Western Australia's Constitutional Documents: A Drafting History

LEE HARVEY+

This paper examines the drafting history of the Constitution Act 1889 (WA), the Constitution Acts Amendment Act 1899 (WA) and, briefly, Western Australia's electoral laws.

INTRODUCTION

> *In any case, the construction of a constitution was a significant intellectual and political event.*[1]

Drafters of the *Constitution Act 1889* (WA) (*Constitution Act 1889*) were not constitutional scholars whose names have been celebrated through decades of legal history. Indeed, the origins of the drafting of this Constitution are obscure and no drafter or drafters claimed credit for its contents. In stark contrast to the *Commonwealth Constitution*, no committees of eminent lawyers sojourned on government yachts to revise working drafts for publication. There were no great constitutional conventions where words of the State's most significant legal document would be discussed and from which handwritten notes are carefully preserved for posterity. Unlike Victoria and New South Wales,[2] no select committees were established to draft the future Constitution except a select committee chosen by ballot to determine electoral districts under this Act.[3] A great deal of the *Constitution Act 1889* (WA) was discussed and developed in private.

DRAFTING HISTORY: WHO DRAFTED WESTERN AUSTRALIA'S CONSTITUTION

The colony's Governor, Sir Frederick Napier Broome is generally credited with drafting the Constitution.[4] A more nuanced suggestion is that the 'Founding

---

* Deputy Parliamentary Counsel, Parliamentary Counsel's Office (Western Australia). BJuris (WA), LLB (Hons)(WA), MPhil (Australian Studies) (WA).

1 G Lawson and G Seidman, 'Discretionary Grants in Eighteenth-Century English Legislation' in G Lawson et al (eds), *The Origins of the Necessary and Proper Clause* (Cambridge University Press, 2010) 41.

2 In relation to the making of the New South Wales, Victorian and Commonwealth constitutions, see generally A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 11-18; G Taylor, *The Constitution of Victoria* (Federation Press, 2006) 27-37, J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).

3 Western Australia, *Parliamentary Debates*, Legislative Council, 18 March 1889, 49.

4 See, for example, Constitutional Centre of Western Australia <www.ccentre.wa.gov.au/ExhibitionOnline/OurConstitution/Pages/ADraftConstitution>. Broome was Governor on

Fathers' of Western Australia were Governor Broome, Legislative Council members, especially Stephen Parker, Septimus Burt and John Forrest, and Lord Knutsford, Her Majesty's Secretary of State for the Colonies.[5] Undoubtedly, the Legislative Council could not have debated, amended and enacted the Constitution Bill without the Governor's active support. In the 1890s constitutional context, the reasons are obvious. First, most legislation introduced into the Legislative Council originated with the Governor after consultation with Executive Council. Such Bills were introduced by the Colonial Secretary or Attorney General. Second, money Bills could not be introduced except on the Governor's recommendation[6], an important factor in relation to a Constitution Bill which included provision for salaries and pensions. Finally, the Governor was obliged to comply with instructions issued to him by the UK Secretary of State who became a significant contributor to the final form and content of the Constitution Act 1889 (WA).

Governor Broome had overseen the introduction of representative government during his 1869-1875 tenure. On returning to Western Australia in 1883 Broome was cautious about supporting any move to responsible government. He wrote to the Secretary of State:

> I nevertheless think that Western Australia would do well to delay its majority for a time, until its wealth and population shall have still further increased, and until (which is hardly the case as yet) the community contains within itself a good ballast weight of public opinion, and a sufficient complement of qualified public men to govern on the party system.[7]

However, when in 1887 the weight of opinion in the Legislative Council showed decisive support for responsible government, Broome came out strongly in support, and urged the Colonial Office to allow responsible self-government.[8] His advocacy for responsible government on behalf of the colony was acknowledged by Legislative Council members.[9] Although unpopular in some Western Australian government and judicial circles[10] and generally conservative,

two occasions, 1869-1875 and 1883-1889.

5 P W Johnston and S D Hotop, 'Patches on an Old Garment or New Wineskins for New Wine? (Constitutional Reform in Western Australia - Evolution or Revolution?)' (1990) 20 *University of Western Australia Law Review* 428, 432-3.

6 13&14 Vict c 59 s 14.

7 Governor Broome to Lord Derby 9 April 1884. Reproduced in *Correspondence Respecting the Proposed Introduction of Responsible Government into Western Australia* (London, June 1889) 5-6.

8 Governor Broome to Sir H T Holland 12 July 1887, ibid, 11.

9 Western Australia, *Parliamentary Debates*, Legislative Council, 26 April 1889, 381 (Mr A Forrest), 387 (Mr Venn).

10 See eg E Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979* (University of Western Australia Press, 1980) 195 (attributing Broome's unpopularity and 'aggressive and bullying tactics' as reasons for the growth in support for responsible government). See also B de Garis, 'Constitutional and Political Development, 1870-1890', in D Black (ed), *The House on the Hill: A History of the Parliament of Western Australia 1832-1900* (Western Australian Parliament, 1991) 54.

he showed statesman-like qualities in pursuing the enactment of the 1890 UK Enabling Act, including its Schedule containing the *Constitution Act 1889* (WA), and was part of the 1890 three man delegation in London to present to the UK Parliament and public Western Australia's case for responsible government.

Unfortunately for historians and constitutional originalists three important issues remain unanswered: How much of the 1889 Constitution Bill was drafted by Governor Broome? To what extent did Governor Broome instruct the Attorney General Mr C.N. Warton as to that drafting? To what extent did the Governor and Attorney General simply adopt or copy the contents of previous Western Australian Constitution Bills?[11]

Prior to the establishment of a specialised parliamentary drafting office in the United Kingdom in 1869, English legislation had been drafted by barristers, judges or Members of Parliament. New South Wales and Victoria appointed permanent salaried parliamentary drafters in 1878 and 1879.[12] However, those offices were small and considerable drafting was still contracted out to private lawyers with Judges continuing to be consulted about proposed legislation.[13] In contrast, Western Australia, which lacked financial resources and could neither afford to employ a parliamentary drafter nor to contract out drafting, relied principally on its Attorney General, an unelected Legislative Council member appointed by the Secretary of State for the Colonies, to draft Bills and other legislative instruments. As late as 1893 Legislative Council members complained about delays in producing government Bills because 'in this colony we are not in a position to provide a salary for a Parliamentary draftsman, and we have to depend on the Attorney General to draft nearly all the Bills that are submitted to this House, except the few introduced by private members'.[14] The Attorney General somewhat sharply replied that they should 'stick to the system, because it is cheap'.[15]

The Attorney General in 1888, Mr C.N.Warton, was probably not inclined to assist in drafting a Constitution Bill. He had an eccentric reputation acquired during his UK parliamentary career by the persistence with which he enforced parliamentary rules preventing progress being made on Bills which would otherwise have been unopposed.[16] At his farewell dinner, before he leaving

11 Constitution Bills were introduced into the Legislative Council in July 1874 and July 1878.

12 C Meiklejohn, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel, 2012) 6.

13 Ibid.

14 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 April 1893, 391 (Mr Canning).

15 Ibid (Mr Burt). An official draftsman was appointed about 1900. See C Ilbert, *Legislative Methods and Forms* (Clarendon Press, 1901) 182 noting, in relation to Western Australia 'There is now an official draftsman appointed by the Governor in Council on the recommendation of the Attorney-General, to whom he is responsible. He has no staff, and his duties are indeterminate...'.

16 Philip Mennell, *The Dictionary of Australasian Biography: Comprising Notices of Eminent Colonists from the Inauguration of Responsible Government Down to the Present Time [1855-*

London to become Attorney General in Western Australia, it was recounted that he had 'achieved quite a unique reputation as the great "blocker" in the House of Commons, beyond that, he is what mathematicians might call "an unknown quantity"'.17 Perhaps surprisingly, for someone now vested with the duty of drafting legislation, he responded that he 'blocked' because:

> his theory was that the primary duty of Parliament was not legislation, but to look after the defences of the country and the efficiency of the services. Far more important was it that they should have an army and a navy thoroughly efficient and their taxes properly expended than that a number of generally worthless Bills, proposed by inefficient members should be passed.[18]

Inevitably, that raises an originalist's question: what was WA Attorney General Warton's role in the drafting of the *Constitution Act 1889* (WA)? Interestingly, he was thanked by Governor Broome for his assistance in drafting the Constitution.[19] However, Warton was not highly regarded in the colony. He 'appears to have been a man of little ability' and 'was a man who insisted upon form and was a better civil servant than a lawyer'.[20] Nor, it seems, was he particularly taken with the less conservative aspects of the draft Constitution. He was, he conceded 'not, in theory, a very warm admirer of the new Constitution'.[21] Warton did, however, in the Legislative Council move and advise on technical amendments to remove ambiguity from the draft Bill and provide advice on other proposed amendments.[22] Despite asserting that he had nothing to do with the Bill's policy,[23] Warton occasionally could not resist advocating a particular policy. For example, with typical eccentricity, he objected to an amendment to increase the Legislative Council's quorum from five to seven because the Legislative Council should 'bear in mind that this Upper House would probably consist of quiet, easy-going, and perhaps infirm old gentlemen, chosen principally for their wealth, their long experience, and their age; and it might be a difficult thing sometimes to get together seven of these old gentlemen'.[24] His avowed objective was to have 'a decent, respectable, conservative bill, that will give us a Constitution under which the interests of those who have long resided in the colony and made it their home shall be conserved and protected'.[25] Simultaneously, however, Warton displayed what seemed to some members an excessive interest in pursuing questions about

---

1892] (Hutchinson and Co, 1892) 494.

17 *The Western Mail*, 11 December 1886, 19.

18 Ibid.

19 Governor Broome to Lord Knutsford 12 July 1887, *Correspondence* above n 7, 38.

20 Russell, above n 10, 218.

21 Western Australia, *Parliamentary Debates*, Legislative Council, 17 April 1893, 391.

22 Western Australia, *Parliamentary Debates*, Legislative Council, 21 March 1889, 74 to 3 April 1889, 234.

23 Ibid 75.

24 Ibid 84.

25 Western Australia, *Parliamentary Debates*, Legislative Council, 5 November 1888, 224.

the pension payable to him on the introduction of responsible government.[26]

Governor Broome was also assisted by other Legislative Council members, some of whom had for decades been advocates for responsible government. Included was the Colonial Secretary, Sir M Fraser, leader of the Government and the Governor's representative in the Legislative Council. As such, Fraser was 'responsible for all questions of policy, or change of policy, advocated on the part of the Government, as regards the [1889 Constitution] bill'.[27] Even when the Legislative Council was not in session, the Colonial Secretary assisted the Governor to administer the colony and, as was to be expected, largely supported the Governor's and Secretary of State's views.

DRAFTING HISTORY: UTILISING OTHER CONSTITUTIONS

The Constitution's drafters did not, of course, determine its contents without the assistance of precedents, for example, prior constituent legislation in force in Western Australia, other colonies constitutions and the US and Canadian Constitutions, as well as the influence of local public opinion. First, the concept of a Western Australian constitution providing for responsible government had been discussed for many years before the 1889 Act was drafted.

In 1874, under the progressive Governor Weld's auspices, the principles and details of a Bill to provide for responsible government had been affirmed by a Legislative Council majority. This 1874 Constitution Bill included an elected lower House and a wholly nominated upper House.[28] Governor Weld announced a dissolution of the Legislative Council to allow electors to express their opinions on the Bill. However, the result was not clear and the Colonial Office did not support the Bill. When Governor Broome sought the Secretary of State's approval in 1887 to draft and introduce a Constitution Bill, and instructions as to the Bill's content, he noted: 'It will be found interesting and useful to peruse my predecessor's (Mr Weld's) Despatch of the 11th August 1874, forwarding the Bill for the introduction of Responsible Government, which had then passed the second reading in the Legislative Council'.[29] On 25 January 1875 the Legislative Council 'by an overwhelming majority adopted a series of resolutions fully and emphatically setting forth their view on the question of the proposed change of constitution'.[30] Even so, the Secretary of State refused to recommend that the Governor be authorised to implement the reforms. In 1878, S H Parker moved for leave to introduce another Bill to establish a Constitution and grant a civil list.

26 Western Australia, *Parliamentary Debates*, Legislative Council, 3 April 1889, 230.

27 Western Australia, *Parliamentary Debates*, Legislative Council, 21 March 1889, 75 (Warton).

28 See I McPhail, *Highest Privilege and Bounden Duty: A Study of Western Australian Parliamentary Elections 1829-1901* (Western Australian Electoral Commission, 2008) 117-23 (providing details of this 1874 Bill).

29 Governor Broome to Sir H T Holland, received 22 August 1887, *Correspondence* above n 7, 15.

30 Western Australia, *Parliamentary Debates*, Legislative Council, 15 July 1878, 221 (Mr Parker).

Leave was not granted even though S H Parker claimed that he had consulted nearly every Council member as to its provisions[31] and even though the fundamental provisions of the 1878 Bill were the same as the 1874 Bill.[32] Three days later he introduced a series of resolutions affirming the expedience and necessity for change. Extensive debate ensued and the original motion was defeated. However, Parker continued to campaign for responsible government. On 18 April 1883 he took the moderate, but tactical, approach of moving that the Secretary of State be requested to provide a statement as to the terms and conditions on which responsible government would be granted to Western Australia. This motion was carried unanimously.[33]

Progress towards introduction of a Constitution Bill was slow. In April 1888 there was discussion in the Legislative Council about whether a select committee could or should prepare a Constitution Bill. Simultaneously, there was reference to newspaper comment that 'members of that House were not exactly the right sort of people to prepare a Constitution Bill'.[34] As the Constitution Bill would impose a financial charge it could only be introduced on the Governor's recommendation. It was pointed out that the members 'knew perfectly well that at this moment the Government had a bill already prepared'[35] that could be adapted by the Governor to deal with any resolutions passed by the Council. Debate in the Legislative Council then moved to the detail of the Bill. The draft 1888 Bill forwarded by Governor Broome to the Secretary of State on 28 May 1888, and the Constitution Bill introduced into the Legislative Council on 19 October 1888, were products of these prior drafts and resolutions as well as the Governor's and Secretary of State's views.

Second, Western Australian drafters had the advantage of the availability of, and knowledge about, experiences under the constitutions of Victoria (*Constitution Act 1855*), New South Wales (*Constitution Act 1855*), Tasmania (*Constitution Act 1854*) and South Australia (*Constitution Act 1855*). Those constitutions followed the approach of the Canadian provinces, New Zealand and the British provinces of South Africa which were strongly influenced by the British parliamentary system. Indeed Governor Broome, when forwarding the 1888 Bill to the Secretary of State, noted 'Many of the clauses of the Draft Bill embody the usual provisions of a Colonial Constitution Act'.[36]

The second reading speech and committee stage debate for the *Constitution Bill* show the influence of other jurisdictions on Legislative Council members. Numerous references were made to the constitutions of other colonies, particularly in relation to the constitution of the various Legislative Councils. In his second

31 Western Australia, *Parliamentary Debates*, Legislative Council, 12 July 1878, 213.
32 Ibid 214.
33 Western Australia, *Parliamentary Debates*, Legislative Council, 18 April 1883, 33-7.
34 Western Australia, *Parliamentary Debates*, Legislative Council, 6 April 1888, 275 (Mr Venn).
35 Ibid 280 (Mr Marmion).
36 Governor Broome to Lord Knutsford, received 27 June 1888, *Correspondence* above n 7, 38.

reading speech, the Colonial Secretary set out in detail the constitutions of the Upper House, and the qualifications of electors and members, in other Australian colonies and New Zealand.[37] Often their experience was used as an example of why a different approach should be taken in Western Australia.[38] There were also references to the practice of the House of Commons[39] and the United States Constitution[40] as indicating why, and why not, the Western Australian Act should contain specified provisions. Many provisions were almost identical to the constitution of another colony. Section 36, for example, mirrored the Victorian and South Australian provisions on parliamentary privilege and s 73 mirrored the New South Wales manner and form provision.

DRAFTING HISTORY: UK COLONIAL OFFICE

The draft 1888 Constitution was subject to the Colonial Office's scrutiny. That Office acted as adviser, drafter and policy decision-maker in relation to several drafts of the Bill. The Colonial Office understood the legal and practical effects of parliamentary reform in Britain. It was also aware of problems in relation to the operation of other colonies' constitutions and, therefore, was concerned to avoid their perpetuation. In dealing with other Australian colonies, it had been keen to avoid the difficulties that had arisen in America and to not limit, unduly or without good reason, the self-government powers granted to the colonies. In 1873 the Secretary of State for the Colonies, Lord Kimberley, made it clear to Governor Weld: 'Her Majesty's Government would not be disposed to resist any widespread and sustained desire which might hereafter prevail in the Colony for responsible Government'.[41]

By 1888 the Secretary of State, Lord Knutsford, had set out clearly the sort of matters he expected to be in the draft Constitution Bill and Governor Broome was careful to indicate that 'suggestions contained in your Lordship's despatch of January last, and in my despatch of the 12th of July previous, so far as approved or not objected to by your Lordship, have been incorporated'.[42] In the same despatch however, and contrary to the Secretary of State's recommendations, Governor Broome supported the Legislative Council's resolutions against separation of the north of Western Australia and commending an elected bicameral legislature. The 1888 Bill was examined by the Secretary of State not only from a general policy point of view but also in relation to specific drafting issues. For example, Lord Knutsford noted:

> you will observe that the expression Parliament has been removed from the Bill whenever it was employed as meaning the two Chambers....[I]t

37 Western Australia, *Parliamentary Debates*, Legislative Council, 2 November 1888, 178-9.

38 Eg, Western Australia, *Parliamentary Debates*, Legislative Council, 21 March 1889, 80 (Sir J G Lee Steere) comment regarding recent events in Queensland and New South Wales.

39 Eg, Ibid 84 (Mr Warton).

40 Eg, Ibid 88 (Mr Parker).

41 Lord Kimberley to Governor Weld, 17 October 1873 [received 10 December 1873] SROWA 391/12223/253. Cited McPhail, above n 28, 116.

42 Governor Broome to Lord Knutsford, May 28 1888 [received 27 June 1888], *Correspondence* above n 7, 38.

> is not strictly accurate to describe the Legislative Council and Assembly of Western Australia, without the Queen, as constituting the Parliament of the Colony...[43]

In an early illustration of the spirit of modern drafting and 'plain English' the Secretary of State observed: 'I have desired that brevity of expression should, as far as possible, be aimed at'.[44] Also, from a drafting perspective, Lord Knutsford and the Colonial Office made a substantial number of corrections and amendments in the 1888 draft. However, it was clearly indicated that in broad terms the Bill's content was a matter for the Legislative Council. There was ample scope for as many alterations in detail as the Legislative Council might adopt so long as the main principles insisted on by the Secretary of State were adhered to, in particular, the nominated Upper House, control of northern wastelands and the protection of Aboriginal affairs. Any material alterations would require full explanation.[45]

The second reading of Constitution Bill in the Legislative Council on 31 October 1988 was not seen or approved in its entirety by the Secretary of State because Part III relating to an elected Upper House was inserted after the Secretary of State commented on the Bill.[46] Consequently, Part III was considered to be more open to change than other aspects already approved by the Secretary of State.[47] Lord Knutsford was closely informed of progress on the Bill. When the outgoing Attorney General's pension was reduced by £200 by amendment in committee the Secretary of State quickly insisted the reduction be changed on the Bill's recommittal. Fierce debate on this point provoked the Colonial Secretary to presciently comment: 'I hope we are not going to delay or to jeopardise the Constitution Bill for the sake of £100 a year'.[48]

Although there had been a great deal of public and parliamentary debate before the Bill was dealt with in committee in 1889, its initial progress through the Legislative Council to its third reading was remarkably swift and uncontentious. Of the 78 clauses in the Bill, 54 clauses were agreed to without debate and only 10 clauses were amended. Most amendments were insignificant. However, some amendments have been important, especially the insertion, following the Secretary of State's request, of amendments to the s 73 manner and form provision.[49] Other amendments were made to prevent swamping in the Legislative Council and

43 Lord Knutsford to Governor Broome, 31 August 1888, *Correspondence* above n 7, 56.

44 Ibid.

45 Ibid 58.

46 Western Australia, *Parliamentary Debates*, Legislative Council, 27 March 1889, 158 (Mr Warton), 169 (Mr Warton).

47 Western Australia, *Parliamentary Debates*, Legislative Council, 28 March 1889, 169 (Mr Warton).

48 Western Australia, *Parliamentary Debates*, Legislative Council, 3 April 1889, 228.

49 Western Australia, *Parliamentary Debates*, Legislative Council, 28 March 1889, 166-72. R S French, 'Manner and Form in Western Australia: An Historical Note' (1993) 23 *University of Western Australia Law Review* 335, 342 surmises that Wilsmore (*Western Australia v Wilsmore* (1982) 149 CLR 79) 'may have been a victim of an Imperial draftsman's sleight of hand'.

increase its quorum and to reduce the duration of the Legislative Assembly's term. Qualifications of members and electors were fiercely debated but there was little change of significance. Changes of significance, as far as the Bill's progress was concerned related to control of wastelands and the Attorney General's pension. When the Bill was sent by Governor Broome to the Secretary of State on 4 April 1889 after the third reading, only five of the ten amendments were considered worthy of note.[50] Indeed, the Governor sent the Bill 'jubilant at the idea that the bill had passed, with so few amendments, and praising the House for its loyalty, and saying that all that was required now was the assent of the Imperial Parliament'.[51]

The Secretary of State did not accept the Legislative Council's amendments relating to control of wastelands or the Attorney General's pension. A 'vortex of telegrams'[52] ensued and the Secretary's 6 April 1889 message[53] rejecting those amendments altered the course of the Bill's enactment. The Governor, having received these responses, returned the Bill to the Legislative Council with several suggested changes.[54] Most were of a minor technical nature. However, the questions of control of waste lands and the Attorney General's pension remained contentious.

The Legislative Council was well aware that progress would be slowed if the Secretary of State's views were ignored. Even so, some Council members were not prepared to concede on these vital matters without bitter argument.[55] The Bill eventually forwarded to the Secretary of State was, at least to some, 'modified and mutilated from its original form to suit the wishes, soothe the prejudices and correct the mistakes of the Home Government'.[56] When the Bill was first introduced in the Legislative Council in 1888 it was expected that 'many small alterations which did not interfere with the principle of the bill would be made wholesale, when the bill appeared as a schedule to the [UK] Enabling Act'.[57] In the event, the Constitution Bill eventually scheduled to the Enabling Act seems not to have been changed by the Secretary of State or the United Kingdom Parliament. However, there was significant debate in the House of Commons about the contents of the Enabling Act. Even the Secretary of State's approval and swift passage through the House of Lords in July 1889 was not sufficient to ensure

50 Message reproduced, Western Australia, *Parliamentary Debates*, Legislative Council, 10 April 1889, 253.

51 Western Australia, *Parliamentary Debates*, Legislative Council, 17 April 1889, 346 (Mr Burt).

52 Ibid.

53 Reproduced, Western Australia, *Parliamentary Debates*, Legislative Council, 10 April 1889, 253.

54 Ibid 253-4.

55 For example, Western Australia, *Parliamentary Debates*, Legislative Council, 17 April 1889, 349-51 (Mr J Forrest).

56 Western Australia, *Parliamentary Debates*, Legislative Council, 23 July 1889, 346 (Mr Venn).

57 Western Australia, *Parliamentary Debates*, Legislative Council, 27 March 1888, 346 (Mr Warton).

that the Enabling Bill, with the Constitution Bill attached as a Schedule, would have a smooth and timely passage through the House of Commons. Not until July 1890 was opposition overcome in the House of Commons, enabling Royal Assent to be given on 15 August 1890 and proclamation of the Bill by the Governor, Sir William Robinson, on 21 October 1890.

STRUCTURE AND GENERAL CONTENTS: 1889

Structurally, the *Constitution Act 1889* (WA) was divided into seven parts:[58] Part 1 - Parliamentary, Part II - Electoral, Part III - Elective Council, Part IV - Judicial, Part V - Legal, Part VI - Financial, Part VII - Miscellaneous.

More substantially, this Act extended representative government and internal self-government and introduced responsible government. The concept of responsible government is not, from a textual perspective, distinctly identified in the Act.[59] Textually, little directly indicates the Executive's role including its relationship with both Legislative Chambers. However express textual provisions indicated that the Governor was to act on Executive Council's advice in areas such as the designation and declaration of executive offices of Government (s 28) and appointment and removal of public officers (s 74). Also, explicit provision was made for 'five principal executive offices liable to be vacated on political grounds' (s 28); namely, Ministers of the Crown, at least one having to be occupied by a Legislative Council member (s 6), and for compensation payments to incumbents liable to retire on political grounds (ss 71 and 74). Upon appointment, Ministers, if they were also parliamentarians, had to resign and recontest their seats (s 29). However, other than s 6, there is no express requirement that Ministers be members of Parliament. Only an implication extrapolated from ss 28 and 29 suggests that this, as a matter of law, must occur. This textual and contextual constitutionalisation of responsible government was similar to the approach in other Australian and self-governing British colonies.

The Act contained provisions concerning power to assent to Bills passed by the Western Australian Parliament, a bicameral legislature, basic rules for conduct of each House's business, detailed rules governing the election or choice of members for each House, judicial independence and constitutional amendments. As is traditional in colonial constitutions,[60] the Act conferred on the Queen 'by and with the advice' of the Legislative Council and Assembly plenary power to legislate for the 'peace, order and good government' of the colony (s 2). It established a bicameral

58 New Parts have since been added dealing with preliminary matters (Part 1A), the Governor (Part IIIA) and local government (Part IIIB).

59 See, generally, W F P Heseltine, *The Movements for Self-Government in Western Australia from 1882-1890* (BA Hons thesis, University of Western Australia, 1950) 143; L B Marquet, 'The Separation of Powers Doctrine and the Constitution of Western Australia' (1990) 20 *University of Western Australia Law Review* 445, 446-7.

60 *Constitution Act 1902* (NSW) s 5; *Constitution Act 1867* (Qld) s 2; *The British North America Act 1867* (Can) s 91; *Commonwealth of Australia Constitution Act* (UK) s 51; *Australia Act 1986* (UK & Cth) s 2(1).

legislature comprising a Legislative Council (15 members nominated by the Governor) and Assembly (30 elected members) identical powers except that money Bills could not originate in the Council. Franchise rules differed between Houses and members were drawn from different electorates. No provision contained a formal procedure to resolve deadlocks between the Houses. After 6 years or when the population reached 60 000, Legislative Council members were to be elected (s 14). These general rules were supplemented by provisions reflecting the framers' local concerns. These included the division of Western Australia into one or more additional colonies, payment of funds to an Aborigines Protection Board and compensation payments to officers ceasing to hold office after the Act commenced.

DRAFTING TECHNIQUES PRE AND POST 1890: TWO CONSTITUTION ACTS

The *Constitution Act 1889* (WA) was a coherent document containing 78 sections arranged in a logical format. By 2012, only 29 of those sections remain unchanged although many are largely, if not completely, spent. Of the original sections, 34 have been deleted from the 1889 Act. The subject matter of many of those provisions is now dealt with in other Western Australian Acts, in particular the *Constitution Acts Amendment Act 1899* (WA) and the *Electoral Act 1907* (WA). Significant amendments have made to the remaining 15 sections. The Act no longer deals with qualifications of members and electors of the Legislative Council or Legislative Assembly except members' oath or affirmation of office in s 22.

Consequently, one contextual requirement is obvious. The original 1889 document has to be read and interpreted in conjunction with an equally significant document: the *Constitution Acts Amendment Act 1899* (WA). The genesis of the 1899 Act is a consequence of three important matters: drafting practices at the turn of the eighteenth century, deference to the historical significance of the *Constitution Act 1889* and the constitutional impediments to changing the 1889 document.

By 1896 the 'Constitution' consisted of several Acts of the WA Parliament that were required to be read in conjunction with the *Constitution Act 1889*: the *Constitution Act Amendment Act 1893*, the *Constitution Act 1889 Amendment Act 1894* and the *Constitution Act Amendment Act 1896*. The operation of the *Constitution Act 1889* was also affected by *The Officials in Parliament Act 1891* and *The Officers in Parliament Act 1893*.

In this context, two quite different styles of amendment - non-textual (indirect) and textual (direct) amendments - and their differences are important. Consistent with traditional United Kingdom drafting practice, each set of amendments was in a self-contained Act that indirectly amended or affected the *Constitution Act 1889*. With this technique the amending law does not merge with the Act being amended or alter its text. Instead, the former consists of a narrative of the effect of the amendment on the old law and must be read alongside it. The amending

law does not lose its separate identity in the statute book. Perceived advantages of a non-textual amendment are that the amendment should make sense when standing alone and its effect should be easily ascertainable. This complies with the rule, known as the four corners doctrine, that members of the legislature must understand the provisions of a Bill from within its own terms. By contrast, a textual amendment read by itself is often meaningless.[61] It was for these reasons 'the technical [textual] method of amendment is hardly ever adopted in England except in the case of non-contentious matters'.[62]

The disadvantage of successive non-textual amendments is obvious: '[t]he effect is a cumulative one as statute is piled on statute making comprehension progressively more difficult'.[63] This 'interwoven web of allusion, cross-reference and interpretation'[64] can be resolved by the legislative process of consolidation and repeal. Such statutory consolidation of non-textual amendments is a matter of some art and often becomes a long and complex process. In the United Kingdom consolidations can be enacted in an expedited process set out in the *Consolidation of Enactments (Procedure) Act 1949* (UK). Under that Act 'corrections and minor improvements'[65] can appear in the consolidation. The UK Law Commission can recommend consolidation bills which embody improvements that go beyond the scope of the 1949 Act and are necessary for a satisfactory consolidation. In neither situation can substantive changes be made by way of consolidation. It is a presumption of statutory interpretation that a consolidation does not change the law. The presumption will be defeated by words in the consolidation Act which are so clear that they can only be interpreted as changing the law. Of course, there is less room for the operation of this presumption in Australia where there is not a formal process of consolidation.[66]

Using the technique of textual amendment, the text of an existing written law is amended by deleting words or provisions, by substituting new words or provisions or by inserting additional words and provisions. The Australian colonies and

61 *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (Her Majesty's Stationery Office, May 1975) (the Renton Report) 76 sets out the following examples of the same amendment in the *Town and Country Planning Act 1968* (UK) drafted non-textually and textually.
Non-textual:
For a person to be treated under section 149(1) or (3) of the principal Act (definitions for purposes of blight notice provisions) as owner-occupier or resident owner-occupier of a hereditament, his occupation thereof at the relevant time or during a relevant period, if not occupation of the whole of the hereditament, must be, or, as the case may be, have been occupation of a substantial part of it.
Textual:
In subsections (1)(a), (1)(b), (3)(a) and (3)(b), for the words 'the whole or part' (wherever occurring) there shall be substituted the words 'the whole or a substantial part'.

62 Ilbert, above n 15, 258.

63 G C Thornton, *Legislative Drafting* (LexisNexis Butterworths, 4th ed, 1996, reprinted Tottel Publishing, 2006) 405.

64 Ibid citing H H Marshall and N S Marsh, 'Case Law, Codification and Statute Law Revision Report', Third Commonwealth and Empire Law Conference (1965) 407, 425.

65 Section 2.

66 See J F Burrows, 'Consolidation Acts' (1983) 2 *Canterbury Law Review* 1 at 5f for examination of problems that can arise from consolidations.

most other colonies adopted this technique long before the United Kingdom. The Commonwealth Parliament first used the textual amendment method in the *Electoral Divisions Act 1903* (Cth) to amend the *Commonwealth Electoral Act 1902* (Cth). Sir Alison Russell, in 'the Bible of colonial legal draftsmen the world over',[67] recommended:

> ...referential legislation should always be avoided. It is almost impossible to apply the provisions of an Act dealing with one matter to the provisions of another Act dealing with another matter, without doubts arising in the application.[68]

Nevertheless, the United Kingdom continued to use non-textual amendment for significant amendments until late into the 20th century.[69] It was one of the drafting techniques that were 'the bane and curse of the United Kingdom Statute Book'.[70]

By 1905 most states and the Commonwealth had reprint legislation authorising publication of amended Acts. Such legislation facilitates periodic reprinting of statutes and subsidiary legislation as a single updated text taking account of all amendments since their enactment. The effectiveness of the reprint or compilation system is closely connected to the use of the textual method of amendment.

Prior to the introduction of textual amendments, it was common practice to consolidate amendments into one Act for ease of reference. Victoria, for example, retained its *Constitution Act 1855* and enacted a *Constitution Act Amendment Act 1890* (Vic) ('An Act to consolidate the Law relating to the Amendments of the Constitution'). The two Acts remained in force until 1975 when most of Victorian constitutional provisions were included in the *Constitution Act 1975* (Vic).

Western Australia adopted a similar approach. In 1899 the Western Australian Parliament enacted the *Constitution Acts Amendment Act 1899* ('An Act to amend the *Constitution Act 1889*, and to amend and consolidate the Acts amending the same') which consolidated all previous amendments.

As a general matter, although the practice of textual amendment was reasonably well-established in Western Australia in 1899, Acts often included a mixture of non-textual and textual amendments. However, it would have been inconsistent with drafting practice to enact legislation containing significant constitutional provisions by way of textual amendment. Despite its title, the drafters seem to have intended that provisions of the *Constitution Acts Amendment Act 1899* (WA) would stand alone, not as part of the *Constitution Act 1889*. Two reasons

67 H H Marshall, 'The Drafting of Statutes: The Commonwealth Experience' (1980) *Statute Law Review* 135.

68 A Russell, *Legislative Drafting and Forms* (Butterworth and Co, 4th ed, 1938) 69. The term referential amendment is often used interchangeably with the term non-textual amendment. See the Renton Report above n 61 at 76 for an analysis of the use of these terms.

69 The non-textual method is now in decline in the UK. See J F Burrows and R I Carter, *Statute Law in New Zealand* (LexisNexis, 4th ed, 2009) 636; Thornton, above n 63, 407.

70 Marshall, above n 67, 139.

predominate. First, unlike other non-textual amendment Acts in Western Australia, the drafters did not provide that the new Act was to be 'construed as one with the principal Act'. Second, the new Act did not refer to the *Constitution Act 1889* as the principal Act.[71] As was noted in *Wilsmore*,[72] the drafters' clear intention was that the 1899 Act remain separate from the *Constitution Act 1889*. Indeed, this question - was the *Constitution Acts Amendment Act 1899* (WA) a principal Act - received an affirmative answer in *Wilsmore*: 'the [1899] Act assumes an identity which is quite distinct from any of the preceding Acts, including the 1889 Act'[73] and 'the 1899 Act is itself a principal Act'.[74]

An alternate approach was available: to repeal the *Constitution Act 1889* and enact a new Constitution Act that consolidated all of the existing provisions and incorporated the new provisions. The *Constitution Act 1855* (NSW) was, for example, repealed and substituted with the *Constitution Act 1902* (NSW). The new *Constitution Act* for New South Wales consolidated existing statutes and did not create a new scheme although amendments were enacted to accommodate the new position of New South Wales as a State under the *Commonwealth Constitution*.

The Premier, Sir John Forrest, originally intended to achieve such a consolidation. The *Constitution Acts Amendment Bill* introduced on 22 August 1899 was a Bill 'to consolidate and amend the Constitution Act 1889, and the Acts amending the same'.[75] Between the Bill's first and second readings he changed his mind, and in Committee recommitted the Bill in a form where only the amendments to the 1889 Act were consolidated. At least three reasons for that decision can be postulated. First, his decision was ostensibly because to completely consolidate the Acts would obscure the character of the historic original 1889 document. It was:

> not wise nor in accord with precedent to altogether consolidate the Constitution Acts, because they would remove from the statute book the landmarks of the original constitution. It is far better and also more in accordance with usage that the original Constitution Act should...be on the statute book, and we should amend the Act from time to time, and also from time to time consolidate the amendments....We will then all be able to look back and see in the statute book what remains, at any rate, of the original Constitution under which self-government was granted to this colony.[76]

---

71 cf *Dentists Amendment Act 1899* (WA) s 1 'This Act may be cited as the Dentists Act Amendment Act, 1899, and shall be construed as one with the Dentists Act 1894, hereinafter called the principal Act.' The amendment Act is a mixture of non-textual and textual amendments.

72 *Western Australia v Wilsmore* (1982) 149 CLR 79.

73 Ibid 95 (Wilson J).

74 Ibid 102.

75 Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 August 1899, 973.

76 Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 August 1899, 1033.

Second and more pragmatically, Forrest may have been unwilling to renew old debates. Not only the amending provisions but also the provisions from the 1889 Act would have been the subject of parliamentary comment and review. There is considerable risk in such an approach.

> It obscures, and distracts the attention of the legislature from, the immediate point or points in issue. It throws the whole law into the crucible, exposes to amendment, not merely the particular provisions which the introducer of the Bill desires to alter, but all other provisions of the law which appear to be in any way open to criticism, and consequently multiplies the points of attack and the obstacles to progress in Committee.[77]

Finally, it has been suggested that Forrest's decision to split the Western Australia's Constitution into two separate Acts was 'a deliberate political strategy intended to circumvent the manner and form provisions located within section 73(1)' of the *Constitution Act 1889*.[78] For example:

> It is not to be supposed that the Western Australian propounders of this Bill in 1889 and those concerned with the introduction of the legislation in the Imperial Parliament were unaware of the practice which had been followed in other Australian colonies, at least since 1855, of amending the various provisions in their *Constitution Act* by repealing the relevant provision and changing the constitution of either House of Parliament in a separate Act called a *Constitution Act Amendment Act* which the legislatures had freely amended thereafter without special majority.[79]

The effect of s 73 as enacted in 1889 was not intended to be as stringent as the s 73(2) manner and form provision added in 1978 and could easily be avoided by enacting a separate Act. Indeed, it was suggested that s 73 'could not have been intended to be a great constitutional safeguard'.[80]

Only Western Australia and Queensland constitutions are not consolidated into one statute.[81] Queensland consolidated several constitutional provisions in the *Constitution of Queensland 2001* (Qld) which 'declares consolidates and modernises the Constitution of Queensland'.[82] However, that Act did not include various entrenched constitutional provisions because additional procedures,

77 Ilbert, above n 15, 256.

78 N Miragliotta, 'Western Australia: A Tale of Two Constitutional Acts' (2003) 31 *University of Western Australia Law Review* 154, 157-8.

79 *Western Australia v Wilsmore* (1982) 149 CLR 79, 91 (Aickin J).

80 Ibid 85 (Gibbs CJ).

81 Although the 'constitution' of the State extends well beyond the terms of the *Constitution Act 1889* and the *Constitution Acts Amendment Act 1899*: 'the Constitution of a colony...may be looked for wherever any provision is made for the Constitution of any of its great organs of legislation, judicature, or executive power': *McCawley v The King* (1918) 26 CLR 9, 52 (Isaacs and Rich JJ).

82 Section 3.

including approval by the majority of Queensland electors at a referendum, might have been required. Provisions that were not consolidated are attached at the end of the 2001 Act so that Queensland's constitution comprises one document, albeit comprising four Acts.

The 1990 centenary of responsible government in Western Australia engendered discussions about amalgamating the *Constitution Act 1889* and the *Constitution Acts Amendment Act 1899* (WA).[83] A 1991 Joint Select Committee of the Legislative Assembly and the Legislative Council on the Constitution examined this issue and recommended a model Bill for constitutional consolidation.[84] In 1996 the WA Commission on Government recommended:

> Upon the amendment of the *Constitution Act 1889* in accordance with our recommendations, the remaining provisions of the *Constitution Acts Amendment Act 1899* should be consolidated with the *Constitution Act 1889* or repealed.[85]

The State Government's official response to the 1996 report[86] supported in principle the consolidation of the constitutional laws of Western Australia into one Act. However, no legislation was introduced, perhaps because of s 73(2)'s manner and form requirements. In 1997 John Cowdell MLC introduced and second read the *Constitution Act Amendment Bill* which mirrored the draft consolidated Constitution in the 1991 report.[87] On 13 November 1997, the Bill was discharged from the notice paper and referred to the Standing Committee on Legislation.[88] In 1998 the State government organised public constitutional forums to cover three themes including the State Constitution and a consolidated WA Constitution was included in the forums' information package.[89]

Of course, consolidating the 1889 and 1899 Acts might from several perspectives - interpretative and substantive - be attractive. However, the drafting process would be substantial. Further, any changes of significance would be required to comply with s 73(2) of the *Constitution Act 1889*. Even a minor issue such as the renumbering of a section might, on the most cautious legal view, require a s 73(2)(e) referendum. Even if it were practicable to amalgamate these two Acts, the loss of flexibility of amendment resulting from the effect of s 73 on an

83 Johnson and Hotop, above n 5, 437-9.

84 *Joint Select Committee of the (Western Australian) Legislative Assembly and the Legislative Council on the Constitution*, (1991), Final Report, Vol. 1 and Vol. 2. The Constitutional Centre of Western Australia includes an unofficial consolidation on its website: <www.ccentre.wa.gov.au/ResearchAndSeminarPapers/WesternAustralianConstitution>.

85 Western Australia, *Commission on Government*, Report No 5 (Government of Western Australia, 1996), Recommendation 262(2).

86 Western Australia, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 7642 (Mr Court).

87 Western Australia, *Parliamentary Debates*, Legislative Council, 15 October 1997, 6791.

88 Western Australia, *Parliamentary Debates*, Legislative Council, 7840.

89 Western Australia, *Western Australia's Constitution Acts: Western Australian Constitutional Forums and People's Convention* (State of Western Australia, 1998).

amalgamated Act is a significant deterrent. For example, the requirement for absolute majorities in relation to any amendment does not currently apply to the *Constitution Acts Amendment Act 1899* (WA). If the Acts were amalgamated, provisions in the 1899 Act not requiring amendment by absolute majority might, in an amalgamated Constitution, require absolute majorities and, perhaps, s 73(2) referendums.

INTERRELATIONSHIP: CONSTITUTIONAL AND ELECTORAL LEGISLATION

Electoral laws are an integral part of WA's constitutional law and changes in laws providing for the constitution of the legislature almost inevitably give rise to the need to change Western Australia's electoral laws.

In 1850 s 9 of the *Australian Colonies Government Act* (UK)[90] provided that on the petition of not less than one-third of the householders in Western Australia it would be lawful to establish a Legislative Council. One third would be appointed by the Crown and other members would be elected. The first elections in Western Australia were held in 1867 when qualified colonists voted for persons to be subsequently nominated as members of the Legislative Council. These were unofficial elections and not subject to electoral laws.[91]

In 1870 a Local Ordinance[92] provided for the establishment of an 18 member Legislative Council, 12 members to be elected on a restrictive property franchise, the division of the colony into electoral districts and technical details of election of members. It was the first legislation in the colony that set out who was entitled to vote and how the 1870 elections were to be conducted. Election petition practices under the Ordinance were tightened in 1875 by 'An Act to amend the Law relating to Election Petitions, and to provide more effectually for the prevention of Corrupt Practices at the Election of Members of the Legislative Council'.[93] The *Ballot Act 1887* (WA) further modernised election procedures.

By April 1889 colonists hoped that the Legislative Council's enactment of the Constitution Bill was imminent. Consequently, the Attorney General moved the second reading of an Electoral Bill 1889 (WA) with a view to having it referred to a select committee. The Bill consisted of only 8 clauses and was 'the merest skeleton'.[94] The Legislative Council refused to refer the Bill to a select committee and a Commission consisting of the Attorney General, Septimus Burt, Stephen Parker, Sir James Lee Steere and Robert Fairbairn, the Resident Magistrate of Fremantle was appointed by the Governor to 'inquire into the state of the electoral

90 13&14 Vict c 59.

91 H Phillips, *Electoral Law in the State of Western Australia; an Overview* (Western Australian Electoral Commission, 2008) 2; MacPhail, above n 28, 82.

92 33 Vic No 13 (WA).

93 39 Vic No 10 (WA).

94 Western Australia, *Parliamentary Debates*, Legislative Council, 3 April 1889, 235 (Mr Parker).

law, and, if possible to amend and consolidate that law'.[95] The Commission's focus was to strive 'to carry out the spirit of the Constitution Bill'.[96] Following this inquiry, a more complete Bill was introduced in July 1889, referred to a select committee, passed in August 1889 and reserved for Royal Assent.

The *Electoral Act 1889* (WA) ('An Act to consolidate and amend the Law relating to Elections to the Legislature'[97]) consolidated various electoral laws relating to electoral procedures, the rolls and electoral malpractice but did not deal with matters such as the franchise, qualifications or boundaries. The latter were matters that were dealt with in the Constitution Bill that was before the Legislative Council. Governor Broome referred to the reserved Electoral Bill as a measure he believed would 'prove, in years to come, one of the strongest and best safeguards of the Constitution'.[98] However, by 1892, there were claims that the Act included 'miraculous blunders in drafting' and that the lodger clause was 'a disgrace to the drafting capabilities of the politicians of Western Australia'.[99]

The *Constitution Act 1889* retained the property franchise for electors and members. It was slightly less restrictive than the 1870 law. The Constitution also provided for the division of Western Australia into electoral districts. Lord Knutsford had removed proposed legislative constraints on amendments to the electoral provisions of the draft Constitution and therefore those provisions could be altered by simple majority.[100] The electoral districts provisions would later be moved to the *Constitution Acts Amendment Act 1899* (WA), subsequently to the *Redistribution of Seats Act 1904* (WA), the *Electoral Districts Act 1922* (WA), the *Electoral Distribution Act 1947* (WA) and now the *Electoral Act 1907* (WA). From 1903, a manner and form requirement for an absolute majority for amendments was included in each of these electoral Acts.

On 21 October 1890 the *Constitution Act 1889* was formally proclaimed and the old Legislative Council ceased to exist. The next day, writs were issued for elections to choose 30 members of the Legislative Assembly. Elections occurred between 27 November and 12 December 1890.[101] The Governor could then decide who to commission as the first Premier and, with the advice of the Executive Council, nominate 15 members to constitute the new Legislative Council.
The *Constitution Act 1889* did not, and still does not, provide that all Ministers of the Crown must be members of Parliament.[102] Legally, the Governor could have

95 Western Australia, *Parliamentary Debates*, Legislative Council, 29 July 1889, 45 (Mr Warton).
96 Ibid.
97 53 Vic No 23.
98 Western Australia, *Parliamentary Debates*, Legislative Council, 13 August 1889, 129.
99 Western Australia, *Parliamentary Debates*, Legislative Council, 3 November 1892, 5 (Mr Hackett).
100 Lord Knutsford to Governor Broome, 31 August 1888, *Correspondence*, above n 7, 57.
101 Black notes that polling did not commence until early December but from 27 November onwards a number of members were declared to have been returned unopposed, D Black, 'At Last She Moves - the Advent of Responsible Government in Western Australia, 1890' in Black, above n 10, 18.
102 One Minister must be a member of the Legislative Council; *Constitution Act 1889* s 6, now

appointed Ministers of the Crown before the first Legislative Assembly election but he decided not to do so.

The five members of the first Ministry, each of whom had been a member of the former Legislative Council, were sworn in on 29 December 1890. The four Ministers who were Legislative Assembly members were required to re-contest their parliamentary seats at by-elections.[103] All four Ministers were re-elected and, on 20 January 1891, Parliament reassembled for a formal opening by the Governor.

By 1893 the State's population exceeded 60 000 and, as the *Constitution Act 1889* required, an Act was passed abolishing the nominee Legislative Council and providing for an elective Council. The *Constitution Act 1889* established the general framework and the *Constitution Amendment Act 1893* (WA) provided greater detail as to how the elective Legislative Council was to be constituted. The 1893 Act dealt with the qualifications of Council and Assembly members and electors. It repealed 14 sections of the *Constitution Act 1889* and also so much of other sections and schedules as affected the members' qualifications and the electoral districts boundaries.

The *Electoral Act 1893* (WA) ('An Act to amend the *Electoral Act 1889*') was drafted hurriedly towards the end of 1893 to give effect to some of the changes in the *Constitution Amendment Act 1893* (WA). The electoral amendments were based on Queensland's *Elections Act 1892* (Qld) drafted by Sir Samuel Griffith 'one of the ablest Parliamentary draftsmen in Australia'[104]. It was decided not to introduce a completely new Electoral Act because 'a great many of the provisions of our own existing [Electoral] Act were very good, and that it was not necessary, at the present time at any rate, to alter them'.[105] The Attorney General, Mr Septimus Burt, had drafted several important Acts in 1893,[106] including the *Constitution Amendment Act 1893* (WA), but was absent from Western Australia when the 1893 electoral amendments were drafted, as he quickly indicated when pejoratively referred to as 'the father of that famous measure'.[107] The fact that Parliament had to be reconvened on 20 December 1893 for a 2 day sitting to pass the *Electoral Rolls Act 1893* (WA) correcting errors in the *Electoral Act 1893* (WA) suggests that greater skill and attention should have been applied to the drafting of the latter Act.

Constitution Acts Amendment Act 1899 s 43(3).

103 *Constitution Act 1889* s 29, repealed 63 Vic No 19 s 2.

104 Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 October 1892, 1034 (Premier, Sir John Forrest).

105 Ibid.

106 A member of the Assembly alleged (Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 1893, 388) that the reason the Homesteads Bill, the Constitution Act Amendment Bill and the Municipalities Bill were not prepared earlier was because the Attorney General 'is so occupied with his private business at the Supreme Court that he has not time to prepare the Bills'. In the Attorney General's defence another member responded that 'no man should sacrifice his own advantage merely for the sake of drafting Bills' (ibid, 396 (Mr Simpson)).

107 Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 September 1895, 1114.

In any event, two years later, the *Electoral Act 1895* (WA) ('An Act to consolidate and amend the Law relating to Parliamentary Elections') was enacted. Again, this Act was copied from the *Elections Act 1892* (Qld) and provided qualified electors with a faster method for getting on to the Electoral Roll. Subsequently, in tandem with the *Constitution Acts Amendment Act 1899* (WA), this 1895 Act was repealed and the *Electoral Act 1899* (WA) enacted. Sir John Forrest acknowledged[108] that the 1895 Act had been 'a fruitful source of complaint' although its Queensland equivalent did not seem to have caused problems. He decided therefore to introduce the *Electoral Bill 1899* 'adapted from and chiefly based upon the existing law of South Australia'.[109] The 1899 Act also reflected the eligibility changes arising from the *Constitution Acts Amendment Act 1899* (WA).

Western Australia's basic constitutional documents were further separated in 1907 when parts of the *Constitution Acts Amendment Act 1899* (WA) relating to electoral matters were removed into the *Electoral Act 1907* (WA). The *Constitution Act 1889* provisions that dealt with qualifications of Council and Assembly members and electors were initially dealt with in the 1893 amendments and subsequently in the *Constitution Acts Amendment Act 1899* (WA). In 1907 sections 26 to 30 of the *Constitution Acts Amendment Act 1899* (WA) relating to the qualifications of Legislative Assembly electors were repealed and replaced by provisions in the *Electoral Act 1907* (WA). The qualifications of Legislative Council electors remained in the *Constitution Acts Amendment Act 1899* (WA) until 1963 when the provisions were replaced by provisions in the *Electoral Act 1907* (WA). In 2006 the remaining qualification provisions were included in the *Electoral Act 1907* (WA).[110]

CONCLUSION

The *Constitution Act 1889* is the product of many drafters: drafters of earlier constitutions, drafters in Western Australia and drafters in the United Kingdom. It includes traditional colonial provisions, provisions to meet local concerns and provisions that were of importance to the United Kingdom government. The three principal constitutional documents - the *Constitution Act 1889*, *Constitution Acts Amendment Act 1899* and *Electoral Act 1907* - are now a uniquely Western Australian set of documents. They evolve continuously[111] and, despite constraints of manner and form provisions, no doubt will continue to be amended to reflect the changing needs of the State.

108 Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 August 1899, 984.

109 Ibid.

110 For overview of WA electoral laws generally, see Phillips, above n 91.

111 See, for example, *Electoral and Constitution Amendment Act 2011* (WA) limiting the Governor's powers to issue writs for Legislative Assembly elections.