984.[374]

Constitution Alteration (Fixed Term Parliaments) Bill 1981. In November 1981 Senator Evans (ALP) introduced a Bill to provide for fixed parliamentary terms. Clause 8 of the Bill proposed that section 53 of the Constitution be altered by adding, after the last paragraph, the following words:

> Where the House of Representatives passes a proposed law appropriating revenue or moneys or imposing taxation and transmits it, at least one month before the date fixed under section twenty-eight of this Constitution for the expiry of the House of Representatives, to the Senate for the concurrence of the Senate and, at the expiration of one month after the date on which the proposed law is so transmitted to the Senate, the Senate has not passed the proposed law in the form in which it was so transmitted to the Senate, or with any amendments made or requested by the Senate to which the House of Representatives has agreed, the proposed law shall be presented to the Governor-General for the Queen's assent as if it had been passed by both Houses of the Parliament.

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371 ACC Proc, Perth 1978, 205.

372 Standing Committee 'D', Fourth Report to Executive Committee in ACC Proc, Adelaide 1983, vol II, 68-85.

373 ACC Proc, Adelaide 1983, 202-5.

374 See below.

The new clause, it was explained, would formalise what the practical situation would be under the proposed fixed term provisions. Under those provisions there would be little point in the Senate blocking supply if it were impossible thereby to force a dissolution of the Parliament, or dismissal of the Government.

In March 1982, Senator Evans moved an amendment to the proposal for alteration of section 53.[375] Under this amendment the paragraph to be added to the section would apply only to those appropriation and tax Bills the passage of which was considered essential to the Government's capacity to govern, that is, Bills imposing taxation and Bills appropriating revenue or moneys for the ordinary annual services of the Government. Although the amendment was agreed to, the motion as amended was defeated by 30 votes to 20.[376] Amendments moved by Senator Macklin (Australian Democrats) were also defeated. One such amendment was to omit section 54 of the Constitution and substitute a section to read 'Laws appropriating revenue or moneys for the ordinary annual services of the Government shall contain only such appropriation, and any law which contravenes this section shall be of no effect.'[377]

Constitution Alteration (Appropriation Bills) Bills. In 1983, and again in 1984, Senator Rae (Liberal) introduced a Bill to incorporate in the Constitution provisions to give effect to the Court proposal. The Bill was substantially that approved by the Australian Constitutional Convention in 1983. It also included the clause, recommended by the Convention, to define appropriations for the ordinary annual services of the Government. Unless the Parliament otherwise provided, such appropriations would not include appropriations for:

(a) the construction of public works or buildings;

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375 Hansard, 18 March 1982, 1005-6.

376 Hansard, 28 October 1982, 2020-1.

377 id, 2021.

(b) the acquisition of land or buildings or major items of plant or equipment;

(c) financial assistance to the States;

(d) the implementation of new policies not previously specifically authorized by legislation; or

(e) the services of the Parliament.

There was a further clause to require appropriation of revenue or moneys for certain ordinary annual services of the Government to relate to the services of a particular year only and to be passed by the Senate not earlier than six months before the commencement of that year. The appropriations to be subject to this rule were those for:

(a) salaries and allowances of officers of the Executive Government of the Commonwealth (other than Ministers of State);

(b) other administrative expenses of the departments of State; or

(c) pay and allowances of members of the defence forces of the Commonwealth.

The effect of this clause would have been to prevent the enactment of laws appropriating moneys for these ordinary annual services for an indefinite period of time. A further clause proposed that the only appropriation Bills which the Senate should be prohibited from amending were those to appropriate moneys for the particular, ordinary annual services referred to above. All other appropriation Bills would be amendable by the Senate.

If an appropriation Act contained amendable items and unamendable items, a State, or a senator for a State, could bring action in the High Court for a declaration that so much of the Act which contained amendable items was of no effect.

Senator Rae's Bills were opposed by the Government and did not proceed beyond the second reading debate.

Advisory Committee's recommendations

The Senate's powers in relation to appropriation Bills were considered by the Advisory Committee on Executive Government.[378] All but one member of the Committee considered that the most desirable alteration of the Constitution would be to remove the Senate's power to block supply for more than 30 days. But 'in the event of no change being made to the Senate's power to reject supply, the government which is refused supply should be able (at its option) to obtain a double dissolution of the Senate as well as the House of Representatives.'[379] One member of the Committee preferred this solution.

We mention and comment on the Committee's reasons for its recommendations later.

Submissions

We received a large number of submissions on the subject of the Senate's powers over money Bills. Most of them were from individuals, but there were also several from organisations. The Queensland and Tasmanian Governments made submissions on the recommendations of the Advisory Committee.

The submissions were concerned principally with the question of whether the Senate should continue to have power to refuse to pass a Government's annual appropriation measures. Opinions were more or less equally divided on this question. Almost as many favoured maintenance of the present position as proposed alterations to limit the Senate's powers. The different points of view reflected in the submissions were essentially those set out in the following statement of issues and arguments.

Issues and arguments

The main issue is whether the Senate's powers in relation to

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378 Executive Report, 20-8.

379 id, 28.

appropriation Bills should be diminished and, if so, how. In particular, should the Senate's power to veto such Bills, or specified classes of such Bills, be removed, or should the power of veto be retained, subject to a proviso that, if it is exercised (whether by rejection of a Bill or failure to pass it within a specified time of its transmission), it shall be open to the Governor-General to dissolve both Houses?

The arguments which have been advanced for removing or restricting the Senate's power of veto are:

(a) Although a vote by the Senate of no confidence in the Government is, by convention, not a ground for removal of the Government or for dissolution of the House of Representatives, the power of the Senate to veto the Government's annual appropriation measures effectively gives it a power to decide how long a Government, which has the confidence of the House, shall remain in office and when a general election for the House shall be held. If the Senate exercises the power, the Government will not have legal authority to withdraw moneys from the Consolidated Revenue Fund for payment of the salaries of public servants and routine government services. In short, the Government will not be able to govern. Again, if the Senate exercises the power to force a general election for the House, it cannot itself be dissolved unless there is a Bill or Bills over which the two Houses are deadlocked and which satisfy the conditions for a double dissolution laid down in section 57 of the Constitution.[380]

(b) The Senate is unlikely to exercise its power of veto except when the Government does not have a majority of supporters in that House. This means that the power to force a general election for the House of

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[380] See id, 22 and 25.

Representatives is effectively in the hands of the non-Government parties in the Senate.

(c) Even if the Senate's refusal to pass the Government's annual appropriation measures is followed by a double dissolution, there is no guarantee that the ensuing elections will resolve the differences in party control of the two Houses.

(d) Because of the time-table of annual appropriation measures, the Senate's power of veto is, in theory, exercisable every six months. This can have a destabilizing effect on the conduct of government, can contribute to the frequency of elections and can deter a Government from introducing unpopular, though necessary or defensible measures.[381] (We note, however, that some contend that there is no evidence to support these contentions about the practical effect of the mere existence of the Senate's power of veto.)

(e) Even though the framers of the Constitution envisaged that section 57 of the Constitution would provide a means of resolving deadlocks between the two Houses over financial measures, the time-table for the annual appropriation bills is such that the conditions which have to be satisfied before both Houses may be dissolved under that section can ever be met, under existing practices, before current legislative authority for annual expenditures expires.[382]

(f) '[T]he important role of the Senate as a house of review is impaired by the present power it possesses to refuse supply and threaten to bring down the government...[T]he ultimate political power which the Senate possesses distracts unnecessarily both the Senate and those who observe it from its checking role.' The Senate's 'function as a house of review

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[381] See id, 21, 25.

[382] See id, 21.

> would be emphasised if it were not also the possessor of that far stronger power.'[383]

The arguments against diminution of the Senate's power to veto a Government's financial measures depend heavily on certain premises about the proper role of the Senate within the federal system of parliamentary government, and about the proper role of an upper House in a parliamentary system in which, it is claimed, the political executive - the Ministry - controls the lower House and, in turn, is controlled by a caucus of the parliamentary members of the Government party or parties. The arguments also acknowledge that power over the nation's pursestrings is of critical importance in the general conduct of government and that a power to veto a Government's annual appropriation measures is a power, not merely to disapprove those measures, but also to censure a Government for actions or proposals which have no necessary connection with the proposed appropriations.

Some central points which have been made by those who oppose removal or reduction of the Senate's power to veto a Government's financial measures are as follows:

(a) The Australian Senate, unlike the House of Lords and the Canadian Senate, is a democratically elected legislative chamber. Arguments for reducing the powers of the Senate which rely on United Kingdom and Canadian law and practice are therefore based on false analogy.

(b) The Constitution implies, or at least is not inconsistent with the proposition, that the Executive Government of the Commonwealth is responsible to both Houses of the Federal Parliament in the sense that both

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383 id, 25. Some members of the Advisory Committee did not 'regard this as a particularly compelling reason' for removing the Senate's power to block supply.

have, and can legitimately exercise, powers which are effective to unseat a Government and force elections.

(c) The Senate's powers under the Constitution are an integral and valuable part of a system of checks and balances against abuses of governmental power which the Constitution was meant to enshrine. The Senate's power to veto a Government's annual financial measures is a safety-valve in that it provides a means of forcing a corrupt, extravagant or incompetent Government to the polls and thereby to the judgment of 'the people'. Because party discipline in the House of Representatives is strict, the Senate is the only effective censor of the Executive Government, and the only effective safeguard against what has been termed 'elective dictatorship'.

(d) The Senate was intended to have, and still has, a role in the protection of the interests of States. The Constitution assures the Original States equal representation in the Senate, regardless of the size of their populations. Assurance of that equal representation was a condition which many of the Australian colonies insisted upon before they would agree to federation. The Senate's power to veto a Government's annual financial measures is still a means whereby the interests of States may be protected.[384] The Constitution forbids the Federal Parliament from enacting laws with respect to taxation which discriminate between States or parts of States[385], and forbids it to make any revenue law which gives 'preference to one State or any part thereof over another State or part thereof'.[386] But the Constitution does not prohibit the Federal Parliament from enacting appropriation laws which discriminate

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384 cf id, 23-4.

385 Section 51(ii).

386 Section 99.

> between States. In consequence, it is possible for the Parliament to impose, say, uniform taxation, yet appropriate the revenue thereby yielded in a discriminatory way, to the advantage of the States which have the greatest representation in the House of Representatives. The Senate's power of veto of a Government's financial measures, it is argued, provides a safeguard against the enactment of discriminatory measures of this kind.

Generally, the opponents of constitutional amendment to diminish the Senate's powers over money Bills have queried whether, if those powers were to be substantially reduced, the Senate would have any substantial role in the government of the nation. They have suggested that removal of the Senate's power of veto would be tantamount to destruction of the Senate as a real force in federal government. On the other hand, many of these opponents have not resisted the proposition that if the Senate's power of veto is retained, the power should be qualified so that, if the Senate elects to exercise it, all of its members should be forced to the polls through a simultaneous dissolution of both Houses.

Several of those who have argued against certain proposals for alteration of the Constitution to diminish the powers of the Senate over money Bills have drawn attention to the likely consequences of adopting those proposals.[387]

It has, for example, been suggested that, if the Senate's powers over money Bills were to be reduced, one likely consequence would be to lessen parliamentary scrutiny and control of public finance. This point was made by AR Cumming Thom, until recently the Clerk of the Senate. In a submission to the Commission[388] Mr Thom drew attention to the system which the Senate has developed in recent years to scrutinise the financial proposals of Governments. This system has, he said:

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387 See AR Cumming Thom S2694, 15 October 1987; H Evans S2527, 2 October 1987.

388 S1061, 26 February 1987.

> compelled governments and their administrative departments to provide more detailed explanations of financial and administrative proposals and to consider more carefully estimates of expenditure. This has resulted in greatly improved public awareness of government operations and has improved the quality of government itself. If the Senate were to have no powers in relation to financial legislation, this could well lead to governments ignoring any attempts by the Senate to scrutinize estimates and expenditure, and, in the long run, to a considerable lessening of parliamentary scrutiny and control of government finance, one of the most fundamental ingredients in the system of representative parliamentary government.

It has also been suggested by Mr Thom[389] that were the Senate's power to veto appropriation Bills to be removed, the result would, in effect, be to

> allow all legislation to be enacted by the House of Representatives alone, and thereby achieve a situation of de facto unicameralism. A great many Bills passed by the Parliament contain clauses which have the effect of appropriating money, whether of an unspecified or a specified amount. It would be an easy step for a government to insert in almost every government Bill an appropriation clause, and this could be made to appear quite legitimate. Virtually all legislation could then be enacted without the consent of the Senate.

Mr Thom went on to suggest that

> In order to avoid the situation just described it would be necessary to have some enforceable constitutional guarantee against this new form of "tacking", that is, the inclusion of appropriation clauses in Bills which are not intended primarily to be appropriation Bills ... Such a provision, however, would lead to the anomalous situation of action in the courts being necessary to preserve the powers of one of the Houses of Parliament. It could also lead to a state of some artificiality in the legislation of the Commonwealth, in that legislation requiring expenditure for its operations would be separated from the laws providing the necessary money. Amongst other things, this could have the effect of indirectly giving the government of the day the same complete legislative power which it would gain if all appropriation Bills could be passed without the consent of the Senate. Future governments could well rely on a combination of appropriations and administrative actions for most of their activities.

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389 ibid.

Another officer of the Department of the Senate made similar points in his submission on the Report of the Advisory Committee on Executive Government.[390]

Reasons for recommendations

General. It is now widely recognised that the provisions of the Constitution concerning the Senate's powers over money Bills are not satisfactory and should be altered. Precisely how they should be altered the political parties have yet to agree upon.

The essential issue, it seems to us, is how long a Government which has the confidence of the House of Representatives should be entitled to govern and who is to decide when it is to face an election? Is the Government to be held responsible to both Houses so that if the Senate chooses to deny the Government the financial authority required to enable the functions of government to be carried out, the Government must resign or risk dismissal and the House of Representatives dissolved? In our view the primary principle to which the Constitution should give expression is that Governments are formed, effectively, by the House of Representatives and are entitled to govern so long as they have the confidence of that House. For that reason we have concluded that it should not be open to a Senate, in which a Government may not have a majority of supporters, to deny a Government essential means of governing and thereby force a general election for the House, unless the Senate itself has to face the judgment of the people at the same time.

The purpose of our proposals is to remove from the Senate the power to deny a Government financial means to administer programs and policies which have been the subject of appropriations in the previous financial year or which have already been approved by legislation. The Senate will, in such cases, be left with no more than a suspensory veto.

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390 H Evans S2527, 2 October 1987.

The changes which we recommend in relation to the Senate's powers over money Bills are integral to the changes we recommend in relation to the minimum and maximum terms of the Federal Parliament, the circumstances in which the Houses of that Parliament may be dissolved, and the circumstances in which the appointments of Ministers may be terminated. The relevant recommendations on these matters are, in summary, as follows:

(a) The maximum term of a Federal Parliament should be increased from three years to four years.

(b) The House of Representatives may not be dissolved within the first three years of a Parliament unless the House of Representatives resolves that the Government does not have its confidence.[391]

(c) The appointment of a Prime Minister may not be terminated unless the House of Representatives resolves that the Government does not have its confidence.

(d) Elections for the Senate and the House of Representatives shall be simultaneous and the terms of senators shall be limited accordingly.

For the system contained in the above proposals to be workable it is essential that, during the first three years of a Parliament, a Government which has the confidence of the House be assured of essential supplies. It is for this reason that we recommend that if, during the first three years of a Parliament, the Senate rejects or fails to pass certain appropriation Bills within 30 days of their transmission, those Bills may become law notwithstanding that they have not been passed by the Senate.

It can, of course, be argued that if the minimum term of Parliament is fixed, and the House of Representatives is not

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391 See Chapter 5 under the heading 'Appointment and terms of the Prime Minister and Ministers'.

capable of being dissolved before the expiration of the term unless it passes a vote of no confidence in the Government, there would be no point in the Senate exercising a power to veto appropriation Bills. If, however, a Senate dominated by non-Government parties was determined to force early elections, a power to veto appropriation Bills might still be used against the Government.

We consider it not unreasonable to allow the Senate to exercise a power of veto over financial measures in the last year of a maximum four year parliamentary term and to do so in order to force elections. On the other hand, we agree that if the Senate chooses to exercise its power of veto, it should do so in the knowledge that it will thereby create a basis for a double dissolution. It is for this reason that we **recommend** that if, in the fourth year of the life of a Parliament, the Senate rejects or fails to pass within 30 days of transmission, any money Bill which it is prohibited from amending, the Governor- General in Council may dissolve both Houses simultaneously, thus forcing both of them to the polls.

We have not been persuaded by the argument that the Senate's power to veto appropriation Bills, at any time, should be preserved as a check on corrupt, extravagant or grossly incompetent Governments. While we do not deny that the Senate has a significant role to play as a House of review, its ability to perform that role is not, we believe, dependent on its having power to veto a Government's annual appropriation Bills. Such a power is one which, when exercised, is, more likely than not, to be exercised only or mainly for party political purposes.

Equally, we have not been persuaded by the argument that the Senate's present powers with respect to money Bills should be preserved so as to safeguard the interests of the States, and particularly the States with the smallest representation in the House of Representatives. While we concede that there have been instances in which senators have voted against Government measures because they believed those measures not to be in the

interests of the States they represented, it is clear that on the two occasions on which the Senate chose to assert its power to veto annual appropriation Bills, party political considerations were paramount. State interests can be and are represented by members in their party political rooms.

Another argument against limitation of the Senate's power of veto over money Bills which we have considered, but not found persuasive, is that if the power to veto certain appropriation Bills were to be removed, Governments might be disposed to use appropriation Bills which could not be vetoed by the Senate as a vehicle for introducing measures which ought properly be the subject of non-financial legislation. In our view the scope for employment of appropriations in lieu of other legislation is extremely limited. Furthermore, under the alterations to the Constitution we propose, the Senate would have power to amend and veto any provision in an appropriation Bill for a new purpose.

Finally, we draw attention to the fact that later in this Chapter we recommend revision of the procedure laid down in section 57 of the Constitution for resolving deadlocks between the two Houses. The revised procedure we recommend does not apply to disagreements over money Bills which the Senate cannot amend. We are satisfied that section 57, as it now stands, does not provide an appropriate means of resolving deadlocks over annual financial measures. Although it has been suggested that the section would be better fitted for that purpose if the annual budgeting time-table were altered, we believe it to be unrealistic to proceed on the basis that such a change will come about.

Having given general reasons for our recommendations, it is necessary to explain and justify particular features of our proposals.

Principles to be preserved. The alterations to the Constitution we propose in this part of the Chapter would not change a number of the principles already enshrined in sections 53 and 54 of the Constitution. In particular, the proposed alterations would preserve the following basic principles:

(a) Subject to specified exceptions, the Senate shall have equal powers with the House of Representatives in respect of all proposed laws.

(b) Proposed laws for appropriating revenue or moneys or for imposing taxation can originate only in the House of Representatives.

(c) Defined categories of money Bills are not subject to amendment by the Senate, but the Senate may request amendment of any such Bills.

(d) The Senate may not amend any Bill so as to increase any proposed charge or burden on the people.

(e) Bills which the Senate may not amend must not include extraneous provisions, that, clauses proposing laws which the Senate can amend.

The proposed new section 54A also preserves provisions in the present section 53 which permit certain money Bills to be initiated in the Senate and amended by it. They are Bills for the imposition or appropriation of fines or other pecuniary penalties, and Bills for the demand, payment or appropriation of fees for licences for services under the proposed law.

It is also relevant to note here that, for reasons we give later in this Chapter, we propose that the principle expressed in section 56 of the Constitution be maintained. This principle is one the effect of which is to prevent any proposed appropriation of revenue or moneys being passed unless the proposal is recommended by the Government of the day.

Appropriation Bills not subject to Senate veto. The appropriation Bills which, under our proposals, the Senate would be prohibited from amending, and over which it would have merely a suspensory veto are Bills appropriating revenue or moneys for ordinary annual services of the Government. At present such

Bills are the only appropriation Bills which the Senate is prohibited from amending. But in our scheme, there is an important proviso. Under it the Senate could amend and reject any appropriation Bill so far as it appropriates revenue or money for a new purpose, as defined. We comment on the definition of an appropriation for 'a new purpose' below, and explain our reasons for recommending the proviso later on.

In considering what types of appropriation Bills should not be subject to amendment or veto by the Senate, except when they provide for expenditure for a new purpose, we have had regard to the 1965 Compact.[392] This was intended to resolve previous disagreements about what appropriation Bills should be classified as Bills to appropriate revenue or moneys for the ordinary annual services of the Government and what should not. Only the former category of Bills would not be susceptible to amendment by the Senate. Bills to authorise expenditure on construction of public works and buildings, on the acquisition of sites and buildings, on items of plant and equipment clearly definable as capital expenditure, and on grants to States under section 96 of the Constitution, were categorised as Bills the Senate could amend.[393]

Under our proposals the Senate would, subject to the proviso covering 'new purposes', be denied power to amend not only Bills to appropriate revenue or moneys for the ordinary annual services of the Government. It would also be denied power to amend certain other appropriation Bills which, under the 1965 compact, the Senate can amend, namely Bills to appropriate moneys for the construction of public works or buildings, for the acquisition of land, or for the acquisition of plant or equipment.

The only power the Senate would have over all of these types of appropriation Bills would be a power of suspensory veto. The

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392 See above, 375.

393 See also the proposed section 54A agreed on by the Australian Constitutional Convention in 1983; ACC Proc, Adelaide, 1983, vol I, 322.

reason why we consider that Bills of these types should be subject to the same rules as apply to Bills appropriating moneys for ordinary annual services of the Government is this. If the object of limiting the Senate's powers over appropriation Bills is to prevent the Senate denying a Government, which has the confidence of the House of Representatives, the financial means to administer programs and policies which have already been approved by the Parliament, the distinction made in the 1965 Compact is not an altogether rational one. On this point we agree with the Tasmanian Royal Commission into the Constitution Act 1934. They stated[394]

> The policy should be to ensure that government can be carried on in the normal manner. This militates against the division made in the "1965 Compact" between such matters as salaries to public servants on the one hand and "construction of public works and buildings" or "capital expenditure" on the other ... [M]ost expenditure on capital works is part of the normal expenses of government, such as plant and equipment used for government departments. Similarly, annual appropriations to meet ongoing capital works that were commenced some time, perhaps years, before are as much continuing governmental commitments as many salaried items. Results, universally considered undesirable, that follow a rejection of supply, such as the dismissal of public servants, would also follow a closure of public works projects and the sacking of those working on them.

It should be noted that the types of appropriation Bills which, under our proposals, would not be subject to amendment by the Senate do not include Bills to appropriate moneys for grants to States pursuant to section 96. Nor do they include, expressly, Bills to appropriate moneys for the ordinary annual services of the parliamentary departments. Both of these types of appropriation Bills are presently accepted as being subject to amendment by the Senate.

Taxation Bills not subject to Senate veto. The taxation Bills which, under our proposals, would not be susceptible to amendment by the Senate, and would thus be subject only to its power of suspensory veto, include not merely Bills imposing taxation.

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394 Report (1982), 54.

They include also Bills dealing with the imposition, assessment or collection of taxation, and only with those matters. This class of taxation Bills is, to some extent, wider than that presently described in section 53 of the Constitution. At present the only taxation Bills the Senate is prohibited from amending are those imposing taxation. Yet the 'anti-tacking' provision contained in the first paragraph of section 55, as judicially interpreted, recognises a somewhat wider class of taxation measures, that is, measures dealing with the imposition of taxation, and only with that subject.

The taxation Bills which, we recommend, should be unamendable by the Senate include the broader class of Bills indicated by the first paragraph of section 55, together with Bills dealing with the assessment or collection of taxation, but only with those subjects. If the object is to prevent the Senate from denying a Government, which has the confidence of the House of Representatives, the financial means by which to govern, the Senate's power needs to be limited not only in relation to appropriations, but also in relation to the measures necessary for the raising of revenue. To raise revenue available for expenditure, it is clearly not enough to impose taxation. There must also be laws dealing with assessment of liability to tax and collection of the taxes which taxpayers are liable to pay.

Appropriations for new purposes. We have **recommended** that the limitations to be imposed on the Senate's powers to amend and reject designated classes of appropriation Bills should not apply to any such Bill so far as it appropriates revenue or moneys for a new purpose. A new purpose is defined to mean:

- a purpose in respect of which revenue or moneys were not appropriated for expenditure in the previous financial year; or

- a purpose the accomplishment of which is not specifically authorised by law or is dependent upon the enactment of a proposed law.

The effect of the proviso may be illustrated by two hypothetical examples. First, if an annual appropriation Bill (say Appropriation Bill No 1) for the ordinary annual services of the Government were to include an item for expenditure on a criminal injuries compensation scheme, and the scheme was entirely new and not authorised by any enactment, the Senate could either amend or reject the item. Secondly, if a Bill to appropriate revenue or moneys for the kinds of items presently included in Appropriation Bill No 2 were to include an item for expenditure on an entirely new, and previously unauthorised, public works project, that item also would be subject to amendment or veto by the Senate.

The concept of an appropriation for a new purpose is not an unfamiliar one. A similar concept is employed in South Australia's Constitution Act 1934 to define when the Legislative Council may request amendment of an appropriation Bill and when it cannot. Bills appropriating money for a previously authorised purpose cannot be the subject of such a request,[395] and an appropriation Bill 'for any previously authorized purpose...[must] not contain any provision appropriating revenue or other public money for any purpose other than a previously authorized purpose.'[396] The term 'previously authorized purpose' is defined[397] to mean:

> (a) a purpose which has been previously authorized by Act of Parliament or by resolution passed by both Houses of Parliament; or
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> (b) a purpose for which any provision has been made in the votes of the Committee of Supply whereon an appropriation Bill previously passed was founded.

The concept of appropriations for new purposes is also reflected in the 1965 Compact. As we have already mentioned, the categories of appropriation Bills which, it has been accepted, may be amended by the Senate include Bills to authorise

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395 Section 62.

396 Section 63.

397 Section 60(4).

expenditure on 'new policies not authorised by special legislation'. But subsequent appropriations for such items are included in the Bill which is not subject to amendment by the Senate, that is, the Bill for the ordinary annual services of the Government.

We note also that under the alterations to the Constitution recommended by the Australian Constitutional Convention, Bills appropriating moneys for ordinary annual services of the Government would have been defined to exclude, inter alia, Bills appropriating revenue or moneys for 'the implementation of new policies not previously specifically authorised by legislation'.

The concept of 'a new purpose' as we have defined it is, in our view, preferable to that of 'a new policy'. The latter concept lacks the precision that is desirable in any constitutional definition. It would be difficult to differentiate between a new policy and a mere variation or new example of an existing policy.

The proviso we recommend, it should be added, is similar to that the Tasmanian Royal Commission into the Constitution Act 1934 recommended in relation to the Legislative Council's power to veto appropriation Bills.

Tacking. We have included in our proposed alterations a provision the object of which is to prevent what is referred to as 'tacking', that is, the inclusion in a Bill which the Senate cannot amend of extraneous matter. The provision will mean that even if the Bill receives the Royal assent, notwithstanding that it has not been passed by the Senate, the extraneous provisions will be of no effect.[398] Adoption of this provision would render the first paragraph of section 55 of the Constitution otiose. Indeed, if the provision we recommend were to be adopted, and the first paragraph of section 55 were to remain, a

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[398] Similar provisions on 'tacking' in appropriation bills are contained in Constitution Act 1902, section 5(3) (NSW); Constitution Acts Amendment Act 1899, section 46(7) (WA).

question could arise as to whether the latter had been repealed by implication.

We therefore **recommend** that the first paragraph of section 55 be repealed.

We assume that the question of whether a law does contain extraneous provisions which, under our proposal, will have no effect, could be determined by the High Court, on the application of any person or body having the requisite standing to sue.

Requests for amendment of money Bills. The fourth paragraph of section 53 presently provides that, even if a proposed law is not one the Senate can amend, the Senate may, at any stage, return the proposed law to the House of Representatives with a request that it be amended. This paragraph would be reproduced in the new sections we propose. Thus throughout the life of a Parliament the Senate would continue to have power to return an unamendable Bill to the House, at any stage, with a request for its amendment. On the other hand the power of the Senate to press its request for amendment would be curtailed. As we have already explained, the Senate is now in a position to persevere with its requests for amendment of Bills it cannot amend until such time as the House of Representatives capitulates. It can do this notwithstanding that the House has never conceded that the Senate has a constitutional right to press its requests more than once at any stage in the passage of a Bill, and notwithstanding many legal opinions in support of the House's interpretation of the fourth paragraph of section 53.[399]

Were our proposals to be adopted, a Senate which repeatedly requested amendments of money Bills it could not amend would have no more than 30 days, commencing from the day on which a Bill was transmitted by the House, within which to press its requests for amendment.

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399 JR Pettifer, op cit, 380-4.

Period for consideration of unamendable money Bills. In selecting 30 days as the period during which the Senate may exercise what we have, for short, called its power of suspensory veto, we have been guided by the opinions of those who have first hand knowledge of parliamentary processes. We note that well before that 30 day period would begin to run (that is, from the transmission of a Bill by the House), senators will have knowledge of the contents of the Bills which will eventually come before the Senate. The contents of those Bills will be a matter of public record as soon as they are introduced in the House.

We note also that, in practice, the budget papers are tabled in the Senate shortly after they have been tabled in the House and that Appropriation Bills Nos 1 and 2 and Appropriation (Parliamentary Departments) Bill No 1 are referred to the Senate Estimates Committees before those Bills are passed by the House and transmitted to the Senate. In the 1987 budget session, Appropriation Bills Nos 1 and 2 were read for the first and second times on 15 September. They were referred to the Senate's Estimates Committees on 22 September for report on or before 5 November. Appropriation Bill No 1 was finally passed by the House on 8 October, and Appropriation Bill No 2 and Appropriation Bill (Parliamentary Departments) Bill No 1 on 20 October. All three Bills were received by the Senate on 21 October. Appropriation (Parliamentary Departments) Bill was finally passed by the Senate on 19 November; Appropriation Bills Nos 1 and 2 on 26 November. Thus in each case the time which elapsed between the transmission of the Bill to the Senate and its third reading by that House was approximately thirty days.

Certification of money Bills. In the draft alterations to the Constitution to give effect to our proposals we have made provision whereby in the event of the Senate failing to pass a money Bill of the kind it cannot amend or veto, the Bill cannot receive the Royal assent, or be the basis for a double dissolution, unless there is endorsed on it a statement by the Speaker of the House of Representatives that the Bill is of that

kind and that the prescribed conditions have been met. This statement would not, however, be binding on a court of law.[400]

Recommendation of money votes

Recommendation

We recommend that section 56 of the Constitution be altered by deletion of the word 'Governor-General' and substitution of the words 'Governor-General in Council'. This alteration would make it clear that the Crown's financial initiative is exercisable by the Governor-General only on Ministerial advice.

Current position

Section 53 of the Constitution requires that 'proposed laws appropriating revenue or moneys, or imposing taxation' shall originate in the House of Representatives. Section 56 provides:

> A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

This section gives expression to the well established principle of Westminister parliamentary government that financial initiatives are the preserve of the Crown. The Executive Government is charged with management of the public revenues and other public moneys and it alone may request parliamentary authorisation of expenditures. This request is formally communicated to the House by message from the Governor-General.

Standing Order 292 of the House of Representatives expands on the requirements of section 56. It provides:

> No proposal for the appropriation of any public moneys shall be made unless the purpose of the appropriation has in the same session been recommended to the House by message of the Governor-General, but a Bill, except an Appropriation or

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400 cf Parliament Act 1911, section 3 (UK).

> Supply Bill, which requires the Governor-General's recommendation may be brought in by a Minister and proceeded with before the message is announced. No amendment of such proposal shall be moved which would increase, or extend the objects and purposes or alter the destination of, the appropriation so recommended unless a further message is received.

The exception referred to in Standing Order 292 applies only to Class 2 Bills, that is, special appropriation Bills. In practice messages concerning such Bills are announced after the Bill has been introduced and read for a second time.[401] In contrast ordinary appropriation and supply Bills (Classes 4 and 5) are introduced only after announcement of the Governor-General's message has been announced.

One consequence of section 56 is that an amendment of an appropriation Bill to increase or extend the objects and purposes, or alter the destination of the proposed appropriation, cannot be passed without a further message from the Governor-General recommending appropriation for the purposes of the amendment.[402] The further message in such a case is announced before the amendment is moved.

Section 56 does not preclude the passing by the House of motions to reduce the amounts of money which the Government recommends should be appropriated for designated purposes. When the motion for the second reading of the main appropriation Bill (that is, Appropriation Bill No 1 of Class 4) is moved, it is customary for the Leader of the Opposition to move an amendment to that motion to the effect that the House condemns the Government's Budget for specified reasons. The object is to initiate general debate on the Government's policies and performance. When the Government's Bills are deliberated on by the House at the Committee stage - the stage at which detailed amendments of clauses may be moved and voted on - private members may move reduction of the amount of proposed expenditures on designated items or else total

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401 JA Pettifer, op cit, 349.

402 id, 350-2, 359-60.

omission of items. The typical form in which such an amendment is moved in relation to an item in Appropriation Bill No 1 is 'That the proposed expenditure for the Department of...be reduced by $10'.[403]

The last occasion on which a motion of this kind was successfully moved was in 1941. Four days after the House had passed the amendment the Government resigned.[404]

Advisory Committee's recommendation

The Advisory Committee on Executive Government, with two members dissenting, recommended that section 56 of the Constitution be deleted.[405] It so recommended for two main reasons. The first was that section 56:

> is in part redundant and, in one regard, offensive to parliamentary independence. It is redundant because the government can only continue in office if it has the support of the House of Representatives. In practice, no financial measure is passed by the House without the approval of the government.[406]

The second reason was to assure the Parliament greater independence from the Executive and greater control over the funding of parliamentary activities. The Committee observed that:

> The executive government can, hamstring the work of the parliament by refusing to recommend the approval of expenditure on specific items of parliamentary activity, such as the establishment of particular parliamentary committees, or the provision of facilities for members and senators or the support staff provided by the parliament.[407]

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403 Pettifer, op cit, 359-60.

404 id, 358-9.

405 Executive Report, 28-9.

406 id, 29.

407 ibid.

The Committee did, however, concede that deletion of section 56:

> would not guarantee adequate funding for parliament, because such repeal would not remove the government's ability to control the lower house and determine the legislation which it is to pass.[408]

The dissenting members of the Committee were of the view that the problem of securing adequate funding of Parliament should be resolved without alteration of section 56.[409]

Submissions

In its Report the Advisory Committee referred to oral evidence given by Senator Peter Baume commenting on the Executive's control over funding of the Parliament.[410]

Since the publication of the Committee's Report we have received submissions on the Committee's recommendation from the Clerk of the House of Representatives, AR Browning[411] and from three former Clerks of the House, NJ Parkes, JA Pettifer and DM Blake.[412] All opposed the Committee's recommendation that section 56 be deleted. Its adoption, they suggested, would abrogate an important and perfectly defensible constitutional principle. It was also pointed out that the deletion of section 56 would not achieve the result desired by the Committee because even without the section, the Executive Government would still be in control.

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408 ibid.

409 ibid.

410 ibid. The Committee referred also to an article on the subject by Senator Baume in The Australian, 5 May 1986.

411 S2705, 16 October 1987

412 S2679, 9 October 1987.

Issues

The main issues are:

(a) whether the Constitution should be altered to remove entirely the Executive Government's monopoly over the initiation of appropriation Bills; and

(b) whether, if section 56 is retained, it be qualified by a further provision which would permit Bills for appropriation of moneys for the purposes of the Parliament to be initiated and passed without a recommendation from the Governor-General.

Reasons for recommendation

We are not persuaded that there is any need to alter the Constitution to abrogate the fundamental and long-standing principle that no appropriation Bill may be passed unless it has been recommended by the Executive Government. To remove section 56 from the Constitution would mean that any member of the House could initiate Bills for appropriation of federal moneys. But a Government having the confidence of the House would still be able to prevent any appropriation Bill which did not have its support from being passed.

In our view, there are good reasons for retaining in the Constitution the general principle which section 56 expresses. It is a principle which ensures that appropriation and supply Bills reflect a Government's overall policies in regard to public expenditures. Existing parliamentary procedures do not make it

impossible for private members of Parliament to offer suggestions for change in the appropriation Bills which a Government has initiated. It is true that when an amendment is moved to increase the proposed appropriation, to extend its objects and purposes or to alter its destination, the amendment cannot be passed unless the Executive Government first approves it and does so by formal message from the Governor-General. But the fact remains that parliamentary processes do provide opportunities for private members to criticise the appropriations proposed by the Government and to suggest alterations for the Government's consideration.

In the case of special appropriation Bills, (ie Class 2 Bills), the procedure is for a private member to move that the Bill be withdrawn and redrafted with a view to bringing forward another Bill which incorporates the desired changes. Such a motion, if passed, does not effect an amendment of the Government's Bill. It is merely declaratory of the opinion of the House and its passage by the House indicates that even the Government's supporters in the House believe that the Bill should be revised.[413]

We are not unsympathetic to the argument that the Parliament should not be beholden to the Executive Government for the funding of its activities. Section 56 does, of course, mean that a Parliament's capacity to perform its functions, including that of scrutinising Executive acts, can be impaired by the Executive's refusal to approve the requests of the parliamentary departments for funding at the level they desire. But like the minority of the Advisory Committee, we are not convinced that the

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[413] See Pettifer, op cit, 350.

problem should be resolved by the extreme measure of total repeal of section 56. Nor are we persuaded that the problem can be satisfactorily resolved by introduction of a special constitutional provision for the funding of Parliament.

In this connection it is relevant to note that, since 1982-83, there have been separate annual appropriation Bills for the parliamentary departments, that is, for the Senate, the House of Representatives, the Parliamentary Reporting Staff, the Parliamentary Library, and the Joint House Department. These cover all recurrent and capital expenditure items administered by the parliamentary departments and include advances to the presiding officers of the two Houses. The Bills are prepared on the basis of estimates prepared within the departments, subject to the approval of the Minister of Finance. In the case of the Senate, the estimates are prepared by a standing committee known as the Appropriations and Staffing Committee.

This Committee was established for the first time in March 1982[414] following the report of the Select Committee on Parliament's Appropriations and Staffing (the Jessop Committee). The appointment of the Select Committee, in turn, followed expressions of concern by senators, over a period of years, about the practice of including appropriations for the parliamentary departments within the annual appropriation Bills for the ordinary annual services of the Government. Appropriations for the parliamentary departments, it had been argued, were not properly characterised as appropriations for the services of the Government, that is the Executive Government.[415] The Select Committee recommended that the annual appropriations for the parliamentary departments be contained in separate Bills. It

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414 Hansard (Senate), 19 November 1981, 2408-18; 26 November 1981, 2676-9; 25 March 1982, 1213.

415 See Hansard, 12 May 1964, 1075 (Senator Murphy); Report from the Committee appointed by Government Senators on Appropriation Bills and the Ordinary Annual Services of the Government (Cormack Committee 1965) - PP 55/1967, paras 98-101; Hansard (Senate), 10 September 1968, 479-82; Report of Senate Estimates Committee A, 1974.

also expressed the view that there should be no need for such Bills to be recommended by a message from the Governor-General. It should be possible for Bills of this kind to originate in either House.

The Leader of the Government in the Senate (Senator Sir John Carrick) announced on 25 March 1982 that the Government had agreed to the Select Committee's proposal that there be separate appropriation Bills for the parliamentary departments which would not be treated as being for the ordinary annual services of the Government. But, on the general issue of Parliament's control of its own funding, he stated that the Government firmly believed that it needed

> to maintain control over the total amount of funds available for expenditure by the Parliament because of the constitutional responsibility of the Government for budgetary policy and for the level of public expenditure.

On the other hand, the Government had recognised that detailed control over expenditure items was unnecessary. It therefore proposed to approve overall figures for each department (broken down into capital and recurrent items) so that the departments and the presiding officers would have responsibility for determining the direction of expenditure.[416]

Although the Minister for Finance has the final say on whether the appropriation Bill for the parliamentary departments shall be in accordance with the departmental estimates, in practice the Minister consults with the relevant parliamentary officer or body before varying the estimates.[417]

While there are bound to be differences of opinion, from time to time, between the Government and the parliamentary departments over what is an adequate level of funding for those departments,

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416 Hansard (Senate), 25 March 1982, 1214.

417 See Senate Estimates Committees A-F - Report to the Senate on Departmental Estimates for 1986-87 - PP 216/1987, paras 4-6.

we agree that the Government should continue to have the ultimate responsibility for approving the departmental estimates.

We therefore support the retention of the principle contained in section 56. The only alteration of the section we recommend is one to make it clear that the requisite recommendation to the House be by the Governor-General in Council rather than the Governor-General. This recommendation is in line with our general view that where it is well understood that a power vested in the Governor-General may be exercised only according to ministerial advice, the Constitution should reflect the established convention and do so in the customary way. A power vested in the Governor-General in Council is a power which the Governor-General may exercise only as advised by the Federal Executive Council. That body represents the will of the Ministry for the time being.

We deal with the Federal Executive Council and its composition in Chapter 5 of this Report.

Disagreement between the Houses

Recommendations

Section 57 of the Constitution should be renumbered as section 57B and amended as follows:

(i) it should apply only to proposed laws which may be amended by the Senate; that is, non-amendable money Bills should be excluded from its operation;

(ii) simultaneous dissolution of the House of Representatives and the Senate following the second 'rejection', as defined, of a proposed law by the Senate should be permitted only in the fourth year of the term of the House of Representatives;

(iii) it should be made clear that the Governor-General acts on the advice of Ministers when dissolving the two Houses and, following the third rejection of a proposed law, when convening a joint sitting;

(iv) the drafting of the section should be clarified in the following ways:

- 'rejection' of a proposed law by the Senate should be defined to include the concepts of 'failure to pass' and 'passage with amendments to which the House of Representatives will not agree';

- the only amendments to a proposed law which should be considered and voted on at a joint sitting are those which have been made by the Senate and not agreed to by the House of Representatives;

- it should be made explicit that the period which must elapse before the second passage of a proposed law by the House of Representatives runs from its rejection by the Senate;

- the intervening period should be expressed as '90 days' rather than '3 months';

(v) affirmation by a special majority of members at the joint sitting should be required before:

- an amendment to a proposed law shall be taken to have been agreed to;

- a proposed law shall be taken to have been duly passed by both Houses of the Parliament.

The special majority should consist of an absolute majority of the total number of members of both Houses and at least half the total number of senators

and members chosen for or in a particular State, in at least half the States;

(vi) a proposed law should not lose its identity as the proposed law which is the subject of the section if it contains only such alterations as are necessary by reason of the time which has elapsed since its introduction or which represent amendments made by the Senate;

(vii) section 58 (assent to Bills) should not apply to a proposed law passed at a joint sitting unless the Speaker of the House of Representatives has certified that it has complied with all the requirements set out in section 57 as amended.[418]

Current position

Section 57 of the Constitution provides a means of resolving a disagreement between the House of Representatives and the Senate over a proposed law which has been passed by the House of Representatives. In general terms it provides that if the Senate twice rejects or fails to pass a proposed law or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve both Houses of Parliament simultaneously. (These are the only circumstances in which the Senate can be dissolved). If the disagreement persists after the election of a new Parliament, there may a joint sitting of both Houses to vote on the proposed law. If the proposed law is passed by an absolute majority of the total number of members of both Houses, it becomes law after receiving the Royal assent.

Section 57 reads as follows:

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[418] The Speaker's certificate will not be conclusive of compliance with the provisions.

> 57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.
>
> If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.
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> The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queens's assent.

The Senate and the House of Representatives have been dissolved simultaneously on six occasions. On 4 June 1914 the Governor-General agreed to dissolve both Houses on the ground that the Senate had twice rejected the Government Preference Prohibition Bill. The dissolution took place on 30 July. In the election on 5 September the Government was defeated. The Bill was not reintroduced in the new Parliament.

On 17 March 1951 the Governor-General agreed to a double dissolution on the ground that the Senate had not yet passed the Commonwealth Bank Bill which had been presented for a second time

on 11 October 1950, over five months earlier. The dissolution took place on 19 March and the election on 28 April. The Government was re-elected with a majority in both Houses and secured the passage of the Bill.

On 11 April 1974 the Governor-General dissolved both Houses on the ground that the Senate had twice rejected six Bills, a Bill for one vote one value on 29 August 1973, two Bills concerning representation of the Territories in the Senate on 14 November 1973, two Medibank Bills on 9 April 1974 and the Petroleum and Minerals Authority Bill on 10 April 1974. At the election on 18 May 1974 the Government was re-elected without a majority in the Senate but with an absolute majority of the total number of members of the two Houses. In the new Parliament the Senate rejected three of the Bills and was evenly divided on three others. (Under section 23 of the Constitution, they were therefore deemed to have passed in the negative.) The six Bills were passed at a joint sitting on 6 and 7 August 1974.

On 11 November 1975 the Leader of the Opposition was commissioned as caretaker Prime Minister on condition that he recommend a double dissolution on the basis of 21 Bills which the Senate had twice rejected on dates between 11 December 1974 and 8 October 1975. At the election on 13 December 1975 the new Prime Minister was elected with a majority in both Houses but none of the Bills was reintroduced.

On 10 March 1982 the Senate rejected nine sales tax Bills for a second time. The House of Representatives could not continue beyond 25 November 1983, three years from its first meeting; any dissolution, therefore, could not take place within six months of that date. The double dissolution was proclaimed on 4 February 1983, almost 11 months after the necessary circumstances had arisen. Four other Bills fulfilled the conditions for a double dissolution, a social service Bill which had been rejected by the Senate for the second time on 25 March 1982 and three education Bills which had been rejected for the second time on 19 May 1982. The Government was defeated at the election on 5 March 1983 and none of the Bills was reintroduced.

On 2 April 1987 the Senate rejected the Australia Card Bill a second time. On 27 May the Prime Minister advised and the Governor-General approved a double dissolution. It was proclaimed on 5 June. At the election on 11 July the Government was re-elected without a majority in the Senate but with an absolute majority of the total number of members of the two Houses. The Bill was not reintroduced.

The double dissolutions of 1914, 1951 and 1974 were founded on eight Bills in all, of which seven were subsequently enacted. The double dissolutions of 1975, 1983 and 1987 were founded on 35 Bills in all, none of which was subsequently reintroduced.

The political exigencies and rationalisations of the time have produced wide variations in the form and publication of communications which have passed between Prime Ministers and Governors-General in respect of double dissolutions. The third person note accompanied by a memorandum which the Prime Minister sent to the Governor-General on 4 June 1914 and the three subsequent notes which they exchanged on the same day were tabled in Parliament on 8 October, the opening date of the new Parliament. The letter which the Prime Minister sent on 16 March 1951 with opinions from the Attorney-General and Solicitor-General and the Governor-General's reply of the following day were tabled with a foreword by the Prime Minister on 24 May 1956.

The letter which the Prime Minister sent on 10 April 1974, accompanied by a joint opinion by the Attorney-General and Solicitor-General and another opinion by the Attorney-General, a further letter which the Prime Minister sent on 11 April and the Governor-General's reply of that date were tabled with a foreword by the Prime Minister on 30 October 1975. The Governor-General himself published immediately the letter and statement of reasons which he gave to that Prime Minister on 11 November 1975. On 20 February 1979, 15 months after the Governor-General had resigned, the new Prime Minister tabled an opinion which the Solicitor-

General gave on 12 November 1975 and related correspondence with a foreword by himself.[419]

On 4 June 1984 the Prime Minister tabled the letters which his predecessor delivered to the Governor-General and the reply which the Governor-General gave on 3 February 1983 about the double dissolution proclaimed the following day. On 23 November 1987 the Prime Minister tabled his letter to the Governor-General and the Governor-General's reply of 27 May concerning the double dissolution which took place on 5 June.

The 1974 double dissolution and subsequent joint sitting gave rise to three cases in which the High Court considered the meaning of section 57: Cormack v Cope,[420] Victoria v Commonwealth and Connor (PMA Case)[421] and Western Australia v Commonwealth (Territory Senators Case).[422] As a result, the following points may be regarded as settled:

(a) The provisions of section 57 are justiciable in relation to whether an occasion has arisen on which a joint sitting may be convened and whether legislation passed at the joint sitting is valid. In the PMA Case the High Court ruled that one of the six Bills passed at the joint sitting, the Petroleum and Minerals Authority Bill 1973, was invalid on the basis that the

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419 On the same day he tabled, with a foreword by himself, the letter he sent to the former Governor-General on 26 October 1977 and the reply of 27 October concerning the issue of writs for the general election of members of the House of Representatives and Territorial senators on 10 December and an invitation to the Governor of each State to issue writs for the election of half the senators for his State on the same day. The terms of these senators, elected on 13 December 1975, were due to expire on 30 June 1978. The terms of the members of the House of Representatives were to expire on 17 February 1979. This has been the only occasion on which correspondence has been tabled concerning premature elections.

420 (1974) 131 CLR 432.

421 (1975) 134 CLR 81.

422 (1975) 134 CLR 201.

requisite three months had not passed between the Senate's failure to pass the Bill and its second passage by the House of Representatives. The majority judges indicated, however, that they did not regard the dissolution of the Parliament as justiciable. In their view, if the double dissolution had been granted on the basis of the Petroleum and Mineral Authorities Bill only and thus unauthorised by section 57, the ensuing elections would ensure that the new Parliament would be legitimate. This means that the legitimacy of the Parliament elected following a double dissolution under section 57 cannot be challenged, but a law enacted by a joint sitting of that Parliament may be ruled invalid on the basis of events preceding the double dissolution.

(b) The section operates distributively, so that a double dissolution may be granted or a joint sitting convened in relation to more than one Bill.[423] This means that a Government can build up a 'stockpile' of Bills on which to base a double dissolution and, potentially, have them all passed at a joint sitting. It is an open question whether a declaration as to the invalidity of the dissolution could be obtained before a proclamation dissolving both Houses.[424]

(c) There is no time limit within which a double dissolution must occur following the second rejection of a Bill by the Senate (provided that, as specified by

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423 Cormack v Cope.

424 See, for example, PMA Case (1975) 134 CLR 81, 156-7 (Gibbs J).

the section, it does not take place within six months before the expiry of the House of Representatives).[425]

(d) The three months interval which must elapse before the second passage of the Bill by the House of Representatives runs from the Senate's rejection of, or failure to pass, the Bill. The expression 'fails to pass' involves the notion that a time has arrived when, allowing for a reasonable period for deliberation, the Senate ought to decide whether or not to pass the Bill or make amendments to it for the consideration of the House of Representatives.[426]

The cases on section 57 have not resolved all aspects of its interpretation. Indeed the court cannot be expected to define the expression 'fails to pass' any more precisely than it has done in the PMA Case. The problem is a conceptual one. Each stage of the procedure set out by section 57 may be triggered by the Senate's failure to pass a particular Bill but it is impossible to say precisely when a failure to do something, that is, a non-event, occurs. Consequently, there may be doubt about whether a Bill has satisfied the requirements of the section and whether the Government can properly advise the Governor-General to dissolve both Houses.

The meaning of the section is also unclear in relation to a Bill passed by the Senate 'with amendments to which the House of Representatives will not agree'. It is not clear whether the three months begin to run from the date of passage by the Senate or the decision of the House not to accept the amendments. Doubts may also arise as to when it can be considered that the House 'will not agree' to the Senate's amendments.

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425 Territory Senators Case.

426 PMA Case.

Issues

The major issues which have emerged in our review of section 57 may be summarised as follows:

(a) Should the procedure set out in the section apply to all Bills passed by the House of Representatives?

(b) Should a procedure for resolving a disputed Bill or Bills involve a double dissolution and an ensuing election?

(c) If so, should the Government be able to advise the Governor-General to dissolve both Houses at any time after the second rejection of a particular Bill or Bills?

(d) What should be the function of the Governor-General in relation to section 57?

(e) Should the section be clarified and, if so, how?

(f) In view of our recommendation to break the nexus in size between the House of Representatives and the Senate, should the requirement that a proposed law be passed by an absolute majority at a joint sitting be altered?

Previous proposals for reform

1950 Senate Select Committee upon the Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill. The Committee recommended as follows:

> that when the circumstances have arisen that would under the broad provisions of section 57 of the Constitution justify the granting of a double dissolution, or if an ordinary Public Bill has not become law within six months - and two months in the case of what, without precise definition, we call a Money Bill - of the receipt of the Bill by the Senate

> from the House of Representatives, then the dispute or the Bill as the case may be should be referred to a joint sitting of the two Houses, at which the will of an absolute majority of the total number of the members of the Senate and the House of Representatives shall prevail. This proposal would necessitate the repeal and redrafting of section 57 of the Constitution and would result in the elimination of the provisions for a double dissolution. The opportunity could - with advantage - be taken to clear up ambiguities in the present wording of section 57...[427]

1959 Joint Committee on Constitutional Review concluded that section 57:

> was no longer appropriate to modern conditions of parliamentary government and should be modified to draw a distinction between money bills and other bills and to provide the government with more than one possible means by which the resolution of a deadlock might be obtained.[428]

In summary, the procedure it recommended for resolution of deadlocks over proposed laws other than annual supply Bills or Bills imposing taxation was as follows:

1. A deadlock is deemed to arise between the two Houses if:

   (a) the Senate has not passed a proposed law transmitted to it from the House of Representatives within 90 days and the session has not ended; and

   (b) the House of Representatives passes the proposed law again in the same or the next session; and

   (c) the Senate either rejects it again or has not passed it within 30 days after transmission from the House.

2. When a deadlock is deemed to arise the Governor-General may:

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[427] Paper No. S1 1950-1951, xxvii.

[428] 1959 Report, 19.

(a) convene a joint sitting to vote together on the proposed law as last passed by the House of Representatives; or

(b) dissolve the Senate and the House of Representatives simultaneously.

3. If the proposed law is affirmed at a joint sitting by an absolute majority of the total number of members of both Houses and by at least half the total number of members of both Houses drawn from a particular State, in at least half the States, it is deemed to have passed both Houses.

4. If, following a double dissolution or the dissolution or expiry of the House of Representatives within one year after the deadlock has arisen, the House of Representatives passes the proposed law again and the Senate rejects it again or has not passed it within 30 days, the Governor-General may convene a joint sitting.

5. If the proposed law is passed by an absolute majority of the total number of members of both Houses, it is deemed to have been passed by both Houses.

The amendments proposed by the Joint Parliamentary Committee were contained in a Bill, Constitution Alteration (Disagreement between the Senate and the House of Representatives) 1964, which was introduced by the Leader of the Opposition in the Senate. A debate took place but no vote was taken.

Australian Constitutional Convention. Consideration of section 57 by a Standing Committee of the Australian Constitutional Convention was overtaken by the events of 1974 and 1975. Since that time, debate concerning section 57 has been in the context of the role of the Senate in relation to supply and the powers of the Governor-General. In relation to the latter, the Perth (1978) session requested one of its Standing Committees to consider the conventions (or accepted practices) which applied

under the Constitution. The Standing Committee's recommendation concerning the Governor-General's role under section 57 was that the Constitutional Convention should recognise and declare that the following practice should be observed as a convention in Australia:

> The Governor-General may refuse advice to dissolve both Houses if he is not satisfied that the conditions in section 57 have been complied with...[429] recommendation was considered by the Adelaide (1983) session but referred to the Standing Committee for further consideration. The following practices were finally adopted without division by the Brisbane (1985) session:
>
> K. The Governor-General, having satisfied himself on the advice of the Prime Minister that the conditions in section 57 of the Constitution have been met and that a double dissolution should be granted dissolves both Houses of the Parliament simultaneously on the advice of the Prime Minister.
>
> L. All advice tendered by the Prime Minister to the Governor-General in connection with a dissolution of the House of Representatives or a dissolution of both Houses of Parliament and the Governor-General's response thereto, should be committed to writing and published before or during the ensuing election campaign.
>
> ...
>
> P. The Governor-General, having satisfied himself on the advice of the Prime Minister that the conditions in section 57 of the Constitution have been met, acts on prime ministerial advice in exercising his power to convene a joint sitting of the members of the Senate and of the House of Representatives.[430]

Disagreements between the Houses of the State Parliaments

In considering the issues raised by section 57 we have taken into account the manner in which disagreements over proposed laws are dealt with by the Parliaments of the States. In summary, the position is as follows:

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429 Fourth Report of Standing Committee D To Executive Committee, 37, ACC Proc, Adelaide 1983, vol II.

430 ACC Proc, Brisbane 1985, vol I, 416-7. All the principles and practices which the ACC resolved should be observed as conventions in Australia are set out in Chapter 2 at pp **XXX**.

New South Wales. The Constitution Act 1902 was amended in 1933[432] to include machinery for the resolution of deadlocks over supply and other Bills. With respect to 'other Bills' it provides, in summary, that if the Legislative Council twice rejects a Bill passed by the Assembly, or fails to pass it within two months of its transmission to the Council, and the deadlock is not resolved by a free conference between managers of each chamber or debate at a joint sitting, the Assembly may, by resolution, direct that the Bill be put to referendum. If a majority of the electors voting approve the Bill it becomes law.[433]

Victoria. In 1984 the Constitution Act 1975 was amended[434] to provide for a qualified fixed term for the House of Assembly and to change the fixed term of Legislative Councillors to a term of two Assemblies. With respect to Bills other than supply Bills the amended Act provides that, if the Council rejects a Bill passed by the Assembly and the Assembly resolves that it is a 'Bill of special importance' and passes it for the second time, the Governor may dissolve the Assembly if the Bill is rejected again by the Council. A Bill is deemed to have been rejected if it is not passed within two months after transmission to the Council. The Governor cannot dissolve the Assembly pursuant to this provision after one month has elapsed since the last rejection of the Bill.

Queensland. The Parliament has consisted of only the Legislative Assembly since 1922.

Western Australia. There is no statutory provision for the resolution of deadlocks. A Royal Commission into Parliamentary Deadlocks was established in 1984 and reported in February

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432 Constitution Amendment (Legislative Council) Act 1933.

433 Constitution Act 1902 (NSW), section 5B.

434 Constitution (Duration of Parliament) Act 1984

1985.[435] It recommended that a procedure based on section 57 of the Federal Constitution should be adopted to resolve deadlocks over Bills other than supply Bills, with the proviso that the double dissolution option should only be available within three months of the second rejection of a Bill by the Council. Its recommendations have not been implemented to date.

South Australia. The Constitution Act 1934 was amended in 1985[436] along similar lines to Victoria's. However, it draws no distinction between supply Bills and other Bills and retains a double dissolution provision to resolve a deadlock in certain circumstances.

Tasmania. There is no statutory deadlock provision. In 1981 the Royal Commission into the Constitution Act 1934 was established to inquire into the settlement of deadlocks between the Legislative Council and Legislative Assembly. It recommended that the following procedure should apply to all Bills other than constitutional amendment Bills, Bills dealing with taxation and appropriation and supply Bills (except appropriations for new policies):

> (a) Where the Council has not passed any bill within three months of its receipt from the Assembly, the Assembly may, by resolution, declare it to be a 'prescribed bill' or purposes of the Constitution Act.
>
> (b) If the Council has not passed a prescribed bill within six months of its having been so declared, the Governor may, on the advice of his ministers, either:-
>
> > (i) Issue a writ for a referendum of electors to decide whether the bill should become law; or
> >
> > (ii) Issue a writ for a referendum of electors to decide any questions in relation to the bill that have been agreed upon by resolution of both Houses; or
> >
> > (iii)Dissolve the Assembly.

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435 WA Royal Commission into Parliamentary Deadlocks, Report (1984-5).

436 Constitution Act Amendment Act 1985.

(c) A dissolution of the Assembly shall not be deemed to be in pursuance of paragraph (b) above if: -

(i) More than three months have elapsed since the Council rejected a prescribed bill, or voted that it should be read on this day six months; or

(ii) More than nine months have elapsed since the Assembly declared a bill to be prescribed; or

(iii) The dissolution occurred within six months of the expiration of the term of the Assembly.

(d) If the Assembly is dissolved pursuant to the above provisions a prescribed bill may, if the Assembly so resolves, be presented to the Governor for assent without the approval of the Council at any time within three months of the first sitting of the Assembly after the return of the election writs. There should be no 'stockpiling', i.e. the procedure shall be available in the case of one bill only.

(e) If a prescribed bill is approved by electors at a referendum it may be presented to the Governor for assent without approval of the Council at any time within three months of the return of the referendum writ, if the Assembly so resolves.[437]

These recommendations have not been implemented to date.

Submissions

Only a few submissions were received on aspects of section 57 other than its application to 'supply Bills'. Several submissions favoured altering section 57 to provide that, in the event of a second rejection of a Bill by the Senate, the Governor-General may either convene a joint sitting or dissolve both Houses simultaneously.[438] Several others favoured the Senate having the power only to delay a Bill for a certain period, not to reject it.[439] Other proposals were that a Bill rejected by the Senate or passed with amendments with which the

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437 Tasmania, Royal Commission into the Constitution Act 1934, Report (1982) 72.

438 Mr Justice R Else-Mitchell S085, 23 January 1987; FJ Reid S805, 12 January 1987.

439 JH Miller S067, 23 April 1986 (but no delay in relation to defence Bills); L Jarman S122, 20 June 1986.

House did not agree should become law for one year, then lapse unless reintroduced and passed;[440] and that the Governor-General, acting on the advice of the Full High Court, should be empowered to direct that a referendum be held on a deadlocked Bill.[441]

Mr CP Long[442] suggested that the reasons given for the withdrawal of the Australia Card legislation raised doubts about the interpretation of section 57. In his view, the special machinery set up by the section must be deemed to apply 'not merely to the Act it produces, but also to its regulations; in other words the regulations, as in the case of their Act, must be placed before a joint sitting of both Houses.' In his opinion, the matter should be clarified.

A detailed submission on section 57 was provided by Professor James Crawford.[443] He considered that, apart from money Bills, the deadlock procedure is broadly satisfactory. In particular, he thought that the power to call a double dissolution should not be limited out of any concern that the power may be abused. In his view, any abuse of power would be a matter for the electorate to take into account. In relation to the problem of when a failure to pass a Bill or to accept proposed amendments to one can be said to have occurred, Professor Crawford thought that any constitutional alteration would be likely to be wordy and cumbersome. He submitted that it would be more fruitful for the Senate and the House of Representatives to adapt their procedures or even to introduce new rules which would determine when, for the purposes of the House, a Bill would be regarded as having been rejected.

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440 G Jensen S1003, 20 February 1987.

441 Q McNaughton S1075, 3 March 1987.

442 S3202, 3 February 1988.

443 S808, 7 January 1986.

Reasons for recommendations

Money Bills

We **recommend** that the procedure set out in the present section should not apply to those categories of money Bills which the Senate may not amend, that is, appropriation Bills (with the exception of those appropriating funds for new policies) and taxation Bills. This recommendation and our proposal for the resolution of deadlocks over such money Bills is discussed in detail earlier in this Chapter.[444]

The following discussion relates only to Bills initiated by the House of Representatives which the Senate may amend. It does not include, however, Bills for the alteration the Constitution. These are dealt with in Chapter 13.

Timing of double dissolution

In our view, the present procedure for resolving disagreement between the Houses over Bills passed by the House of Representatives is unsatisfactory. While it is clear, both from the language of the section itself and upon the basis of precedent, that the procedure is not restricted to either the passage of vital Bills or to a situation where the Parliament has become unworkable, it is nevertheless open to abuse. If the conditions set out in the section are fulfilled, a Government can secure the dissolution of the Senate, as well as the House of Representatives, the only circumstances in which it can do so. A Government without a Senate majority could therefore obtain a double dissolution by the device of passing a Bill known to be totally unacceptable to the non Government party or parties.

It seems clear that the Government Preference Prohibition Bill which was the subject of the 1914 double dissolution was designed

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444 Under the heading 'Powers of the Houses with respect to money Bills' above.

to provoke the opposition of the Senate and to bring about the conditions for a double dissolution. On that occasion, however, it appears that the Parliament may well have been unworkable.[445] Sir Robert Menzies, discussing the double dissolution of 1951 in his memoirs, said that, frustrated by a hostile majority in the Senate and confident of victory in an election, he decided to 'work towards a double dissolution on a lively issue' and selected the Commonwealth Bank Bill for the purpose.[446]

Further, provided that a Bill exists which has been twice rejected in accordance with the section it is possible for a Government to bring about an election for both Houses at any time because there is no time limit within which a double dissolution must occur following the second rejection of a Bill by the Senate. In other words, a Government could use a disputed Bill or Bills as the justification for an early election (including a full Senate election) at a time it considered opportune for its own political success.

In an earlier part of this Chapter[447] we have set out our views on the timing and frequency of elections. We have recommended that the House of Representatives may not be dissolved during the first three years of its four year maximum term unless the Government loses the confidence of the House and no Government can be formed from the existing House. Obviously, that part of section 57 which provides for the simultaneous dissolution of both Houses is incompatible with that recommendation.

In considering this matter, we noted that both Victoria and South Australia, which have recently adopted terms for their lower Houses comprising a maximum of four years and a minimum of three years, provided an exception in the case of 'deadlocked' Bills. We concluded, however, that to allow for further exceptions to

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445 PP Vol 5 1914-17, 129.

446 RG Menzies, The Measure of the Years (1972) 43; See also 44-7.

447 Under the heading 'Terms of the Federal Parliament' above.

the minimum term would defeat the purpose of our proposals, that is, to provide for stability and certainty in our parliamentary system.

The history of the use of section 57 to bring about a double dissolution rather than to resolve a disagreement over proposed legislation confirmed us in that view. We consider that, in its present form, section 57 is detrimental to stable government. It is also detrimental to the review function of the Senate because the Senate is put at risk if it rejects a Bill.

It may also be argued that a general election is not an appropriate way to resolve conflict over proposed legislation because on most occasions the disputed Bill or Bills have attracted little or no attention during the election campaign. Further, the election results may not alter the balance of power in the two Houses with the result that, even though the Government may be able to obtain passage of its 'section 57 Bills' at a joint sitting, the Senate could continue to frustrate the Government's legislative program if it so wished. In other words, the election would not have resolved anything that could not have been resolved by a joint sitting without an intervening election.

Another argument against providing for a general election in this context is that, once members and senators are elected for a term of office, they should be responsible for resolving their own internal conflicts throughout that term.

For these reasons, we initially proposed that dissolution of the Parliament should not be part of the procedure for dispute resolution and that, instead, the Government should have the option of a joint sitting on disputed Bills. We announced this on 2 October 1987 at a press conference detailing the scheme we were considering proposing to the Government in relation to parliamentary terms, the Senate's power over money Bills and legislative deadlocks.

Our provisional proposals provoked widespread comment in the media and in Parliament and, as a result, we reconsidered our position on joint sittings. It was said that the effect of our proposal would have been that, in most circumstances, a Government could have achieved the passage of any legislation, notwithstanding the opposition of the Senate, within approximately six months of its introduction in the House of Representatives. That, however, would have depended on what provisions we would have recommended in relation to a special majority which we had not at that time formulated.

Since the option of a joint sitting is not essential to our recommendation that the House of Representatives have a minimum term of three years, we have decided, on balance, that a modified version of the present system is to be preferred.

It is clear that the Senate's rejection of or failure to pass an ordinary, amendable Bill is not critical to the life of a Government as would be its rejection or failure to pass vital financial legislation. We have decided, therefore, to recommend that, for the first three years of a Government's term, the two Houses should be left to resolve disputed legislation between themselves.

In the fourth year, if a Bill or Bills exist which satisfy the requirements of section 57 (as altered), we consider that a Government should be able to secure a double dissolution on that basis and, if it is returned at the ensuing election, have the disputed legislation put to a joint sitting.

In other words, the Government should not be able to advise the Governor-General to dissolve both Houses at any time after the second rejection of a particular Bill or Bills by the Senate.

We <u>recommend</u> that simultaneous dissolution should only be permitted in the fourth year of the term of the House of Representatives.

Function of the Governor-General

Section 57 provides that, following the second rejection of or failure to pass a Bill by the Senate, 'the Governor-General may dissolve the Senate and the House of Representatives simultaneously.' There has been considerable speculation about whether, notwithstanding the conventions of responsible government, the Governor-General has any discretion to refuse a Prime Minister's request for a double dissolution. As noted earlier in our general discussion of the 'reserve powers' of the Governor-General in Chapter 2[448], the debate has covered two questions: whether the Governor-General should be satisfied independently that the conditions of section 57 have been met and whether, if satisfied that they have been met, the Governor-General has any discretion to refuse to grant a double dissolution.

Whether the conditions set out in section 57, as presently formulated, have been fulfilled and therefore constitute the legal basis for dissolution of the Parliament, may involve issues of law. The legal issues can be resolved by the High Court at a later date and a law wrongly passed in reliance on the section can be invalidated, as occurred in relation to the Petroleum and Minerals Authority Act.

Such a course of action would not, of course, be of assistance in a case where the dissolution (at least, of the Senate) might itself be illegal. As noted above, it is highly unlikely that the Court would declare void a dissolution and subsequent election, even if it were established that they were unauthorised by section 57. We will therefore recommend in Chapter 6 of our Final Report that, on the application of the Governor-General in Council, the High Court should be empowered to issue a declaratory judgment relating to any question of law as to the manner and form of enacting a proposed law. This will allow the Court to determine, prior to a proclamation of dissolution,

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[448] Under the heading 'Reserve powers of the Crown'.

whether the requirements of section 57 have been fulfilled. In the face of a negative ruling by the Court, any advice already given to the Governor-General to dissolve both Houses pursuant to section 57 would be withdrawn.

If a number of our other recommendations relating to section 57 are accepted, the uncertainty surrounding its operation should, in any event, be removed. It should be clear, simply from a reading of the parliamentary record, whether disputed legislation fulfills the conditions precedent for a double dissolution. We discuss this further below.

The second matter, which has been the subject of some disagreement over the years, is whether the Governor-General, even if satisfied that the requirements of the section have been met, may refuse to dissolve the Parliament. It has been argued that a Governor-General is entitled to be satisfied that either the proposed law over which the Houses have been unable to agree is of such public importance that it should be referred to the electors or that the Parliament is in such a state of practical deadlock that it is unworkable. It is noteworthy in this regard that Prime Ministers, in their letters of advice to the Governor-General of the day, have not confined themselves to establishing that the requirements of section 57 have been complied with but have pointed to difficulties within the Parliament and/or the importance of the disputed legislation.

We do not, however, regard this as evidence in favour of an independent role for the Governor-General. In our view, it is to be regarded as setting out, as a matter of public record, the political justification for a double dissolution. Any exercise of political judgment by a Governor-General is inappropriate and could be expected to cause serious constitutional difficulties and public controversy.

In practice, a Governor-General would have no choice but to grant a double dissolution to a Prime Minister who retained the confidence of the House of Representatives and threatened to

resign unless his or her advice was accepted. In this situation the Governor-General would be unable to find a replacement Prime Minister.

Therefore, we **recommend** that the relevant part of section 57 be altered to read, '...the Governor-General in Council may dissolve the Senate and the House of Representatives simultaneously.' The addition of the words 'in Council' make it clear that the Governor-General may act only on the advice of the Ministry. For the same reason, 'in Council' should be added to the words 'Governor-General' in the context of the convening of a joint sitting, so that the relevant part reads, '...the Governor-General in Council may convene a joint sitting of the members of the Senate and the House of Representatives.'

Clarification of section 57

The drafting of the present section, particularly the use of the expression 'fails to pass', is unsatisfactory. We have noted above the conceptual difficulty involved in attempting to ascertain precisely when a non-event can be said to occur.

Further, even if it is accepted that the High Court, as the 'guardian of the Constitution' should be able to review the internal workings of Parliament to ensure that procedures set out in the Constitution are adhered to, there is a problem as to how it should inform itself in relation to the Senate's failure to pass a Bill. How much regard should it have, for example, to statements in Hansard or the press about the Senate's intention? This highlights the problem with the wording of the section for there are no objective criteria to determine when a failure to pass has occurred.

We also noted above that, in relation to a Bill passed by the Senate 'with amendments to which the House of Representatives will not agree', it is unclear whether the three months which must elapse before the House passes the Bill for the second time runs from the date of passage by the Senate or the decision of

the House not to accept the amendments. Further, it might not always be clear when it can be said that the House 'will not agree' to the Senate's amendments.

These difficulties can and should be resolved in the interests of certainty. It is intolerable that a risk exists that the Parliament might, in good faith, be dissolved in reliance on a Bill which, on one interpretation of events, fulfills the requirements of the section but which is later held not to have done so. This risk should, so far as possible, be removed. Similarly, the risk of legislation passed at a joint sitting being invalidated because vague or ambiguous procedural requirements were not met, should be removed.

Therefore, we recommend that the relevant steps of the procedure set out in the section should be triggered only by the 'rejection' of a Bill by the Senate. If, at the expiration of sixty days after the transmission of a Bill, the Senate has not passed it or has passed it with amendments to which the House of Representatives has not agreed, the Senate is to be taken to have rejected it. In our view, sixty days allows the Senate adequate time to consider a Bill.

Another aspect of section 57 which requires clarification relates to the amendments to a Bill which may be considered and voted on at a joint sitting. The application of section 57 in respect of a particular Bill at each stage of the procedure depends upon that Bill retaining its identity as the Bill originally passed by the House of Representatives, or that Bill with such amendments only as have been made, suggested or agreed to by the Senate. Notwithstanding this, the final paragraph of the section provides for the joint sitting to vote upon the proposed law as last proposed by the House of Representatives '...and upon amendments which have been made therein by one House and not agreed to by the other...'.

On its face, this appears to allow for the possibility of the House of Representatives amending its own Bill during the period

following its third rejection by the Senate but before a joint sitting. Assuming a Government had the numbers, it could then have the amended Bill passed at the joint sitting.

We do not think that that result was intended by those who drafted the section. It would make nonsense of the requirement that the Bill maintain its identity throughout the procedure and would be very unfair to the Senate. If the House of Representatives amends a Bill without the agreement of the Senate, the process should start again. We **recommend**, therefore, that it be made clear that the only amendments which can be considered and voted on at a joint sitting are those which have been made by the Senate and not agreed to by the House of Representatives.

In addition, we **recommend**:

(i) that it be made explicit that the period which must elapse before the second passage of a proposed law by the House of Representatives runs from its rejection by the Senate; and

(ii) that the intervening period should be expressed as 'ninety days' rather than 'three months'.

Majority requirement at joint sitting

We have discussed above our recommendation that the size of the House of Representatives should not be tied to being twice the size of the Senate and our decision not to make this subject to the condition that the present weight of a senator's vote in relation to that of a member of the House of Representatives be preserved at a joint sitting.[449]

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[449] Under the heading 'Nexus between the size of the House of Representatives and the Senate' above.

We acknowledge, however, that concern has been expressed that the position of the less populous States (which are more strongly represented in the Senate than in the House) might be weakened if the nexus is broken and only an absolute majority is required for the passage of legislation at a joint sitting.

We have decided, therefore, to recommend that a special majority which takes into account State groupings of senators be required. To this end, we have adopted the formula proposed by the 1959 Joint Committee, that is, a proposed law will be deemed to have passed both Houses if it is affirmed at a joint sitting by an absolute majority of the total number of members of both Houses and by at least half the total number of members of both Houses drawn from a particular State, in at least half the States.[450] This means that at least half the total number of members and senators in each of at least three States must vote for the Bill in addition to an absolute majority of the whole Parliament.

We also recommend that the same special majority be required before an amendment to a proposed law shall be taken to have been agreed to at a joint sitting.

Identity of proposed law

It has been pointed out by Mr CK Comans, CBE, QC, former First Parliamentary Counsel,[451] that the double dissolution of 1983 demonstrates a possible problem of identity of proposed laws which are the subject of section 57. Each of nine Bills (relating to sales tax) listed in the double dissolution Proclamation contained a clause providing for its commencement on 1 January 1982. The Bills were originally transmitted to the Senate on 27 August 1981 but were not passed. They were introduced for the second time in the House of Representatives on

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450 The recommendation of the Joint Committee related only to a joint sitting held in the absence of a prior double dissolution.

451 CK Comans, 'Constitution, Section 57 - Further Questions' (1985) 15 Federal Law Review 243, 247-8.

16 February 1982 but because of 'constitutional considerations' still expressed to come into operation on 1 January 1982. The Government took the view that section 57 required that the Bills be in exactly the same form as those originally passed by the House. The Treasurer announced, however, that a new commencement date of 29 March 1982 had been set and that, once the Bills had passed both Houses, the Government intended to introduce a further Bill altering the commencement date. According to Comans:

> it can surely be argued that the Bills, as rejected by the Senate on the second occasion, were not the same proposed laws as were not passed on the first occasion even though the text remained unchanged. The Minister's own statement recognized that the Bills could no longer have the operation originally intended and provided by their texts.[452]

He suggested that the awkward position which arose in relation to the sales tax Bills could have been avoided if section 57 had included a paragraph along the lines of the following provision in section 2(4) of the Parliament Act 1911 (UK):

> (4) A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker of the House of Commons to be necessary owing to the time which has elapsed since the date of the former Bill....

We agree that section 57 should be altered to resolve the problem posed by a Bill which is in identical terms to the original Bill but requires alteration by reason of the time which has elapsed since its introduction. We recommend a provision along the lines of the United Kingdom provision quoted above, but we think that the test should be an objective one rather than dependent upon certification by the Speaker.

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[452] id, 248

Therefore, we recommend that a proposed law should not lose its identity as the proposed law which is the subject of the section if it contains only such alterations as are necessary by reason of the time which has elapsed since its introduction or which represent amendments made by the Senate.

Royal assent

We have recommended a number of changes to section 57 designed to remove the present uncertainty surrounding its operation. We have also emphasised that the Governor-General, in dissolving both Houses simultaneously and in convening a joint sitting under the section, acts on the advice of Ministers. In Chapter 2 we recommend that section 58 be altered to provide expressly that the Governor-General acts on the advice of Ministers in relation to assenting to Bills passed by both Houses.

In order to ensure that the Governor-General is not placed in an awkward position, by reason of any uncertainty about whether a Bill has complied with section 57, we recommend that section 58 not apply to a Bill passed at a joint sitting unless the Speaker of the House of Representatives has certified that it has complied with all the requirements of section 57. The Speaker's certificate would not be conclusive (that is, whether an Act was authorised by section 57 would still be a justiciable issue) but it would form part of the Government's advice to the Governor-General.

SALARIES OF MEMBERS OF PARLIAMENT

Recommendation

We recommend that section 48 be omitted and that the following section be substituted:

> Each senator and each member of the House of Representatives shall receive such remuneration as the Parliament may fix.

Current position

Section 48 of the Constitution provides:

> Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

In exercise of its power under section 51(xxxvi.) of the Constitution,[453] the Federal Parliament has, from time to time, enacted laws to vary the allowances payable to senators and members of the House of Representatives under section 48. For purposes of appropriations, however, a distinction is made been salaries payable to members of the Parliament and allowances for travel and other expenses. There are separate Acts of the Parliament making special (that is, standing) appropriations for both purposes.[454]

Previous proposals for reform

Section 48 was considered by the Australian Constitutional Convention in 1975 and 1976 as part of its general review of expended and outmoded provisions in the Constitution. It was agreed that the section is out of touch with reality and it was resolved that it be omitted and that the following section be substituted:

> The Parliament shall determine, or provide for the determination of, the remuneration, salaries and allowances of each Senator and each member of the House of Representatives to be reckoned from the day on which he takes his seat.[455]

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453 The power to make laws with respect to 'matters in respect of which this Constitution makes provision until the Parliament othewise provides'.

454 See Parliamentary Allowances Act 1952; Remuneration Tribunal Act 1973.

455 ACC Proc, Melbourne 1975, 174; ACC Proc, Hobart 1976, 206-7.

The Bill, Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983 made no provision for alteration of section 48.

Reasons for recommendation

We agree with the Australian Constitutional Convention that section 48, like section 66 which deals with salaries payable to Ministers, is outmoded and should be replaced by a new provision. We think it desirable that the Parliament should have an express power to make laws on the remuneration of members of Parliament. The only question is, therefore, how the new provision should be expressed.

We are satisfied is that the term 'allowances' is no longer apt to describe the subject matter of the power and that it would be preferable to employ the term 'remuneration'.

Terms such as 'salaries', 'allowances' and 'remuneration' have been employed in a variety of statutory contexts, but none of them has a fixed or special legal meaning. Examination of judicial decisions in which the terms have been interpreted suggests that the term 'remuneration' has a wider connotation than 'salaries' and 'allowances'. A salary is thus but one form of remuneration. An allowance may also be a form of remuneration, but, when payable in connection with a person's service as an employee, or as the holder of a public office, it usually connotes a payment in respect of costs such as costs of travel or costs of living away from a person's place of residence.[456]

We have no doubt that the term 'allowance', in the context of section 48 of the Constitution, would be interpreted liberally so

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456 See Attorney-General for NSW v Perpetual Trustee Co (Ltd) (1952) 85 CLR 237, 242, 265, 269; WJ & F Barnes Pty Ltd v Federal Commissioner of Taxation (1957) 96 CLR 294, 302, 310; Federal Commissioner of Taxation v Hatchett (1971) 125 CLR 494.

as to encompass both payments by way of salary for services, and payments by way of allowances in the narrow sense. Nevertheless we consider it more in accord with modern English usage to describe the Federal Parliament's power to fix salaries payable to members of the Parliament, and to authorise payment to them of moneys to cover incidental costs incurred by them in discharging their duties, as a power to fix their remuneration.