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RESPONSIBLE GOVERNMENT AND RECENT CONSTITUTIONAL CHANGE IN AUSTRALIA AND NEW ZEALAND

ADDRESSING the Constitutional Centenary Conference in Sydney in 1991, the former Governor-General of Australia, Sir Ninian Stephen, bemoaned the fact that fewer than 60% of Australians know that Australia has a constitution.[1] Australians might be criticised for this neglect were it not that important sections of the Commonwealth constitution, particularly those dealing with the executive, are so divorced from Australian constitutional practice that citizens should be excused for paying so little attention. Much the same criticism can be levelled at the constitutions of the Australian states and New Zealand. This article considers some of the constitutional debate of recent years in Australia and New Zealand, of which Sir Ninian's speech was a part, focussing specifically on responsible government, the model of government which emerged in Britain, Canada, Australia, and New Zealand in the middle of the 19th century. I write from the perspective of an informed outsider who finds himself perplexed at the unwillingness of Australian and New Zealand politicians to write responsible government into their constitutions.

The central feature of responsible government is that executive powers are effectively exercised by a Prime Minister and Cabinet who have the support of a majority in the popular chamber of the legislature.[2] By constitution, I mean here the formal documents adopted as constitutions in Australia and New Zealand, not the myriad accessories - the letters patent, orders-in-council, statutes, and conventions - that surround each document in constitutional law. Indeed, a major criticism levelled by this article is that

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1 *The Australian*, 3 April 1991.

2 The paper does not enter into the debate concerning the precise meaning of "responsible" in contemporary politics, or who exactly is responsible to whom. See, for example, Thynne & Goldring, "Government 'Responsibility' and Responsible Government" (1981) 16 *Politics* 197-207. They identify five uses of the word "responsibility". See also Weller & Jeansch (eds), *Responsible Government in Australia* (Drummond, Richmond, Victoria 1980).

ordinary citizens ought to be able to understand their constitutions, in broad outline at the very least, without having to master the mysterious detritus of the British constitutional tradition represented by these accessories.

THE COMMONWEALTH OF AUSTRALIA

I must begin with a few sentences of elementary description. Section 64 of the Australian Commonwealth constitution, adopted in 1900, describes the executive as if it were an eighteenth century limited monarchy. The Governor-General, on behalf of the Queen, controls the executive power, summons, dissolves and prorogues Parliament "as he thinks fit", and appoints ministers to serve at his pleasure. In the only allusion to responsible government in the constitution, ministers are required to have seats in Parliament and the Executive Council, the Governor-General's advisory council, but there is no reference in the constitution to the Prime Minister or the Cabinet, or to the central rules of responsible government: that is, that ministers must have the support of a majority in the House of Representatives, that the Governor-General must accept the advice of ministers, and that the House of Representatives has priority in the legislative process. Instead, responsible government is regulated not by constitutional law, but by constitutional conventions, ostensibly binding rules that have no legal standing.

In 1975, Governor-General Sir John Kerr demonstrated how fragile constitutional conventions can be. He dismissed the Labor government of Gough Whitlam, appointed the Liberal leader, Malcolm Fraser in his stead, and dissolved Parliament after Fraser lost a vote of confidence in the House of Representatives, all in just a few hours. Kerr was within his formal rights under the constitution, but the Labor Party insisted that he and the anti-government majority in the Senate had violated a number of binding conventions. First, by blocking, though not rejecting, the supply of money, the Senate had prevented Whitlam's government, which had the confidence of the House of Representatives, from carrying on its work. Second, by dismissing Whitlam, the Governor-General had rejected the advice of a Prime Minister who retained the confidence of the House. Third, by appointing Fraser, the Governor-General had appointed someone he knew did not enjoy the confidence of the House.[3]

Kerr's death in 1991 was the occasion for a recapitulation of the 1975 crisis and it became clear that although passions have subsided, Australia is still

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3 *The Australian Constitutional Crisis of 1975: Facts and Law* (Institute of Public Affairs, Sydney 1976) pp5-9.

far from resolving the constitutional questions raised by his conduct. There is bi-partisan agreement that the Governor-General should retain a degree of discretionary power for use in some unforseen political crisis, but this level of agreement actually resolves nothing. Were a Governor-General to use his discretion as Kerr used his in 1975, there would surely be another constitutional crisis.

Since 1975 there have been a number of attempts to clarify responsible government in law so that the events of 1975 will not be repeated. From 1973 to 1985, for example, the Australian Constitutional Convention, an assembly of more than one hundred representatives of the Commonwealth, state, and local governments, moved at intervals from state to state, reviewing the constitution as a whole, and it considered the rules of responsible government several times. In 1976, for example, Standing Committee "D" considered Gough Whitlam's proposal that the Senate should lose its power to block supply, so that a government with a majority in the House of Representatives would not be denied the financial means with which to govern. In 1977 the committee reported in favor of some change, but made no specific recommendations.[4] It remains the case in Commonwealth constitutional law that the Senate can legally reject supply, although the Labor and Liberal parties disagree as to whether a constitutional convention exists that the Senate should never, in practice, exercise this power. In 1983, Labor Senators on the Senate Standing Orders Committee blocked the publication of the 6th edition of *Australian Senate Practice*, by a former Clerk of the Senate, Jim Odgers, because they disagreed with his interpretation that the Senate retains the right to block supply.[5]

The question of whether certain constitutional conventions said to regulate the Governor-General's powers, several of which Sir John Kerr ignored in 1975, should be enacted as constitutional laws was put to Committee "D" in 1978, and to plenary sessions of the Australian Constitutional Convention in 1983 and 1985. The Convention accepted that certain rules should be observed as constitutional conventions in Australia, namely that a government must have the confidence of the House of Representatives and the Governor-General must act on the advice of the Prime Minister in several matters: when appointing a new Prime Minister, appointing and

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4 Commonwealth of Australia, Australian Constitutional Convention 1977, Standing Committee D, *Special Report to the Executive Committee: The Senate and Supply* (Perth, 1978) pp56-58, 67-70.

5 *Sydney Morning Herald*, 10 September 1991. Odger's book was published in 1991 by the Royal Institute of Public Administration, ACT branch.

dismissing ministers, summoning, dissolving and proroguing Parliament, convening a joint sitting of the two houses, and submitting a constitutional amendment to a referendum.[6] But the Convention refused to write these rules into constitutional law. Instead, it recognized the existence of certain "binding" conventions even though these contradict the language of constitution.

Late in 1985, frustrated by the slow progress being made on constitutional reform, the Commonwealth Labor government of Robert Hawke appointed a small, six person, Constitutional Commission to report on reform. In 1988 the commission made a number of recommendations on responsible government, some dealing with the executive and others with Parliament.

On the executive, the commission recommended retaining Australia's status as a constitutional monarchy, subject to changes which would "ensure that the Constitution expresses or reflects the rules which in fact govern important aspects of the system of responsible parliamentary government".[7] Most importantly, the commission recommended that the office of Prime Minister be recognized in the constitution, that ministers be appointed and dismissed only on the advice of the Prime Minister, and that the Prime Minister be dismissed only after losing the confidence of the House of Representatives. The commission also recommended that membership of the Federal Executive Council be limited to ministers, which would effectively establish the Cabinet in the constitution. The commission further recommended the elimination of the Governor-General's power to refuse the royal assent to a bill or reserve a bill to the Queen for her consideration, and the Queen's power to disallow a bill to which the Governor-General had already given their assent. The intention of these reforms was clearly to write responsible government into the constitution for the first time in Australia by recognizing the Prime Minister and the Cabinet.

On Parliament, the commission's recommendations were intended to reduce the number of Commonwealth elections, enhance the stability of Commonwealth government, and promote a more constructive relationship between the House of Representatives and the Senate. Implicit in these objectives was the goal of strengthening responsible government by limiting

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6 Commonwealth of Australia, Australian Constitutional Convention, *Minutes of Proceedings* (Perth, 1978) p205; Standing Committee D, *Reports* (Adelaide, 1983) pp27-45; *Proceedings* Vol 1 (Adelaide, 1983) pp319-322; *Proceedings* (Brisbane, 1985) pp7-45, 389-391.

7 Commonwealth of Australia, Constitutional Commission, *First Report of the Constitutional Commission: Summary* (AGPS, Canberra 1988) p23.

some of the opportunities the Senate currently has to block the policies of a government which has the support of the House of Representatives.

It is always difficult to define the composition and powers of a second chamber in responsible government. The Prime Minister can only be required to have the confidence of one chamber in a bi-cameral legislature because the party or coalition which controls one chamber might not control the other. In Australia, following British precedents, the responsible chamber is the House of Representatives. But if the government is responsible to the House, how much power can the Senate have? If it has too much power, it may prevent the government from governing. If it has too little power, its *raison d'etre* is called into question. A balance is difficult to draw. As part of the bargain with the colonies which produced the Australian Commonwealth, the Senate was given very substantial powers. A money bill may only be introduced in the House of Representatives, but in every other respect the Senate has co-equal powers. Furthermore, because it is popularly elected, the Senate has considerable legitimacy. Consequently, the relationship between the Senate and the House of Representatives, or more particularly, between the Senate and governments drawn from the House of Representatives, has always been problematical. This relationship has been complicated by the fact that the chambers are elected by different electoral systems for different terms, with the result that the party or coalition which controls one chamber may not control the other. In fact, since the adoption of proportional representation for Senate elections in 1948, the government party or coalition has only controlled the Senate in the years 1976 to 1981.

Senators presently serve fixed, six year terms, with one-half retiring every three years, and the maximum term for the House of Representatives is three years. The Constitutional Commission recommended in 1988 that the maximum term for the House of Representatives should be raised to four years, and that Senators should serve for two terms of the House of Representatives, with one half retiring at each election, save in the case of a double dissolution under s57 of the constitution, when, to resolve a deadlock between the two houses, the Senate and House are elected simultaneously in their entirety.[8] The commission added that the House of Representatives, which can presently, by convention, be dissolved at any time on the advice of the Prime Minister, should ordinarily serve a minimum term of at least three years and should only be dissolved in less than three

8 *First Report of the Constitutional Commission: Summary* pp12-16.

years if the Prime Minister loses a vote of confidence.[9] During the three year minimum term, the Senate would lose its power to reject money bills. Such bills would become law if not approved within thirty days of their presentation to the Senate, but the Senate would retain its power to reject non-money bills. Furthermore, the double dissolution procedure used to break a legislative deadlock between the two chambers would be restricted to the fourth year of a Parliament.

The commission's proposals on Parliament represented a compromise between those who favor liberating the government from the Senate's veto and those who favor a strong Senate. If implemented they would ensure that a government which retains the confidence of the House of Representatives could not be forced out of office by the Senate's rejection of supply in the first three years of a Parliament. However the government would have to accept defeats on non-money bills during that period without dissolving Parliament, and would not be able to invoke the double dissolution until the fourth year.

The Commission reported these recommendations, and many others which had no direct bearing on responsible government, in 1988, but to no avail because the Hawke government decided not to present a comprehensive reform package to a constitutional referendum. Instead it set about reform piecemeal, picking just four questions for a referendum in September 1988 which it thought relatively non-controversial. It miscalculated badly and ran into a whirlwind of opposition. Question 1 called for maximum four year terms for both the House and Senate, question 2 called for "fair and democratic elections throughout Australia", question 3 called for the constitution to recognize local government, and Question 4 was a composite measure on rights and freedoms. All four questions were defeated by similar margins, with questions 1,3 and 4 receiving the lowest percentages ever recorded in the history of Australian referenda, 33%, 33% and 30% respectively.[10]

Only question 1 involved responsible government, and it was very different from the commission's recommendation. The commission had suggested:

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9 Very similar provisions were adopted by Victoria in 1984 and South Australia in 1985, discussed below, and were approved by the Commonwealth Senate, but not the House of Representatives, in 1982. See McMillan, Evans & Storey, *Australia's Constitution Time for Change?* (Law Foundation of New South Wales and Allen & Unwin, Sydney 1983) pp263-266.

10 *Sydney Morning Herald*, 5 September 1988.

(1) that there should be a four year maximum, *and*, ordinarily, a three year minimum term for the House of Representatives;

(2) that senators should serve for two Parliaments, not one; and

(3) that there should be new rules to regulate disagreements between the two houses.

It is clear, however, that by limiting its proposals to simultaneous elections and maximum four year terms for both houses, and by refusing to limit the dissolution power in the first three years of a Parliament, the government was trying to maximize the possibility that a single party or coalition might win control of both chambers at a general election. Prime Ministers would retain the tactical advantage of being able to determine, through their advice to the Governor-General, that a general election for both houses might be held at any time during the four year term. The Liberal and National parties, both of which supported the commission recommendations, attacked the government's proposals and the Leader of the Liberal Opposition, John Howard, argued: "It is not so much a referendum about parliamentary terms as a referendum to reduce the term of the Senate."[11] In the face of this opposition, Question 1 went the way of questions 2, 3 and 4.

Reform of the Commonwealth constitution suffered a major setback in the referendum of 1988, but it refuses to die. Indeed, in 1991 it entered a ten-year window of opportunity as Australians began to commemorate the centenary of the series of Constitutional Conventions, beginning in 1891, which led to the adoption of the Commonwealth constitution in 1900. In April 1991, eighty-nine people met in Sydney in the Centenary Constitutional Conference, chaired by the former Governor-General, Sir Ninian Stephen, which was addressed by both the Prime Minister, Mr Hawke, and the leader of the Opposition, Dr Hewson. In April 1992 a Constitutional Centenary Foundation was established in Melbourne, with cross-party support, to continue the work of the conference.[12]

The 1991 conference identified "key issues" which should be considered in the constitutional reform process, including a bill of rights, the head of state, federalism, Commonwealth-state financial relations, relations with New Zealand, parliamentary reform, and judicial reform. Sir Ninian Stephen argued very specifically that it was time to put into the constitution the overlay of conventions which currently regulate responsible government

11 Aust, Parl, *Debates* HR (1988, 35th Parl, 1st sess) Vol 161 at 2552-2553.
12 *Melbourne Age*, 15 May 1992.

in Australia, and Mr Hawke argued that Australia will become, in time, a republic, which will require a redefinition of the head of state.[13] The only concrete reform which appeared for a while to be emerging from the conference, by agreement between Mr Hawke and Dr Hewson, was a maximum term of four years for the House of Representatives,[14] but nothing has yet come of this proposal.

In 1992, the issue of whether Australia should become a republic, which Prime Minister Hawke raised a year earlier at the Centenary Constitutional Conference without provoking a controversy, caused a political flap when the visit to Australia of Queen Elizabeth II coincided with at an opinion poll showing, for the first time, a majority of Australians in favor of a republic.[15] Hawke's successor, Paul Keating, fanned the flames by stating that the monarchy and the Australian flag, which still incorporates the Union Jack, present outdated images of a dependent Australia.[16] In June 1992, the Australian Labor party adopted a policy that Australia should become a republic by the year 2001, but there has been little discussion of how a republican constitution might be drafted, or how responsible government might be written into the constitution in the absence of the Crown and the royal prerogative. Labor has done no more, therefore, than begin the debate on the issue of an Australian republic and its implications for the constitution.

THE AUSTRALIAN STATES

The constitutional debate at the Commonwealth level in recent years has been matched by debates in the Australian states. Responsible government came to what were then colonies in the 1850s when Governors were instructed by the British government to replace colonial officials with ministers having the support of majorities in the colonial legislatures. The constitutions which were adopted for these colonies all assigned executive powers to the sovereign, leaving responsible government to operate primarily by convention and instructions from the Crown, but certain provisions were included which only have meaning in the context of responsible government. The state constitutions all provide, for example, that lower houses may be dissolved by the Governor, and in all but Queensland, ministers are required to sit in Parliament. The New South Wales, Victoria, Queensland, and Western Australia constitutions provide

13 *The Australian*, 3 April 1991.
14 *Adelaide Advertiser*, 3 April 1991.
15 *Melbourne Age*, 4 March 1991.
16 *Melbourne Age*, 23 March and 29 April 1992.

that appointments to all public offices "shall be vested in the Governor with the advice of the Executive Council with the exception of officers liable to retire from office on political grounds which appointments shall be vested in the Governor alone". This complicated provision means that whereas non-ministerial public appointments are made in Council, in practice, with the advice of the ministers who sit there, the Council shall not advise on the appointment of "officers liable to retire from office on political grounds", who are the ministers themselves. In South Australia, appointments to public office are made by the Governor-in-Council "except the appointment of the officers required by [the constitution act] to be members of Parliament [ie ministers], the appointment and dismissal of which officers shall be vested in the Governor alone". Finally, the constitutions use the language of responsible government by referring to Ministers of State, or in Victoria to "responsible Ministers of the Crown".

Despite these allusions to responsible government, the most fundamental rules of the model are nowhere spelled out in state constitutions: that ministers must be appointed from the party or group controlling the lower house of the legislature and that the Governor must accept their advice. In the states the Governor still summons, prorogues and dissolves the legislature, appoints ministers, and, with the exception of New South Wales, recommends money bills to the legislature. In Queensland, Western Australia, and South Australia the Governor's signature is required for expenditures from public revenues, albeit counter-signed by the Chief Secretary in South Australia. Finally, of course, the Governor's assent is required for legislation in every state. But in practice, the Governor is expected to act on the advice of ministers, notwithstanding the misleading reaffirmation of gubernatorial government in the 1977 amendment to s14(2) of the Queensland constitution, that in their power to appoint and dismiss ministers, the Governor "shall not be subject to direction by any person whatsoever nor be limited as to his sources of power".

To date, no state has taken the opportunity provided by the *Australia Act 1986,* 1985 (Imp & Cth),[17] which formally terminated the United Kingdom's authority to legislate for the states, to write responsible government comprehensively into state law. Section 7(5) declares that state Premiers will advise the Queen on her vestigial responsibilities in each state, such as the appointment of the Governor and the terms of the Letters Patent which regulate the Governor's official conduct. The South Australian, Tasmanian, and West Australian Letters Patent also recognize state

17 Lumb, *The Constitution of the Commonwealth of Australia Annotated* (Butterworths, Sydney, 4th ed 1986) pp10-11.

Executive Councils, which are dominated by ministers, as advisers to the Governor, and Victoria specifically adds the Premier as an adviser too. But although Letters Patent are part of constitutional law, they are never seen by the public and the constitutional forms of limited monarchy are retained in the state constitutions themselves.[18]

New South Wales is the only state to have rewritten the state constitution to recognize the changed relationship with the United Kingdom brought about by the *Australia Act 1986,* 1985 (Imp & Cth). Mr Sheahan, the Attorney-General, agreed, when introducing the *Constitutional (Amendment) Act* 1987 (NSW), that it was desirable "that no trace remain of the imperial clause characteristic of the Governor's office",[19] and the state constitution now provides that the Governor summons Parliament and gives the royal assent in their own name, with no provision for reservation to, or disallowance by, the Queen, unless she is present in the state. But with the exception of a new provision that state ministers must sit in the Executive Council, the reforms did not touch upon responsible government at all. The office and role of the Premier are still not defined in state law and the Premier's only specific power, placed in the constitution in 1975, is to appoint or remove a Parliamentary Secretary, a junior minister. The New South Wales Parliament chose not to write into the constitution the convention that the Governor must act on the advice of ministers, although this rule was acknowledged as a convention. Section 38A was added to the constitution in 1987 and reads:

> The enactment of the *Constitution (Amendment) Act* 1987 does not affect any law or established constitutional convention relating to the exercise or performance of the functions of the Governor otherwise than on the advice of the Executive Council.

The "established constitutional convention" to which this section alludes is that the Governor must act on the advice of ministers, represented here as members of the Executive Council. In other words, New South Wales parliamentarians, as recently as 1987, took the very odd position of recognizing in the constitution a constitutional convention, by definition a non-justiciable rule, which they steadfastly refuse to write into constitutional law. The Minister of Justice, JR Hallam, argued that s38A would preserve

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18 Castles & Harris, *Lawmakers and Wayward Whigs* (Wakefield Press, Adelaide 1987) pp251, 255-256; Hanks, *Constitutional Law in Australia* (Butterworths, Sydney 1991) pp127-128, 138.

19 NSW, Parl, *Debates* LA (1987, 48th Parl, 3rd sess) at 10742.

the responsibility of the Governor to accept the advice of the Premier, but if this was Parliament's intention why could it not be stated plainly in the constitution?

Only one archaic formal power of the Governor was eliminated from the New South Wales constitution in 1987, their responsibility to recommend money bills to the legislature. The reform requires a minister to introduce such bills and formalizes the convention that ministers control the financial initiative through their advice to the Crown. This simple reform succeeded in New South Wales in 1987 but an earlier attempt to achieve a similar end failed in South Australia.

In 1984 the South Australian Labor government proposed to delete s59 of the state constitution that requires the Governor to recommend money bills to Parliament. The Attorney-General, Mr Sumner, described s59 as "an anachronistic procedure that carries with it no substantive meaning in contemporary times",[20] but Liberals and Australian Democrats joined to defeat the government's motion by 12 votes to 9 in the upper house, the Legislative Council. The government had failed to specify that a minister would henceforward introduce money bills to the legislature. This gave the opposition the opportunity to argue that the removal of s59 would eliminate the only provision which requires the government to go to the legislature for the supply of money. The reform bill failed and an opportunity was lost to clarify the government's financial initiative in South Australia.

Notwithstanding small changes in New South Wales law, the Australian states have made almost no progress in clarifying the executive, as it presently exists, in their constitutional law but they have made substantial changes in the law of Parliament. These changes, which have had a substantial impact on responsible government, center on new maximum terms for the lower house in state Parliaments. Tasmania reduced its maximum term from five years to four in 1972, but until recently the other states had three year terms. It was generally recognized in the 1980s that three years is too short a period for effective decision-making, given that a government loses time settling in after one election and preparing for the next. In 1981, the Labor Premier of New South Wales, Mr Wran, successfully argued that a four year term would assist "long-term, sound, consistent decision-making", and would reduce the number of elections in the state.[21] All but Queensland followed this lead. Changing the maximum term of a lower house need have no effect on responsible government per

20 SA, Parl, *Debates* HA (1984, 45th Parl, 3rd sess) at 2137.
21 NSW, Parl, *Debates* LA (1981, 45th Parl, 3rd sess) at 5706.

se, but the model of government became an issue in three states, Victoria, South Australia, and Queensland, where the discussion of a maximum four year term included discussion of a minimum three year term.

A minimum term for the lower house raises serious difficulties for responsible government. The model requires that a government which loses the confidence of the lower house, or is denied a supply of money, must resign and be replaced by another. It may be necessary to dissolve the house and hold a general election to find a new government. Furthermore, a government which finds its most important bills rejected by Parliament may also want to call a general election to secure a fresh mandate. Australia has special problems in this regard because the British view, that the upper house must yield to the lower house if the two disagree on legislation or supply, has never prevailed. The Australian Senate has the constitutional authority to reject any bill approved by the House of Representatives, and this is true of the Legislative Council in each bi-cameral Australian state Parliament.[22] The Victorian Legislative Council has refused to vote supply seven times since 1865, most recently in 1947 and 1952,[23] and in recent years there have been credible threats to block supply which were not followed through, in West Australia, in 1989 and 1990,[24] and in Victoria in 1991.[25] In Tasmania, the government was forced to amend its budget by the Legislative Council in 1989.[26] Unless qualified in some way, therefore, a mandatory minimum term might lead to political chaos in a political system where the upper house has the power to reject all legislation. That is why, in 1988, the Constitutional Commission recommended certain constitutional changes to accompany a three year minimum Parliament. First, it recommended that the Commonwealth Senate not be permitted to reject supply in the first three years of a parliament, and second, that a government be permitted to call for an dissolution in the first three years of a Parliament if it is defeated on a vote of confidence.

The commission's recommendation were not implemented in the Commonwealth Parliament, but with the adoption of minimum

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22 Lumb, *The Constitutions of the Australian States* (University of Queensland Press, St Lucia, 5th ed 1991) p51.

23 *Melbourne Age*, 14 February 1991.

24 "Political Chronicle: Australia and Papua New Guinea, July-December 1989" (1990) 2 *Aust J of Pol & Hist* 255, and "Political Chronicle: January-June 1990" (1990) 3 *Aust J of Pol & Hist* 448.

25 "Political Chronicle: Australia, January-June, 1991" (1991) 37 *Aust J of Pol & Hist* 479.

26 "Political Chronicle: Australia and Papua New Guinea, July-December, 1989," (1990) 36 *Aust J of Pol & Hist* 353.

parliamentary terms by Victoria and South Australia in recent years, it was necessary to devise procedures to ensure that minimum parliamentary terms be made compatible with the continued existence of strong second houses. In 1984, the Victorian Parliament decided, with the support of all parties, that there would be a four year maximum and a three year minimum term for the House of Assembly, and that members of the Legislative Council would serve for two parliaments, with half retiring at each election, but s8 of the state constitution was drafted to provide that the House of Assembly can be dissolved in fewer than three years if one of three conditions is met:

(a) If a bill forwarded by the House of Assembly is not approved by the Legislative Council within two months it can be determined by the Assembly to be a "bill of special importance", and if rejected a second time by the Council, the Governor may dissolve the Assembly.

(b) If the Legislative Council rejects, or fails to pass within one month, a supply bill dealing *only* with the Consolidated Fund for the ordinary annual services of the government, the Governor may dissolve the Assembly. Bills to appropriate monies for new buildings or land, capital expenditures, new services, or services relating to Parliament are excluded from this provision.

(c) If the Government loses a vote of confidence in the Assembly.[27]

The double dissolution provision of the Victorian constitution was deleted.

The expectation following this reform was that a Victorian government would serve a minimum of three years, and that a dissolution might be called during that period only if a government were to lose its most important bills in the Legislative Council, including supply, or lose the confidence of the House of Assembly. In 1991 the new procedures were shown to be flawed when the Liberal and National parties sought to use them to force the Labor government of Premier Joan Kirner out of office in the third year of the Parliament by refusing to vote for supply in the

27 The government could force a dissolution by voting no-confidence in itself, as happened in West Germany in 1972 and 1982. See McMillan, Evans & Storey, *Australia's Constitution: Time For a Change?* p265.

Legislative Council, which their parties controlled. They discovered that to trigger the dissolution, a supply bill must, in the language of s8, deal "only with the Consolidated Fund for the ordinary annual services of government". In recent years Parliament has been approving supply bills which contain capital works and other spending programs, in addition to the ordinary annual services of government, and blocking such a supply bill would not, therefore, be grounds for a dissolution. Instead it might produce chaos because the government would be denied supply but would not be allowed, and could not be forced, to resign if the three year minimum has not expired.[28] In the circumstances, the opposition backed down, but the Liberal leader, Mr Kennett, insisted that the right to block supply in the upper house remains a legitimate reserve power.[29]

Very similar provisions to regulate the dissolution were adopted in South Australia in 1985, and for many of the same reasons. The new procedures provide for a minimum term for the House of Assembly of three years and a maximum term of approximately four years, depending on the time of the year set for the election. Members of the Legislative Council now serve for two Parliaments instead of fixed six year terms.[30] In its original bill, the South Australian government allowed no deviations from the three year minimum term, which prompted a learned lecture on responsible government from RC DeGaris, a Liberal member and the only member of the Legislative Council to vote against the bill. He said:

> I do not believe that fixed terms are compatible with the Parliamentary system in which the Executive is directly responsible to the Legislature. Among the elements that are essential to the Parliamentary system we have in Australia I emphasize the following: first, the flexibility that enables appeal to the people to be made at any time when it appears that the Government no longer enjoys the confidence of the Lower House; secondly, the right of the Government to determine the circumstances in which a defeat in the House

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28 *Sunday Age*, 3 February 1991; *Australian*, 6 February 1991; *Melbourne Age*, 25 April and 21 May, 1991.

29 "Political Chronicle: Australia, January-June, 1991" (1991) 37 *Aust J of Pol & Hist* 481.

30 Whereas the Victorian maximum term runs from the date of the first meeting of Parliament, the South Australian is tied to particular dates. If the four year term expires between 1 October and 28-29 February, Parliament will continue until 28-29 February. If the term expires between 1 March and 30 September, Parliament will continue until 1 March. The effective maximum is therefore in a range of from 3 years and 5 months to 4 years and 5 months.

> of Parliament is a defeat on the issue of confidence; thirdly, the right of a Government to request a dissolution following defeat in the House or at a time of its own choosing when parliament has run a reasonable course. ... The birth of new Parties, the amalgamation of Parties and the disappearance of political Parties all create extreme difficulties unless we use the accepted principle of using the system of reference to the voters' intention.[31]

The government met this criticism on the second reading by adding s28A to the constitution. It states that the Governor shall not dissolve the House of Assembly before the expiration of three years unless one of four conditions is met:

(a) A motion of no-confidence in the government is passed in the House of Assembly.

(b) A motion of no-confidence is rejected in the Assembly.

(c) A bill determined by the Assembly to be a "bill of special importance" is rejected in the Legislative Council.

(d) The Governor acts pursuant to s41, the double dissolution provision, of the South Australian constitution.

This list differs in four major respects from the exceptions in s8 of the Victoria constitution. First, the rejection of a supply bill by the upper house is not specifically listed as a ground for an early dissolution because the state Liberal party believes that the Legislative Council's right to reject supply is an essential safeguard against government abuse of power, and should not routinely trigger a dissolution.[32] It is a fact, however, that supply has never been denied by the Council in South Australia, and if it were, the supply bill could be designated a "bill of special importance" under the new procedures. Its rejection would then trigger an early dissolution. Second, the South Australian act states that the Governor may dissolve Parliament not only if the government loses a vote of no-confidence, but also if it wins. This should discourage frivolous no-

31 SA, Parl, *Debates* HA (1985, 45th Parl, 3rd sess) at 2995.
32 Castles and Harris, *Lawmakers and Wayward Whigs* p260.

confidence motions. Third, in Victoria a "bill of special importance" is only declared to be such by the Assembly after it has been rejected once by the Legislative Council. In South Australia it can be declared either "before or immediately after" the third reading of the Bill in the House of Assembly, so that the dissolution might be brought forward at the discretion of the government. Finally, South Australia retained the double dissolution mechanism in the constitution, although it has never been invoked.

In Tasmania, the Premier, Mr Field, introduced a similar amendment to the constitution in 1989, but it failed to pass before the government was defeated in a general election.[33] The amendment, to s12 of the *Constitution Act* 1934 (Tas), would have denied the Governor the right to dissolve a House of Assembly which had more than six months remaining on a maximum four year term unless one of three conditions were met:

(a) Parliament rejects a supply bill for the ordinary annual services of government.

(b) The Assembly votes no-confidence in the Premier and the other ministers.

(c) No member of the Assembly can command sufficient support to provide a stable government.

This was a particularly interesting attempt to combine a fixed parliamentary term with the flexibility of responsible government. It proposed a minimum three and a half year term, but it also proposed several ways by which a dissolution might occur, including, in (c) above, the contingency which traditionalists frequently cite in defence of the royal prerogative; a "hung parliament" in which no leader can command a majority and the Crown must be called in to resolve the deadlock. There was also a very interesting qualification of the no-confidence provision which would have given the Tasmanian Assembly the specific right to name the Premier, effectively eliminating the royal prerogative in this instance. The bill proposed that the Governor would have no power to dissolve the Assembly after a motion of no-confidence in a Premier if that motion itself, or another motion carried within eight days, expressed confidence in another person to be Premier.

The most recent proposal to change a parliamentary term in an Australian state was made in Queensland in 1991, but the attempt to change from a three to a four year maximum term was rejected in a referendum. The

33 *Constitutional Amendment Bill* 1989 (Tas).

constitutional changes discussed above were approved by referenda in New South Wales, Victoria, and South Australia. The relationship between upper and lower houses was not an issue in Queensland because its Legislative Council was abolished in 1922. The Labor Premier, Mr Goss, proposed only that there be a maximum parliamentary term for the Legislative Assembly of four years, with no minimum. He argued that a minimum term would interfere unacceptably with responsible government:

> I believe that parliaments should run their full term. Governments are elected for specific periods, and voters are entitled to expect that Government will run for a specific time. But there must also be enough flexibility in the system to allow for exceptional circumstances and to allow for early elections if a Government loses confidence on the floor of the House, the business of Government becomes unworkable, or an extraordinary mandate might be required.[34]

Goss had the support of the Liberal party for his proposals but the National party insisted that there would be little net gain for political stability in a system which lengthened the maximum term of a Parliament from three to four years whilst continuing to permit the government to advise a dissolution at any time. Mr Cooper, a leading National, argued: "Without some guarantee that four year terms will actually be achieved, or nearly achieved, the introduction of this legislation means absolutely nothing." The bill was approved in the Legislative Assembly by a vote of 52 to 25 but was narrowly defeated in a referendum in March 1991, largely because of the National party's opposition.[35]

NEW ZEALAND

New Zealand has also been engaged in constitutional reform in recent years. Indeed, it adopted a new constitution in 1986. The country's first constitution was included in a United Kingdom statute, the New Zealand *Constitution Act* 1852 (UK). It was the constitution of a self-governing colony. Executive powers were assigned to the Governor, later the Governor-General, who was a practicing chief executive because responsible government was not implemented. The Governor's role was immediately challenged by New Zealand politicians who demanded

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34 Qld, Parl, *Debates* (1990, 46th Parl, 1st sess) at 5472-5473.

35 The vote was 666,662 to 690,500, with 22,523 informal ballots. See *Courier-Mail*, 25 March 1991.

responsible government, which had already been granted to Canada in 1848. The United Kingdom yielded and in December 1854 instructed the Governor to replace his colonial officials with the leaders of the majority in the Assembly, and to accept their advice in colonial matters. This the Governor did in 1856.

As a result of the *Constitution Amendment Act* 1857 (UK), most of the constitution of 1852 became amendable by ordinary New Zealand legislation and it was substantially altered over time, though never to identify the conventions of responsible government in law. The only allusion to responsible government was a 1979 amendment that ministers of the Crown and members of the Executive Council must be members of Parliament.[36] It remains the case today, despite the adoption of a "new" constitution in 1986, that responsible government is not identified in the constitution.

The New Zealand constitution of 1986 is very short, with only twenty-nine articles.[37] The country began its life with six provinces but has been a unitary state since 1876, and since 1950 has been unicameral too, so the constitution is not burdened by provisions on an upper house or federal-state relations. Nor does it contain a bill of rights.

When the Minister of Justice, Geoffrey Palmer, introduced the new constitution to the House of Representatives in December, 1986, he said it would gather into one statute the most significant *statutory* constitutional provisions of New Zealand law. He added:

> For the first time the Bill will allow people reading a single Act of Parliament to have some understanding of New Zealand's basic constitutional structure. It will point out who the Sovereign is, and the functions of the Sovereign; it will define the Executive, the Legislature and the judiciary. That is a step forward, and it represents a basic constitutional structure that will serve the country for many years to come. The Bill is overdue.[38]

This was an extraordinary statement because no-one taking the constitution at face value would be able to understand the true character of the executive. It is true that statutory provisions of New Zealand constitutional law were

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36 New Zealand, *Statutes* (No 73 of 1979) s9.
37 New Zealand, *Statutes* (No 114 of 1986).
38 NZ, Parl, *Debates* GA (1986, 41st Parl, 2nd sess) at 5852.

gathered into one Act, but it ignores the conventions and instructions which actually regulate the Sovereign's powers. Indeed, the sections which deal with the Sovereign were transferred with relatively minor changes from the *Constitution Act* 1852 (UK). And although the residual colonial relationship between New Zealand and the United Kingdom was eliminated from the law in 1986, a redefinition which New Zealand could have accomplished at any time since the passage of the *Statute of Westminster* 1931 (UK), the new constitution still specifies that the Governor-General assents to laws, summons, prorogues, and dissolves Parliament by proclamation, and recommends money bills to the House of Representatives. There is no reference to the Prime Minister or Cabinet, no requirement that they must have the support of a majority in the House of Representatives, and no requirement that the Governor-General must accept their advice.

In two significant respects, however, the wording of the 1852 Act was not precisely reproduced in 1986. Section 16 of the new constitution, which deals with the royal assent, states: "A Bill passed by the House of representatives shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent." The new constitution does not state, as the 1852 constitution stated, that the Governor-General's assent is discretionary. The government thought it inappropriate to reaffirm this discretion in 1986 because it is now universally accepted that the Governor-General acts only on ministerial advice.[39] In other words, Parliament agreed in 1986 that the new constitution should say nothing to suggest that the Governor-General might actually use the powers which are explicitly granted to the Crown in the same constitution. Similarly, the 1852 provision which specifically identified the Governor-General as the executive was not reproduced in the new act because the real executive is now the Prime Minister and the Cabinet. But Parliament shied away from identifying these offices in the constitution.

This ambivalence about legalizing conventions and redefining the executive reflects the fact that everyone in Parliament agreed that New Zealand should remain a monarchy and that the Governor-General should retain some discretion to act in exceptional circumstances. The only question about this arrangement was raised in the House of Representatives by Mr Graham who asked if the exceptional circumstances might be identified in the constitution. The Minister of Justice thought not. Mr Palmer stated:

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39 NZ, Parl, *Debates* GA (1986, 41st Parl, 2nd sess) at 4851.

> These reserve powers ... are not defined ... for very important reasons - that is to say, the events upon which they could be exercised are not really capable, it is thought, of any precise definition, and as Parliament cannot foresee everything that might arise in the future it is better not to try.[40]

The New Zealand Parliament therefore enacted a "new" constitution in 1986 which is, in most respects, the old one and it contains key provisions which are completely at odds with contemporary constitutional practice. Parliament spent very little time in its review. The second and third readings of the *Constitution Act* 1986 (NZ), together with the committee stage, take up only eleven pages in the New Zealand *Hansard*, and the act passed through all its stages without a vote. Only five people participated in the debate, and only two of these questioned the bill's deficiencies. As modern constitutions go, however, it is a strange, even bizarre document, because the opportunity to bring New Zealand constitutional law into conformity with constitutional practice was simply ignored.

In September 1992 a referendum was held on the New Zealand electoral system which might lead to further constitutional reform. Eighty-five percent of those who voted rejected New Zealand's current House of Representatives electoral system, the simple plurality, or first past the post, system. Seventy percent voted for the German "mixed member proportional system". Those who advocated the German system suggest that the size of the House be raised from 97 to 120, that 60 seats be elected from constituencies by simple plurality, and that 60 seats be elected by a second ballot in which each voter indicates a preference for a party, with seats being awarded in proportion to the number of votes cast for each party. The governing Nationalist party, which won 67% of the seats with only 48% of the popular vote in the general election of 1990, committed itself to the referendum before that election and now finds itself required to devise a "mixed member proportional system" which the electorate can vote up or down at the next general election, due by November 1993.[41] Should the electorate approve a system with substantial proportionality, the probable outcome in the near-term will be that the five minor parties which formed the Alliance in support of electoral reform will win more than the single seat which their combined vote, 14 percent of the total, secured in 1990. It is also possible that because of the spread of parties in the House of Representatives no party will be able to form a government unaided and

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40 NZ, Parl, *Debates* GA (1986, 41st Parl, 2nd sess) at 5857.

41 *Keesing's Record of World Events* (Longmans, Cambridge 1992) at 39101.

that coalition governments will be necessary. Coalitions can result from either pre- or post-election arrangements between parties, but if they result from the latter there may be a period of bargaining after each election in which the role of the Governor-General could prove crucial, particularly if party leaders deadlock without forming a government. It might be prudent, therefore, for New Zealand politicians to think now about how the constitution might be amended so that the procedures for forming governments are defined realistically and unambiguously once the new electoral system is in place.

CONCLUSION

The reforms discussed above hardly amount to constitutional ferment in Australia and New Zealand but there has been some movement. With respect to responsible government, three areas of constitutional discussion and reform have emerged, and intersected, in recent years:

(1) Specifying minimum and maximum terms for Parliaments;

(2) redefining the relations between the two houses in bi-cameral legislatures to accommodate the minimum term; and

(3) redefining the executive and the powers of the Crown.

The maximum and minimum parliamentary terms adopted by Victoria and South Australia, and the lists of circumstances in which a government might be allowed to seek a dissolution in those states, represent very significant modifications of responsible government with respect to the termination of state governments and relations between the two houses of Parliament. Indeed, there appears to be an emerging consensus that there should be four year maximum and three year minimum Parliaments in Australia, and that relations between the upper and lower houses should be redefined to permit responsible government to co-exist with the minimum term. The Commonwealth Constitutional Commission would have liked to see such rules extended to the Commonwealth, but with one major change from the precedents set thus far. The Victorian reforms of 1984, the South Australian reforms of 1985, and the unsuccessful Tasmanian reforms of 1989 all recognized that the upper house should be able to force a government out of office by rejecting supply at any time. The Commonwealth Commission proposed to abandon this principle in the first three years of a Commonwealth Parliament.

There seems to be very little movement, however, towards identifying the executive and its powers realistically in either Australian or New Zealand constitutional law. The issue has been addressed several times, by the Australian Constitutional Convention and the Commonwealth Constitutional Commission, for example, but it is far from being resolved. It would be excessively generous to accept the list of conventions to regulate the Governor-General's powers which was approved by the Australian Constitutional Convention in 1985, or the imprecise allusions to conventions concerning the executive in the revised New South Wales and New Zealand constitutions as having settled the issue satisfactorily. The most far-reaching proposal, that the Tasmanian Assembly should have the right, in certain circumstances, to name the Premier, was not accepted in 1989.

Should we be concerned at this failure to redefine the executive? There are several grounds for suggesting that we should. Democracy requires that the electorate be minimally informed about the processes of government. At present, however, it is extremely difficult for average citizens in either Australia or New Zealand to understand the true nature of the executive from the language of their constitutions. The several executives in Australia and New Zealand are invariably defined as limited monarchies. However the effective executive, the Cabinet, owes its authority to letters patent, orders-in-council, the *Australia Act 1986,* 1985 (Imp & Cth) and assorted other statutes, and constitutional conventions. Clearly, the sources of constitutional practice are so esoteric and dispersed as to be beyond the comprehension of most citizens. But the situation is even more serious than this. Those who govern Australia and New Zealand, the Governors-General, Governors, Prime Ministers, Premiers, ministers, and Members of Parliament often disagree over what is or is not constitutional. This opens the door to constitutional crises. The best example, of course, is the Commonwealth constitutional crisis of 1975, and there is still disagreement over the issues it raised. We should sympathize particularly with Governors-General and Governors as they negotiate the potentially turbulent waters of constitutional controversy, with very little help. The Irish President has a body of statutory advisers on constitutional matters, the Council of State, for which there is no equivalent in Australia or New Zealand.[42] In 1975, Governor-General Kerr called on Sir Garfield Barwick, the Australian Chief Justice, for advice on the use of the prerogative, and was criticized by his opponents for doing so, but to whom should he have turned?

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42 *Constitution of Ireland* art 31.

Tasmania offers several examples of recent confusion amongst political practitioners. In what Alex Castles calls the "shadowland of customary practice",[43] the state Premier has become progressively more powerful as an adviser to the Crown, but the precise nature of this relationship is still not agreed. What, for example, are the Governor's discretionary powers with respect to the appointment of a new government, particularly when no single party has a majority in the legislature? The prevailing view in Australia is that a Governor should, without question, appoint whoever has the support of a majority in the lower house, either by forming a majority coalition, or securing the support of small parties or independents for a minority government. But before he would appoint the minority Labor government of Michael Field after the Tasmanian state elections of 1989, the Tasmanian Governor, Sir Phillip Bennett, sought and received assurances from five "Green Independents" in the Assembly that they would support the government. In effect, the Governor set conditions on the formation, and continuance in office, of the government, a very controversial intervention on his part. In similar circumstances, the minority South Australian government of John Bannon was reappointed in 1989 with no direct intervention by the Governor.[44]

A second question raised in Tasmania in 1989 was what powers Premier Gray, Field's predecessor, retained in the period between the general election, which he lost, and Field's appointment. Gray publicly stated that he wanted a second election to be called immediately because of his doubts that Field would be able to form a government, but he backed down after an accord was signed between the Labor party and the Green Independents. The constitutional issue of the rights of a defeated, but still incumbent, Premier to advise the Governor went unresolved.[45]

In April 1991, Tasmanian legislators disagreed over whether a vote of no-confidence in a single minister should be treated as a vote of no-confidence in the government as a whole. The Greens, on whose support the government depended for its majority, moved a vote of no-confidence in the Deputy Premier and Minister of Education, Mr Patmore, but they continued to support the government. Premier Field insisted that members of his government were collectively responsible, that the vote would be treated as one of no-confidence in the government as a whole, and that a defeat would be grounds for his resignation, something the Greens did not wish to see.

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43 Castles, "Post-Election Constitutional Usage in the Shadow of Mount Wellington: Tasmania's Constitutional Crisis, 1989" (1990) 12 *Adel LR* 292 .

44 At 295-299.

45 At 300-303.

In order to resolve the problem, and against the wishes of his Premier, Mr Patmore resigned and the vote of confidence was averted, but he was immediately reinstated to the government as Deputy Premier and Minister of Justice.[46]

The Tasmanian Labor party was again returned to office as a minority government with Green support after the May 1991 general election, and in June the Greens moved a motion of no-confidence in the government as a whole, which provoked further controversy. The motion succeeded but the Premier avoided resigning by abandoning the forestry bill which the Greens had cited as the reason for their lack of confidence. The government subsequently won a vote of confidence with Green support.[47]

These examples suggest that Tasmanians are not agreed on crucially important constitutional questions such as the Governor's role in government formation, the powers of a defeated, but still incumbent, Premier, and the implications of no-confidence motions. Such questions could quite easily be clarified in constitutional law. In Ireland, for example, it is the sole responsibility of the lower house, Dáil Éireann, to nominate the Prime Minister (Article 13.1.1). The President has no discretion in the matter. The constitution also specifies that governments act collectively (Article 28.4.2). In a 1983 study, Greg Fry pointed out that nine of the eleven post-colonial countries in the South Pacific adopted responsible government at independence and wrote British conventions into their constitutional law. In each case, for example, Parliament alone was authorized to nominate a Prime Minister, who was required to resign after a vote of no-confidence.[48] It is often argued that constitutional conventions cannot be reduced to legal form, but this is simply not true. They can.

One final defence of the status quo in Australia and New Zealand is that a constitution which works well, or even tolerably well, should not be tampered with. That may be so, but if substantial reform of a constitution is attempted, for whatever reason, it surely makes little sense in the process to reaffirm constitutional rules which are obsolete. The Australian Constitutional Convention worked for twelve years to amend the Commonwealth constitution from 1973 to 1985, the New South Wales constitution was substantially amended in 1984, and again in 1987, the South Australian constitution was revised in 1985, and a new constitution

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46 *Australian*, 11 and 17 April 1991.

47 *Examiner*, 1-3 November 1991.

48 Fry, "Succession of Government in the Post-Colonial States of the South Pacific: New Support for Constitutionalism" (1983) 18 *Politics* 43.

was adopted by New Zealand in 1986, but even on these occasions legislators chose to affirm legal forms which have been dead for 150 years, rather than take the opportunity afforded to write constitutional practice into constitutional law.

Constitutional reform to reflect responsible government is desirable in Australia, but unlikely. Professor Cheryl Saunders, one of the prime movers of the Australian Constitutional Centenary Foundation, is herself skeptical that constitutional reform can overcome an apathetic public and the restrictive rules which exist in Australia for amending the constitution,[49] but this may be to assign too much blame to the public. Politicians are responsible for failing to clarify the several constitutions in ways which can be understood by the public. It is true that the process of amendment by legislation and referendum is cumbersome in Australia, though not in New Zealand, and that voters are more likely to reject than to approve change in referenda, but not if the major parties can agree on reform, and join forces to promote it.

49 *Canberra Times*, 6 May 1992.