

**THE
WESTERN AUSTRALIAN
CONSTITUTION**

By Wayne Martin QC

THIS SERIES OF PAPERS WAS COMMISSIONED TO ASSIST WESTERN AUSTRALIANS
TO ENGAGE IN INFORMED DISCUSSION ON A RANGE OF CONSTITUTIONAL ISSUES
OF IMPORTANCE TO THE STATE

THE WESTERN AUSTRALIAN CONSTITUTION

WHAT IS A CONSTITUTION?

A constitution is the set of basic rules designed to establish and control government. It defines the institutions of government and sets out the rules and procedures they must follow if their actions are to be lawful. A constitution reflects a belief in the importance of putting limits on the power of government and ensuring it is responsive and accountable to the electors.

Most countries, including Australia and the United States of America, have a written document or documents which outline the fundamental laws and institutions of government. By contrast, New Zealand and the United Kingdom are usually regarded (despite the existence of documents as important as the Magna Carta 1215 and the Act of Settlement 1700) as having unwritten Constitutions.

Countries with a federal system of government, such as Australia, typically have more than one written constitution; in addition to the national constitution, each state or region has its own constitution.

THE SIGNIFICANCE OF CONSTITUTIONS

Most Australians are unaware of the impact of the Commonwealth and State Constitutions on their day-to-day lives. These Constitutions do, however, have a continuing effect on almost everything Australians do.

As well as their legal function of providing laws to establish and control governments, constitutions enable people to know and understand the basic framework and operations of government and why they are obliged to comply with the laws of parliament and the decisions of the courts.

Imagine a situation where someone breaks the law, for example by speeding and is arrested and charged with an offence under the Road Traffic Act 1974 (made by the Western Australian Parliament). Why must that person appear in court and, if convicted, pay a fine or be imprisoned? The reason is that the Western Australian Parliament has been given power by the Western Australian Constitution Act 1889 to make laws for the "peace, order and good government" of the State and the Road Traffic Act is such a law.

But where does the power of the Western Australian Constitution come from? What is the source of its authority? The original source of authority in all Australian Colonies was the Parliament of the United Kingdom. Since 1986, however, it has been generally accepted that the source of power for constitutional arrangements in Australia comes from the Australian electors.

THE WESTERN AUSTRALIAN CONSTITUTION

In Western Australia, unlike the Commonwealth, there is no single document that sets out the fundamental arrangements for government. There are two important Western Australian Acts: the Constitution Act 1889 and the

Constitution Acts Amendment Act 1899. Together, they provide the starting point for consideration of the State Constitution.

European settlement in Western Australia commenced in Perth in 1829. A Legislative Council was later established and in 1899 so that some of its provisions could be amended by a State referendum.

Other important documents considered to be part of the Constitution of Western Australia include the Electoral Act 1907 (WA), the *Supreme Court Act 1935* (WA), and some United Kingdom and Commonwealth statutes, in particular the *Commonwealth of Australia Constitution Act 1900 (UK)* and the *Australia Acts 1986* (Cwth and UK).

Other relevant sources include :

- principles of constitutional law established by courts;
- various powers (originally derived from the United Kingdom Crown) exercised by the Western Australian Governor, such as the power to appoint the Premier and
- well-established practices that regulate the manner in which the institutions and offices of government exercise their powers and relate to each other.

Western Australia's constitutional arrangements are broadly similar to those of other Australian States. All Australian States have written Constitutions, a Governor, Parliament and Supreme Court. Like the Commonwealth, however, some States, including New South Wales and Victoria, have a single document referred to as the State Constitution.

HOW CAN THE WESTERN AUSTRALIAN CONSTITUTION BE CHANGED?

The Western Australian Constitution Acts can be changed in two ways within Western Australia :

- most provisions can be amended by the Western Australian Parliament through the process of ordinary legislation.
- a State referendum is required to amend some provisions in the 1889 Act, including some relating to the Governor, or to abolish the Legislative Assembly or the Legislative Council.

Over the years, the Western Australian Parliament has made a significant number of amendments to the Constitutional Acts. However, no amendment proposal has yet been put to a State referendum.

It may also be possible to amend the Western Australian Constitution Acts by Commonwealth legislation or a national referendum under the Commonwealth Constitution. A recent endeavour to do so occurs in the *Australia Act 1986* (Cwth), which purports to amend section 50 of the 1889 Act, a section which concerns the Governor.

IS THERE A NEED FOR SIGNIFICANT CHANGE TO THE STATE CONSTITUTION NOW?

There is a wide range of views on whether the Western Australian Constitution needs to be changed. Some Western Australians believe the current State Constitution serves us very well. Others favour limited change, while others again propose either comprehensive amendments or a new State Constitution. The options are outlined below.

No change

Leaving the current State Constitution as it is does not preclude amendments in the future. Those who see no need for change, however, regard the current constitutional arrangements, including the processes for making amendments, as adequate.

Consolidation of the 1889 and 1899 Acts

Some people consider that having two principal Acts as the basis of the State Constitution makes it difficult to understand the system of government in Western Australia. They believe the two Acts should be consolidated into one document. If this were done, it has been suggested it would provide an opportunity to delete obsolete provisions and simplify the language at the same time.

Consolidation and inclusions

Even if there were no difficulty in following the two principal Acts, people could not, by reading them, gain an adequate understanding of the Western Australian system of government. That is because many of the institutions, powers and practices of State government are not mentioned. Important omissions include the State electoral system, the Premier and Cabinet, and the relationships between Cabinet, the Governor and Parliament.

Of course it may not be possible (without having a very lengthy document) to include all such matters in a single State Constitution Act. People will always have to read other sources, including books, to acquire a full understanding of the Constitution. This raises an important question: how much ought to be added? For instance, should practices relating to the activities of the Premier, Cabinet and the Governor be put into a Constitution Act? There would be both advantages and disadvantages. The advantages include increased public understanding of those practices. On the other hand, the capacity of those practices to evolve in response to changing circumstances may be diminished once they are set down in legislation.

Changing the amendment requirements

Should the current ways of amending the Constitution Acts be changed? For example, the requirement to have a State referendum could be abolished so that all constitutional provisions could be amended by the Western Australian Parliament (as was the situation until 1973). Alternatively, the power of

amendment might be totally (or partially) removed from the Parliament, and a State referendum required for any (or most) amendments.

One advantage of a referendum requirement is that the electors directly participate in, and therefore have the opportunity to learn more about, their State Constitution. but such benefits need to be assessed against the cost and delay associated with referendums. There is also the traditional difficulty of achieving constitutional development by referendum.

Other specific issues

A number of other specific constitutional changes, some of which would have a very significant impact on our system of State government, were raised in submissions to the Commission on Government. The Commission recommended that these issues be considered by a people's convention. The issues are briefly outlined below :

Assent to legislation

To become law in Western Australia, a Bill passed by the Legislative Assembly and the Legislative Council must be signed by the Governor. As a matter of practice, the Governor signs Bills only on the advice of the Premier. Although on some rare occasions it may be appropriate for the Premier to withhold that advice in order to prevent a Bill becoming law, this practice could be used to frustrate the will of the Parliament. Should the Governor be required, therefore, to assent to Bills automatically? Or is the force of convention (and public opinion) sufficient to prevent the practice being abused?

Bill of Rights

There has been a great deal of debate in Australia about the pros and cons of having a Bill of Rights. At present, no Constitution in Australia contains a Bill of Rights, although there are statutory protections of rights in both Commonwealth and State legislation, for example, the *Racial Discrimination Act 1975* (Cwlth) and the *Equal Opportunity Act 1984*(WA). It would be possible to include a Bill of Rights within a Western Australian Constitution Act. Such a Bill would specify a set of rights, for example, freedom of speech. Should we have a Bill of Rights If so, should it include electoral matters such as the right to vote?

Citizen-initiated referendums

At present, only Parliament can initiate constitutional change. Given the present amendment arrangements (outlined above), is there a need to provide for citizen-initiated referendums in the State Constitution? If so, should such referendums apply only to constitutional change?

The preamble

The preamble to the Constitution Act 1889 states the legal background to its enactment, without referring to fundamental constitutional

principles. Should there be a new preamble? If so, what should it include? For instance, should it expressly refer to Aboriginal Western Australians and their history?

Power of Parliament to recall Parliament

Under existing practice, the Premier determines when the State Parliament is convened. Accordingly, when the Government does not have a majority in the Legislative Assembly, it would be possible for the Government to stay in office by the Premier not convening Parliament. Should the State Constitution make provision for some other mechanism for convening Parliament under these circumstances?

Prorogation

Prorogation is the adjournment of Parliament. When this happens, any Bills or motions automatically lapse, and standing committees are not able to meet. This interrupts the continuing work of the Parliament. Should the Constitution restrict the power of the Premier to request the Governor to prorogue Parliament? If so, in what circumstances? Alternatively, should the Constitution be amended so that prorogation does not affect Bills or committees?

Resolution of parliamentary deadlocks

Unlike the Commonwealth and some other State Constitutions, there is no mechanism in the Western Australian Constitutional Acts to resolve deadlocks between the two Houses of Parliament, the Legislative Assembly and the Legislative Council. At present, deadlocks are resolved through arrangements made between the two Houses. Should these be replaced by specific provisions in the Western Australian Constitution? Since the appropriation of money by Parliament is essential to the ongoing operations of Government and the services it provides, should special provision be made for a deadlock over the Budget?

Role of local government

Local government is recognised by the 1889 Act. Should the Constitution give greater recognition or status to local government? For example, should a referendum be required to abolish local government in Western Australia?

Role of political parties

The written sources of the Western Australian Constitution make no reference to political parties. Should the State Constitution recognise political parties? If so, what status and powers should they be given? Would constitutional status elevate parties above individuals?

Selection, appointment and powers of the Governor

The selection, appointment and powers of State Governors and the Governor-General are now the subject of national debate. They are referred to and covered at some length in the discussion paper 'Implications of a Republic for Western Australia'.

Size of the ministry

The Western Australian Constitution presently limits the number of Ministers to 17, and requires that a least one Minister be a member of the Legislative Council. Should there be any change to these provisions? For example, should the limit on the number of Ministers be lifted?

THE FUTURE

The Constitutional Forums and People's Convention will provide Western Australians with an opportunity to consider and share their views about the State's constitution. This paper raises a number of important issues and questions. Having people who are interested in, informed about, and contributing to, the evolution of the Western Australian Constitution will help put this State in the best position to face the challenges of the new century.