

Is constitutional change



Image: Newspix.

beyond us?

Did the framers of Australia's Constitution get it right? What have those who followed done with their vision over the past century? What should we be working towards for the next 100 years?

These are some of the questions being addressed in the project 'The Vision in Hindsight: Parliament and the Constitution'. Launched by Federal Parliament's Department of the Parliamentary Library to help celebrate the Centenary of Federation, the 'Vision in Hindsight' project will be a collection of essays which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The essays will be published as research papers on the Parliamentary Library's web site (www.aph.gov.au/library). A selection of the essays will be included in a volume of work to be published in November 2001.

With the agreement of the Parliamentary Library and essay contributors, About the House will publish summaries and extracts from some of the 'Vision in Hindsight' essays. The first essay we are featuring is 'The Parliament as Partner: A Century of Constitutional Review' by Professor Cheryl Saunders, Director of Comparative Constitutional Studies at the University of Melbourne. In her essay, Professor Saunders considers the high rejection rate of referendums and what needs to be done if we are serious about constitutional reform.

"A stalemate has been reached in relation to changing the Australian Constitution," says constitutional expert Professor Cheryl Saunders. "The challenge for the 21st century is to find ways of enabling the Parliament and the electorate to work in a more productive partnership to achieve constitutional change, when it is appropriate to do so."

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In her detailed paper on the history of and prospects for constitutional reform in Australia, Professor Saunders argues that the difference of view between the Parliament and the people is becoming more marked on issues of constitutional reform. Only eight of 44 reform proposals put to referendum by the Parliament have been approved by the people in the past 100 years. The six most recent referendum proposals have all failed, with the 1988 proposals receiving an historically high 'no' vote.

"While people will have different opinions about the merits of particular referendum proposals," says Professor Saunders, "on any view the record of rejection suggests a waste of energy and money. It also contributes to a defeatist attitude towards the prospect of constitutional change, which prevents serious

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consideration of constitutional change as an option for dealing with significant national problems.”

Professor Saunders suggests that the framers of Australia's Constitution included a referendum procedure for progressive, democratic reasons. “The framers had different expectations of the extent to which a Constitution alteration procedure might need to be used,” comments Professor Saunders. “But they all assumed, explicitly or implicitly, that change would be needed at some stage. They wanted the mechanism to reflect the views of Australians organised both nationally and by States.”

The framers of the Constitution were keen to avoid the problem of a rigid Constitution, as was evident in the United States. They wanted a mechanism for altering the Constitution that would strike what they considered to be an appropriate balance between protection of the Constitution and flexibility to change it as need arose.

One of the important limitations included in the Constitution is that only Parliament can initiate proposals to be put to referendum. The Constitution's framers thought that this requirement would provide an important filter for the proposals that would go to the people and would assist public understanding of the proposals.

However, with a high rate of rejection of referendum proposals, Professor Saunders is critical of the way in which successive Parliaments and governments have handled the responsibility for constitutional reform bestowed on them by the Constitution's framers. She is particularly critical of:

- the highly adversarial character of most debate on constitutional change;
- the lack of importance that has been attached to an understanding of the Constitution on the part of people born in Australia or those migrating to the country;
- the lack of an accepted process for public consultation on constitutional issues; and
- the inadequacy of the procedures for informing voters about particular proposals for change at the time of referendum.

According to Professor Saunders, the adversarial style of politics that tends to accompany responsible government has left its mark on constitutional debate, ranging parties and jurisdictions against each other on issues over which agreement and consensus logically are possible.

To overcome the perceived obstacles to constitutional change, four general constitutional reviews have been conducted since Federation, at intervals of roughly 25 years. But each of these reviews, argues Professor Saunders, has been subject to a degree of political intervention that seriously impeded its effectiveness.

Even when a different process was tried, in the form of a Constitutional Convention in 1999, Professor Saunders suggests that it was a flawed process for the purpose for which it was established. “The ambiguity of its relationship with both the Parliament and the voters ultimately was reflected in the quality and acceptability of the proposal that was put to referendum,” she says.

In her paper, Professor Saunders canvasses various broad options for the future, which she considers are cumulative and not mutually exclusive. They include the following:

- recognise and accept that approval by referendum requires a different approach to government;
- take a longer-term view of constitutional issues within the Parliament and minimise unnecessary partisanship;
- find practical measures to make it clear that discussion of the Constitution is natural, important and need not be divisive. This might be done by, for example, establishing a joint standing committee of the Parliament, charged with making an annual or, at least, regular report on the Constitution in accordance with agreed terms of reference;
- hold referendums in conjunction with elections unless there is a compelling reason not to do so, in the interests of minimising cost and controversy over cost;
- ascertain and take into account the views of voters at the time a proposal for change is being developed. The manner in which this is done is likely to depend on the nature of the proposal;
- provide more sophisticated and effective procedures for helping voters to understand proposals for change in the approach to a referendum. An independent body might be given the responsibility to design and execute an information program, with a right of review to ensure that the program is balanced and fair; and
- give priority to enabling and encouraging Australians to understand and engage in discussion on the Constitution and system of government.



Professor Cheryl Saunders says that adversarial politics has left its mark on constitutional debate.

“Some of these options may appear utopian, given Australia's robust political culture,” concedes Professor Saunders. “In reality, however, there is little other choice. There is no prospect of removing the referendum requirement from the Constitution. Nor would it be desirable to do so, even if it were possible: the trend towards greater involvement of people in major public decisions, which the framers observed in the 1890s, is even more marked 100 years later, not only in Australia but elsewhere in the world. If the Parliament is to remain the sole filter for referendum proposals it is necessary to make the partnership work, in order to deal with national problems for which constitutional change is the best or only solution.”

A full copy of the essay 'The Parliament as Partner: A Century of Constitutional Review' by Professor Cheryl Saunders is available from the Parliamentary Library's web site at: www.aph.gov.au/library/pubs/rp/2000-01/01RP03.htm

For further information on 'The Vision in Hindsight: Parliament and the Constitution' project of the Department of the Parliamentary Library, call Judy Hutchinson on (02) 6277 2512 or email: dpl.publications@aph.gov.au