METHODS OF CONSTITUTIONAL REVISION IN THE FEDERAL SPHERE: AN ELECTED CONSTITUTIONAL CONVENTION?

R D LUMB*

Most attempts to amend the Australian Constitution have ended in failure. A major reason is that too often the proposals have not had a popular input reflecting the opinions of people in the various regions of Australia The author proposes the adoption of an Elected Constitutional Convention, similar to that which was used to draft the current Constitution in 1897-1898, to remedy the problem Such a Convention would foster the goals of participatory democracy, give a more effective voice to the less populous states, and reduce the dominance of the Federal government in initiating constitutional reform.

1. INTRODUCTION

An analysis of the history of constitutional reform since the beginnings of Federation reveals one major feature: the paucity of measures which have been approved at referenda under section 128 of the Australian Constitution. Only eight out of over 40 proposals have been approved,[1] a success rate of less than 20 per cent.

While successive federal government leaders have expressed surprise at this rather dismal constitutional reform record, sober analysis would indicate the major reason for the high failure rate lies in the quest of federal politicians since Federation for increased federal powers, often to cope with a temporary political or economic problem. A great number of the proposals which have

* LLM(Melb) D Phil(Oxon); Professor of Law, University of Queensland.

1. The significant ones have been co-ordination of borrowing (the Financial Agreement) (s 105A in 1929), power over a wide range of social services (s 51(xxiiiA) in 1946), a power over aboriginals (s 51(xxvi) in 1967), the method of filling casual vacancies in the Senate (s 15 in 1977), and a retiring age for High Court and Federal Court judges (s 72 in 1977).

failed have been proposals to extend commonwealth control in the economic and industrial spheres. At the heart of the analysis is the significance of federalism and the distribution of federal-state powers.

Many reformers have in the past espoused a constitutional outlook that it is an inexorable law of history that power moves from federal units (whether they be called provinces, states or regions) to the centre. Starting from this premise, any reform which is designed to accelerate the process is, by this yardstick, useful and beneficial to the people of Australia.

But any such inexorable law, while it might have been sustained decades ago, no longer appears to reflect the realities of political and historical development in the 1990's. Certainly one detects an increased recognition of the role of the states, particularly in terms of the ongoing debate on fiscal imbalance in the Australian federation. One also discerns, of course, the powerful political influences from the centre which are opposed to fiscal devolution. One also detects that, beneath the facade of Australian unity and nationalism, there are important regional differences which since the beginning of and even before Federation, have made the residents of the outlying states suspicious of moves to centralise more authority and power in the national capital. It can be said, therefore, that constitutional reform proposals which fail to take account of these phenomena will not succeed.

When we examine the present constitutional machinery for reform, we can take the view that the machinery laid down in section 128 reflects a certain unilateral bias in that a proposal for amendment of the Constitution is initiated solely by the federal parliament.[2] That means that the proposals that go to the people may well reflect the political agenda of the governing party at the time the proposal is agreed upon by the parliament. The inescapable hurdle to the success of such proposals (which may not be bipartisan) is that they must be approved by a majority of electors in a majority of states as well as by a national majority.

2. Although s 128 of the Australian Constitution makes provision for submission of a proposal to one House by the Governor-General, there is debate on whether the Governor-General would act on ministerial advice *not* to submit a bill passed by the Senate to a referendum. It may be that he has a constitutional obligation to do so where the conditions of fact set out in the section are complied with. In a 1914 precedent there was doubt as to whether these conditions of fact were complied with: G Sawer *Australian Federal Politics and Law* (1956) Vol 1 (Victoria: Melbourne University Press, 1956) 119, 124. See also *Victoria v Commonwealth* ("PMA Case") (1975) 134 CLR 81.

Of course the proposals emanating from the parliament may be preceded by a preliminary thrashing out of the issues in some other forum. However, unless the democratic charter of such advisory bodies is firmly established, the advice which is delivered by them may not be seen by all as reflecting an Australian consensus. Moreover, even if the advice per se reflects such a consensus, it can be thrust aside at the political whim of the government of the day.

It is therefore incumbent on constitutional reformers to consider methods which will reflect an Australian consensus. In this article I am proposing that the method used to formulate our present constitution in 1897-1898 (the elected constitutional convention) be utilised to ensure that any future proposed constitutional changes have a reasonable chance of success.

The importance of adopting this method is increased when one considers the items placed on a tentative agenda at a constitutional conference held in 1991 known as the Constitutional Centenary Conference. At that Conference key issues identified for study and analysis included the question of the head of state, redistribution of legislative powers, and a bill of rights, amongst other matters.[3] If any modification of existing provisions relating to these matters is to secure approval, the sole power of the federal parliament to propose amendments (whatever may be the respect that exists for the bodies advising them on these proposals) requires reconsideration.

Indeed the Conference recognised this when it noted that "[t]here was general support amongst participants for the idea that there should be additional ways of initiating constitutional referenda under section 128 of the Constitution; for example, by a specified proportion of electors or by a specified majority of State Parliaments".[4] It is a pity that the conference did not also include the concept of an elected constitutional convention in their reference to these alternative methods.

3. *Constitutional Centenary Conference 1991: Concluding Statement* (Constitutional Centenary - Newsletter of the Constitutional Centenary Foundation: No 1, April 1992) 7-8.
4. Ibid, 8.

2. THE 1890's CONVENTIONS

As is well known, the major impetus to the framing of a federal constitution in Australia was the 1891 National Australasian Convention.[5] However the Convention was a nominee convention, the delegates being appointed pursuant to resolutions passed by the Houses of the Legislatures of the Colonies. This Convention consisted of seven delegates from each of the Colonies including New Zealand. The Federation Bill which emanated from the Convention was not proceeded with and the opponents of an Australian federal union had to start afresh. The major steps taken later were approval of the proposal for an elected convention at the Premier's Conference in 1895, the passage of Enabling Acts from each of the Colonies providing for the Convention, and provision for the draft bill emanating from the Convention to be submitted to referenda in the colonies before submission to the Imperial Parliament for ratification.[6]

Under the Enabling Acts,[7] the Convention was to consist of ten representatives of each Colony. A major feature was the principle of equal representation for each Colony. Qualifications for being elected to the Convention were membership of either House of the Colonial Parliament or eligibility for such membership. This meant that, in addition to members of Parliament, any person on the electoral roll of a Colony who had the qualifications for membership of either House of the Legislature was entitled to stand for election to the Convention subject to a required number of nominations supporting the candidature of the person.[8]

The method of voting for Convention representatives was as follows. Each Colony was to be treated as one electoral district and every voter was required to vote for the full number of representatives required, that is, ten.[9] Thus one voter would be casting a vote for ten candidates. The ten candidates

5. See J Quick and R Garran *The Annotated Constitution of the Commonwealth of Australia* (Sydney: Angus and Robertson, 1905) 123 et seq for a description of the Convention.
6. The major features of the agreement reached at the Premiers' Conference are set out in Quick and Garran, ibid, 158-159. They also point out that under the agreement the Parliaments of the Colonies were involved in every stage of the process. It gave them "a voice in initiating the process, a voice in criticizing the Constitution before its completion, and a voice in requesting the enactment of the Constitution after acceptance", 160.
7. Australasian Federation Enabling Act: NSW 1895, No 24; Victoria 1896, No 1443; SA 1895, No 632; Tas 1896 No 57; WA 1896, No 32.
8. The number of nominations varied from 100 in New South Wales to 10 in Tasmania.
9. The electors were not required to mark the ballot paper by indicating a numerical order of preference but merely to place an appropriate sign in the squares opposite the candidates' names.

elected would be those who received the highest aggregate of votes. Electoral qualifications were the qualifications required for electing a member of *either* House of Parliament of the Colony. However, Queensland did not participate in the elections and Western Australia departed from the principles of election with its delegates being selected at a joint meeting of the Houses.[10]

It appears from the description in Quick and Garran[11] of the Convention elections in the four Colonies which held elections that they were in no sense an outright political fight between parties. Much depended on the circumstances and groupings in the particular Colony. Certainly there were "party" tickets but these tickets were not just narrow party machine tickets in the modern sense. Tickets emanated from community organisations and even newspapers. Because of the distances involved in covering the various geographical areas of a Colony the campaign was conducted mainly by way of pamphlets and printed addresses. The public reputation of many candidates played a large role in securing their election. On the whole such reputation was derived from the candidate being a member of parliament or a former member. Indeed an analysis of the list of successful candidates shows that, of the number elected, the vast majority were politicians, indeed leading politicians. These included premiers and attorneys-general and ex-ministers still serving in their houses of parliament. Only about six of the successful candidates were not members of parliament.

In New South Wales, the Catholic Archbishop, Cardinal Moran, was one of the candidates but was not successful. Dr John Quick, an ex-MLA and one of the architects of Federation, was a successful candidate in Victoria.

The deliberations of the Australasian Federal Convention were spread over the years 1897-1898 and were divided into three sessions. The debate was of a markedly high standard displaying erudition and a grasp of political realities. After the first session of the Convention, an adjournment was taken and the draft produced by the drafting committee was submitted to the Colonial legislatures for comment. It was finally adopted by the Convention after revisions were made.

10. The (Qld) Enabling Bill was not passed by the Parliament and therefore that Colony did not have any representatives at the Convention. S 17 of the (WA) Enabling Act (1896) 60 Victoria No 32 departed from the agreed structure in providing for the selection of delegates by the two Houses sitting together.
11. Supra n 5, 163-165.

Pursuant to the enabling legislation, it was to be submitted to the electorate at a referendum in each Colony. There were several delays and changes made by the premiers. A second round of referenda was held. The draft was approved by a majority of electors in five Colonies, including Queensland. Western Australia gave its approval after the Bill had been approved by the Imperial Parliament.

It is interesting to note that although the Convention method was used to draft our Constitution, the method is not contained in section 128. What is the reason for this? The draft agreed upon in the 1891 Convention did make provision for a method of *ratifying* amendment proposals by way of conventions. Under the original proposal the amendments were to be submitted to conventions of the people of the states convened for that purpose. If approved by a majority of conventions, the proposal was to become law.[12]

Criticism was directed against the clause on the ground that it did not provide for approval by a majority of the voters.[13] Attention was drawn to the Swiss model which involved a referendum of the people. Mr Thomas Playford expressed the following opinion:

> It would have been a great deal better to adopt the Swiss mode of referring alterations of the constitution to the people than to adopt this mode of convention, because in this mode of convention you can never ascertain correctly the views of the people. You only ascertain the views of the men who have been elected members of the convention.[14]

He added:

> With regard to conventions, you never can calculate as to the number of the people; but only as to the majority of individual states. You, therefore, cannot combine the two principles that are combined in the Swiss mode of deciding these matters.[15]

Other members spoke in favour of these sentiments.[16] Sir Samuel Griffith, however, supported the convention method of ratification. Referring to American experience,[17] he said:

> The people of that country, who are practical people, recognise that millions of people are not capable of discussing matters in detail; they deal with general principles, and select men whom they trust to deal with details. That is the principle of conventions.

12. See *Official Report of the National Australasian Convention Debates* (Sydney: Government Printer, 1891) 884 for the text of the proposal. See E Hunt *American Precedents in the Australian Federation* (New York: Columbia University Press, 1930) 212 et seq.
13. *Official Report of the National Australasian Convention Debates* ibid, 886.
14. Ibid, 891.
15. Ibid.
16. Eg Dr John Alexander Cockburn, ibid, 892-893.
17. But not appropriately distinguishing Federal from State practice.

> That is why I think they are far preferable to a plebiscite. If the question were to be simply a kingdom, or a republic, there might be a plebiscite upon that. But suppose the question were settled in favour of a kingdom, what would be the basis? How many other questions would you have to put? You must have a complicated document, and in order that the electors may exercise an intelligent vote they must be thoroughly familiar with every detail. Is that a practicable state of things?[18]

On the other hand, Mr Alfred Deakin stated that an "intermediary" convention did not provide for deliberation because the electors would only vote for members "to say simply yes or no, and not to exercise their reason in any way".[19] Significantly, Mr Deakin came closer to the mark in distinguishing the practice followed in the American States from that under Article V of the United States Constitution.[20]

Support for the constitutional convention in the 1891 Convention was directed to the *ratification* rather than the initiation of proposals.

In any case, the criticism of the convention method at the 1891 Convention proved effective. When the 1897 draft was presented, the clause relating to the amendment of the Constitution (at that time numbered clause 121, now section 128) contained the present requirements: approval by a national majority of electors and a majority of electors in a majority of states.[21] In other words, the national majority requirement was added and the referendum was substituted for the convention method of ratification.

An analysis of the Convention debates therefore reveals the reason for rejection of the Convention method of *ratification*. It does not reveal, however, why the elected convention method of *initiation* utilised so successfully in 1897-1898 was not provided as an *alternative* method of proposing amendments, particularly where there was proposed a wholesale revision of the Constitution. Presumably the canons of representative government, whereby the people were represented in both Houses of the Federal Parliament, provided the rationale for restricting amendment proposals to those Houses.

18. *Official Report of the National Australasian Convention Debates* supra n 12, 894.
19. Ibid, 895.
20. Ibid, 916. See infra 63-67.
21. *Official Report of the National Australian Convention Debates* (Adelaide: Government Printer, 1897) 454.

3. LATER EXPERIMENTS

On 1 December 1921, the Prime Minister, Mr William Morris Hughes, moved the second reading of a Constitutional Convention Bill.[22] An analysis of his second reading speech shows the reasons for adopting this method of constitutional reform.[23] Several proposals which were regarded as significant by successive federal governments and which were intended to increase commonwealth power in economic and industrial matters had been defeated at referenda. Specifically, Mr Hughes in 1919 had recommended that certain powers over these matters be conferred on the Commonwealth. The Premier of Tasmania had suggested an elected constitutional convention to revise the Constitution. The Premiers' Conference took up the suggestion. In the meantime, the Commonwealth moved to submit its proposals to a referendum but, as stated above, they were defeated.

The call for an elected constitutional convention was taken up and supported by the influential Australian Natives Association, state premiers and state parliaments.

In the parliamentary debates on the Bill, Mr Hughes stated that the convention method was one of the best ways of educating the people. He rejected the suggestion of the Deputy Leader of the Opposition, Mr Charlton, that the convention was a waste of public money because any recommendations would have to come before the Parliament, resulting in duplication.[24]

Certain features of the Bill were outlined by the Prime Minister. Unlike the Convention of 1897-1898 there would not be equal representation for the states. Members would be elected on a population basis mirroring House of Representatives' electorates. However provision was made for nominated delegates: an equal number from each state ($3 \times 6 = 18$) plus the same number from the commonwealth. Elected delegates were to be 75, thus making a total convention number of 111. However, Mr Hughes indicated that he would be prepared to dispense with the nominated delegates.[25]

Mr Charlton, in reply,[26] showed a lack of enthusiasm for the proposal, giving as his reason the cost of a convention.[27] More importantly, he felt that

22. Australia House of Representatives 1921 *Debates* Vol HR 98, 13472.
23. Ibid, 13474-13475.
24. Ibid, 13477.
25. Ibid, 13477 et seq.
26. Ibid, 13951 et seq.
27. Ibid, 13952.

Federal members would have to defend their interests against possibly hostile alternative power bases. The membership of the Convention would reflect the party divisions in the House of Representatives.[28] He also thought that the mode of election and the number of members would create the basis for opposition by the states.[29]

The other major speaker, Dr Earle Page (later to become Leader of the Country Party), warmly supported the idea of an elected constitutional convention.[30] However, he found fault with the denial of equal state representation. In his view, the structure of the convention should be similar to that of the 1897-1898 Convention. He also favoured a wholly elected convention with no nominees. A further benefit in an elected constitutional convention noted by Dr Page was that it would reduce party political influence: "[I]f a convention were elected to consider the Constitution, it would be much freer than any present legislative body, because there would be no cracking of the party whip."[31] Dr Page quoted passages from Bryce's *The American Commonwealth,*[32] referring to the great value of the Constitutional Convention in the United States. Bryce favoured a "big" convention which would permit a wide representation of many interests.[33] Because of opposition, however, Dr Page was willing to concede that a smaller convention could be established, perhaps amounting to 72 persons. But instead of the population principle being applied to the method of electing delegates, he proposed that each state should have four electorates returning three members each, elected according to the principle of proportional representation.[34] He considered that a member of the House of Representatives could stand for election without putting at risk his own seat if defeated at the convention election, the boundaries being different.[35] The motion for the adjournment of the constitutional convention was put and carried. However, the Government did not proceed with the Bill. The only other murmur heard in favour of an elected convention came from Premier Lyons at a Premiers' Conference in the early 1930's. No firm proposal emerged from it.[36]

28. Ibid.
29. Ibid, 13953.
30. Ibid, 13955 et seq.
31. Ibid, 13960.
32. J Bryce *The American Commonwealth* (London: Macmillan, 1889).
33. Australia House of Representatives Debates supra n 22, 13961-13962.
34. Ibid, 13963.
35. Ibid.
36. P H Lane *An Introduction to the Australian Constitution* 2nd edn (Sydney: Law Book Co, 1977) 247.

Other Methods of Revision

The methods which have been utilised in the last 70 years to advise the Federal Parliament in making proposals under section 128 are: the royal commission, the parliamentary committee, the parliamentary (nominated) convention and the constitutional commission.[37]

The 1927-1929 Royal Commission on the Constitution consisted of seven members headed by Sir John Peden. However the recommendations in its report were not implemented and it became, therefore, an academic exercise.[38]

After the Second World War, a Joint Parliamentary Committee on Constitutional Review consisting of federal parliamentarians was established under the aegis of the Menzies Government in 1956. Its final report was delivered in 1959, but no action was taken in regard to it.[39]

The most ambitious attempt to reform the Constitution was the 1973-1985 Australian Constitutional Convention.[40] It was a nominee convention, in which 12 members were selected by each state parliament and 16 members were selected by the commonwealth parliament.[41] Additionally there were representatives from the Northern Territory and the Australian Capital Territory and local government.[42] In all, the number of delegates and representatives by the mid 1970's exceeded 130.

There were certain ructions in the activities of the convention in the 1974-1975 period. In 1974, Prime Minister Gough Whitlam pulled out the commonwealth delegates because of a difference of opinion with the states. In 1975 a session was boycotted by four of the six states and the federal Opposition. More amicable relations were resumed in 1976. Major studies were initiated by standing committees. The sessions of the convention

37. See generally Lane ibid, 246 et seq; C Saunders "Changing the Constitution" in B Galligan and J Nethercote (eds) *The Constitutional Commission and the 1988 Referendums* (Canberra: Centre for Research on Federal Financial Relations, 1989) 31 et seq; R D Lumb "Reform of the Constitution - the 1973 Session of the Australian Constitutional Convention" in L Zines (ed) *Commentaries on the Australian Constitution · A Tribute to Geoffrey Sawer* (Sydney: Butterworths, 1977) 233, 235-238.
38. Lane ibid, 248.
39. Ibid, 249.
40. Ibid, 250 et seq.
41. Resolutions of the Houses provided that the Prime Minister, Premiers and Leaders of the Opposition would be ex officio members.
42. Supra n 36, 257.

continued until the final abandonment of the convention in 1985.[43] Saunders pin-points the weaknesses of the Convention as follows:

- its composition through the appointment of members of Parliament conspicuously failed to arouse popular imagination.
- there was no established link between Convention recommendations and submission to referendum. In consequence, most recommendations simply were not put to referendum. Many have since been examined by the Constitutional Commission, which constitutes a useful link between the Convention and the Parliament in this respect.
- even when Convention proposals were put to referendum they tended to become party political issues. This was seen most clearly in 1984-1985. It can be rationalised by arguing that it is inappropriate to run referendums at the same time as Federal elections but the fact is that the politicisation of Convention proposals on the hustings represented a partial breakdown of the Convention process. If the problem with the ... [1959 Joint Parliamentary Committee on Constitutional Review] was lack of State involvement, the Convention suffered from lack of Commonwealth involvement and commitment, from both sides of politics.[44]

The Constitutional Commission of five members consisting of lawyers and ex-politicians operated between 1986-1988. It was designed to provide the expertise for constitutional revision by a small body, as distinct from the large parliamentary body represented in the 1972-1985 Convention. Again, its weaknesses are summarised by Saunders:

- even leaving aside the inevitable involvement of politicians when constitutional alteration bills go through the Parliamentary process, it is hard to keep politicians out of constitutional reform, and probably undesirable. Politicians have a particular perspective on the operation of the Constitution which is essential to any discussion to change. The problem was partly, although not wholly, overcome in the case of the Commission by the involvement of former politicians.
- it is almost impossible to get a body that is really representative of the community when that body is appointed by Government. On the other hand, an elected body almost inevitably will include politicians, which this exercise was designed to avoid.
- real problems developed in connection with State involvement in the Commission process. It is unrealistic to expect State Governments to make submissions at large about the Constitution to a body like the Commission and there was no obvious opportunity for them to be involved formally in the process at a later stage.[45]

43. In the interval, 3 amendments were approved by the electorate in 1977, amending ss 15, 72, and 128 of the Australian Constitution.
44. Saunders supra n 37, 34.
45. Ibid, 35.

The Commission did produce some significant reports. However, the political agenda of the Government cut across many of its recommendations. In the result the Government submitted four proposals of its own in the 1988 referenda, all of which were defeated.[46]

4. THE CONSTITUTIONAL CONVENTION AS A METHOD OF CONSTITUTIONAL REVISION IN THE UNITED STATES

In the United States, it is interesting to note that the referendum procedure for ratifying amendments to the Constitution is part of the amendment procedures at state level but not at federal level. However, the constitutional convention as a method of amending or revising constitutions is to be found at both levels. Indeed it can be described as the method par excellence of *revising* a constitution because of its involvement of popularly elected delegates. However, there is a great difference between the practical use of the method at state and federal levels. The constitutional convention as a method of *proposing* amendments at the federal level has not been used since the original Convention of 1787. Moreover, only one convention has been held to ratify amendments.[47] The method has been used many times at the state level.

State Procedures for Amendment

There are two major methods by which amendments are proposed at state level, subject to rejection or ratification at a referendum. They are by proposal of the state legislature (with either an ordinary majority or a two-thirds majority of members approving the proposal) or by a call for a constitutional convention initiated by the state legislature and approved by the voters at an election. A third method is available in some of the states, the constitutional initiative and referendum.[48]

46. See generally Gallıgan and Nethercote supra n 37.
47. E Corwın and J Peltason *Understandıng the Constıtution* 8th edn (New York: Holt Rhinehart and Winston, 1979) 119.
48. See generally A L Sturm *Methods of State Constıtutıonal Reform* (Ann Arbor: University of Michigan Press, 1954); A L Sturm "The Procedure of State Constitutional Change - with Special Emphasis on the South and Florida" (1977) 5 Florida State University L Rev 569; T White "Amendment and Revisıon of State Constitutions" (1952) 100 Penn L Rev 1132; R D Lumb "Methods of Alteratıon of State Constitutions in the United States and Australıa" (1982) 13 F L Rev 1, 8-9.

The proposal for a Convention, as we have said, emanates from the legislature. The "call", as it is termed, must then be submitted to the electors at the next general election. In some states the question of calling a convention must be submitted to the electors periodically. If the call is approved, the convention may be established under or pursuant to state legislation or resolution. The following features of a state constitutional convention may be noted.

(i) Membership and Method of Election

Many state constitutions contain provisions on the number of delegates to be sent to a convention. If the constitution is silent, the state legislature has the power to determine the number. It appears that the most numerous House of the state (that is, the lower house) is used as a basis for determining the number of delegates in some states. However, the methods are various: some use the state senates or upper houses as a basis. In others, there are elections at large: the state being one election district. This is usually in addition to district-selected candidates.[49] While most conventions are fully elected, some have included nominee and ex officio delegates, although the constitutionality of providing for such delegates is open to question.[50]

As to the method of electing delegates, they may be elected in the same manner as state legislatures. Under state general electoral legislation, provision is made for the identification of candidates and parties on the ballot paper as well as on the nomination form. This is called a "partisan" ballot. However, in relation to some offices (for example, judicial offices), provision is made for "non-partisan" ballots, where the party affiliation, if any, of the candidates is excluded from designation on the ballot.[51] Where a state constitution is silent on the matter, the state legislature can provide for non-partisan election for convention delegates, even though this may be inconsistent with electoral legislation applying to ordinary elections.[52]

49. See Sturm *Methods of State Constitutional Reform* ibid, 93 et seq.
50. White supra n 48, 1174. Compare Sturm "The Procedure of State Constitutional Change - with Special Emphasis on the South and Florida" supra n 48, 582.
51. 26 Am Jur 2d Elections ss 204-211. See *Moon v Halverson* 206 Minn 31.
52. 16A Am Jur 2d Constitutional Law s 507 and the cases cited therein.

(ii) Powers of the Convention

The powers of a convention are derived from the legislative call, that is, from the terms of the proposal for a convention submitted by the legislature to the electorate. Some controversy exists as to whether the legislature may provide for a "limited convention": that is, a convention whose agenda is limited to matters either determined in the call or by the legislature at a subsequent point of time but before the convention delegates are elected. However, some constitutions allow only the calling of an "unlimited convention".[53] That means that the whole constitution is open for revision if the convention so decides. If, however, the constitution is silent on the matter, it appears that the agenda of the convention may be limited to a specific subject matter or matters. As indicated previously, usually the act or resolution calling the convention will set out the subject matter; if approved by the people, restrictions on the agenda will be regarded as valid. In some cases, however, the act limiting the agenda matters has been passed after the approval of the call at an election but before the voters have elected delegates to the convention.[54]

Article V of the United States Constitution

This provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

As was pointed out earlier, no constitutional convention for proposing amendments in the federal sphere has been held since 1787.[55]

Since the Second World War, three issues have led many states to request the calling of a constitutional convention by Congress.[56] In 1967, 33 state legislatures requested Congress to call a convention to propose an amendment to revise the Supreme Court decision requiring "one vote one value", that is, the decision which required seats of the Houses of the legislatures to

53. Sturm "The Procedure of State Constitutional Change - with Special Emphasis on the South and Florida" supra n 48, 583; White supra n 48, 1138 et seq.
54. Supra n 52, 352.
55. Corwin and Peltason supra n 47, 119.
56. Ibid.

be appointed on the basis of population. Later a number of states requested revision of the abortion law following the United States Supreme Court decision in *Roe v Wade*.[57] More recently there were requests from many states for a convention to consider the question of an amendment requiring balancing of the federal budget.

Legislation has also been proposed on the method of holding a convention. In 1967, Senator Sam Ervin proposed legislation, following the request of a number of states for an apportionment "convention". Legislation was passed by the United States Senate in 1971 and 1973 to regulate the calling and conduct of a constitutional convention, but insofar as the House of Representatives did not approve the legislation it did not become law. In 1984, hearings were conducted on a Bill relating to the holding and structure of a constitutional convention.[58] More recently, in 1989, a Bill was introduced by Senator Orrin Hatch on this topic.[59] No concrete legislation has come from these initiatives.[60]

The most hotly disputed question is whether a federal convention must be unlimited in terms of the topics which may be examined by it, or limited to certain matters as determined in the state's application or as approved in the congressional resolution to hold a convention. There are passionate defenders of both the "limited" and "unlimited" convention.[61] Those who argue that a convention's powers must be unlimited refer to the language in Article V, arguing that the text does not limit a convention to a particular subject matter.[62] They do accept, however, that it should consider the subject-matter of the request contained in the application by the states. They also argue that the Framers' intent was that the agenda of a convention should not be restricted. A difference in practice has been noted, for while in the nineteenth

57. 410 US 113 (1973).
58. See N Cogan "Comments on Regulating a Constitutional Convention" (1985) 50 Journal of Air Law and Commerce 587.
59. B M Van Sickle and L M Boughen "Lawful and Peaceful Revolution: Article V and Congress' Present Duty to Call a Convention for Proposing Amendments" (1990) 14 Hamline L Rev 1, 39.
60. It has been suggested that the United States Congress is reluctant to pass legislation outlining procedures for calling a convention because it is reluctant to share its initiating power with other bodies.
61. Compare L H Tribe "Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment" (1979) 10 PLJ 627 with W Van Alstyne "Does Article V Restrict the States to Calling Unlimited Conventions Only? - a Letter to a Colleague" (1978) Duke LJ 1295.
62. Cogan supra n 58, 590-591.

century there were more requests for unlimited conventions, more recently limited conventions have been favoured.[63] Those who argue against a limited convention are also worried that specific amendments may be introduced into the Constitution which will affect its status as fundamental law.[64]

The other issue causing controversy is the question of the qualifications of members and the method of selecting members. As to members, the question has been raised whether these should be nominated or whether there should be ex-officio members in addition to elected members. A second issue is whether the states should be equally represented as in the Senate or whether the representation should reflect population (namely, the "one person one vote" requirement). A third issue is whether a particular class of delegate should be excluded (namely, members of Congress), and whether elections should be conducted on a non-partisan basis. On all these issues there are differences of opinion.

5. CAN AN ELECTED CONSTITUTIONAL CONVENTION BE ESTABLISHED IN AUSTRALIA WITHOUT AN AMENDMENT TO SECTION 128?

Reference has been made earlier to the 1921 Convention Bill.[65] The question arises as to what head of power in the Constitution would support legislation of this nature. Further, if the head of power exists, what is the value of making provision for a constitutional convention in the Constitution itself rather than establishing it on a statutory basis?

It would appear that the most promising source of power for establishing a statutory convention would be the incidental power under section 51(xxxix). The legislation would be characterised as legislation incidental to the execution of a power vested by the Constitution in the Parliament or in either House thereof. The Parliament (or either House) has power to propose constitutional amendments. It would be in execution of this power to establish advisory bodies whether nominated or elected to advise the Parliament by producing a report on the matters submitted to it and by making recommendations for alteration either in a general form or by making specific amendment proposals. To comply with the strictures of the Privy Council in

63. Ibid, 592.
64. Tribe supra n 61, 628-630.
65. Supra 59-60.

the *Royal Commissions* case,[66] a statutory convention would not have power to compel answers to questions. However a statutory convention, as contrasted with a royal commission, would not need such powers to carry out its tasks effectively.

The defect of the statutory convention approach is that many aspects of the convention structure would be subject to the control of the government of the day, including the method of electing delegates. This would detract from the objectivity of the convention as it might well be held to reflect only the political program of one side of the federal parliament.

It might be suggested on the pattern of the Australia Acts 1986 that a convention could be established by commonwealth legislation passed at the request or the consent of all the states.[67] It would not be constitutionally necessary to rely on request-and-consent legislation as commonwealth legislation could stand on its own constitutional feet, but requests from six states for the enactment of legislation (reached at or after a Premiers' conference) would indicate a high degree of consensus amongst the various elements in the federal system for the convention process. Any recommendations of such a convention would of course only be advisory to the federal parliament which could refuse to submit them to a convention. And the ad hoc nature of the legislation would not satisfy the goals of those who would want to see a permanent procedure established in the Constitution itself. To achieve that goal it is necessary to examine the nature of a "constitutional" constitutional convention.

6. A CONSTITUTIONAL AMENDMENT

If it were decided to go the constitutional way, it would be necessary to incorporate provision for conventions in section 128 or in a new section 129. We have seen that the Parliament (or one House thereof) has the sole right to initiate constitutional amendment proposals. It would be foolhardy, however, for the Parliament to proceed to draft a proposal for conventions for

66. *Attorney-General for the Commonwealth v Colonial Sugar Refining Co Ltd* [1914] AC 237, 255-256.

67. However it would not be possible to rely on s 51 (xxxviii) as a constitutional basis for such legislation. In *Port Macdonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, the High Court at 375-379 gave a wide interpretation to this head of power but it could only be utilized to overcome the inability of State Parliaments (before the (UK) Australia Act 1986 and the (Cth) Australia Act 1986) to legislate with respect to matters within the exclusive power of the Imperial Parliament. Therefore it would not apply to matters which already came under another head of Commonwealth power.

incorporation into the Constitution unilaterally. It would do so at its peril and at the risk of alienating the states. It would therefore be necessary to achieve the widest degree of Australian community support, particularly in having representatives of all Parliaments involved in proposing the substance, and approving the draft, of an amendment to section 128 or a new section 129 (or both).

The group or groups assigned the task of fostering the attainment of this goal would have to recognise the constraints of constitutional precedent and the history of past referenda in this country. Consensus will be essential; otherwise the exercise will not be fruitful.

If the commonwealth government of the day chose the members, there would be suspicion that only one side of the federal compact was being represented. Each state parliament would therefore have to participate in the choice of representatives. Involvement of community groups should be a goal (for example, industry groups, unions, churches, law societies and bar associations as well as academics). But the body should not be too unwieldy and there would need to be some restriction on numbers.

Whatever body was selected, the enormity of its task should not be underestimated. Whilst some matters could be left for statutory elucidation, central matters would have to be incorporated into the amendment proposal. It is suggested that the following five issues be dealt with in the amendment proposal. It is only necessary at this stage to indicate the writer's initial views.

Calling of a Convention

At present amendment proposals are initiated in the federal parliament. It would open up the initiation process if a "call" could also be made by a majority of the state parliaments. If there were a danger of too frequent calls being made, some limitation might be put on intervals between calls. The machinery for processing a call could be under the supervision of an impartial person or body such as the Presiding Officers of the Houses, the Australian Electoral Commission or a separate commonwealth-state body established for this purpose.

Agenda

Provision should be made for the agenda, that is, the subject-matter to be discussed at the convention, to be specified in the call. If an unlimited agenda were prescribed, the area of debate would be too extensive and the time frame too unmanageable.

Membership of the Convention and Qualifications

An appropriate size would be between 120 and 150 members, although a smaller number was suggested in the debates on the 1921 Bill.[68] The number would appear to be justified in the light of the growth in Australia's population since then. The Convention should be entirely elected with no nominees or ex-officio members. It should be permissible for commonwealth and state parliamentarians to nominate as candidates.

Method of Election of Members

Equality of representation for the states (as in the Senate) should be recognized. Otherwise, the less populous states would regard themselves as disadvantaged. In order to avoid excessive party influence, a system of proportional representation should be used in electing members, with each state being divided into multi-member electorates. Furthermore, party designations should not appear on the ballot paper. To this extent a "non-partisan" election of members is possible.

Presentation of a Convention's Proposals to the Electorate

Before being submitted to the voters at a referendum, the proposals should be presented to the federal parliament which should have the right to initiate alternative proposals, this being consistent with the principles behind section 128 of the Australian Constitution.

7. CONCLUSION

This then would be the suggested outline of a convention initiation procedure for constitutional alterations which would be worked out under the consultative processes previously discussed. For such a proposal to become part of the Constitution, it would be necessary to submit it to the electorate under the existing provisions of section 128. Consequently the government controlling the House of Representatives when the proposals were submitted would have the right of initiation. If the amendment was accepted, a new section 129 would be added to the existing provisions (with appropriate amendments being made to section 128).

The proposals for an elected constitutional convention would foster the goals of participatory democracy. It would, of course, lead to reduced party

68. Supra n 59.

control over the agenda for constitutional revision. It would also give the States, particularly the less populous ones, a more significant role in the constitutional revision process. By the same token, it would weaken the role of the commonwealth in the initiation process or at least provide an alternative method for initiating changes.

The overall benefits of such a new procedure would be seen in a greater acceptance by the electorate, at referenda, of proposals for amendment of the existing constitutional document. If this procedure were adopted by Australian electors, it would be a fitting accompaniment to the celebrations of the centenary of the Australian federation.