

Reviewing South Australia's Constitution

Clement Macintyre*

South Australia's second Constitutional Convention met in Adelaide in August 2003. Among the major matters it considered were measures to improve parliament and government; the size, structure and role of the Legislative Council and the House of Assembly; and representation and the South Australian electoral system.

South Australia's second Constitutional Convention and the first to be run using a Deliberative Poll provides a valuable opportunity to consider, deliberate and to recommend specific changes to the Constitution of South Australia and to the way that the State Parliament operates as the supreme representative assembly of the people of South Australia.¹

During the Convention, delegates will be invited to explore the workings of the Constitution and of the Parliament, to examine the relationship between these two institutions and to offer thoughts on how each might work more successfully. By the end of the Convention, it is hoped that all, collectively and individually, will have become more familiar with the working of the parliamentary processes, the functions of the government and related agencies and authorities, and with the means by which the South Australian Constitution gives shape and substance to

* Senior Lecturer in History, University of Adelaide; Editor, *Legislative Studies*, 1997–2000. Keynote address to opening session of the South Australian Constitutional Convention, Town Hall, Adelaide, 8 August 2003. For other articles on constitutional review in South Australia, see C. Macintyre and J. Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform*, Wakefield Press, 2003; The Samuel Griffith Society, *Upholding the Australian Constitution*, vol. 15, May 2003, chapters 1 (by former Chief Justice Len King); 2 (by Trevor Griffin); 3 (Geoffrey de Q. Walker); 4 (Peter Reith).

¹ The first 'Constitutional Conference' was held in 1981. Proceedings of the South Australian Constitutional Conference held at Parliament House, Adelaide, 27 and 28 November 1981.

these institutions. At the same time, the Convention is meant to be more than a simple process of education and familiarisation. It is expected that the deliberations will lead to a series of recommendations, and to the proposal of a range of reforms. While the nature and character of these reforms will not be clear until after the Convention, it is already obvious that they will be received by the Parliament with interest and with good spirit and that they will stand a good chance of leaving the long history of representative government in South Australia enhanced and strengthened and ready to meet the challenges of the twenty-first century.

As the best form of government for the future is considered, it is appropriate to reflect upon what has been done in the past. Most South Australians will be familiar with many of the civic initiatives that were pioneered in South Australia — but it does not hurt to remind ourselves that many of the democratic practices that we take for granted were first developed or advocated in South Australia. South Australia had the first municipal government, had the first courts to accept evidence from Aborigines, and, under one of the first democratic constitutions in the world, introduced electoral reforms many years before other societies. South Australia was the first in Australia and among the earliest in the world to grant adult women (including Aboriginal women) the right to vote. It was the first in Australia, and second place in the world, where women voted in a general election and, in 1894, it was the first in the world to grant women the right to stand as Members of Parliament.

This is certainly a list to be proud of — but simply reciting achievements of the past does not necessarily mean that our current system of government could not benefit from further examination and some considered reform. As is indicated in the foreword to the Discussion Paper prepared ahead of this Convention, ‘there is much in our political and parliamentary processes that works well but, equally, there are some aspects that it is appropriate to examine’.² Specifically, the issues that the Convention will consider are: ‘Measures to improve Parliament and Government’; ‘The size, structure and role of the Upper House (Legislative Council)’; ‘The size, structure and role of the Lower House (House of Assembly)’; and ‘Representation and the South Australian electoral system’. These are at once very narrow and precise matters, but they are also ones that allow much broader and more general debates as each offers a good opportunity to explore related themes.

Measures to improve parliament and government

A number of matters relevant to this issue are explored in the Discussion Paper and in the Summary Paper. Among these is the role of the Parliament itself as a keystone of responsible government as well as several of the related and parallel institutions that operate beside the Parliament (the Auditor-General and the Ombudsman, to cite two examples). Delegates will be asked to reflect upon these

² *Constitutional Convention Discussion Paper*, Adelaide 2003, p. 5.

institutions and consider ways that certain reforms to them will improve the workings of the Government and the Parliament. It is important to remember, however, that discussion is not limited solely to those aspects raised in the documents. The Discussion Paper and the Summary are designed to stimulate discussion and debate — not to define the limits to it.

As measures to improve the Parliament and Government are considered, two key points to bear in mind are the differences between parliaments and governments, and the nature of the relationship that exists between them. In our system of parliamentary democracy, the government is formed within the Parliament (normally by the party or coalition of parties that holds a majority of seats in the House of Assembly — the lower house), but the Parliament also has a crucial role in monitoring the performance of the Government and maintaining a close scrutiny of the actions of the Government. It is sometimes said that the Government makes the day-to-day decisions, but the Parliament makes the laws. Understandably, there is a tension in the relationship between the two as some of the elected members of the Parliament form the Government (or Executive) and some other members constitute an Opposition that is expected to challenge and criticise the Government. Yet, despite this clear division, we talk of the ‘Parliament’ as a single institution with one of its key functions being the monitoring and scrutiny of the Government. This means that there should be distinguishing, on the one hand, between what governments can and cannot do and, on the other hand, the ways that the institution of the Parliament can act to make the Government accountable and, through the elected representative character of the Parliament, ultimately answerable to the voters.

The accountability of Government is important, and it has been subject to close examination in recent years in parliamentary democracies around the world. There is a growing body of evidence to suggest that the faith that citizens have in their system of government and parliament is in decline. There appears, to some at least, to be a growing gap between the wishes of the citizens and the actions of the government. Those that make this claim talk of a ‘democratic deficit’. This was described by one recent Federal politician as ‘the cancerous growth of cynicism and . . . sense of alienation for many citizens’.³ In response to this perceived democratic deficit a number of solutions have been proposed and delegates are invited to put forward their own ideas. One that will be considered is the concept of Citizen Initiated Referendum. This is explained in some detail in the Discussion Paper and in it there are arguments for and against its introduction in South Australia. It is true that the use of Citizen Initiated Referendum would be a radical departure from our traditional political system and it is not used anywhere else in Australia. For some, however, this is part of the attraction and those who support its introduction argue that it has worked well in those parts of the world where it has been introduced.

³ Peter Reith in L. Hill, ‘Democratic Deficit’ in C. Macintyre and J. Williams (eds), *Peace, Order and Good Government: Constitutional and Parliamentary Reform*, Wakefield Press, Adelaide, 2003, p. 133.

As with Citizen Initiated Referendum, so with all the other suggestions for improving the Parliament and the Government in South Australia. A key question must be, will the reform proposed genuinely lead to better outcomes. Reform simply for the sake of reform will rarely lead to improvements. Proposed reform based on careful consideration of the issues and on the measured view of others, however, may well make a valuable contribution to the results of the Convention.

Size, structure and role of the Legislative Council

With respect to the Legislative Council it is fair to say that its role has changed quite considerably in the course of its history. Some of this change has come as a result of reforms to the electoral system used to elect members of the Legislative Council. It has also come simply because of evolutionary processes in the broader parliamentary context. In its early years the Legislative Council was explicitly intended to protect the interests of a restricted section of South Australian voters — there was once a property qualification that limited the number of voters. It was not until the 1970s that all enrolled South Australian voters were able to cast a vote in elections for the Legislative Council.⁴ The Legislative Council was once seen as an undemocratic house (in that not all could vote for its members) and as a brake or check upon the perceived ‘excesses’ of the Government in the lower house. Now, however, as a democratically elected house (some argue even more democratic than the House of Assembly), its supporters see it as playing a valuable role as a house of review.

In some respects, this role as a house of review has been strengthened in recent years. The electoral system used for the Legislative Council now means that no single party usually holds a majority of the seats in the Legislative Council. Indeed, no single government — Labor or Liberal — has held a majority of the seats in the Legislative Council since 1975. So, in contrast to the House of Assembly where governments depend upon secure majorities, this tends to mean that legislation is passed by the Legislative Council more as a result of negotiation and agreement — after review and reflection — not just because a single party can force it through by sheer weight of numbers.

There are several quite specific proposals for reform of the Legislative Council and to enhance it as a house of review. These include: reforms to the Parliamentary Committee system so that more — preferably all — of the standing committees are located in the Legislative Council (where they are less likely to be dominated by the Government); ceasing to appoint members of the Legislative Council as Government Ministers (and thus diminishing the influence the Government might hold over some members); and equipping members of the Legislative Council with more resources to enable them to apply greater critical scrutiny to proposed

⁴ D. Jaensch, *Community Access to the Parliamentary Electoral Processes in South Australia since 1850*, State Electoral Office, 2003, p. 31.

legislation. Some other proposed reforms are dependent upon changes to the electoral system and are dealt with under issue four.

A more radical proposal is simply to do away with the Legislative Council altogether. Some commentators have argued that the Legislative Council is largely redundant in our current system.⁵ Why do we still need two houses in the South Australian Parliament? Both are now democratically elected and there is a considerable overlap in the functions that they perform. If we could build the Legislative Council's review functions into the procedures of the House of Assembly, would we still need an upper house? If the Legislative Council was abolished it would also mean that the Government of the day could reasonably expect to get the bulk of its legislative program passed without the risk of being blocked by a hostile upper house. The two newest parliaments in Australia — those in the Northern Territory and the Australian Capital Territory — were both established with a single house and the Parliament of Queensland voted to abolish its upper house in the 1920s. New Zealand provides another example of a parliament that began with two houses but has since moved to 'uni-cameral' or single house system.

Size, structure and role of the House of Assembly

Similar, though perhaps less controversial, questions emerge when considering the House of Assembly. Rather than the possible abolition of the House of Assembly, a more common debate has been about the appropriate size. How many members should be elected to sit in the House of Assembly? Several observers, including some current members of the House of Assembly have, at various times, argued for a reduction in the number of members.⁶ Mostly these arguments have been based on the range of tasks and responsibilities that are assumed by members of Parliament, on the development of new technology that allows a member of Parliament to be more easily in contact (even if only electronically) with a larger electorate and more voters, and on the possible savings that would be made with a reduced bill for salaries and superannuation. All these arguments have some merit.

There are, however, counter arguments to a reduction in the number of members of Parliament. It would tend to weaken the Parliament's capacity to exercise critical scrutiny over the Government of the day, and would reduce the level of representation that is central to the role of the House of Assembly. Unless the House

⁵ See for example public submissions to the Constitutional Convention Parliamentary Steering Committee, <http://www.constitutionalconvention.sa.gov.au/main.php?page=submissions> and the *Advertiser*, *passim*.

⁶ See for example, M. Rann, 'Parliament — 10 ideas for reform', undated press release (1995) and Peter Lewis annexure to Compact 2.3 'reduce the number of Members of Parliament in both Houses to 35 in the House of Assembly and 17 in the Legislative Council or such other number as the Convention determines is desirable', <http://www.constitutionalconvention.sa.gov.au/main.php?page=compact>.

of Assembly is a sufficient size so that there is a credible and effective opposition to challenge and criticise the Government, and unless there is a pool of Government back-bench members of Parliament giving a sympathetic yet critical appraisal of the Government, then the task of keeping the Government accountable to the Parliament — and thus to the voters — will be almost impossible. Similarly, it is argued that if there were fewer members, then each would represent more voters and larger geographical electorates, and that this might well lead to members being less responsive to the interests of local communities and less frequently available to hear the views of individual voters.

Another matter relevant to any consideration of reforms appropriate to the House of Assembly is the position of the Speaker. Given that the Speaker of the South Australian House of Assembly not only chairs the meetings of the House, but may also exercise a casting vote; is responsible for the administration of the House and for the allocation of some resources in the operation of the House; and is the formal public representative of the House, it is easy to see that this is an important and sensitive role. Although the office of the Speaker of the South Australian House is currently held by an Independent member, traditionally it is usual for a member of the governing party to be elected to this office. In light of the importance and sensitivity of the role, it has been suggested that Speakers should either be asked to sever all ties with their party after election as Speaker, or be drawn in some way from outside the Parliament and be free of all party political affiliation. If a change to the current model is to be recommended, it is important that the means by which the independence of the Speaker can be best facilitated is considered.

Representation and the South Australian electoral system

Perhaps the best way to begin consideration of any possible changes to the electoral systems used in South Australia is to start from a basic understanding of our current model. For the election to the Legislative Council, all 22 members are elected using a State-wide proportional representation system. At each State general election half the seats (11 of the 22) are filled and each member of the Legislative Council is elected for a so-called 'double-term' of eight years. In the House of Assembly all 47 members are elected at each general election (every four years) and each member is elected to represent a specific geographic area — called an electorate or an electoral district. These members are elected using a form of preferential voting. The fact that each house is elected using a different system is an important point.

Defenders of the current arrangements point out that the two systems give a combination of local attention, and a diversity of political interests. A member of the House of Assembly is elected as a local member of Parliament — to represent a specific community or group of communities, and members of the Legislative Council are elected from across the State which, due to proportional representation, means that they are more likely to be from a broader range of parties.

Critics of the current arrangements have identified a number of concerns. I will touch on only a few. Beginning with the House of Assembly, it is argued that single member electorates tend to discriminate against the smaller parties. We can see an example of this in the 1997 State election when the Australian Democrats received just over 16 % of the House of Assembly first preference votes across the State, yet did not win a single seat in the lower house. This ‘injustice’, in the eyes of the critics, could be corrected by adopting a system of multi-member electorates with a form of proportional representation used to elect members. If we adopted this system we would bring our electoral practices closer to the electoral system first proposed for South Australia by the pioneer political reformer Catherine Helen Spence in the late nineteenth century.

Turning to the Legislative Council, it is clear that while the results of elections to the Legislative Council are more proportional, in that the share of the seats won by the parties is more likely to correspond to their share of the total vote, there is concern that treating the whole of the State as a single electorate means that there can be no guarantee that all regions of South Australia will necessarily be represented in the Legislative Council. The introduction of electoral districts, or regional seats, would produce this result, but it may also reduce the proportional balance of the outcome.

A further issue in relation to Legislative Council elections is the use of the double term. This was originally defended on the basis that it would act to slow wild and short lived movements in political support among the voters, but its continued existence is harder to defend now that the same voters elect members of both houses, and now that there are four years between elections and the double term has stretched from six to eight years. If we did away with the double term and moved to a system whereby all 22 members of the Legislative Council were elected at a single election, then the share of the vote (or the quota) required for election would fall from about 8.3 % to just over 4%. Some see this as too small a share of the State-wide vote in that it would lead to the election of fringe candidates: others advocate the change precisely because it would be likely to lead to an even greater range of parties and groups being elected to the Legislative Council.

There are other electoral reforms that might also warrant consideration. These include voluntary voting to replace the current compulsory system, optional preferential voting (a system already used in some parts of Australia) and the allocation of a certain number of seats in such a way as to ensure the representation of some groups in the Parliament. It has, for example, been suggested that one seat in the House of Assembly be reserved for indigenous candidates?⁷ Others have suggested reforms that would lead to a more equal gender balance among members of the Parliament.

⁷ Peter Lewis, submission to the Constitutional Convention Parliamentary Steering Committee, <http://www.constitutionalconvention.sa.gov.au/main.php?page=submissions>.

The 'fairness clause'

Before I finish, I want to raise just one more matter: reform of the 'fairness clause'. This is a provision in the State Constitution that means that all lower house electoral boundaries are examined and, where necessary, re-drawn after every State election to ensure that, wherever possible, the party receiving the majority of the House of Assembly votes throughout the State after the distribution of preferences, can expect to win a majority of the seats. It was introduced in 1991 after a series of election results in which one or another of the parties secured the bulk of the votes across the State, but because of a concentration of votes in certain seats, was unable to win enough seats in the House of Assembly to form a government.⁸

The fairness clause was intended to lead to fairer outcomes. However, one of the consequences of the regular re-drawing of some boundaries is that it means that voters can find themselves regularly moving between adjoining seats, and members of Parliament who work to build links with certain local communities find that the voters in their electorate have changed. Other critics have suggested that because the calculation of votes is made on the basis of the two-party-preferred vote (the notional final vote after the distribution of preferences) it discriminates against the smaller parties. So while it is difficult to argue against something called 'fairness', it may be that the periodic review should be less frequent than every four years.

These, then, are the four issues: an improved and accountable Parliament and Government, the role of the Legislative Council, the role of the House of Assembly, and the electoral system. It should be pretty clear that none of these is a discrete or self-contained issue, but rather that consideration of and ideas for one will have implications and consequences for the others. However, it is also important to add that the implications and consequences will not be limited to the issues listed for your consideration. They will help to shape and influence the broader pattern of some of the key public institutions in South Australia. This means that delegates have both a responsibility to apply themselves to the process of deliberation, and a great opportunity to contribute to reform. In this context it is worthwhile being mindful of three points.

The first is that the recommendations that emerge should be both attractive and of benefit. They should also be the sort of proposals that will be practical and do-able and acceptable to the broader community and to the Parliament which ultimately must ratify any proposed reforms.

The second is the need to be generous to future generations of South Australians. In over 150 years, this is our second Constitutional Convention and the first that is composed of a random sample of citizens. Who knows when reform will be next on the agenda? Accordingly, consider how the system might work for the next political

⁸ The Hawke Centre, submission to the Constitutional Convention Parliamentary Steering Committee, <http://www.constitutionalconvention.sa.gov.au/main.php?page=submissions>.

generation — and the one after that. What seems to barely work under strain now, may work well in the future; similarly, what seems unproblematic now might not work at all in the future.

Thirdly, be realistic about what can be done. The Commonwealth Constitution would probably strike out some reforms that have been proposed. Others are so simple and easy we must wonder why they have not been attended to sooner. Above all, remember that constitutional change tends to be evolutionary rather than revolutionary and, on balance, it is better to move slowly with caution, than speedily without due care.

Each delegate to the Convention has an opportunity to make a contribution to the reshaping of some of the key political institutions in South Australia. It was recently pointed out in another place that section 2 of the Australia Act specifies that one of the functions of the State Parliaments is to legislate for ‘peace, order and good government’.⁹ These are admirable aspirations and goals. All delegates to the Convention have an opportunity to contribute ideas that will assist South Australia moving closer to those goals. ▲

⁹ *Australia Act 1986*, s 2(2)