Launching Address

Re-Writing the Constitution

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When, in the last decade of the nineteenth century, representatives of the Australian colonies, among the most notable of whom was Sir Samuel Griffith, met for the purpose of considering a scheme for a Federal Constitution, they were actuated by what appeared to them to be practical needs and inspired by an ideal.

The principal needs which they saw were to provide a common framework for defence and to establish what would now be called a common market for the purposes of trade.

The ideal was that the Australian continent should be occupied by only one nation.

When, today, it is suggested that Australia should have a new Constitution to mark the commencement of the new century, it is difficult to discern any practical need or any ideal which would provide a sufficient motive for entirely abandoning a Constitution which has proved in practice to be extremely flexible, and for re- moulding our constitutional principles in a way not yet made clear.

The argument that the Constitution was defective because it was drawn in horse and buggy days was used unsuccessfully by Dr Evatt more than forty years ago, and the fact that the Constitution is approaching its centenary at the same time as the twentieth century is drawing near its close provides in itself no reason why the Constitution should be rewritten.

The Constitution of the United States, on which ours was modelled, was framed in 1787 and in that country no politician would dare to suggest that its Constitution should be consigned to the scrap heap.

Of course, no legal instrument is likely to be perfect and it is possible to suggest changes that might beneficially be made to our Constitution, although it is by no means easy to make proposals for substantial change which would meet with general agreement.

However, when it is suggested that we should adopt a new Constitution, that implies that it is thought that the Constitution needs not mere amendment, but radical change. It may therefore be instructive to examine what are the essential features of our Constitution, since it seems natural to assume that the protagonists of a new Constitution wish to do away with, or at least to modify, some of those features.

The essential characteristics of our Constitution seem to me to be these.

There is a federal union under the Crown, that is, federalism is of the essence of the Constitution, and it is intended that Australia should be a Constitutional Monarchy.

The Parliament is comprised of a bicameral legislature, democratically elected. It is implicit that there should be a system of responsible government - the ministry should be members of, and responsible to, the legislature, and there is no rigid separation of legislative and executive powers.

The independence of the judiciary is intended to be secured. There is no general bill of rights.

The Commonwealth created with these attributes is intended, as the Constitution Act declares, to be "indissoluble"; and the Constitution itself is made difficult to amend.

It is not difficult to guess which of these features will be sought to be altered if a new Constitution is to be enacted;
indeed, in some instances guesswork is unnecessary, for some of the eminent persons who say that we need a new Constitution have made their wishes clear.
Let me mention first one question that will be among the most contentious of the proposals for change, and in my opinion the most potentially dangerous, threatening as it does the very basis of the ideal of one nation for one continent. That is the proposal that the Constitution should provide for a treaty, or some other form of reconciliation, with the Aboriginal people and the people of the Torres Strait Islands, and should recognise them as the indigenous peoples of Australia (which of course they are) and should secure for them special constitutional rights.
We may admit that in the past the Aboriginal people have been the victims of crimes and blunders and that the condition of many of them (but by no means all) is today lamentable. We should certainly recognise that the situation of many of the Aboriginal people means that they have special needs which our society should meet.
It does not follow that a generation which was in no way responsible for the crimes or the blunders of the past should be so racked with guilt that we should imperil our sovereignty and place the very existence of our nation at risk.
We cannot ignore the fact that already the argument is put forward that the Aboriginal people are a sovereign people who should receive international recognition as such. It has been frankly suggested that it is possible that in the future some areas of Australia, such as Arnhem Land, the Central Desert or the Torres Strait Islands, may become separate nations.
Whether or not it is safe for Canada to create a separate nation in its remote north, it must be obvious that the security of Australia would be threatened if any of those parts of Australia, which are nearest to neighbouring countries, or at the very heart of the continent, acquired separate nationhood.
As I shall mention briefly later, constitutional provisions which purport to create rights in broad terms can be interpreted to give a result consistent with the preconceptions of the interpreter, and there can be no doubt that those who seek recognition of the sovereignty or independence of the Aboriginal people would find support for their arguments in constitutional provisions of the kind proposed.
There is at present ample legislative power to make proper provision for the amelioration of the lot of the Aboriginal people, and neither justice nor humanity requires that the existence of the Australian nation should be endangered by including in the Constitution provisions that recognise that the Aboriginal people have a status different from that of other Australian citizens and that they have special rights based not on individual needs but on race.
Another constitutional change, of quite a different kind, is clearly intended by many of the advocates for a new Constitution, that is, that Australia should become a republic. There are some who regard this change as inevitable and under-rate its importance.
Putting aside the question of loyalty to the Queen, it is not true to say that all that would be involved would be the substitution of a President for the Governor-General.
One question that would arise is whether a President would still be able to exercise the reserve powers of the Crown and if so, whether he or she, being politically appointed, would do so free from political influence or bias.
And if the President retained those powers in relation to the Commonwealth Parliament, who would exercise them in relation to the States?
The existence of the reserve powers has been anathema to some since Sir John Kerr exercised them in 1975, but they remain necessary in any system of responsible government if the ultimate authority of Parliament over the executive is to be maintained.

It should not be forgotten that during the last five years the Governors of two States (Tasmania and Queensland) have had occasion to exercise those powers, and have done so in a way which everyone recognised was completely impartial.

If the powers were abolished in relation to the States, responsible government would be diminished; if a President could exercise them in relation to the States, that would further weaken federalism in Australia.

The manner in which powers were divided between the Commonwealth and States would be critical in any new Constitution. At the outset of the Convention held in 1891, Sir Henry Parkes indicated the approach to federalism which was intended to be taken in the Constitution. He said:

"I think it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as is absolutely necessary in view of the great end to be accomplished, which, in point of fact, will not be material as diminishing the powers and privileges and rights of the existing colonies."

Constitutional developments, commencing in the 1920's, have so expanded Commonwealth power that its exercise has crippled the powers, invaded the rights and diminished the authority of the States.

If there is to be constitutional change, a significant issue will be whether the power of the Commonwealth is to be further expanded or is to be confined to areas that really do require action by the central government.

My view of the appropriate division of power in a federal system can be summed up in one sentence: nothing should be done by the Commonwealth that could be done equally well by the individual States themselves.

That, I think, was the view held by the majority of the founding fathers of our Constitution and it is a principle for which the European Community is currently aiming to gain acceptance; with the bureaucratic genius for meaningless jargon they call it the principle of subsidiarity. It is not a view widely held in Canberra.

Already, in Australia today there is no ascertainable line of division between the powers of the Commonwealth and those of the States - potentially the Commonwealth can invade any field of governmental activity, and has invaded many, with a cumbrous and expensive duplication of bureaucracies.

It is almost certain that the new Constitution which those who initiated the movement for change would like to see in place would make it easier, rather than more difficult, for the Commonwealth to diminish the authority of the States. Who can doubt, for instance, that it will be said that the Commonwealth should have power with respect to the environment and the economy? A new Constitution may still be a federal one, but if the reformers have their way it may provide for federalism of a kind in which the powers of the States are even more attenuated than they are at present.

It has been made clear by those who wish to rewrite the Constitution that they would strongly support another change -the inclusion of a guarantee of basic rights. Bills of rights are in fashion at the moment.

The Australian Constitution does give constitutional protection to the democratic institutions of the Commonwealth, but otherwise contains only a rudimentary guarantee of rights. Nevertheless, although the legislative and administrative acts of the Commonwealth and the States would not always pass the tests that would be applied under a bill of rights, the people of Australia enjoy as much freedom as exists in any country whose constitution contains an elaborate guarantee of rights.

At first sight it might appear that a bill of rights could do nothing but good, securing liberty and justice. A little thought will show that it would have disadvantages as well as advantages.
Perhaps the greatest disadvantage is that no human mind can foresee the effect which a court may ultimately give to general words intended to guarantee a right. Who, in 1901, could have predicted the course of interpretation of section 92?
The result may be that beneficial legislation may, quite unpredictably, be struck down by the courts and ordinary commercial or personal activities, as well as governmental policies may be frustrated. The history of the Fifth and Fourteenth Amendments to the United States Constitution shows that very clearly.
Those amendments, which provide that no one shall be deprived of life, liberty or property without due process of law, have been given an effect which varied in accordance with the views on politics and society of the judges at the time; in 1857 they meant that the Congress could not limit the expansion of slavery, in 1923 they meant that laws guaranteeing minimum wages for women and children were invalid, and today they enable the Supreme Court to decree at what stage of pregnancy, if at all, a woman may have an abortion.
Since, under a bill of rights the courts are often required to decide questions of a political nature they in consequence tend to become politicised, as again United States experience shows.
The enforcement of a bill of rights often means that criminal proceedings fail for purely technical reasons: witness the release of Trimbole by the Irish courts.
Judges, in giving effect to a bill of rights, are sometimes required to engage in detailed regulation of a bureaucratic kind. I once met a federal judge in California who did nothing but hear claims from the inmates of San Quentin Prison, which is a State Prison, that the food was so unpalatable, the beds so uncomfortable and the bath water so tepid that imprisonment there contravened the constitutional ban on cruel and unusual punishments.
Since every right entails a corresponding obligation, a bill of rights may obviously place additional burdens on the community or on some sections of it. If there were to be a bill of rights there would be conflicting opinions as to what are the basic rights that should be guaranteed. I would expect, for example, that there would be a move to delete the word "property" from the familiar guarantee of life, liberty and property. In truth, an actual division of power, such as exists under a federal system, affords a more effective protection of human rights than mere words can do.
If the Constitution were to be rewritten, it might be expected that some of the other essential characteristics which it now possesses and to which I have already referred would be preserved by general agreement. No one would be likely to suggest that the Parliament should not be democratically elected or that the judiciary should not be independent. The practical difficulty of achieving a unicameral legislature would be likely to deter those who would wish to abolish the Senate from trying to do so, although an attempt might be made to limit the Senate's powers.
On the other hand, it is probable that an attempt would be made to render the Constitution easier to amend, in the hope that gains that could not be won today might be won tomorrow.
It might be suggested that the principles of responsible government should be modified, to enable the appointment of Ministers who were not Members of Parliament.
Opinions might understandably differ as to the value of amendments of those kinds.
There are some suggestions for improvements to the Constitution which might be generally supported. There might be no dissent from the suggestion that the independence of the judges of the States, as well as of those of the Commonwealth, should be protected, and that the rights to trial by jury for serious crimes should be clearly guaranteed.
On occasion in the past, amendments that have been thought to have popular appeal have been proposed as the sprat to catch the mackerel of accompanying amendments of a more

controversial kind, but the tactic has hitherto proved unsuccessful. The possibility of making marginal improvements does not justify rewriting the whole Constitution.
However, on issues of fundamental importance it is inevitable that there will be irreconcilable conflict. Take for example, the crucial issue of federalism.
On the one side there will undoubtedly be an attempt to expand Commonwealth power at the expense of the States. On the other hand there are those who, like myself, would say, with due acknowledgment to the words of a celebrated resolution passed in the eighteenth century by the House of Commons, that the power of the Commonwealth Government has increased, is increasing and ought to be diminished.
The amendments that I would favour would be intended to make federalism work as was originally intended. To achieve that result, it would first be necessary to redefine some of the legislative powers of the Commonwealth, principally with a view to ensuring that they are specific in nature, and cannot be given so wide an effect that they spill over into almost every field of activity in which the States engage.
This does not mean that one would necessarily oppose the conferral of further powers on the Commonwealth, if it appeared that there were particular matters with which the States were not competent to deal. What is meant is that the powers of the Commonwealth should be defined with such precision that they cannot be given so all-embracing a scope that they distort the balance between the Commonwealth and the States that was originally intended by the framers of the Constitution.
Particular attention would need to be paid to the external affairs power, the corporations power and the power with regard to overseas and inter-State trade.
Everyone agrees that the power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any State is quite unsatisfactory, but there will be widely differing views as to what should replace it.
To improve the working of the federal system it would also be necessary to amend the constitutional provisions concerned with the financial arrangements between the Commonwealth and the States.
The Commonwealth now dominates the States in financial matters, raising much larger revenues than it needs to for its own purposes and distributing the balance to the States on terms that control their activities. This fiscal imbalance not only impairs the ability of the States to govern their own affairs; it also often reduces their sense of financial responsibility.
Part of the problem is created by the fact that the States are forbidden by the Constitution to impose duties of excise - a term which has been given a wide meaning - and by the provision of the Constitution, originally intended to be of an interim nature, that enables the Parliament to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.
However, the question is a complex one. Many of the difficulties could be resolved by agreement between the Commonwealth and the States, but having regard to the strong centralist leaning of most Commonwealth Governments, one should not be too optimistic that any completely satisfactory agreement will be reached.
Although the Constitution would benefit from amendment in some respects, it is not an outdated instrument that requires radical change, in spite of the vast changes in society that have taken place since 1901.
It is difficult to escape the belief that the move to rewrite the Constitution is quite adventitious, and unlikely to be productive.
However, our response cannot be one of mere inertia. It has been proposed that for the rest of the century there should be a process of public education and debate in Australia for the purpose of

reviewing the Constitution. The Samuel Griffith Society must ensure that education does not degenerate into propaganda, and that the debate is not one-sided.

The Society is launched in the hope that it will take an active part in the discussion of these questions, so that no change is made to the Constitution unless it is clearly seen to be for the good of the people of Australia.