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PEACE, ORDER AND GOOD GOVERNMENT: STATE CONSTITUTIONAL AND PARLIAMENTARY REFORM

Edited by Clement Macintyre & John Williams
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This collection of essays, edited by Professor John Williams of the Law School of the University of Adelaide and Associate Professor Clement Macintyre of the School of History and Politics of the University of Adelaide, contains the papers delivered to a conference held in Adelaide in mid-2002. The conference was a precursor to the State Constitutional Convention that was subsequently held in August 2003. The Convention had been agreed to by the Australian Labor Party in return for the support of Independent MP Peter Lewis following the 2002 State election.

These events shaped the essays in this collection in various ways. First, and most obviously, the focus of many of the papers is South Australian constitutional law. Second, the collection is explicitly concerned with reform. This lends to the persuasive, rather than analytical, style of many of the contributions. Finally, the political events surrounding the conference provided a sense of urgency and purpose to many of the chapters.

At a general level, the thread connecting the various contributions is, as the sub-title would suggest, state constitutional and parliamentary reform. However, as the collection contains such varied (and generally interesting) contributions it is impossible to extract any themes that may be said to permeate the entire book. This is illustrated by the concluding contribution of Professor John Warhurst of the School of Social Sciences at the Australian National University who, given the unenviable task of making some concluding remarks to the conference, made no attempt to synthesise the contributions, but rather made a series of distinct remarks on various issues raised.

Yet despite the diversity of topics covered by the collection, one issue, namely direct democracy and citizen-initiated referenda, which emerged as a dominant theme of the Convention itself, is covered in some detail. The contributions of Professor Emeritus Geoffrey de Q. Walker of the University of Queensland, Gary

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Humphries, Senator for the ACT, Dr Lisa Hill of the School of History and Politics of the University of Adelaide, and Dr Patrick Bishop of the Department of Politics and Public Policy of Griffith University, all address this topic. The juxtaposition of contrary views presented in these various short sharp chapters presents the reader with a stimulating interplay of ideas and perspectives, which leaves one with the impression of being part of a well rounded debate on the matter.

The contribution of de Q. Walker to this debate, who passionately advocates the need for citizen-initiated referenda, is particularly interesting. The 'minimalist' position that he presents, by which citizens, upon the collection of a sufficiently large petition, may veto by referendum a Bill that has already passed one of the Houses of Parliament, is especially thought provoking (although it does not appear that this idea was actively pursued at the Convention itself). Such a mechanism would engage citizens in an ongoing law-making role and would allow the citizenry to make meaningful, indeed determinative, interjections during the four year political cycle. The author de Q. Walker quotes an anonymous Swiss visitor, who notes that 'Australians are a free people only on election day'.[1] In de Q. Walker's opinion, citizen initiated referenda, by contrast, provides the citizenry with 'an incentive for independent and considered thought'.[2] Importantly, however, this minimalist model of citizen-initiated referenda would not appear to entail any major constitutional reorientation (in contrast to some other direct democracy proposals that depart more radically from the parliamentary tradition).[3] Further, limiting the power to that of a veto, rather than the initiation of new laws, protects against the 'tyranny of the majority' and, thereby, preserves one of the important features of representative government. There are legitimate concerns that the introduction of citizen initiated referenda may promote ever more populist parliamentary decision making; governments, fearful of being contradicted by popular vote, would be more cautious about the bills they present to Parliament. Nonetheless, de Q. Walker presents a strong case for direct democracy as an antidote to the much discussed political malaise.

Two chapters addressing the role of Governor under state and territory constitutions were also of great interest. Professor George Winterton's contribution, entitled 'The Role of the Governor', begins by asking whether the office of Governor ought to be retained at all, or, alternatively, whether it can simply be abolished? In answer to

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1 G. de Q. Walker, 'Direct Democracy: Advantages and Options for South Australia' in Macintyre and Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (2003) 104.

2 Ibid 109.

3 For a more detailed discussion of the potential constitutional limits that may apply to attempts by the South Australian Parliament to delegate its decision making power see Macintyre and Williams, 'Lost Opportunities and Political Barriers on the Road to Constitutional Reform in South Australia' (2005) 20.1 *Australasian Parliamentary Review* 103, wherein the authors discuss the Privy Council decision of *In Re the Initiative and Referendum Act* [1919] AC 935.

his question, Winterton notes the following points: there is no adequate substitute for the symbolic role of, and the ceremonial duties undertaken by, the Governor; the Governor may, whilst bound by the duty to act in accordance with ministerial advice, 'encourage' and 'warn' (to use Bagehot's terminology) the government of the day in an intelligent and non-partisan manner;[4] and, the Governor retains a range of governmental functions, such as the appointment of the Premier and the dissolution of Parliament.[5] Despite endorsing the retention of the office of Governor for these reasons, Winterton concedes that such functions are not constitutionally necessary. Even most of the discretionary reserve powers could be codified.[6] The only constitutionally indispensable function of the Governor may be, in Winterton's view, the power to dismiss a Premier who ignored a motion of no-confidence or who persistently acted unlawfully.

This chapter was complimented well by the contribution of Adjunct Professor Geoffrey Lindell of the Law School of the University of Adelaide, entitled 'Lessons to be Learned from the Australian Capital Territory Self-Government Model'.[7] Lindell detailed the operation of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) which, by making no provision for Vice-Regal representative, puts Winterton's propositions to the test. Lindell finds that this, apparently radical model, 'continues to be accepted with surprising ease. It took place without public debate or controversy, perhaps because in the eyes of the public the notion of the Crown has come to be perceived as a "façade"'[8]. Under this model, many of the reserve powers have been codified: the inability of the Assembly to elect a Chief Minister within 30 days results automatically in the dissolution of the Legislative Assembly; the appointment of the Chief Minister is now done by the Assembly itself; and, legislation takes effect when Parliamentary Counsel lodges it on an electronic register. Fascinatingly, as a territory based reform, the ACT model may well be the perfect crucible in which to test Winterton's opening question. This is so because provision is made under the *Australian Capital Territory (Self-Government) Act 1988* (Cth) for the Governor-General to dissolve the Assembly in the event that it becomes incapable of performing its functions or does so in a grossly improper manner. Therefore, despite providing an excellent means by which to test the indispensability of the office of Governor, the Governor-General can perform the role of ultimate protector of the rule of law in the event that the experiment fails. If the Governor-General is called upon, then it will provide strong evidence that the Governor truly is indispensable under the State constitutions. If

4 In my view this argument can be made much more cogently under the English Constitution by virtue of the long service of English monarchs than in the various Australian jurisdictions in which Governors enjoy only relatively short tenures.

5 George Winterton, 'The Role of the Governor' above n 1, 211-13.

6 Ibid 212.

7 Geoff Lindell, 'Lessons to be Learned from the Australian Capital Territory Self-Government Model' above n 1, 47-67.

8 Ibid 48.

the Governor-General is not called upon, on the other hand, then this experiment may herald the end of the office of Governor.

Finally, a further notable contribution is that of the late Justice Bradley Selway. In his chapter, entitled 'The "Vision Splendid" of Ministerial Responsibility Versus the "Round Eternal" of Government Administration',[9] Selway argues that the relentless expansion of Commonwealth power, and in particular fiscal control, has generated constitutional anomalies at the State level. Selway considers that political decisions are now largely made in the Commonwealth arena, and then imposed upon the financially reliant States. The role of ministers in State governments has, thus, become largely administrative. Selway summarises the situation in characteristically forthright terms: 'the fundamental role of the South Australian Government is not the determination of policy issues but rather to deliver services to its people in accordance with policy made elsewhere'.[10] According to Selway, this is not necessarily a problem in itself. Rather, the problem is that our electoral and parliamentary systems are designed to produce good politicians, rather than good administrators. Political skills such as forceful communication, resolute decision making and a keen focus on the currents of popular opinion are not necessarily the skills required for sound administration: 'If Ministers possess management or administrative skills at all, it is merely a fortuitous circumstance.'[11]

The solution Selway suggests lies in reforming the executive in order to focus it more acutely on service delivery. Without giving detailed consideration as to how this might be achieved, Selway proposes that a presidential style system may be more appropriate. Alternatively, he argues that an executive headed by a professional administrator and answerable to the Cabinet, operating as a Committee of the Parliament, such as city governments in the United Kingdom or the United States, may provide an answer.

Despite the fact that this collection emerged in anticipation of the Constitutional Convention that was to follow, most of the contributions remain current. Perhaps this is so because virtually none of the proposed reforms were adopted in South Australia, and very few of them have been taken up in other Australian jurisdictions. Prospective constitutional reformers should not overlook the smorgasbord of valuable ideas contained in this collection.

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9 Bradley Selway, 'The "Vision Splendid" of Ministerial Responsibility Versus the "Round Eternal" of Government Administration' above n 1, 164-77.

10 Ibid 172.

11 Ibid 173.