Constitutions: Their place in modern Australasia

Kevin Rozzoli*

Niccolo Machiavelli, in Chapter VI of his treatise The Prince, says 'It should be borne in mind that there is nothing more difficult to handle, more doubtful of success, and more dangerous to carry through than initiating changes in a state's constitution'.

Let us not be daunted, however, but press forward in our consideration of this difficult matter. The need to examine constitutional arrangements across our region is pressing, although largely ignored. This is no more so than in New South Wales where there is a grab-bag of ill-conceived constitutional detritus trailing in the wake of knee-jerk reactions, political opportunism and administrative indifference.

While the Commonwealth Constitution provides the jurisdictional power of the parliament through s.49, to make laws for the 'peace, order, and good government of the Commonwealth', s.50, its powers, privileges and immunities and the order and conduct of its proceedings, and ss.51 and 52, its principal legislative powers, the New South Wales Constitution Act provides only that the Legislature, shall, subject to the provisions of the Commonwealth Constitution, have power to make laws for the peace, welfare, and good government in all cases whatsoever. Despite a number of electoral and machinery matters it is generally silent on the issues one should expect to be addressed in a constitutional document.

A constitution enunciates the system of fundamental principles by which a nation, state or body politic functions. It is not, however, an automatic safeguard of public rights. Accountability lies in the conscience of the people, though respect and legal adherence to a well-drafted constitution will provide both a shield and a sword to protect and defend the people.

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Parliamentary democracy is that form of government in which sovereign power resides in the people as a whole, exercised either directly by them, or through their elected parliamentarians. Today there is a perception that executive decisions are 'rubber-stamped' by a parliament that leaves its constituency far behind.

While there are many alternative forums of community opinion and advocacy — the courts, universities, media, Church, and single-issue groups — these bodies are never truly accountable: at best they express opinions, at worst they are divisive.

In a democracy a parliament can be the only true voice of the people as accountability to those it serves is fundamental to the sovereign power of the people. While not essential there is great benefit in a balanced, well drafted constitution. It is the power to hold a government to account that provides a brake to over zealous or unwise authority. While the executive should be able to govern on a day-to-day basis, parliament and the judiciary each in its sphere must be free to challenge executive action.

A constitution should both expound the fundamental principles and enunciate the basic mechanism of good governance. A sound constitutional framework should contain only those elements of fundamental principle that are immutable and intrinsic to the preservation and carriage of the forces that forge parliamentary democracy. It should reflect the sovereignty of the people to determine laws through their elected representatives and acknowledge the rule of law for all persons.

It should provide the five basic functions of a parliament, provision of a government, finance for state services, debate on matters of concern, law-making and scrutiny of the executive and public service. It should also enshrine the electorate's right to choose its government and to judge the efficacy of its administration.

Two elements that spring from these premise are recognition of Lower Houses as the originating house for all legislation and of Upper Houses' primary role as houses of review and secondly that once given a mandate a government has the right to govern and deliver to the electorate those policies on which it was elected.

The need to develop a process by which parliament evolves solutions to the social issues of our time presents a particular challenge. Members need to realise they have a wider responsibility than insular party interests — their principal role is as parliamentarians with a wider community responsibility. Parliamentarians should be able to exercise this responsibility even if they are in conflict with the executive.

Vital to the sovereignty of a parliament is an independent, non-partisan Speakership. Some elements of the statutory process by which this may be achieved include, election by secret ballot for a term of years, giving up of party affiliation, standing aside from direct electorate representation, not to continue as a member upon retirement, and removal from office by a two-thirds majority.

The independence of the judiciary is also fundamental and should be fully protected by entrenchment within the constitution. It should provide an appropriate mechanism for judicial accountability. A Constitutional and Legislative Division of the NSW Supreme Court should be established with jurisdiction to consider matters of constitutional interpretation, disputed electoral returns, removal of judicial officers and members of parliament, all matters to be presented by way of stated case. The role of independent accountability officials, vital to maintaining the highest standards of integrity and accountability should also be specified in the constitution.

The constitution should be considered higher law that can only be amended by referendum. Constitutional change is the most profound action a community can take and as such it should be treated as a special circumstance to be conducted only within the strictest framework of democratic rules.

There are many matters that are enacted to support a constitution. These legislative provisions should be brought together in a single Parliamentary Act. Unlike matters contained in the constitution these provisions would cover areas that may need periodic amendment to reflect changing situations. The Act would also interlock with the standing orders of the parliament

The government has a vital role to play in the process of constitutional review by promoting new ideas and constructive debate within all sections of the community, but it must try to drive the issue without putting its own bias on the outcome. At the end of the day the people must be able to claim ownership. Failure to provide this objectivity has bred a suspicion within the Australian elector that has led to the defeat of most referendums.

In examining the adequacy of a constitution we should therefore ask two questions. *Does the document expound a system of fundamental principles for governance?* And, *Does the document provide the basic platform of a democratic system?* In addressing them my comments will fall into two categories, those that touch on legislative power, and those that touch on performance.

What should be included in a constitution? I will briefly touch on a number of elements.

The roles of the Head of State and the Executive Council and their relationship should be spelt out in minimalist terms; it being only necessary to provide within the constitution for the basic framework of responsibility.

The role of the Premier should be clearly defined as the chief minister of the Government, a first among equals within the executive structure of Cabinet. A Premier's constitutional functions are no greater than other ministers. The expanded role as chief minister derives its source and authority by virtue of the support of government members or those offering support to the government.

The role and responsibilities of Ministers should be spelt out, although only within the broadest terms and the convention of the Westminster system. The requirement for Ministers to be members of the Parliament should be codified, for while there are provisions by which a person may act as a Minister without membership these are rare, and one could argue, inappropriate. It is difficult to imagine any situation where it would be imperative to provide such a facility. It is simpler and more satisfactory to make membership mandatory.

I believe it is important to maintain a formal balance between the size of an executive and its Parliament and that this should be fixed in the constitution. It is also important for the ministerial balance between two Houses, in the case of bicameral parliaments, to be fixed. The opportunity to interfere in these two balances for pure political advantage should be inhibited. The ratio of ministers to members, in total, could be, say, 1 minister for every 4 or 5 members in the Lower House with a similar ratio of 1:4 or 1:5 as between Upper and Lower House ministers. Thus a Parliament with say 60 Lower House members would have say, 15 ministers of whom 3 would be appointed from the Upper House. The growing importance of Upper Houses should be formally recognised; however, in any event the practical requirement for a number of working ministers in an Upper House needs to be accommodated. The importance of the Lower House in determining the governing party and its greater numbers demands that a clear majority of ministers be from that House.

The role and responsibilities of members of parliament should not be set out comprehensively as they are very extensive, encompass many aspects, and change with community expectations over the years. As a member of parliament of thirty years experience I have seen these changes and believe any prescriptive formula would be inhibiting to the role of parliamentarians as representatives of the people. The oath or affirmation should be no more than a declaration to serve the people faithfully and well, within constitutional limits.

There should not be any reference to political parties within the New South Wales Constitution. There has been none to date nor has there been, to my knowledge, any situation which would have been better facilitated by recognition of political parties. Statutory recognition of parties within our parliamentary framework for reasons such as electoral funding should be contained in the Parliamentary Act mentioned earlier. While electors mostly vote along party lines members of parliament are often regarded by their constituents not as creatures of a party system but individuals with a very personal role in furthering the issues which constituents bring to them. I believe most members of parliament do in fact contribute strongly to the process of government, whether in government or in opposition by virtue of this individuality. During the Fiftieth Parliament in New South Wales, the ‘hung’ parliament, the Legislative Assembly experienced a situation in which unpredictability of outcome became the norm. A greater freedom of expression emerged, even within the major political parties. Four independents held the balance of power. Three of them did not espouse any tangible affiliation with the major

parties. The outcome of many votes was therefore determined during the course of debate. This element of the unknown brought an interesting and often vital perspective to the value of individual input to debate. With the return to majority power in the Lower House after the next election this element almost completely disappeared. If a constitution is to say anything about the responsibilities of members it should strengthen the sovereignty of the individual member. Perhaps the provision for secret ballot on certain votes would be a way of building individual sovereignty and thus truer representation of the electorate's views.

It is obviously important for the parliament to figure prominently in the constitution because its role is fundamental to a constitutional democracy. Other agencies and elements of government administration are more properly creatures of statute to be fashioned and refashioned as the need arises. As I have said earlier constitutions should only contain elements of fundamental principle, matters relatively immutable and intrinsic to the preservation and carriage of the forces that shape a parliamentary democracy. There should be some delineation of the linkages between the parliament and the people, the role and relationship of parliament to executive, and, as between the two Houses in the cases of bi-cameral parliaments. In determining the extent of the detail three questions should be asked, *Is it a basic principle? Is it absolutely necessary? Will it require frequent revision?* If the answers are 'yes, yes and no' then it probably should be included in the constitution, otherwise it is a matter for other forms of statutory attention.

There should be clarification of the role of the two Houses and the relationship between them. Lower Houses because of their greater numerical membership and the fact that the composition of their membership determines the government of the day should mean that all legislation originate in the Lower House and perhaps to ensure this right a constitution could contain a provision that any bill which is not passed by an Upper House within 12 months should automatically pass into law. Other elements are the introduction of money bills and the power to amend or reject them, the resolution of deadlocks with other legislation, the functions of single House or joint committees, the role of joint sittings and the conduct thereof. The essence of these roles is contained in the five functions I have mentioned earlier.

The relationship between the parliament and the executive presents a particular challenge as theoretically the Parliament should be a supreme body with the executive as its administrative arm. This is certainly not the case in Australasia where the supremacy of parliament has been greatly weakened by powerful executives. Part of the answer may lie in changing the culture of Australian Parliaments. Constitutional reform may lead to such a change. Members and the public must both be more conscious of the institution of parliament and their own role in relation to it. Parliament must be seen as more than just an extension of the party machine, more than a conflict between parties and more than a mechanism by which policy initiatives crafted behind the scenes by faceless party apparatchiks or unidentifiable bureaucrats are thrust onto an unwitting electorate. The challenge is there to develop a process by which the parliament evolves solutions to the social issues of our time.

Members should accept that their role as parliamentarians has a wider community responsibility than can be represented by insular party interests. Australia has far too rigid a party discipline. This destroys the sovereignty of Parliament in favour of the supremacy of the executive. Certainly the government needs to be able to govern but there are many legislatures in other democracies in which the government can be called to account by its own members on issues that particularly affect that member's constituency. The problem in Australia is that 'crossing the floor' or criticising one's own party is portrayed by the media as an act of treachery on the part of the individual, an inability of the leader to control the rank and file or a sign of instability within the party. It should instead be seen as one of the higher manifestations of a healthy democracy, the encouragement of which leads to stronger and better government. A powerful committee system will give both force and legitimacy to differing points of view within parties, the safeguard lying in the mantle of continuing discussion. This in turn provides a range of options upon which ultimately consensus can be achieved and public division of opinion avoided. Perhaps a Constitution can provide greater focus for the role of committees in the interface between Parliament and Executive and perhaps key accountability committees such as Estimates, Public Accounts and Public Works Committees could have a chairman from the Opposition. I like to quote the English MP Park Roy Jenkins, who in an article written for *The Economist* some years ago said,

> The real question is how much, if any, independent life should Parliament have, beyond providing the forum for the rituals of government and opposition. In theory, it is the cockpit of the nation's life, where independent-minded legislators guard liberties and query the activities of the state and its servants. In practice it is a less bloody and useful arena in which committees are meant to help correct the balance. By gathering back-benchers across parties, they encourage them to think as parliamentarians, not as party yes-men. By enabling them to track particular departments for months or years, they give them a level of knowledge about government that few MPs would otherwise have. One chairman said they ought to be providing a third force in Parliament between the two big parties — and should get a third of the chamber's debating time too. (3.8.91, p. 52)

Committees can have a positive impact on the process of returning power to Parliaments. Executives fear a probing parliament but therein is the key to accountability, which in turn is the touchstone of good government. No doubt there are many procedural initiatives that can be explored in any attempt to enshrine within a constitution the sovereignty of Parliament and thus the people whose voice it is. The underlying tenet that should guide us is the opportunity for any member to initiate debate on a matter of public concern. In many cases it is not the fate of the question before the House that is important it is the capacity to air the subject, to explore alternatives, to expose wrongs and injustice under Parliament privilege. Parliament will be accountable to the legislative root inherent in its constitutional base if it can achieve such a goal.

It is also vital that the separation of power between the parliament and the executive is formally recognised. A parliament must be able to exercise its functions even if they are in conflict with the views of the executive. The right to challenge the

executive provides the brake on over-zealous or unwise authority. Reporting to parliament, an unfettered capacity to call witnesses and control of its budget are fundamentals of parliamentary sovereignty. A new constitution could well incorporate provision for a separate Appropriation Bill for the legislature in which members have both the power and responsibility to vary their budget according to need. Parliament should not be prevented from fulfilling its proper role because it does not have the finance to carry out its functions. Greater integrity, probity and transparency would balance some of the common view of parliamentary expenditure as the privileged few with their snouts in the trough.

The role of independent accountability officials is very much linked to the power of parliament to scrutinise the activities of government specifically and the public sector in a broader sense. There should be a specified role for these officials, some examples being the Auditor General, Director of Public Prosecutions, Solicitor General and Crown Solicitor, Ombudsman, Criminal Justice or Anti-Corruption Commissioners, Electoral Commissioner.

The common thread of these positions is their role in maintaining high standards of integrity irrespective of current public policy. They are intrinsically linked to the scrutiny of public standards and function against a benchmark of honesty and integrity beyond day to day influences and political gamesmanship. Their functions, powers and duties should be simply stated in the Constitution and supported by appropriate legislation.

The independence of the judiciary must be clearly delineated and fully entrenched in a constitution, as such independence is an essential plank of democracy. The Commonwealth provisions would provide a reasonable basis for the relevant section with appropriate modification to suit the particular sovereign government.

I am of the opinion that Local Government should not be entrenched within a constitution. Local Government has neither the broad focus nor the sovereignty to warrant inclusion. It is a provider of services at a local level and does not, nor should have, the policy making powers of a sovereign state. The simple recognition of the existence of a formal structure of local government serves little purpose other than to boost the egos of local alderman or councilors. To give it purpose and meaning would require very complex constitutional definition and constrain the evolutionary process that has always been important to the administration of local government. The Commonwealth Constitution recognises the States because the States existed before federation and have sovereign powers that by agreement were not struck down by the creation of the national state. Whilst the Commonwealth Constitution deals with matters concerning its relationship with the states it does not seek to interfere with or dictate the terms of state except where it was agreed that powers were to be ceded to the Commonwealth in the national interest. The relationship of Local Government to its parent state is quite different. To give it constitutional identity would be to create something which has not hitherto existed and would I suspect greatly complicate and frustrate future administration.

It is useful to have a preamble as a mission statement embodying the essential elements of purpose of the constitution. It needs only state the purpose

> to make laws for the peace, order and good government of the people of the State, exclusive of those matters reserved to the Commonwealth under the Constitution Act, 1900, and which reflect the sovereignty of the people to determine laws through their elected representatives.

This embodies an acknowledgment of the rule of law and covers all persons whether indigenous, Australian born non-indigenous, or immigrant.

There are a few other particular issues on which I will comment, for example, the NSW constitution should provide for the resolution of deadlocks between the Houses based upon the fundamental principle that it is the majority numbers in the Lower House which reflects the will of the people as to which party or grouping provides government.

Supply and money Bills should be treated differently to other Bills. An upper House should not be able to defeat a Supply Bill although that House may and should fully debate the Bill and may establish estimates committees to consider and probe its detail. As the passing of the Supply Bill sets the framework for the annual budgetary provisions it should not be possible for either House to amend money Bills in a way that increases the burden on the people after Supply has been passed. Within this framework, however, either House should be able to amend money Bills in respect of machinery measures. A suggested process might be that where the Lower House disagrees with amendments of an upper House, and so advises the Upper House, amendments may be returned a second time to the Lower House in either their original or modified form. If the Lower House still does not agree to the amendments it may at the expiry of three months from its introduction to the Lower House present the Bill without amendment to the Head of State for Assent. Given the strong framework of annual budgetary guidelines any Bill to raise revenue outside the annual appropriation should only originate in the Lower House upon a message from the Governor but, because it will increase the burden on the people, be capable of veto by the Upper House.

Other Bills should be capable of amendment by either House. Government Bills that fail to pass the Upper House, or are amended in a manner unacceptable to the Lower House, may if the deadlock is unresolved after 12 months from its last passage through the Lower House be presented to the Head of State for Assent. The Government has the right to govern which entails it bringing its legislative program into being. It is for the electorate ultimately to judge the efficacy of Government administration.

The removal of members and judicial officers by a resolution of parliament is archaic, almost certainly void of any capacity to deliver natural justice, and virtually unworkable. Inadequacies and potential injustice has been highlighted in recent years by the Smiles case in New South Wales and the current experience in

New Zealand where a finding of contempt of court against a member sent courts and parliamentary officers in a spin as to whether this triggered the dismissal provision within their Constitution Act. There is no justification in these times for removal by an address of both Houses. Members and officers whose tenure is protected should only be removed for reasons of unsound mind, permanent absence from the jurisdiction, corrupt behaviour or behaviour otherwise unfitting of the Office. The constitution should grant the power to determine such matters to a special division of the Court and procedures to give effect to a removal for any of the foregoing should be established by legislative provision. Legislation could provide for a Parliament to apply by stated case to the division for orders of dismissal. A single judge appointed by the Chief Justice could initially examine the submission to establish whether a bona fide case exists. Where a positive finding is made by the judge the matter could then be referred to a panel of five judges presided over by the Chief Justice. Dismissal is a matter of the gravest nature which should be considered in a manner totally removed from the political process. The suggested approach reflects the *gravamen* of the circumstance and the integrity essential to the process.

Constitutions should be considered higher law that can only be changed by referendum.. Where there is an emerging view that a constitutional provision may need amendment it is important that the essence of the existing provision is understood and the amendment capable of simple address to the people. The question that is put to the people should embody the full text of the proposed amendment. Constitutional amendments that are complex, ambiguous or have multiple elements cannot be adequately addressed by the electorate and will be overwhelmingly rejected. Elements that could be considered would be that any parliamentary resolution to put an amendment to the people would require a two thirds majority of members, and in a bi-cameral parliament a two-thirds majority of both Houses voting in joint session. This would ensure a significant majority of parliamentarians support the proposed referendum.

A well-crafted and relevant constitution should not require frequent amendment. If a State adheres to the philosophy that the constitution is a statement of basic principle guaranteeing essential democratic rules it should not be subject to regular challenge or the need for change. Commonwealth amendments which have promoted acceptable basic principles and have been enunciated in clear and unequivocal terms have had a better history of success than others which have lacked clarity, been of more dubious purpose, or of convoluted construction. This view is supported by the form and content of successful referendums in New South Wales. As indicated previously referendum is the only appropriate way to amend a constitution. A constitution should be a document of the people and as such only to be changed by the will of the people. It should not be a plaything of members of parliament or of any individual group. It is a collective and community measure in every respect.

Proposals for constitutional change can only, however, satisfactorily emanate from the Parliament. While there is a well articulated case for citizen initiated referenda its application to constitutional amendment is doubtful. If one again assumes the constitution to be a 'basic principles' document which should require infrequent change it seems unlikely that a ground-swell of public opinion would not find articulation within parliamentary circles and it is important that a motion proposing a constitutional referendum may be promoted by any member of parliament. It should not be the sole province of the government of the day. While in most instances government's numbers will prevail in any determination it is a fundamental principle of democratic representation that any elected representative have the capacity to bring forward a proposal. As also indicated previously motions for constitutional amendment should be determined by all members in a single vote. Constitutional change is the most profound action a community can take. At all levels therefore it should be treated as a special circumstance to be conducted only within the strictest framework of democratic rules.

I am not a supporter of Citizen Initiated Referenda; however, it could be adopted as part of our system of government but not necessarily as an element of the Constitution. In some ways it is a denial of the system of democracy based on government by elected representatives who have, by their election, been given a special role to determine issues on behalf of the people. They do this from a position of greater knowledge and wider community responsibility; against a background of accountability through the ballot box.

The difficulties of referenda are the problems of specificity, clarity of purpose and the provision of adequate information on the question to be determined. This difficulty of definition means it is easier to consider emergent issues on a case by case basis rather than within a continuing framework which tends to encourage more rather than less matters to be brought forward. The process is expensive and time consuming with questionable outcomes. Members of parliament are elected to govern and govern they should by developing a continuing appropriate framework.

Government has a vital role to play in the process of constitutional review, but it is not the exclusive province of the government. Governments can and should promote a continuing dialogue on constitutional relevance through constructive debate in parliament involving equal contribution from the Opposition, by listening to comments and suggestions arising within the community and ultimately by driving the issue without being seen to put its own gloss on the outcome. The outcome must be, and be seen to be, a manifestation of community opinion. The community must feel ownership of the outcome.

It should also be recognised that most people are only relaxed about gradual change. I believe Australasian parliaments should embark on a significant process of community debate with no specific deadline on the outcome. Does it matter in a country as stable as ours or New Zealand if it takes twenty years? It is the quality of the result that is important.

Some excellent work has done in recent years in examining relevant issues, particularly in Western Australia and by the Northern Territory on its march to Statehood. If a redrafted, better-focused and more relevant constitutional framework is the outcome of community engagement then this and later efforts will have done a great service to the people of our region. I believe all Australasian parliaments should link their endeavours by the establishment of a National Joint Standing Committee on Constitutional Reform with delegates from each jurisdiction drawn from the parliament, academics, parliamentary counsel and community members each of whom should qualify for membership by demonstrating a committed interest to the subject. The Committee should meet twice a year for two days and set sub-committee tasks to be completed by the next meeting. Wide publicity should be given to the deliberations and reports of the committee and a wide network of community consultation established with strong reciprocal arrangements for comment to and from the community and the committee. At the end of the process the community should be so familiar with any proposed change that it is accepted as non-controversial and therefore capable of clear and unequivocal approval by referendum. ▲