

IN THE YEAR 2096

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Visions of Australia's Constitution in the 21st century



Wouldn't it be fantastic to have a crystal ball to divine the future of the constitutional system in Australia? It would save those reviewing the current Constitution wasting their time on irrelevant matters and would focus their attention on those issues vital for the 21st century. Despite the fact that this cannot be done, this article predicts some changes to the Australian Constitution in the hope that the vision becomes reality.

Our Constitution is a fundamental, foundational statement about our community. By establishing a political framework it affects all aspects of our lives, even when this is because it prevents the government from exerting power over a particular issue. In this sense, national constitutions will continue to be important in the 21st century. But their significance will differ from that of 19th and 20th century constitutions because of the changing role of national governments in the international arena. We have to be mindful of the process of internationalisation which is having an impact on our domestic system.¹ External affairs and the integration of the world's political framework will be even more significant in the 21st century, and may in fact represent a new world order. That changed order is not the focus of this vision but it acts as a backdrop to the advent of a more gender conscious Constitution for the 21st century.

The following is an extract from a 21st century article which looks back on the 20th century.

A history of the evolution of Australia's Constitution dated December 2096

Gender and constitutions

The Constitution of 1901 failed women. This failure can be seen both in its formation and in its practice throughout the 20th century.² The 21st century Constitution represents changes that better reflect the nature of the society it governs. In discussing gender in a constitutional context, 20th century discussions often considered the introduction of equality rights into the Constitution, and the use of a constitution to restrict government from infringing women's rights. As the 1901 Constitution did not deal comprehensively with individual rights and the individual's relationship with the state, it made sense to question whether the omission influenced women's political inequality in practice. (There were some individual sections of the 1901 Constitution that related to individual rights: ss.41, 51(xxxi), 80, 116 and 117.) There was a debate, however, within feminist circles about the success of Bills of Rights in effecting change for the disadvantaged within the community.³

Instead of changing the Constitution from the perspective of rights, reforms occurred by transforming long-standing constitutional ideas. The 21st century witnessed the development of new meanings for the

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terms: representative democracy, federalism, responsible government and separation of powers.

Representative democracy

The 1901 Constitution provided for a system of representative democracy by requiring people to choose their representatives (ss.7 and 24). There were references to elections and electors, and regular elections (ss.7, 8, 9, 24, 25, 28, 30 and 32). Moreover, the High Court during Chief Justice Mason's term also articulated an implied constitutional right of freedom of political speech, specifically linked and limited to representative democracy.⁴ This approach (which by 2050 had been reviewed many times by the changing High Court) recognised that different conceptual levels informed constitutional interpretation. At one level was the text of the Constitution itself, with certain rules such as that requiring the direct election of Members of Parliament. At another level was the principle of representative democracy underpinning the rule, and at yet another level were theories or assumptions behind the principle. Twentieth century political theorists had explained that the principle of representative democracy required linkage between the elected and the electorate, and an ongoing connection between the two. They also acknowledged that electoral systems changed over time.⁵

The principles and theories all related to broader principles. In the 21st century, current views of representative democracy have continued to evolve. For instance, we presently see that the connection between the elected and the electorate has become greater because of technological changes. The use of information technology has led to increased public participation in the running of government and greater accountability by Parliament to the public. Electronic mail and websites have created avenues for participation by all people with a computer or TV screen, and the establishment of new community centres means that everyone can access a computer or TV. Elections have become straightforward electronic procedures.

Not only have the electors experienced change, but so too have their representatives. For instance, changes in parliamentary working hours occurred due to the use of information technology. Federal representatives don't have to travel to Canberra as often because electronic systems allow better communication between Members of Parliament and higher quality debate over legislative proposals. Parliamentary committees also use inexpensive video conferencing facilities for their meetings and public hearings. On the rare occasion that a full meeting of Parliamentary representatives is required in Canberra, the introduction of the creche (in the year 2000) made Parliament more family and people friendly.

And of course changes have occurred beyond the technological front. The 20th century's predominantly male governance is an anomalous relic of the past. The 1996 Parliament championed itself as one of the most successful in relation to women, yet it was strikingly unsatisfactory compared to this 21st century. In the House of Representatives in 1996 there were only 23 women out of 148 (15%) and in the Senate there were also 23 women, but out of 76 (30%). The current reality of 50% women in both houses is a far cry from those early days — and the 50% figure of women is not just white, upper class women, as some women cautioned. The Parliament is now overtly conscious of its representative nature. There is a diversity of perspectives, for it became strikingly evident that class and race also affect people's experiences. The experience of the indigenous community was significant in

highlighting this. The whole system of representation has been revitalised in that the democratic process more accurately represents the entire community by ensuring the equal representation of women and by ensuring diversity in the representation of men's and women's interests.

These changes occurred due to the accumulated attempts to reform the system in the last decade of the 20th century. A range of initiatives were used such as: mandatory and voluntary quotas, changes to the political and legal culture in which the under-representation occurred, 'schooling' in parliamentary skills for women and other groups within the community without adequate representation, and significant changes to the electoral system. Each separately would not have resulted in change, but cumulatively they affected how people viewed representative democracy. By well into the 21st century the community ensured changes were made to the Constitutional document itself so that it better represented the expectations of the entire community. We can see this in the current text of the 21st century Constitution which specifically acknowledges the evolving nature of representation, and demands that Parliament regularly review its electoral legislation so it best represents the community. Other changes were made in the Senate, and some of the reasons for those changes are discussed below.

Federalism

Back in 1901, the framers created a federal system. The essence of Federation was the creation of a compact between the States (former colonies of the UK) and the new federal entity, and the balancing of power between the two.

There were various ways of viewing federalism at that time. Rose Scott, who was involved in the federation debates in the 1890s, was fiercely opposed to Federation and a centralised system. As Marilyn Lake highlighted, Scott presciently observed that the creation of a new 'faraway federal parliament' would render it increasingly difficult for the mothers of the nation to participate in national government.⁶ Justice Elizabeth Evatt had similarly noted that if women had been involved in drafting the Constitution they would have never agreed to s.125 mandating that the Federal Parliament be at least 100 miles from Sydney.⁷ Scott was also concerned about the nature of democracy, in that the further the government was from the people, the less accountable and responsive it would be.

But federalism was also a principle from which women and other groups in the late 20th century began to experiment with different forms of representation. At the time of Federation, those framing the Constitution were interested in protecting States' rights, and it was acceptable to incorporate into the democratic system the protection of the collective rights of the States. In the late 20th century other groups within the community were demanding that their interests be specifically represented. The indigenous community, multicultural communities, gay and lesbian communities, rural and urban communities and others succeeded in introducing an Upper House that was not just a States' house, but a people's house of a different quality to the House of Representatives. Instead of the Senate just representing States' rights in the 21st century, it broadened to include other group rights.

The existence of a federal system was also significant with the advent of the further internationalisation of world politics in the latter part of the 20th century. In fact, regional organisations became more significant in shaping community iden-

tity than the former State governments because of those organisations' entrenchment in the Constitution. This involved a refashioning of legislative responsibility, and regional organisations around the country were involved in that redrafting process. It meant that environmental issues, social security matters, competition and economic policy, technological issues and industrial relations principles were all reviewed in light of the different organisation's specific experiences with government and politics. And to the extent that these regional rules conflict with federal and international rules, the current body of elders (made up of nominees from different regions and Federal and international representatives) sits in Geneva and conducts hearings by satellite, making determinative decisions about the extent of those inconsistencies.

Responsible government

The principle of responsible government was unusual in the way that it fitted into the Australian constitutional system in 1901. It stemmed from the Westminster system and the constitutional monarchy under which Australians lived. In that system, the Queen and her representative acted on the advice of the Ministers. The principle also included the notion of parliamentary responsibility, that is, members of the executive are accountable directly to the people. (Section 64 of the Constitution required members of the executive to be Members of Parliament.) This principle included the collective responsibility of the government in promoting a unanimity of approach to policy issues, resulting in a distinctly partisan approach to the resolution of those issues.

The continued centrality of the political parties in the constitutional system meant that the parties could no longer ignore the vexed question of the place of women. Recognising that the political party dictated who was responsible to whom in Parliament, a review of the parties occurred when the old style Senate was able to orchestrate the numbers to support a review. This realisation, together with the effective gender representation of the smaller parties, led to new voices being heard. Promoting equal representation within the political parties was the basis for greater representation in the Parliament and in the Cabinet for policy development. Given Cabinet's centrality to the system of responsible government, women were placed within the Cabinet in equal numbers, including the Minister for the Status of Women.

The final modification to responsible government can be seen in the movement to the Republic. The transition was significantly influenced by women's equal participation. Conscious that the Queen was Head of State only by virtue of not having a brother, women were determined to introduce a system that would ensure equality of gender in the appointment process, both in who chose the Head of State and who was chosen. For instance, the Constitution mandated that the Head of State would alternate between gender. There was also a decision to set out the specific powers of the new Head of State, rather than relying on English conventions that had been interpreted by predominantly male judges.

Separation of powers

Separation of powers was never absolute in the 1901 Constitution. It was an interesting mixture of the United States and English Constitutions which resulted in a partial separation of powers. It had a strict separation of the judicial branch of power, but not of the legislature from the executive. The principle that was protected was the liberty of the individual. These liberties have been reinterpreted in the 21st century

with the recognition that power is not just held by governments, but by other bodies who wield great influence over individuals in the community. The value of separation of powers has extended beyond the narrow purview of government to broader issues of power balance in the society.

One of the High Court cases of the late 20th century, *Brandy v Human Rights and Equal Opportunity Commission* (HREOC) (1995) 127 ALR 1, highlighted the different power issues at play within society. In that case, the court held that the HREOC could not be a *determinative decision-making body*, and the procedure set up transforming HREOC decisions into orders of the Federal Court was a breach of the separation of powers principle in the Constitution. The HREOC framework was specifically designed for the subject matter of the jurisdiction, and to give people affected, access to a resolution of the issues. Women were often disadvantaged by the adversarial system (as they often were in negotiation-style environments) and the separation of powers principle therefore did not truly cater for the different power differentials within society. Great minds went to work on refiguring the checks that needed to be provided for in society, and large private corporations became subject to review by parliamentary committees, as did other groups within society. Parliament essentially better reflected the community and therefore had more authenticity in reviewing the different interests in the community.

This extract from 2096 may not even exist in printed form in the 21st century. Already, the computer is becoming the central mode of communication and in the 21st century the printed form may be as much a relic as the 1901 Constitution itself. However, in whatever form it appears, this article has highlighted a few changes to our present constitution to illustrate that different frameworks and principles may lead to diverse forms of representation and the control of power in the Australian community. It has touched briefly on the effect of globalisation in order to rethink the role of the Constitution. Australia's Constitution will continue to be recognised as reflecting the values and principles of the community and it will have a profound influence over the relationships between private corporations, state bodies and individuals in Australia. To the extent that gender and other interests are more visible in the future constitutional system, the better will it serve its purpose.

References

1. There is growing literature in political science contexts on the effects of internationalisation (also referred to as globalisation) including Elkins, David, *Beyond Sovereignty: Territory and Political Economy in the Twenty-First Century*, Uni of Toronto Press, 1995; Archibugi, Daniele and Held, David (eds), *Cosmopolitan Democracy: An Agenda for a New World Order*, Polity Press, 1995.
2. See further Cass, Deborah and Rubenstein, Kim, 'Representation/s of Women in the Australian Constitutional System', (1995) 17 *Adelaide Law Review* 3-48.
3. See Morgan, Jenny, 'Equality Rights in the Australian Context: A Feminist Assessment', in Alston (ed.), *Towards An Australian Bill Of Rights*, 1994, p.123.
4. *Nationwide News v Wills* (1992) 177 CLR 1 and *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.
5. There was discussion of this issue in the article by Cass and Rubenstein, above.
6. Lake, Marilyn, 'Feminist History as National History', (1996) 106 *Australian Historical Studies* 154, p.163.
7. Cited in Irving, Helen, 'A Gendered Constitution?: Women, Federation and Heads of Power' in Helen Irving (ed.), *A Woman's Constitution?*, Hale and Iremonger, 1996, p.107.