Chapter Two
The South Australian Constitutional Framework – Good, Bad or What?

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The way we are governed frequently evokes passions, and even revolution and war. We see examples all around the world – Afghanistan and Iraq moving towards democratic systems; in Australia, fierce debate (but not war) over a republic versus a constitutional monarchy and, currently, the office of Governor-General; and, in South Australia, the debate is about the relative powers and the roles of the Legislative Council and the House of Assembly, the number of Ministers in the Legislative Council, the number of MPs (but, perhaps, not with the same intensity as that of the republic debate). Dramatic constitutional change comes in some countries as a result of revolution or war; in other countries and states with more settled and democratic systems, it evolves. Even in the non-government sector, the issues of governance and accountability and responsibility provoke significant debate.

The underlying issue is the exercise of power – whether it be over the lives of citizens, or in relation to property or the exercise of influence.

In Australia at all levels we are fortunate that change evolves. We have a long tradition of compliance with constitutional law and upholding of the rule of law. Our courts are free from political and corrupt influences. We have a long history of freedom of expression and, while we may question the responsibility of reporting, a press free from significant constraints. We have a focus on individual rights, even though there is constant debate about where those rights start and finish and to where the power of the State extends. Change to our governmental institutions evolves.

Much of the debate on our Constitutions focuses on whether or not they meet our needs in the 21st Century. The periodical calls for change sometimes appear to suit the views of a few pushing their own barrows. Regardless of the reality, those who promote proposals for change mostly describe them as "reforms", thereby seeking to suggest that the present situation requires change, and to create an aura of desirability around the proposals for change.

In South Australia, our system has evolved over the nearly 170 years since the Colony of South Australia was established. It has travelled from the establishment of the Colony in the 1830s, to responsible government in 1857, to Statehood as part of the Federation of Australia; and, along the way to the present, votes for women, full adult franchise for both Houses, and voluntary to compulsory voting have been addressed. The State Constitution identifies the major institutions which comprise our structure, but much of our constitutional practice relies upon conventions and practice.

Periodically, there are constitutional conventions and other *fora* which consider the current structures. The last State Convention was held over 20 years ago. At the State level the South Australian government has committed to another Constitutional Convention to discuss certain issues. That evolved from negotiations between the Labor Party and the now Speaker, Mr Lewis, as one of the conditions for support by Mr Lewis for the ALP, allowing it to form a minority government after the February, 2002 election.

One of the steps leading to the Convention was the formation of a Panel of Experts to develop a discussion paper on the five questions identified by a Steering Committee as those to be considered at the Convention. The Panel had two months to prepare that paper. Its members felt that to embark upon a consideration of constitutional change, particularly fundamental change such as that relating to our bicameral system and the powers of the two Houses and their relationship, it was important to try to

explain what is the current system and how it operates before considering proposals for change. We felt that a good understanding of what *is* was critical to a proper and informed debate about proposed changes and their effect – what is the current system, how does it actually work (as opposed to the perception and misrepresentations), and what are its underpinning features? Each held views on particular topics, and the discussion paper provided a means to ensure that arguments for and against particular proposals could be properly put.

There is some debate about the membership of the proposed Convention and the method of selection, the preparedness of those who may be selected to attend, and about topics not on the agenda, but these are not to be the focus of my attention today.

The five questions are:

1. Should South Australia have a system of initiative and referendum (Citizen Initiated Referenda), and if so in what form and how should it operate? (This is the subject of a later session at this conference, and probably is the question upon which many will be able to focus because of its specificity, but it should be considered with the knowledge of how our system really works at present, rather than how it is perceived to work).
2. What is the optimum number of parliamentarians in each House of Parliament necessary for responsible government and representative democracy in the Westminster system operating in South Australia?
3. What should be the role and function of each of the Houses of Parliament?
4. What measures should be adopted to improve the accountability, transparency and functioning of government?

5.1 What should be the role of political parties in the Legislative Council and what should be the method of election to the Legislative Council?

5.2 What should be the electoral system (including the fairness test) and method of election to the House of Assembly?

Each of these questions opens up wide vistas for constitutional debate. In considering several, may I give some background, particularly for those not from South Australia.

In South Australia we are governed by a Parliament comprising two Houses – the House of Assembly, with 47 members each elected by the electors in separate electoral districts (single member constituencies), and a Legislative Council of 22 members, half elected at each general election by the whole State by the system of proportional representation. Each House has identical powers except as to money Bills, which cannot be introduced in the Legislative Council and may not be amended in the Council, although it may suggest amendments.

Presently, the Government comprises fourteen Ministers, twelve (including the Premier) in the House of Assembly and two in the Legislative Council. The previous Liberal government, in its second term, had ten Cabinet Ministers (seven in the House of Assembly and three in the Legislative Council) and five non-Cabinet Ministers (four in the House of Assembly and one in the Legislative Council).

The Government presently holds a minority of seats in the House of Assembly in its own right, and depends on the support of Independent members to form government. So did the last Liberal government (1997-2002). South Australia has a history of minority Governments, when the major parties have had to rely on Independents for support to form government.

In the Legislative Council no government has had a majority in the past thirty years. At present, there are 9 Liberal, 7 ALP, three Australian Democrats and three of other minor parties and Independents.

A critical part of our constitutional structure is the court system – a Supreme Court whose decisions are subject only to appeal to the High Court of Australia, and other courts, independent of government and political influence but subject to the rule of law. While from time to time there is

criticism of the courts and someone suggests control over them, particularly in relation to sentencing of criminal offenders, and also in relation to so-called "activism", the preoccupation is with the Parliament and not with the courts. The Constitutional Convention does not have on its list any proposed changes to the courts.

While some argue that the States are of less relevance today than they were, with more power exercised by Canberra over our lives than ever before, there is still considerable power vested in the States. Look at the power/authority which can be exercised by a State over its citizens and those that operate within the State. First, there is the criminal law – that mass of laws which deals with relations between individuals and between bodies formed by people – homicide, assaults of any nature, theft and dishonesty, for example. Then there is DNA testing of its citizens, and what data can be kept on citizens and under what circumstances; planning law, under which the State can tell you what and where you can build and demolish; mining and exploration law; occupational health and safety (the conditions in which you can work or carry on a business); environment laws; and so the list goes on. The State controls water supply and services and the health system, as well as providing numerous other services. So the powers and responsibilities are extensive.

There is a move to greater uniformity across Australia in a number of areas, although that should, in my view, be critically assessed to determine the merits of such a move – uniformity overcoming significant problems created by disuniformity can be acceptable, but uniformity for the sake of uniformity ought not to carry the day.

In some cases powers are ceded by the States to the Commonwealth with various degrees of preparedness to do so, ranging from a headlong rush by some States to do so regardless of consequences, through to a considerable reluctance to do so by others except, perhaps, with strict limitations (for example, in the case of the corporations law).

Notwithstanding these sorts of moves, the State continues to have wide-ranging power over its citizens; this means that, in my view, extreme caution should be exercised when looking to give a government more power, or when proposing what, in effect, are reductions in the safeguards providing some protection for citizens from the exercise unnecessarily of excessive power by government over them and their activities. That is why, in the current debate on our State's Constitution, it is important that citizens who don't have day to day contact with Ministers, governments, Parliaments and Members of Parliament, and who don't live and breathe governance issues, should have available to them detail about the way our Parliament/ government work and the origins of their current powers and practices. They can then better make a judgment about the desirability and appropriateness of change, and what the consequences of change may be.

How does one make a judgment on issues relating to governance, and where does one obtain information about the options and the effectiveness of institutions, and get behind the perceptions created by those who skim across the surface of the issues? For that matter, by what criteria does one determine "effectiveness"?

Most people have to rely on the media for information, although in relation to the forthcoming Constitutional Convention the series of meetings around the State, even though only about one thousand people in total attended, was a good try to generate interest. And the use of the website is an important modern day contribution to providing information. But even through the media we find journalists, editors and commentators pushing particular barrows without a balance of arguments being presented.

The discussion paper prepared by the Panel of Experts is directed towards providing a sound basis for understanding where we are constitutionally, identifying the arguments for not moving radically and those for significant change.

Questions 2 and 3 are inter-related, and focus on the number of MPs and what should be the roles and functions of each of the Houses of Parliament. They require an examination of what is responsible

government and representative democracy, a huge challenge. Question 4 relates to the accountability, transparency and functioning of government. In respect of this, there is significance for the Parliament.

In my view, the power and role of the Legislative Council is the most important and fundamental issue before the State Convention. In examining questions 2 and 3, one should start by posing two questions:

1. What is wrong with the current constitutional structure? Do we need change, particularly with respect to the power and role of the Legislative Council vis-a-vis the House of Assembly?
2. If change is proposed and it is of a radical nature, what are the consequences for the State and its citizens?

Time will not allow exploration of all the arguments for and against an upper House. My position is that, because the State's Constitution has evolved over a century and a half, it ought not to be changed radically but, where necessary, by fine tuning. That is coloured by my own experience in the Legislative Council in both government and Opposition. I'm not an advocate for intemperate and false descriptions of our institutions, such as "useless" when directed towards the Legislative Council or akin to "rotten boroughs". I am a strong supporter of the Legislative Council and the existing balance between the Legislative Council and the House of Assembly, and assert that reducing the powers of the Legislative Council and significantly changing its role has the potential to open Pandora's box and, by virtue of the reduction in oversight of one House, a government will be less accountable and subject to less scrutiny. Such a move will also allow the government of the day even greater power than it has now to affect the lives of citizens unchallenged.

There are arguments that the will of the people is expressed in their vote for the House of Assembly, and that because governments are formed and broken in the House of Assembly, a government ought to have the power to put its programme into effect and not be frustrated by the Legislative Council. That ignores the electoral basis of the Legislative Council, and the fact that our structure does not give absolute power to the government of the day or to only one House of Parliament. Odgers on *Australian Senate Practice* has a concise description of the reason for a bicameral system, as follows:

> "The requirement for the consent of two differently constituted assemblies improves the quality of laws. It also safeguards against misuse of the lawmaking power, and, in particular, against the control of any one body by a political faction not properly representative of the whole community".

The principle is sound, but one may have differing views when minorities seem to hold disproportionate power. In the end, though, like most things to do with the political process, there have to be compromises to get one's legislative programme into effect.

South Australia is one of five States with a Legislative Council, all with similar powers. I doubt that the exercise by Queensland majority governments of their powers in its Legislative Assembly could be regarded as an advertisement for a unicameral system. The Queensland Electoral and Administrative Review Commission (EARC) in 1992 observed, in relation to the absence of an upper House in Queensland, that it:

> "….has had a profound impact on the ability of the Queensland Parliament to carry out its functions under the Constitution and conventions which require it to act responsibly and review the activities of the executive arm of government".

So, what's wrong with a bicameral system? Frankly, nothing, in my view. It provides some protection and, where both Houses are elected by the people, reflects the will of the people even though that may spread over two elections, to some extent smoothing the peaks and troughs of electoral fortunes.

As frustrating as it may be for governments to have to get their legislation through an upper House

they do not control (and some even have that difficulty with their lower Houses, or must accommodate the views of others where a government is in a minority), governments in South Australia manage largely to get their legislative programmes enacted, albeit with some modifications, and there is constant scrutiny of government activities.

In South Australia, as I have said, no government has had a majority in the Legislative Council for at least the past thirty years. This has meant that successive governments of both political persuasions have had to develop means of working with the Legislative Council for the passage of legislation. It has also provided an opportunity for Opposition and minority parties to have an impact on the final form of the legislation. Sometimes that has been good, sometimes not, depending on one's perspective.

Notwithstanding criticism of the Legislative Council that it frustrates a government's programme, in recent times in South Australia, for example in the 1998-99 session, only one Bill went to a deadlock conference where an agreement could not be reached and it was laid aside. The record in the 1999-2000 session is similar.

Going back to 1976, while a number of Bills have been amended by the Legislative Council and the government of the day has agreed to amendments, and Bills have been passed, only 23 Bills were laid aside because agreement between the Legislative Council and the House of Assembly could not be reached. The sorts of Bills where agreements could not be reached covered generally those relating to industrial and other issues on which there were sharp policy differences between Liberal and Labor.

In the last session before the 2002 election, the period from 4 October, 2000 to the end of 2001, 151 Bills were considered in the Legislative Council (99 originating in the Legislative Council, 52 in the House of Assembly) and 102 were passed (62 originating in the Legislative Council, 40 in the House of Assembly). To some extent that was a reflection of the portfolios held by two of the Legislative Council Ministers – they were generally busy Ministers with a normally heavy legislative workload. But it facilitated the work of the Parliament. If all had been introduced in the House of Assembly and had to be considered there first, the House of Assembly would have been relatively idle while the Bills ran the gauntlet of the Legislative Council's consideration of them – engendering even more animosity, unfairly, towards the Council.

While there were frustrations experienced by the Liberal government and individual Ministers where there was delay and there were amendments, controversial legislation to sell ETSA, Ports and TAB did pass the Legislative Council, as did changes to the Native Title legislation (although considerably delayed), and significant changes to the criminal law. Patience and persistence were required by Ministers to succeed.

In 1991 parliamentary committees were overhauled. Now, the Statutory Authorities Review Committee comprises only Legislative Councillors, the Economics and Finance Committee comprises only House of Assembly members, and there are five joint standing committees with the House of Assembly, as well as joint and Legislative Council and House of Assembly Select Committees. Because the Government does not control the Legislative Council, a larger number of select committees are, generally, established in the Legislative Council than in the House of Assembly, and the government generally does not control those committees. Would there be such committees established if the Legislative Council were abolished? I suggest, no. For an incumbent government that would be a satisfactory outcome, but would that be a desirable outcome?

It has been proposed, apart from abolition, that the Legislative Council become a "real" house of review, whatever that may mean. It has been proposed, also, that the powers of the Legislative Council should be reduced to allow it only to delay legislation for varying periods – three months to twelve months – but not to reject or, for that matter, insist on its amendments. Of course, such proposals ultimately lead to emasculation, if not abolition. The power to delay, for example, means no effective sanction against a government, which can just ride out the opposition to a Bill by the Legislative Council

for the required time and then require it to pass.

The connotation of the Legislative Council being a house of review is being coupled with the suggestion of no Ministers in the Legislative Council and, as a consequence, no government Bills (and, presumably, no private members' Bills either) being introduced there. It is, of course, up to the government of the day as to how many, if any, Ministers of its allowable number it will have in the Legislative Council, but the reality is that a government still has to get its legislative programme through both Houses. Having no Ministers in the upper House will mean no one representing the government will have the authority or the responsibility to guide that legislation through that House, thus potentially compromising a government's programme. For years, in Tasmania there was only one government Minister in its Legislative Council, and that was found to be grossly inadequate to ensure the government business was handled appropriately.

From some in the business community has come the criticism that the Council frustrates the programme of the government of the day, more muted now than during the Liberal government's term in office. Without being patronising, however, my experience is that many in the business community do not understand the division of power and responsibility between Parliament and executive government, and their criticism should more properly be directed towards government than Parliament. In reality, much can be done by executive government without it ever having to go to Parliament.

However, where a government may clearly identify a legislative policy as a key platform at an election, the issue of a mandate is raised. That is a vexed issue, particularly where there is a differently but democratically elected upper House, that I doubt will ever be resolved. Ultimately, "obstruction" can only ever be resolved by negotiation and compromise and public pressure. I should say in passing – and referring back to some of the legislation introduced by Labor governments relating to, for example, industrial legislation – business was only too ready to exhort the Liberal Opposition to use all its endeavours in the Legislative Council to reject, or, at least, heavily amend the legislation. In any event, no government can claim to be perfect and should not expect all its legislation to be passed without amendment.

If there were to be change of a radical nature to water down the powers of the Legislative Council, I have already referred to several consequences. It would change the balance of power and it would tip the power in favour of a government, with fewer protections for the wider community from the potential for abuses of power by a ruling majority in the House of Assembly. It would make a government even less subject to scrutiny and less accountable.

I do not wish to make extensive comment on the question of numbers of MPs. Some relate this to an assertion that we are over-governed, but I don't see this as relevant to numbers but more to the regulatory policies of governments, frequently reflected in their legislative programmes. As for numbers, I think that it is nigh on impossible to define what is the optimum number of MPs in each House. Everyone will have a view depending on his/her own knowledge and experience. Suffice to say that in the knowledge of what the electors use MPs for, and the workload of those, in both Houses, who really do service their electors, there is a good argument for more rather than less. Less is likely to result in more staff to handle the workload and, therefore, I suggest, a weakening of access to Members, and less representation and less rather than more access to the Member. To some extent, it does also depend on the role of the Legislative Council – if it is to undertake even more committee work, it cannot do that with existing numbers if it also has to consider legislation properly. So there is an argument for more Legislative Councillors.

I want to make several observations on the legislative work of MPs – there is a view that the more days that one sits the more "effective" the legislature would be. And there is a view that sitting to pass Bills is a measure of effectiveness. Both are simplistic views which ignore the complexity of the parliamentary system of democracy that we have in South Australia.

Encouraging governments to legislate as a measure of effectiveness is an inducement to governments to intrude even more into our lives, work and businesses than they do at the moment. There is no magic in the number of Bills passed. Such work should depend upon the substantive policy commitments of the government rather than the perception of busyness it may wish to present. This focus on numbers of MPs also ignores the wider role of MPs in the community, most of whom work hard for their constituents and constituencies. They are, to some extent, social workers, lobbyists, facilitators, watchdogs, legislators and, in some cases, Ministers or shadow Ministers.

Parliament also requires members to be involved in committees which do constructive work away from the high profile issues. In addition, the probing which occurs through question time and debate is a critical part of ensuring political accountability. So a balance is required – reasonable time in Parliament to fulfil these responsibilities, and out of it to ensure time for committees, research and electorate work and, if there is time, for family and personal responsibilities and activities.

As for question 4, I wish to make only passing comment. It relates to accountability, transparency and functioning of government. Parliament cannot ever be the Executive (as some seem to want it to be) as well as the legislator and watchdog, so there will always have to be compromises, leaving it ultimately to the political processes to resolve issues of real conflict and to ensure political accountability. It raises important questions about what we mean when we talk about accountability. Time does not allow me to develop comments on this important area.

In the time available it has not been possible to cover all arguments for or against each of the propositions to be considered at the Convention. Because we have had, generally, a stable system, I doubt that there will be large numbers of people who want to be involved – they are generally happy with the *status quo*. If that presumption is correct, then radical change is not on the public's agenda. But therein lies a danger, too. Too little interest may leave our Constitution in the hands of too few.