PATCHES ON AN OLD GARMENT OR NEW WINESKINS FOR NEW WINE? (CONSTITUTIONAL REFORM IN WESTERN AUSTRALIA - EVOLUTION OR REVOLUTION?)

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> And no one puts a piece of unshrunk cloth on an old garment, for the patch tears away from the garment, and a worse tear is made. Neither is new wine put into old wineskins; if it is, the skins burst, and the wine is spilled, and the skins are destroyed; but new wine is put into fresh wineskins, and so both are preserved.[1]

The centenary of responsible government[2] in Western Australia presents an opportunity to reflect on the course of constitutional developments since 1890 and, in the light of the lessons that one can learn from that reflection, to consider what changes should be made to ensure that the "Constitution" is fit for a State about to enter the twenty first century. As Chief Justice Malcolm of the Supreme Court of Western Australia recently stated:

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+ The authors wish to acknowledge the research assistance provided by Simone Curtis.

1. *Matthew* 9: 16-17 (Revised Standard version).
2. "Responsible government" originally meant local self government in the colonies but it came to mean in the latter half of the 19th century "government by the advice of ministers chosen from and responsible to the Legislature": A C Melbourne "The Establishment of Responsible Government" in J Rose, A Newton and E Benians (eds) *The Cambridge History of the British Empire* vol 7 pt I: Australia (Cambridge: Cambridge University Press, 1933) 272, 277.

> At the least it provides an opportunity to consolidate the law, practice and statutes comprising the Constitution of the State and to make the relevant body of law and practice more accessible to and understandable by the public.[3]

At such a juncture several choices are open. At one end of the spectrum one can conclude, with a degree of self-satisfaction, that the original constitutional statute, having been refurbished from time to time as occasion warranted, has aged reasonably well and, apart from some minor adjustment, should continue much as it is today. A second alternative is to come to an assessment that, whilst the body politic is largely sound, some structural rearrangements are desirable or, perhaps, even necessary. At the other polar end, one can determine that the new age demands an end to colonial relics and fossils and, rather than a patch-up job, a complete re-writing of the constitution is required to ensure that it reflects, in a single coherent document, the attitudes and aspirations of a multi-cultural, but basically European, political community, thinly distributed in largely coastal communities around an immense arid and vacant desert, adjacent to Asia, but blessed, fortuitously, with vast natural resources.

Shortly stated, constitutional reform can be classified under the following heads:

(a) *cosmetic*, including structural rearrangement;
(b) *substantive*, including the deletion of antiquated provisions;
(c) *fundamental*, in the sense of incorporating significant changes to overcome perceived defects, or explain the presently unexpressed; and
(d) *radical*, in the sense of a major change, even complete re-enactment, involving new aspects of a kind not previously incorporated in the "Constitution".

First, however, the subject of constitutional reform must be viewed against the historical background.

3. Malcolm CJ "Seminar on the Constitution" Parliament House, Perth, 15 August 1990, 2.

THE HISTORICAL CONTEXT

We stress the political, geographical, cultural and sociological features of the Western Australia 'polis' because a system of government organised by its basic, constating law is arguably only effective and legitimate to the extent that it is "of the people", that is, to the degree that it accords with the authentic vision such a community has of itself, however variegated its constituent elements.[4] In forming such an appreciation the starting point must therefore be sought in the historical origins of the present "Constitution". Unless there has been a complete disjunction in the course of the last 100 years, one should assume a degree of historical continuity of the conditions under which that Constitution was granted, notwithstanding developments since. This is not to say that any particular deference should be accorded to the visions of our Founding Fathers, such as they can be identified. Whilst constitutional scholars and judges differ among themselves about the extent to which one can reconstruct propositions of "original intent", and further, dispute the propriety of taking those original intentions into account when interpreting the Constitution[5] no-one today would claim a sacrosanct position for those visions such that they should bind all generations till the end of time.[6]

4. One can, in fact, use the concept of the "Grund-norm", or basic law, developed by the Austrian jurisprudent Hans Kelsen, when seeking to identify the fundamental source that gives legitimacy to a governmental system. Originally, the Imperial government and parliament devolved legislative and constitutive power to the Colony. After 100 years of responsible government, however, it may be appropriate to seek some autochthonous rooting of "the constitution of the State" in a popular act of endorsement, such as a referendum or confirmatory convention.

5. At the federal level the High Court has recently shown a greater disposition to seek the founders' intent: see eg *New South Wales v Commonwealth* (1990) 90 ALR 355, 360-361; *Cole v Whitfield* (1989) 165 CLR 360, 385; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 376-377.

6. In the United States, a debate has been carried on for over a decade as to what priority should be given to "originalist" as against "interpretativist" notions. See eg R Berger "Some Reflections on Interpretivism" (1986) 55 Geo Wash L Rev 1; E Maltz "Some New Thoughts on an Old Problem - The Role of the Intent of the Framers" (1983) 63 BUL Rev 811; and L G Simon "The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified" (1985) 73 Calif L Rev 1482. Australia is only just entering into a similar debate: see G Craven "Original Intent and the Australian Constitution - Coming Soon to a Court Near You?" (1990) 1 PLR (forthcoming); D Dawson "Intention and the Constitution - Whose Intent?" (1990) 6 Aust Bar Rev 93.

Two related features of the 1890 Constitution[7] cannot be overlooked when reviewing the constitutional history of the State over the last 100 years. These were, first, that, despite the degree of self-government it accorded, it was characteristically *colonial*. Secondly, it was *evolutionary* rather than *revolutionary*, in terms of being the natural development of a British, colonial society that had achieved a measure of political maturity and self-reliance.

It was colonial in the sense that it reflected seventeenth and eighteenth century English ideas and concepts of how to organise the institutions of government into its legislative, executive and judicial constitutive parts,[8] but adapted to fit the different circumstances obtaining in the Australian colonies.[9] Thus a large degree of independence was implicit in passing domestic control to a legislature from which the ministry who formed the government were drawn, but ultimate sovereignty in legislative,[10] judicial,[11] and executive matters resided in the United Kingdom.[12] It was evolutionary in the sense that the colony had progressively passed from being a military government upon Governor Stirling's first settlement in 1829,[13] through the state of

7. The 1890 "Constitution" is an amalgam of the (WA) Constitution Act 1889 ("the Constitution Act") as sanctioned by the (UK) Western Australian Constitution Act 1890. As explained by R D Lumb *The Constitutions of the Australian States* 4th edn (St Lucia: University of Queensland Press, 1977) 38, the then Legislative Council of the Colony exceeded the powers conferred on it by passing the 1889 Bill, thus requiring Imperial ratification.
8. Without constructing a legal separation of those distinct powers: *Gilbertson v The State of South Australia* (1976) 15 SASR 66; [1978] AC 772.
9. P Hanks *Australian Constitutional Law* 4th edn (North Ryde: Butterworths, 1990) 182.
10. S 2 of the (UK) Colonial Laws Validity Act 1865 rendered invalid any colonial law that was repugnant to an Imperial law applicable in the colony.
11. The ultimate appeal lying from State courts to the Judicial Committee of the Privy Council pursuant to the (UK) Judicial Committee Act 1833; the (UK) Judicial Committee Act 1844; the (UK) Colonial Courts of Admiralty Act 1890; the (UK) Admiralty Offences (Colonial) Act 1849; and see *Oteri v The Queen* (1976) 51 ALJR 122; and *R v Robinson* [1976] WAR 155.
12. The Governor at that stage being responsible to the United Kingdom Government having to act in accordance with Instructions issued to him under the royal prerogative: A B Keith *Responsible Government in the Dominions* vol I 2nd edn (Oxford: Clarendon Press, 1928) 209; supra n 9, 278.
13. (UK) 10 Geo IV, c 22 establishing the Swan River Colony. See supra n 3, 2.

representative government after 1870,[14] till responsible government in 1890, the last Australian colony (State) to achieve that status. In this it paralleled similar developments in the other Australian colonies.

There was nothing in all this remotely akin to the dramatic revolutionary secession of the American colonies from Britain in the War of Independence after 1776, or the later inclusion or accession of other States into that Union such as Texas (previously Spanish), Louisiana (French) or Arizona (Mexican), all with different and somewhat colourful antecedents. Although said of the Commonwealth Constitution, the words of Chief Justice Barwick in *Attorney-General of the Commonwealth (Ex rel McKinlay) v The Commonwealth of Australia*[15] aptly sum up the contrast in constitutional development between the United States of America and the Australian colonies:

> [T]he American colonies had not only made unilateral declarations of independence but had done so in revolt against British institutions and methods of government. The concepts of the sovereignty of Parliament and of ministerial responsibility were rejected in the formation of the American Constitution. Thus, not only does the American Constitution provide for a presidential system, but it provides for checks and balances based on the denial of complete confidence in any single arm of government.
>
> In high contradistinction, the Australian Constitution was developed not in antagonism to British method of government but in co-operation with and, to a great extent, with the encouragement of the British Government....
>
> The contrast in constitutional approach is that, in the case of the American Constitution, restriction on legislative power is sought and readily implied whereas, where confidence in the parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers.

The grant of self government therefore occurred largely in an unremarkable way and, though not without a degree of self-assertion on the part of the local political leaders, with a strongly conservative bent.

If we are to speak of the "Founding Fathers" of Western Australia, they would be identified on the one hand as the colony's Governor, Sir Frederick Napier Broome, spurred along by the two-thirds elected Legislative Council, of which Stephen Parker, Septimus Burt and John

14. See s 9 of the (UK) Australian Colonies Act 1850; (WA) Ordinance No 13 of 1870; discussed in Lumb, supra n 7, 37-38.
15. (1975) 135 CLR 1, 23-24.

Forrest were leading members,[16] and Lord Knutsford, Her Majesty's Secretary of State for the Colonies, on the other. An analysis of the relevant despatches shows that there were a number of matters in contention in the preceding decade. Some of these matters were of temporary significance only. These included whether provision should be made for the separation of the colony, and the control of vacant Crown land, particularly in the northern parts of the State.[17] These are no longer of any significance. Of some immediate significance was the question of whether the local government should have control of Aboriginal affairs. Distrustful of the colonial government, the Imperial authorities insisted on the inclusion of what became section 70 of the Constitution Act. This required 1 per cent of the colony's revenue to be appropriated for native affairs, and placed under a board[18] responsible, not to the legislature, but to the Governor. This provision rankled with the colony's politicians until it was finally removed in 1906. The circumstances of its removal continue to arouse resentment even today.[19]

Of greater contemporary relevance was the disposition made in respect of the houses of the Legislature. Eschewing any suggestion of getting by on a single chamber - "an experiment full of danger"[20] -

16. For a short history of the movement towards responsible government see B K de Garis "Self-Government and the Evolution of Party Politics 1871-1911" in C T Stannage *A New History of Western Australia* (Nedlands: University of Western Australia Press, 1981) 326, 335-338.
17. See Despatch no 139 Governor Sir F Broome to Secretary of State Lord Knutsford 28 May 1888 appearing in *Despatches Between His Excellency The Governor And The Right Honourable The Secretary of State For The Colonies Relating To Responsible Government* (Perth: Government Printer, 1888) 6-7, paras 3, 4 and 9 ("*Despatches*") Despatch no 69 Secretary of State Lord Knutsford to Governor Sir F Broome 30 July 1888, ibid, 34, para 6; and Despatch no 19 Governor Sir F Broome to Secretary of State Lord Knutsford 31 January 1889 appearing in *Further Despatches Between His Excellency The Governor And The Right Honourable The Secretary of State For The Colonies Relating To Responsible Government* (Perth: Government Printer, 1889) 8, para 5. ("*Further Despatches*")
18. Still referred to anomalously in s 75 of the Constitution Act.
19. The history of s 70 and its contemporary relevance are examined further in P W Johnston "The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust (1989) 19 UWAL Rev 318.
20. Despatch no 139 Governor Sir F Broome to Secretary of State Lord Knutsford 28 May 1888, *Despatches* supra n 17, 7-8, para 12. In para 13 the Governor further dismissed the notion of a single house of 30 members as "an ultra development of democratic institutions, even in this democratic continent."

some debate was attracted to whether, given two chambers, the Upper House should have power to modify money-bills, particularly in light of the prospect of deadlocks between the houses.[21] The Imperial attitude prevailed on this matter, namely that the absence of a deadlock device was preferable because it required the houses to work out their difficulties, even at the cost of some friction.[22] The full potential of deadlocks arising over supply did not seem to trouble the British authorities.

A related issue was whether the Upper House should be elected or nominated. The colony pressed, ultimately successfully, for the former, against the views of London where doubt was expressed whether sufficient men of appropriate capacity and stature could be found in the small colonial community.[23] The principle of rotation of membership of the Legislative Council was also adopted to prevent its character being disturbed too readily by swings of popular sentiment.[24]

Finally, of contemporary relevance, certain provisions of the Constitution Act, namely those dealing with changes to the "constitution of the houses", were thought to require entrenchment by "manner and form" provisions.[25]

21. Ibid, 8, para 17.
22. Ibid, 9, paras 18 and 19.
23. Ibid, 9, para 20. Despatch no 69 Secretary of State lord Knutsford to Governor Sir F Broome 30 July 1888, *Despatches* supra n 17, 34, para 7 and Despatch no 301 Governor Sir F Broome to Secretary of State Lord Knutsford 6 November 1888, *Further Despatches* supra n 17, 4-5, para 5:

> It is often argued that the last thing which a democratic Lower House desires is to replace a weak, sleepy Assembly of nominees by an elected Upper House, vigorous, vigilant, authorised and strengthened in its exercise of power by the suffrages of the most enlightened portion of the community.

24. Despatch no 152 Governor Sir F Broome to Secretary of State Lord Knutsford 6 June 1888, *Despatches* supra n 17, 14, para 3:

> The gradual reconstitution of the Upper House would secure it against entire re-election upon any sudden wave of political opinion, which might possibly be evanescent and mistaken, and which would in any case have full play at a general election of the Lower House.

25. Now redrafted as s 73(1) of the Constitution Act. See Despatch no 81 Secretary of State Lord Knutsford to Governor Sir F Broome 31 August 1888, *Despatches* supra n 17, 37, para 19:

> The first clause of the Bill contains a general power of making laws; and clause 61 of the draft Bill gives power to alter the pro-

Notably absent, from today's viewpoint, were detailed provisions relating to the organisation and exercise of the executive power of government,[26] and provisions entrenching the superior courts.[27] In the final analysis, the document was conservative in its provisions, and typical in leaving unexpressed the key elements of responsible government itself.

To the extent that the 1890 Constitution mirrored the colony's status as an appendage of the British Empire, it is timely to ask whether the fundamental changes in that relationship should be reflected in the current Act. This issue arises most pertinently in relation to the severing of the British links. Preceded by the emergence of an independent and fully autonomous Commonwealth government, parliament and judiciary,[28] the Australian States effectively severed the Imperial cord[29] upon the passage of the Australia Acts[30] in 1986. Still entrenched, by virtue of sections 50 and 73(2)(a) of the Constitution Act, the office of

> visions of the Bill, although it requires special majorities for certain purposes. These clauses appear sufficiently to provide power for varying the details of the electoral law by legislation in the ordinary way, while any change in the constitution of either House will require the assent of an absolute majority of the members of each House.

26. S 50(1) of the Constitution Act does provide that "[t]he Queen's representative in Western Australia is the Governor who shall hold office during Her Majesty's pleasure", while s 74 refers cryptically to the appointment by the Governor alone of "officers liable to retire on political grounds", an indirect reference to the ministers who form the Government in accordance with the principles of responsible government. S 43(1) of the Amendment Act provides that there "may be 17 principal executive offices of the Government liable to be vacated on political grounds...."
27. S 54 of the Constitution Act does provide that Judges of the Supreme Court should continue to hold their commissions during "good behaviour". There is, however, nothing otherwise guaranteeing the independence of individual judges or the autonomy of the institution of the superior courts. In *McCawley v The King* (1918) 26 CLR 9 Isaacs and Rich JJ, 58-68 pointed out that the grant of plenary legislative power to a colony did not carry with it a guarantee of judicial independence.
28. Effected by the (Cth) Statute of Westminster Adoption Act 1942 and the (Cth) Privy Council (Appeals From the High Court) Act 1975.
29. See J A Thomson "The Australia Acts 1986: A State Constitutional Law Perspective" (1990) 20 UWAL Rev 409.
30. Including the (WA) Australian Acts (Request) Act 1985 and the (Cth) Australia Act 1986.

Governor remains the last active element of pre-existing British sovereignty, whilst the State's law-making authority is, by virtue of section 2(1), vested in the Queen with the advice and consent of the Legislative Council and Legislative Assembly. Whilst it is unlikely that sufficient Western Australians will want to terminate the State's nominal attachment to the monarchy for some time, it is appropriate, in our submission, to question whether references to the Queen continue to be of any practical point. Arguably, the use of such expressions is more apt to confuse than to explain. Rather than resorting to the mystical vocabulary of "Crown" personality, and all its needless obscurity, the use of plain words and expressions like "parliament", "Governor", "government", and "the State" is to be preferred.[31] In this respect, the single and consistent use of the word "parliament" in preference to "legislature" is to be commended.[32]

THE PROBLEM OF AMOEBIC SUB-DIVISION OF THE CONSTITUTIONACT

Whilst it may be little more than cosmetic in nature, a further feature of the State's legislative history that warrants consideration is the way in which the seamless garment of the original and single Constitution Act has been rent and further divided with the passage of time. First amended in 1893, the various amendments to the Constitution Act were collected and consolidated into a separate statute, the Western Australian Constitution Acts Amendment Act 1899 ("the Amendment Act"). This has been recognised by the High Court as standing apart from its original.[33] The Amendment Act was itself divided when, in 1907, some parts of it relating to electoral matters were removed to the Western Australian Electoral Act 1907, from which the provisions forming the Western Australian Electoral Distribution Act 1947[34] were excised in 1947. Whilst there may be some

31. These problems are further examined by P W Johnston "The Legal Personality of the Western Australian Parliament" (1990) 20 UWAL Rev 323.
32. In Despatch no 81 Secretary of State Lord Knutsford to Governor Sir F Broome 31 August 1888, *Despatches* supra n 17, 35, para 5 Lord Knutsford commented on the removal of the word "Parliament" from the draft Bill, adding that "it is not strictly accurate to describe [the two Houses], without the Queen, as constituting the Parliament of the Colony;...."
33. *The State of Western Australian v Wilsmore* (1982) 149 CLR 79 Wilson J, 100.
34. Originally the (WA) Electoral Districts Act 1947.

logic in provisions concerning electoral affairs remaining in a separate enactment, it seems to be untenable that the principal constitutional provisions establishing and regulating the fundamental organs of government themselves should not be set forth in a single statute. Such a statute should address:

(a) the Parliament;
(b) the Houses comprising Parliament, and the relations between them;
(e) the Governor, and the officers of the Government, in accordance with the rules of responsible government.
(f) the exercise of the executive power of the State; and
(g) the key features of the judicial system, including its independence.

To say this is but to raise a larger question, that is: what do we mean by "the Constitution",[35] or a "constitutional" statute? It is not enough to say that any statute so called is "the Constitution". Summing up the Western Australian situation, Chief Justice Malcolm has said:

> The basic Constitutional statutes are now the *Constitution Act 1889* and the *Constitutional Acts Amendment Act 1899* as variously amended over the years. These contain powers dealing with Parliament, elections, the Executive Council, the Legislative Council and the Legislative Assembly, the Governor, Local Government, the Judiciary, legal matters, financial matters and miscellaneous matters. There are various other statutes, conventions and practices which, together with the common law, make up the constitutional law of the State.[36]

As His Honour recognises, virtually any statute bearing upon the system of government, including local government, the exercise of governmental power, and the rights of citizens in their relationships to government, may be described as comprising part of "the Constitution", in addition to those concerned with the central institutions. Thus,

35. "Constitution" is itself a word of variable meaning, depending on whether it is used in relation to a State Parliament or a House of Parliament. In *McCawley v The King* supra n 27 Isaacs and Rich JJ, 51-52 pointed out that "Constitution" has at least a double meaning, first, an abstract signification meaning the rules by which the action of a colony or a legislature is governed; and secondly, in popular usage, it denotes the *document* in which the rules are formulated.
36. Supra n 3, 6.

on one view the Western Australian Local Government Act 1960, the Western Australian Police Act 1892 ("the Police Act"), the Western Australian Public Service Act 1978 and the legislation dealing with the courts, such as the Western Australian Supreme Court Act 1935 ("the Supreme Court Act"), all merit inclusion. On another view, all legislation relating to the operations and institution of parliament should be included. This would embrace the Western Australian Parliamentary Privileges Act 1891, certain sections in the Western Australian Criminal Code 1913, the Western Australian Interpretation Act 1984 and the Western Australian Financial Administration and Audit Act 1985. Selection, is, to a large degree, a matter of preference. Essentially, however, there is a "core" meaning that focuses on the organs and agencies that exercise governmental powers, such as those concerning law-making and administration. In this respect, one can confine the immediate debate to the Constitution Act and the Amendment Act, either separately or as notionally consolidated.

Whilst considering the key elements that should comprise the major constitutional statute of the State, a collateral issue arises. This is whether that statute, or parts of it, should be given a *special* status having regard to restrictions on amendment of its provisions. At present, apart from those matters covered by section 73 of the Constitution Act, which require special majorities, and, in the case of subsection (2) of that provision, a referendum, the rest of the Constitution Act and the Amendment Act are completely "flexible", and can be amended in the same way as anordinary statute.[37] Apart from some other topics that might be added by way of constitutional reform, such as some inclusion of measures protecting citizens' rights, a guarantee of judicial autonomy and independence,[38] and citizens' initiatives, there is little to be said in favour of entrenchment. In intergenerational terms, it can even be denounced as undemocratic.

37. Ie they are not "controlled": see *McCawley v The King* [1920] AC 691.
38. Particularly in respect of the courts' budgets and staff.

CONCLUSION ON COSMETIC CHANGES

The primary level of reform could therefore encompass the following:

(a) consolidate, at least in part, the principal constitutional statutes of the State;[39]
(b) replace all out of date and transitional provisions;[40] and
(c) replace antiquated and mystifying references that tend to obscure the true nature of responsible government, replacing them with more explicit provisions.

Whilst this course, if pursued without more, would not materially alter the constitution, it would have considerable explanatory and educational effect, particularly if reduced to intelligible plain English. It would be an important symbolic reaffirmation of the people's confidence in the system of government. One should not, however, underestimate the amount of drafting it would entail.

SUBSTANTIVE ALTERATION

This covers a number of possibilities where actual changes could be made to the constitutional legislation. Necessarily, whether the changes should be made will depend on policy decisions and hence will entail political considerations. Public controversy is therefore likely.

The matter most often mentioned in this respect is reform of the relationships between the two houses, both as affects their financial powers, particularly over supply, and more generally, overcoming deadlocks. The situation in this regard has not materially altered since

39. This would cover continuing the existing two houses and the provisions relating to each of them (Constitution Act ss 8, 9, 12, 13, 15 and 49, Amendment Act ss 5-15 and 18-25) possibly deleting ss 42, 43 and 46 of the Constitution Act as being redundant; regulating the proceedings of the Parliament (Constitution Act ss 22, 34 and 35); and providing for the disqualification of members (Amendment Act ss 31-42). With respect to the Executive: confirming the role of the Governor and Ministers of the Crown Constitution Act s 74, Amendment Act ss 43, 44, 44A and 55 possibly with amplification from the Supreme Court Act; stipulating the financial and other relations between the houses (Constitution Act ss 64, 65 and 72, Amendment Act s 46) and stating the requirements for constitutional amendment (Constitution Act s 73, taking into account that the reservation provisions of s 73(1) have been repealed by s 9(2) of the (Cth) Australia Act 1986. (The authors are indebted to Alex Gardner, Lecturer in Constitutional Law, University of Western Australia, for this analysis).
40. Such as s 59 (relating to customs duties) and Schedule D (relating to temporary payments to former colonial office holders) of the Constitution Act.

1890 apart from the inclusion of section 46 in the Amendment Act. In most respects that provision duplicates sections 53, 54 and 55 of the Commonwealth Constitution, except that throughout it uses the expression "proposed law", that is, a bill, with the result that a failure to follow the requirements of section 46 is non-justiciable.[41] Like those Commonwealth provisions, section 46 does not provide a ready means for resolving disputes over supply, as became evident in the constitutional crisis of 1975.[42] Notably absent is a more general deadlock device such as section 57 of the Commonwealth Constitution, as complicated as the latter is.[43] These deficiencies led the Royal Commissioner on Parliamentary Deadlocks, Emeritus Professor E J Edwards, to recommend that a suspensory veto should be incorporated into the Constitution, allowing the Legislative Council to hold up the appropriation bills for no more than a month, and a more general deadlock provision along the lines of section 5B of the New South Wales Constitution Act 1902 be adopted.[44] This proposal has been rejected by the Upper House.[45] In turn, legislation guaranteeing the passage of supply but requiring a double dissolution of parliament, in the event of a supply deadlock, was introduced into the Council last year but has lapsed.[46] It is doubtful whether the electorate could have a choice of the alternatives unless two referendums were held; one to offer a choice, the other to comply

41. *Osborne v The Commonwealth* (1911) 12 CLR 321, 353.
42. G Sawer *Federation under Strain: Australia 1972-1975* (Carlton: Melbourne University Press, 1977) 163-164.
43. Some of the complexities of s 57 of the Commonwealth Constitution are explored in the 1975 cases of *The State of Victoria v The Commonwealth* (1975) 134 CLR 81 and *The State of Western Australia v The Commonwealth* (1975) 134 CLR 201.
44. E J Edwards *Report of the Royal Commission into Parliamentary Deadlocks: Western Australia 1984-5* (Perth: Government Printer, 1985) paras 180-192 ("the Edwards Royal Commission").
45. The *Acts Amendment (Resolution of Parliamentary Disagreements) Bill* was introduced into the Legislative Assembly and had its Second Reading on 19 September 1985: Western Australia, Legislative Assembly 1985 *Debates* vol 255, 1258. It adopted the recommendations of the Edwards Royal Commission, supra n 44 by proposing a measure along the lines of s 5A of the (NSW) Constitution Act 1902 for deadlocks over supply and a further provision similar to s 57 of the Commonwealth Constitution for other matters, including constitutional amendments. The Bill was defeated on the Second Reading in the Legislative Council: Western Australia, Legislative Council 1985 *Debates* vol 257, 3375.
46. The *Acts Amendment (Simultaneous Dissolution) Bill* was introduced into the Legislative Council and given its second Reading speech on 17 October 1989 by the Honourable E J Charlton: Western Australia, Legislative Council 1989 *Debates* vol 278, 3136, but lapsed in committee.

with section 73(2) of the Constitution Act, which probably applies to a change of that kind.

FUNDAMENTAL CHANGES

These go to the nature and root of the principal organs of government and touch the democratic bases of our system. In this respect, much valuable guidance is to be had from scanning the issues raised in the reports of the Commonwealth's Constitutional Commission in 1988.[47] Among other things, the following questions merit consideration, in relation to Parliament:

(a) should the right to vote be made explicit and entrenched?[48]

47. See Constitutional Commission *First Report of the Australian Constitutional Commission* Vol I (Canberra: Australian Government Publishing Service, 1988) ("*First Report*"). A short summary of cognate issues concerning Western Australia was given by the Malcolm CJ supra n 3, 6-7 as follows:

> Many matters relevant to the Constitution have been left to be implied or regulated by practice or convention. Should all or any of these matters be made the subject of express provision in a single document? Do we need to incorporate any provisions regarding fundamental or basic rights, such as those contained in the Canadian Charter of Rights, the Bill of Rights or the United States' Constitution? Do we need to spell out the role, responsibility and powers of the Governor and the Executive Branch of Government? Do we need to articulate, for example, any of the principles of the Westminster system of Cabinet Government and ministerial responsibility and accountability? Do we need more detailed provisions concerning the independence of the judiciary, the circumstances and procedures by which judges may be removed from office and the powers, role and responsibility of the Supreme Court and the judiciary? Do we need more express provisions concerning the respective powers and responsibilities of Parliament, the Executive and the Judiciary as being the three great arms of Government? What of Local Government? Are the financial provisions of the Constitution adequate? Are we satisfied with the procedures for Constitutional amendment? Is there a place for entrenched provisions, provision for citizens' initiatives, or the submission of proposed amendments or any particular class of amendments for approval by a popular vote in a referendum?

48. Ibid *First Report*, 192-210.

(b) is it desirable to include one-vote one-value, or some approximation?[49]

(c) should the Legislative Council be capable of being dissolved before its four year term expires?[50]

Other matters, such as electoral laws and direct election seem sufficiently up to date not to need close reconsideration.

As to the executive government, the following questions can be posed:

(a) should section 74 of the Constitution Act be deleted and in place of its obscure reference to "offices liable to be vacated on political grounds", should there be more explicit reference to the elements of responsible government;[51]

(b) in particular, should the Governor's so-called "reserve powers"[52] be codified;

(c) should the relationship between ministers, departments and statutory agencies be spelt out;

(d) should provision be made for ministerial resignation or dismissal upon an adverse vote;

(e) should section 43 of the Amendment Act relating to the constitution of the executive council be amended, to reflect more accurately the constitutional role of cabinet; and

(f) should the office of Premier as the actual head of government be recognised?

49. Ibid *First Report*, 227-247. Note that in *Burke v The State of Western Australia* [1982] WAR 248 the Full Court denied that such a principle could be distilled from the words "chosen directly by the people" in s 73(2)(c) of the Constitution Act: Burt CJ, 252-253; Wickham J, 256; Smith J, 256.

50. Whilst it is incapable of being dissolved at the same time as the Legislative Assembly, the Legislative Council arguably lacks moral authority to deny supply to the government since it is not accountable for its actions.

51. In the much debated case of *Toy v Musgrove* (1888) 14 VLR 349 Williams J, 419 stated:

> I am of opinion that a system or a measure of responsible government is created by the [Constitution] Act. This I think may be inferred from the somewhat loosely worded provision ... "with the exception of the appointment of officers liable to retire on political grounds."

52. Ie the Governor's discretionary powers in commissioning and dismissing ministerial advisors (the government). Whether the Governor has such powers is a matter of controversy, as are the circumstances in which the powers might be exercised.

Finally, as regards the judiciary, an important question is whether the courts, particularly the Supreme Court, should have guaranteed, that is, entrenched, independence and autonomy over their own affairs.[53]

RADICAL CHANGES

These imply a change of direction. Two issues stand out here. The first is whether there should be a place for a Bill of Rights, or at least some basic rights and freedoms included in the State Constitution. Whether or not these might be as extensive as, for example, the United Nations International Covenant on Civil and Political Rights (1966), the United States Bill of Rights, or the Canadian Charter of Rights, is debatable. There is, however, a strong case for having some minimum rights that ensure the integrity of the political process itself and particularly the freedom to dissent and criticise. In this regard, freedom of speech, assembly, and religious and political opinion and practice, are vital. The civil liberties record in Western Australia is, in this respect, somewhat lamentable given past resort to section 54B and 87B of the Police Act.[54] Closely associated would be protection against discriminatory police action, and recognition of a core privacy right.[55]

The second issue is that of Citizen Initiated Referenda.[56] This is a complex matter and the United States experience is particulary valu-

53. As with the individual houses of parliament, matters like financial autonomy are vital to the effectiveness of their operations. See F G Brennan "Courts Democracy and the Law" Australian Capital Territory Law Society Blackburn Lecture, Canberra (ACT) 7 August 1990, 2, 7 and 23.

54. The Full Court has held that, with respect to freedom of religious opinion, conscientious objection is no defence to a change of failing to vote: *Blakeney v Coates* (unreported) Supreme Court of Western Australia 22 September 1982 no 4653. Similarly, the Supreme Court has given a broad reading to s 54B prohibiting public demonstrations without police permission: *Riley v Hall* (unreported) Supreme Court of Western Australia 4 June 1981 no 4165.

55. P H Bailey *Human Rights: Australia in an International Context* (Sydney: Butterworths, 1990) 283. Some measure of protection against discriminatory action is afforded by the (WA) Equal Opportunity Act 1984.

56. Discussed in G de Q Walker *Initiative Referendum: the People's Law* (St Leonards: Centre for Independent Studies, 1987) Reviewed by C Gilbert (1989) 15 UQLJ 262.

able in informing us about the safeguards that would need to be put in place to prevent abuse of this process by those able to afford resort to mass-media technology.[57] Enthusiastically promoted by some, it has yet to command much popular support in Australia.

CONCLUSION

This comment began by questioning whether 1990 should be the beginning of a completely new age or merely the revamp of an old lady. Whatever the decision, the historical origins cannot be lightly put aside. Given the natural conservatism of Western Australians this is unlikely to happen. However, besides removing some of the antiquated notions and provisions, more substantive reform is justified. How far this proceeds into the more radical and adventurous fields will remain, of course, a matter of debate.

57. For some of the many articles on the subject see P Borders "California Local Initiatives And Referenda" (1989) 21 Pac LJ 119; T Kennedy "Initiated Constitutional Amendments In Arkansaw: Strolling Through The Minefield" (1986) U Ark Little Rock LJ 1; Note: "The Limits of Popular Sovereignty: Using The Initiative Power To Control Legislative Procedure" (1986) 74 Calif L Rev 491; "The Current Use Of The Initiative And Referendum In Ohio And Other States" (1984) U Cin L Rev 541.