Australia's State Constitutions, Reform and the Republic

John Waugh

AUSTRALIA is still very much a federation, and its constitutional framework is made up of the State constitutions as well as their more familiar Commonwealth counterpart. The Commonwealth Constitution and Commonwealth legislation prevail over State laws where there is any inconsistency, but it is basically the State constitutions that create the structure for parliament and government at State level. In some ways, this structure is rather different from the structure created at the national level by the Commonwealth Constitution, and it sometimes gives State parliaments the chance to act in ways that are not open to the Commonwealth parliament.

At least two kinds of change in the State constitutions are under consideration at the moment: one linked to the push to cut links with the monarchy, and the other based on proposals for more general amendments. The next few years will show whether these paths towards amendment will converge, or leave quite separate reform proposals to succeed or fail independently of each other.

The Constitution Acts

The small number of amendments to the Commonwealth Constitution — only eight since federation — has left it with an appearance of coherence and even permanence that it does not share with its State counterparts. They are patchworks, accretions of years of amendment around the skeletal remains of 19th-century originals. This is most true of the constitutions of Western Australia and Queensland, each of which takes the form of a heavily-amended 19th-century Act supplemented by voluminous provisions in separate pieces of legislation, among them the Constitution Acts Amendment Act 1899 in Western Australia and the Legislative Assembly Act 1867 in Queensland. As a result, in these States the law corresponding to the Constitution Acts of the other States is often scattered and difficult to find.

To some extent, a patchwork of a different sort is found in the other States, which have all consolidated and re-enacted their constitutions at different times in the 20th century. These consolidations put a more modern date on the constitution (1975 in the case of the most recent, in Victoria), but they were not wholesale revisions, less still attempts at writing a new constitution from scratch. Instead, they

collected and organised the original provisions and the amendments that had been made over many years, making them more accessible. This means that a certain amount of the wording of even the most recent State constitutions goes back to 19th-century Acts that have been copied into the modern legislation.

The constitutions have kept some of the style of the 19th-century originals. They are sketchy on some subjects and prolix on others, since they generally do not set out to describe the whole framework of government, but just to lay down rules where legislation was seen as necessary, leaving other things, sometimes surprisingly important ones, to case law or convention. As a result, they have relatively little to say about anything but parliament. They hardly deal with the executive branch of government, and they are generally silent about the powers and organisation of the ministry and the public service. Nor do they contain much more than scattered hints about the way the democratic process controls the powers of the Governor, although amendments made to the Victorian Constitution Act at the end of 1994 have added a new reference of this sort.

Some Differences Among the State Constitutions

There are many differences among the State constitutions. The very numerous differences in detail are not worth trying to summarise here, but some larger differences to do with parliament are worth pointing out. Among them is election timing. Queensland has kept a three-year maximum term for its single house, with no minimum. As for the lower houses in the other States, in Western Australia the maximum term is four years, but again with no minimum. South Australia and Victoria have set a maximum term of four years and (with some exceptions) a minimum of three; in New South Wales, amendments approved by referendum in 1995 introduced a four-year fixed term, again with some exceptions. Tasmania's flexible four-year term for the lower house is overridden temporarily by a 1992 Act that fixed 25 January 1996 as the date on which the current House of Assembly was to be dissolved, but without laying down a rule for future parliaments. In Tasmania and the other States with fixed or minimum terms, an early election is possible if the government loses its majority in the lower house, if the parliament refuses supply, or (in Victoria and South Australia) if the upper house blocks other legislation.

The powers and terms of the upper houses found in all States except Queensland also differ. The Legislative Council of New South Wales has lacked the power to block supply since 1933, when choice of its members by parliament replaced nomination by the Governor (direct popular election followed under amendments made in 1978). New South Wales, like Victoria and South Australia, has a deadlock mechanism allowing for resolution of disagreements between the two houses of parliament. Unlike the other two States, the New South Wales mechanism involves a referendum on the disputed bill; in Victoria, there can be a dissolution of the Legislative Assembly and half the Legislative Council, and, in South Australia, a full election for both houses or an additional election for the Council. In Tasmania and Western Australia, there is no mechanism in the constitution for resolving disagreements between the houses. Royal commissions in these

two States have recommended deadlock mechanisms, but no provisions have been introduced as a result (Beaumont, 1982; Edwards, 1985). If either of these Legislative Councils blocks a bill, it stops dead until negotiations or fresh regular elections for the upper house produce a different result. Members of the Legislative Council have a fixed four-year term in Western Australia, and a six-year term with rotating elections in Tasmania. They go to the polls by rotation in New South Wales, South Australia and Victoria, in conjunction with lower-house elections (but with a minimum term for Legislative Councillors in South Australia).

Voting systems differ considerably between States, and between the upper and lower houses in some States, with corresponding effects on the role and functions of the Legislative Council. The rules on this are generally found, not in the State constitution itself, but in separate electoral legislation, sometimes placed in the Constitution Act (or Acts) Amendment Act (a free-standing piece of legislation, despite its name).

In the McGinty case, the High Court is currently considering whether Western Australia is bound by a guarantee of equal value for votes in different electorates. If the Court said that there was such a guarantee, this would be a major extension of constitutional guarantees based on fundamental features of representative democracy, akin to the guarantee of freedom of political discussion that the Court recognised in the free speech cases of 1992 and 1994. In *Australian Capital Television v The Commonwealth* (1992) and *Stephens v West Australian Newspapers* (1994), the Court has already confirmed that the guarantee of freedom of political discussion applies to State politics, and one of the majority judges (Justice Deane) has said specifically that it limits State legislative power.

On the other hand, the courts have said repeatedly that the State constitutions, unlike the Commonwealth Constitution, do not guarantee the separation of judicial power. The entrenchment of provisions on judicial independence in the New South Wales Constitution Act in 1995 adds a new qualification to this, although without entrenching a full separation of judicial power. Nor are State parliaments bound by some of the other limitations the Commonwealth Constitution puts on the Commonwealth parliament. For example, the constitutional guarantee of 'just terms' for compulsory Commonwealth acquisition of property has State counterparts only in legislation, which the parliaments are able to override.

Amendment and its Significance

One key difference between the various State constitutions is their method of amendment. This is also a difference between the State constitutions and the Commonwealth Constitution. Relative ease of amendment has made State constitutional amendments very frequent by comparison with the Commonwealth Constitution. The level of detail in some of the constitutions has also made many amendments necessary.

The State constitutions could originally be amended by parliament acting alone, although in some States special majorities were needed in parliament for some changes, for example, in the structure of parliament itself. Using this power of

amendment, the parliaments of four States (New South Wales, Queensland, South Australia and Western Australia) have gradually introduced requirements for some changes to pass at a referendum. The current position in these four States is that some aspects of the constitution can be changed by ordinary Acts of parliament, while others need both to pass through parliament and to get majority support in a referendum (sometimes with absolute majorities in parliament as well).

The list of changes that have to go to a referendum differs among the States, but in each of these four States it includes changes to the structure of parliament itself, and changes to the section that sets up the referendum rule. In New South Wales and South Australia, the constitution contains rules about the distribution of electorates, and a guarantee of rough equality in the number of voters in each electorate; these provisions, too, can be changed only with a referendum. In other States, ordinary legislation can change the machinery for electoral distributions. New South Wales is also distinctive in writing the principle of compulsory voting into the State constitution, and entrenching it with a referendum requirement.

Whether entrenchment can validly cover more than provisions dealing with parliament has long been a topic of legal debate, but it is likely that other topics can successfully be brought under a referendum rule. In Queensland and Western Australia, provisions of the constitution concerning the Crown and the State Governor are directly entrenched by a referendum requirement. In New South Wales and South Australia, references to the Crown are found in other entrenched provisions. This has consequences for the method of cutting links with the monarchy at State level, something discussed further below.

In Victoria and Tasmania, the position is different. There, a referendum is not needed for any changes to the State constitution, although there is nothing to stop the government holding one to test public opinion. The Tasmanian Premier, Ray Groom, has signalled that his government would hold a referendum by choice to get public endorsement of a republic plan (*Sun-Herald*, 11 June 1995, p.2). This would continue a tradition of referendums that are held to test public opinion outside the formal mechanism for constitutional change. Examples include the federal conscription referendums during World War I, and the dams referendum in Tasmania in 1981.

Parliament can change most provisions in the Tasmanian constitution by an ordinary Act, without following any special procedures at all, although a change in the duration of the House of Assembly needs a two-thirds majority in the lower house. In Victoria, a list of specified changes require, not a referendum, but absolute majorities in both houses of parliament; these include alterations concerning the Crown and the constitution of parliament. They also include alterations affecting another topic that has recently been causing some friction between the government and the judges: the jurisdiction of the Supreme Court (Supreme Court of Victoria, 1994:13-21). Victoria's experiment in constitutional entrenchment of State court jurisdiction is so far unique in Australia, and has led to mixed results (SARC, 1995). Whether, and how, the Supreme Court's jurisdiction should be entrenched

in the Victorian constitution is currently being debated, and some changes might follow.

Consolidation and Reform

The possibilities for reform of the State constitutions divide into two groups. In the first are proposals that have been circulating for some time and deal with what might be thought of as traditional problems of the State constitutions, although some of those problems have taken on new and more pressing forms following events in State politics in the 1980s. The possibility of consolidating the Western Australian and Queensland constitutions, to make them more accessible, also belongs in this group. In the other group are the changes that might be made to the State constitutions on cutting links with the monarchy. These changes could generally be made without raising the issues involved in the first group of proposals. (The relationship between republic amendments and other changes is explored further below.)

In Queensland and Western Australia, where the State constitution is effectively scattered through the Constitution Act proper and separate Acts that supplement it, the most obvious need is for a consolidation. This would collect and organise existing provisions in a new, accessible Constitution Act, without necessarily making substantial changes. The Queensland Electoral and Administrative Review Commission drew up a bill for a consolidation of this sort, as did a joint select committee of the Western Australian parliament (EARC, 1993a; Kobelke, 1991).

The composition and powers of upper houses, parliamentary terms, deadlocks between the two houses, and entrenchment have been the subject of investigation in the States, and sometimes amendment, in recent years. A series of reports in Western Australia, Queensland and Tasmania have canvassed some of these possibilities, but so far they have led to few changes in the State constitutions themselves. The Fitzgerald and WA Inc. reports both contained constitutional recommendations, as well as others concerning different aspects of the working of government (Fitzgerald, 1989; Kennedy, 1992). The Western Australian Commission on Government is continuing some of this work, investigating the electoral system and constitutional amendment, for example, while a separate committee has already reported on Western Australia's place in the federation, and some of the issues raised by proposals for a republic (COG, 1995; McCusker, 1995). In Tasmania, a board of inquiry has examined the parliament in detail, building on the work of a royal commission twelve years before (Morling, 1994; Beaumont, 1982).

The New South Wales constitution, with fixed four-year terms for the Legislative Assembly, an upper house unable to block supply, and entrenchment of significant parts of the constitution with a referendum requirement, represents, as it were, the furthest point yet reached in the line of development from the original Constitution Acts. A position like that reached in New South Wales has other implications. Fixed terms and minimisation of the risk of a supply crisis reduce the discretion, and, to some extent, the significance, of the State Governor, making it easier for the New South Wales Premier to raise, as he reportedly has, the possibility of abolishing the office (*Australian*, 20 June 1995, p.2).

Beyond these proposals extends a whole political landscape of possible constitutions, whose topography is suggested by examples from overseas. The American State constitutions show how different Australia's could be, particularly in three respects. They include bills of rights of their own, which can supplement, although not contradict, the federal bill of rights. They sometimes do this in great detail. The American State constitutions also tend to describe the whole structure of government much more comprehensively than their Australian counterparts, sometimes, as in the famous example of the Massachusetts constitution, adding eloquent statements of the values on which the constitution is based and the purposes it is to serve. Finally, the process of State constitutional amendment in the United States often involves popularly elected conventions of a kind not seen in Australia since federation.

A bill of rights is the item from this short list that has attracted most attention in the Australian States. The Queensland Electoral and Administrative Review Commission recommended a bill of rights for Queensland in a major report in 1993 (EARC, 1993b), and the Law Society of New South Wales has published a draft State bill of rights in 1995 (Gibb, 1995).

As things stand, putting aside limits from the Commonwealth Constitution and Commonwealth legislation, State parliaments have generally followed the English model of trust in the parliamentary process as the safeguard against abuse of power. The guiding principle has been that the elected parliament should have the final say on the wisdom or propriety of legislation, and that there should be few, if any, cases in which the courts could declare an Act of parliament invalid on purely State constitutional grounds. In a departure from the English model, though, the way the parliament is made up, and some requirements for its procedure, are protected by entrenched provisions in most of the constitutions. Democratic and procedural requirements of this sort do not force legislative outcomes to comply with particular standards, such as human rights guarantees, but instead control the constitution and the procedure of the legislature itself. As an alternative, or even a counterpart, to rights guarantees, it would be possible to entrench further parliamentary safeguards. A guarantee of the principle of one-vote-one-value would be an example, already found in New South Wales and South Australia.

The history of State constitutional amendment in Australia does not suggest that a rush to radical change is likely. Nonetheless, fundamental change to at least one aspect of the State constitutions is looming in the proposals for cutting links with the monarchy, and this gives rise to an increasingly pressing question about the form the State constitutions might take if the change goes ahead.

The Republic

Constitutional change needs not only a reason, but also an occasion. A good argument for making a change is not enough by itself, without the circumstances in which an amendment will have support wide enough for success. This is particularly so wherever the need for a referendum makes popular acceptance, if not warm support, essential for an amendment. Where only legislation is needed, the dynam-

ics of the change can be different, with much less need for wide public involvement, however widespread the discussion that might actually take place.

The republic is shaping up as the issue that will dominate discussion of constitutional change for some years. Whether this will stifle other constitutional change, or act as a vehicle for it, is something that will emerge as public attitudes to the Keating Government's minimalist plan are tested in the community debate the Prime Minister has foreshadowed (Keating, 1995).

Whether republican amendments are introduced without other amendments is, of course, the question of minimalism that is already familiar from the federal sphere. In the States, it takes on a slightly different aspect, and one that differs between some States. The notorious difficulty of getting the necessary referendum majorities to change the Commonwealth Constitution, and the bruising experience of the Australian Labor Party in the unsuccessful referendums of 1988, doubtless influence the present Commonwealth government's preference for minimal change to bring in the republic. Yet at State level, where constitutional change has been far more frequent, this consideration will not work in quite the same way. In Victoria and Tasmania, no referendum would be legally necessary to remove the monarchy from the State constitution, and, depending on the numbers in parliament at the time, bipartisan support might not be necessary either, however desirable it might be in principle.

In other States, where a referendum would be needed for at least some republican amendments to the State constitution, the dynamics of constitutional referendums are even more obscure and unpredictable than they are at the Commonwealth level. State constitutional change, and the State constitutions themselves, attract much less attention than the Commonwealth Constitution, and the process by which these State changes are handled might be quite different from the steps towards republican amendments to the Commonwealth Constitution. In particular, it might be easier for a State government to link republican amendments with other changes, free from the difficulties that State interests and the legacy of the 1975 dismissal of the Whitlam Government pose for wider Commonwealth amendments. Whether a State government would find it was in its interest to do this is another question.

Another consideration complicates the possibilities for State constitutional change to cut links with the monarchy. It is possible, for a variety of legal reasons, that the State parliaments will have to be involved in the implementation of the Commonwealth's republic plan. This might happen in order to amend the covering clauses of the Commonwealth Constitution, which refer to the monarchy, or to amend the Australia Acts, so as to leave the States free to make their own arrangements about links to the crown. The Australia Acts, passed in 1986 to end other residual links with Britain, say that the Queen's representative in each State shall be the Governor. This provision binds the States, which cannot act unilaterally in any way that is inconsistent with it. Unless amended, it might block changes to the Governor's role as the royal representative in each State.

Quite apart from the legal constraints, agreement from as many States as possible would minimise the threat to a referendum from State opposition. For all of these reasons, it is possible that at least some national republican amendments would be part of an agreement reached with the States. At this stage, the results of this would be anyone's guess, but it might have the effect of linking the timing, if not the content, of State republic amendments to the introduction of the corresponding changes at Commonwealth level.

If the Australia Acts would have to be changed before the States could cut their own links with the monarchy, as is quite likely, this would at least delay the implementation of any State republic plans until a national scheme was implemented. A State referendum could still be held first, of course, but putting its decision into effect, if it supported a republic, might have to wait. Certainly this would be the approach to follow if the State government wanted to be as confident as possible that all the steps taken to remove the monarchy from the State legal system were valid and effective.

It would be possible to add a section to the Commonwealth Constitution forcing the States to remove the Crown from their constitutions. This was part of George Winterton's draft republican constitution, and it would certainly prevent the incongruous, or even ridiculous, situation in which some States kept links with the crown while others, and the Commonwealth, cut theirs. It is legally awkward, though, to force the States to remove the monarchy without either prescribing the new provisions their laws must include as a result (hardly a practical possibility in a Commonwealth referendum), or giving the Commonwealth parliament the power to do this for a recalcitrant State (apparently Winterton's solution in his draft: Winterton, 1994:cl. 110(3)). Hence it is understandable that the current Commonwealth government's plan is to let the States remove the monarchy, or not, as they choose. The absurdity of keeping an isolated link with the monarchy might be more effective than legal means to bring States along with the Commonwealth, provided that a Commonwealth scheme itself succeeds.

Republican State Constitutions

The legal details of removing the Crown from the States and replacing its powers and functions are already occupying the minds of people in State government. There are some broad issues or options that are worth highlighting here.

As mentioned above, the Premier of New South Wales, Bob Carr, has reportedly raised the possibility of abolishing the office of State Governor on cutting links with the monarchy. In the United States, the offices of head of state and the head of government are combined, at State level as at federal level. The State Governor performs both functions, as the President does. In Germany, too, the States have no heads of state separate from their heads of government. In India, a republican federation within the Commonwealth, the States have governors of their own, but they are appointed by the Indian government, and their office and their limited powers are created by the Indian Constitution, not by separate State constitutions.

Abolishing the office of Governor in any of the Australian States would require answers to some difficult questions about the situations in which, at present, the Governor can become an important influence on political events. These include the formation of a government when no one party has a majority in the lower house. The formation of the Field Government in Tasmania in 1989 is an example. Similar problems can arise if a government loses its majority in parliament, a situation that can also raise questions about the reserve power of the Governor to dismiss a government or reject the advice of an outgoing government to dissolve parliament. There are alternatives to the role of the Governor in these situations, including the introduction of new laws on parliamentary terms and the government's tenure of office. These could lay down rules enforceable by the courts without giving an independent discretion to someone in the position of the Governor. The move towards fixed terms for State parliaments in New South Wales and Tasmania is a partial example. But there would also be strong resistance to this from people who see the reserve powers of the Governor as a preferable safeguard to fixed rules enforced through court action.

Such a change may also require amendment of the Commonwealth Constitution. It gives the Governors powers in relation to Senate elections, although it also allows these powers to be exercised by the 'chief executive officer or administrator of the government of the State' in the absence of a Governor (Sections 7, 12, 15, 21, 110).

Other questions arise even if the office of Governor is retained. There are some 1,700 provisions mentioning the Crown in current Victorian legislation, for example, including references to crown land. There are some 240 references to the Queen, although hardly any of these give her substantive powers. In almost all cases, she is mentioned in a purely formal way, as in the references to prosecutors for the Queen, and documents issued in the name of the Queen (such as the writs for State elections). Most of these references to the Crown or the Queen could be replaced more or less automatically, many of them with references to the State. The New South Wales government's Oaths and Crown References Bill 1995, if passed, would make some of these substitutions in New South Wales legislation.

In a few cases, a more difficult choice has to be made about a republican substitute for an existing provision. The Victorian Constitution Act refers to the Queen in what it says about the appointment and tenure of the Governor and the Lieutenant-Governor, for example. If the office of Governor remains in some or all republican States, the power of the Queen to appoint the Governor will end, and a new method of appointment will have to be found. The present Governor of Victoria, Richard McGarvie, has floated the possibility of a constitutional council to appoint the Governor on the Premier's advice (McGarvie, 1994:48). Other possibilities correspond to the options available for the choice of a federal president: direct popular election, and election by parliament, for example. The Governor could even be appointed by the federal president, although this is unlikely in light of the long resistance of the States to any suggestion that the Governors are subordi-

nate to the Governor-General. Models for a republican Governor's powers likewise correspond to the options at Commonwealth level for the powers of a president.

The level of anticipation of republican changes in the States is still very low. Most argument about the republic has understandably concentrated on the Commonwealth. The main questions involving the States have so far been whether they could keep their links with the monarchy under a republican Commonwealth Constitution, and whether their governments and parliaments would have to give their consent to a Commonwealth republican scheme. The form the State constitutions would take after such a change has had much less attention, although in its own way it is an issue raising nearly as many questions as the changes that might be made in the Commonwealth Constitution.

Conclusion

Seen as part of the national constitutional structure, the State constitutions lay down the principles on which the States exercise the powers left to them by the Commonwealth Constitution. They, rather than the Commonwealth Constitution, have been the source of power for almost all the varied actions of the States. In the past, and still today, the State constitutions have generally enabled rather than restricted parliament, and they have had little to say about the executive branch of government. The gradual extension of entrenchment qualifies this, as a referendum comes to be required for more amendments to the constitutions of some of the States. But the entrenched provisions mainly concern the structure of parliament and the position of the Crown in the State constitutions. They impose few, if any, limits of the sort found in bills of rights overseas.

In this sense, the policy of the State constitutions has been to facilitate the democratic process as the safeguard of good government and good legislation. For these reasons, people have turned to the Commonwealth Constitution and to Commonwealth legislation to find legally enforceable controls on the powers of the States, but these sources leave many State powers untouched.

The States have more freedom than they have ever used to create distinctive structures of government. How much of this freedom they will use in the next few years is one of the more interesting aspects of the republic debate.

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