

## Australia: The Evolution of a Constitution

KATY LE ROY AND CHERYL SAUNDERS

The Australian federal Constitution has lasted for over 100 years, but has proved capable of adapting to changing circumstances nevertheless. The text of the Constitution has changed little since 1901, with only 8 of 44 referendums for change having been successful. Gradual evolution in the meaning and operation of the text has taken place, however, through judicial interpretation and changing political practice. One of the major evolutionary changes has been the gradual expansion of the powers of the Commonwealth, or federal, government and Parliament. Although the system of government created by the Constitution remains stable, there are current arguments for constitutional change to protect rights more effectively and to establish Australia as a republic.

Australia's Constitution was negotiated during the last decade of the nineteenth century and came into force on the first of January, 1901. It was not the product of upheaval, but rather the result of a desire for limited union for a range of practical reasons on the part of the six colonies that became the Australian states. The Constitution combines United States-style federalism with British institutions of parliamentary responsible government whereby the prime minister is selected from amongst the members of Parliament. The polity comprises six states, two self-governing mainland territories, and some external territories.

Although the Constitution was originally enacted by the British Parliament, Australia gradually achieved independence from Britain without any formal constitutional change or break in legal continuity. Australia's Constitution was also approved through a relatively popular process of referendums in all six colonies. It is quite a brief document, comprising 127 sections and 11,908 words.

The two primary aims of the Constitution were to establish a federation and to provide for the institutions of national government. These aims were satisfactorily achieved, although the brevity of the Constitution makes it misleading in some respects about the way in which Australian government actually works. The Constitution builds upon and assumes the pre-existing common law. Many important rules of a constitutional character lie outside the formal Constitution.

The text of the Australian Constitution has proved difficult to change. A bill to alter the Constitution that has been passed by the Parliament must be approved in a referendum before it becomes law. Approval in a referendum requires the support of a majority of voters nationally and a majority of voters in a majority of states. As noted above, only 8 of 44 proposals for change have succeeded. Possible reasons for this record are the highly adversarial character of the referendum process, lack of understanding of proposals for change, and the conservatism of Australian voters on constitutional issues. Constitutional issues attract relatively little interest in Australia. Typically, Australians claim to know very little about the Constitution. Public education is complicated by the fact that the text of the Constitution does not deal with some of the institutions of government with which people are most familiar, including the Cabinet and the office of Prime Minister.

In the final decade of the twentieth century, the main subject of constitutional debate in Australia was whether to break Australia's formal links with the Crown and establish a republic, and the form such republic might take. The 1999 referendum on this question failed largely because of the perceived deficiencies of the alternative arrangements that would have been put in place. It is likely that the question of whether to establish a republic will continue to be a dominant constitutional issue in the early part of the current century, not because it causes particular practical difficulty, but for symbolic reasons.

Neither the Commonwealth nor the state constitutions include a bill or charter of rights. The Constitution provides no express protection for individual rights, although a handful of limits on Commonwealth power have a similar effect. At the time the Constitution was written, countries within the British constitutional tradition were satisfied that rights could be protected adequately by other means. Unlike other comparable countries, now including the United Kingdom itself, Australia has continued to adhere to this view. Successive attempts to introduce a national bill of rights have failed. Consistent with this somewhat complacent view of the ordinary legal system's capacity adequately to protect rights, there has been no general incorporation into Australian law of international human rights instruments to which Australia is a party. Australian law is assumed to be in compliance with them. Corrective action is possible, although not always forthcoming, if, as sometimes happens, this assumption is shown to be misplaced.

Australia is now the only country in the common law world that has no systematic rights protection. It seems likely that rights will be the subject of constitutional debate at some stage in the future. A legislative bill of rights, enacted by the Commonwealth Parliament, using its power to make laws about "external affairs" would offer less of a challenge to the elected institutions of national government and may be preferred to a constitutional bill for that reason. On the other hand, Commonwealth legislation of this kind would override inconsistent state law and would attract state opposition for that reason. In the face of these difficulties, for the foreseeable future, rights protection in Australia is likely to be left to the traditional mechanisms of the Parliament and the courts, developing the single Australian common law.

In some respects, the Constitution has been remarkably successful. It brought and has peacefully kept together all parts of a geographically very large country, resisting at least one serious attempt at secession. It has functioned as the principal constituent instrument during more than a century of stable democratic government. It has been flexible enough to adapt to dramatically changing circumstances, including transition to Australian independence. It has provided a framework of government within the limits of which Commonwealth, state, and territory communities have developed and flourished. However, **partly because of its longevity, the Constitution has become increasingly irrelevant to the structure and operation of Australian government**, at least for those who regard the purpose of constitutions as being to structure power and control its abuse. More change to the Constitution is probably necessary, and will require increased public education about the constitutional system, a robust public debate, and some attitudinal change.