

Defining Executive Power: Constitutional Reform for Grown-Ups*

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Australia is well endowed with constitutions. It has seven, one for the Commonwealth and each of the six states, and nine if the documents establishing self-government for the Australian Capital Territory and the Northern Territory are included. This gives plenty of scope for constitutional reform, that is, changing the most important rules which specify how a political community is governed. In the event, public debate over constitutional reform in Australia has been sporadic and concentrated on a narrow range of issues. Perhaps this is as it should be. Constitutions should reflect broad public acceptance of the basic rules governing the operation of government, and if the system is running smoothly, there is little reason for change. Only when events occur that demonstrate that there are shortcomings in the structure of government should constitutional reform be considered.

From this perspective, it is instructive to look at what constitutional issues have been the subject of public debate. Since 1901, the most persistent candidate for reform of the Commonwealth constitution has been the allocation of legislative powers to the central government. This was the dominant issue until the 1970s when several factors combined to change the focus of constitutional reform. The indulgent attitude of the High Court towards the extension of Commonwealth influence in the governmental process reduced the pressure for constitutional change to expand Commonwealth powers. At the same time, the growing influence of the Senate and its ability to limit government legislative programs, began to be a topic for constitutional debate. This was confirmed by the dismissal of the Whitlam government in 1975 which reinforced the views of governments on both sides of the partisan divide that the Commonwealth constitution needed to be changed to reduce the independence

* This paper was presented by Professor Sharman as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 22 November 1996. Professor Sharman is Head of the Department of Political Science at the University of Western Australia.

of the Senate and to remove other sources of potential embarrassment to the government of the day.

At this point it should be noted that reform does not necessarily mean improvement. One person's sensible reform may be another's dastardly scheme to undermine the structure of government. I am using the term reform in the neutral sense of change. Whether a change is desirable is a matter of opinion. For the record, and given the institution that is buying my lunch, I believe that all four attempts to limit the influence of the Senate in constitutional amendments proposed since 1974 were undesirable reforms which deserved to fail.

The events of 1975 triggered a period of introspection about our governmental system and raised questions which had broad implications for both Commonwealth and state constitutions. This was coupled with a more general disquiet about the scope of government and a concern with the constitutional protection of individual rights. By the end of the 1980s there had been two major sets of recommendations for change to the Commonwealth constitution; one set from the Constitutional Convention in 1985, and the other from the Constitutional Commission in 1988. In addition, decisions of the High Court relating to implied rights and the Mabo case have raised the issue of the role of the High Court itself in the constitutional system.

From all this activity, little has resulted in the shape of government proposals for specific constitutional change. It is true that four proposals to amend the Commonwealth constitution were put to the people in 1988, but these were intended as a fig leaf to hide the government's inaction on proposals for substantive change, and the amendments were resoundingly defeated by the voters. Whatever the merits of constitutional reform, Commonwealth governments have lost interest in the topic.

The apparent exception is the issue of Australia as a republic. I say apparent because the republican debate is as much about symbolism as substance. The excellent report by the Republican Advisory Committee raised questions about the function of the head of state, but the popular debate is about how the head of state should be chosen, not about the role of the office, and yet this is much the more important question.

The surge of interest in Commonwealth constitutional reform that was catalysed by the dismissal of the Whitlam government in 1975 has become dissipated. There is no focus for debate on constitutional issues in Canberra and the current Commonwealth government sees the republican issue as an embarrassment to be defused for fear that substantive change might be required.

So much for the Commonwealth, but what about the states? Until recently, almost nothing has been heard about state constitutions. The only major exception has been the occasional debate, vigorous at times, over the role and composition of state upper houses. These legislative councils have considerable power and, in the past, often represented only a narrow range of political interests. When these chambers persistently disagreed with government majorities in the lower house, there have been fierce disputes that have sometimes led to constitutional change.

Other than this, there has been little public debate about making substantial changes to state constitutions. Part of the explanation is that many people have never heard about state

constitutions. This is so even though they regulate the conduct of the governments that have by far the most to do with people's daily lives. Another reason is that, as state constitutions predate the Commonwealth constitution, they carry with them historical residues that make them complicated, untidy and difficult to reduce to a single comprehensive document. A further explanation is that the bulk of state constitutional provisions can be changed by the government of the day with no requirement for popular consent at a referendum, further reducing their public visibility. But the major reason is that, for the most part, the structure of state government has not been seen as needing any major overhaul.

That is, until now. During the 1980s and early 1990s, all states experienced major shortcomings in the conduct of government. For some it was corruption in the police force that called into question the integrity of the whole system of the administration of justice. For others it was incompetence and recklessness in the conduct of the state's finances that left the state with debts of billions of dollars. In the inquiries that followed, there was a persistent theme: there had been a lack of openness and accountability in the operation of government that had fostered lax administration and improper conduct by ministers and public servants. Quite apart from the detailed findings of the commissions of inquiry, there had been a structural failure in the system of government. Those parts of the governmental system that were supposed to ensure that governments were kept publicly accountable had proved ineffectual.

This is a very serious failing because the whole point of democratic constitutional government is to keep governments responsive to the wishes of citizens. This can only be done by making government open to detailed scrutiny by the public. Without openness in the conduct of government there can be no accountability, and without accountability, representative government becomes a sham.

A critical defect had been shown to exist in state constitutions. The eventual electoral defeat of governments whose administrations had been guilty of a lack of openness and accountability does not solve the problem. It is not simply a question of removing corrupt, reckless or incompetent people. The problem is how such people could do so much damage before they were removed from office. While a constitution may not be a guarantee against improper conduct, its most important role is to set out rules which minimise its likelihood, and limit the effects of such conduct should it occur. This is where constitutional reform is most needed, because our current constitutions, both state and federal, say very little about the proper exercise of executive power.

Queensland and Western Australia set up commissions of inquiry into the particular events that had led to public disquiet over the conduct of government in these states, the Fitzgerald Commission in Queensland and the WA Inc Royal Commission in Western Australia. In addition to their findings about corrupt, illegal and improper conduct by public officials, both commissions recommended that there should be wide-ranging reforms to the operation of government in these states. They also recommended that another body should be set up with a specific brief to make detailed recommendations for change across the whole public sector. These bodies were the Electoral and Administrative Review Commission in Queensland, and the Commission on Government in Western Australia.

These bodies were duly established and, after much research and wide public consultation, produced a welter of recommendations about parliamentary, electoral, financial and administrative matters in these states. Many, perhaps most, of the recommendations have

been adopted or are likely to be so. There is no question that the review process had led to major improvements in the efficiency, probity, openness and accountability of government. But the question remains: have these changes dealt with the core problem, the defect in these states' constitutional structures that relates to ensuring open and accountable government?

My answer to this question draws heavily on my experience as a Commissioner of the Western Australian Commission on Government, but I must stress that the views which follow are my own and are not necessarily those of the Commission which completed its work earlier this month. I believe that administrative changes are very important but they are no substitute for a solution to the key problem in our constitutional system which is the effective control of executive power. While some recommendations have been made to deal with this problem, there are a series of complications that make constitutional reform of the executive especially difficult.

These difficulties are threefold. First, there is the problem of defining what the executive is, because its definition is elusive and can refer to quite separate entities. Secondly, in our system it is difficult to find out how the executive is supposed to work, as our constitutional documents provide little guidance on this topic. Finally, it is not easy to work out what constitutional reforms to the executive are appropriate, and even more difficult to set them in train.

To deal with the first problem, when people talk about the executive they can be referring to three different things. At its broadest, the executive is almost synonymous with government itself. If we take out the legislature and judiciary, all that is left is the executive, and this comprises the vast bulk of government activities. In this sense, the executive is the whole administrative machinery of state.

The executive can also be used in a narrower sense to refer to the key decision-making components of government. In particular, it can be used to mean the political executive, the prime minister or premier and the ministry—those elected officials who make the most important decisions about government policy.

Finally, it can refer to the formal seat of executive power in our system, that is, the Crown and its representatives, the governor-general and state governors in whose name all key executive decisions and appointments are made.

It is the last two of these meanings that are particularly relevant to the question of constitutional reform, the political executive on one hand, and the formal organs of executive power on the other. The fact that these two meanings of the term executive refer to different entities leads us to the second broad problem with the executive, finding out how it is supposed to work.

During the public meetings in Perth and around Western Australia held by the Commission on Government, people were often surprised to learn that there was no one document that set out all the basic rules about how government should operate in the State. This surprise turned to amazement when they discovered that there was no mention of the role of the premier in the State's *Constitution Act* and only indirect mention of cabinet and ministers. There was no statement of the relationship that should exist between the governor and the premier, between the premier and other ministers, or between the ministry as a whole and Parliament. In other

words the *Constitution Act* gave no guidance about the critical components which are supposed to ensure accountability in our system of government. How can we know if the premier is acting properly if there is no constitutional specification of how the premier ought to act? How can we have accountable government if there is no statement of what offices are to be accountable and to whom?

This problem is not Western Australia's alone. It is a characteristic of all governments in the Australian federation, state and Commonwealth. The explanation for this odd situation is that we have inherited the British tradition of parliamentary government. In this tradition, the forms of monarchical autocracy have been retained, but modified by the practices of representative liberal democracy. If one looks at the constitutional documents of the states and the Commonwealth, executive power is conferred upon the governors and the governor-general. They are given the power to call and dissolve Parliament, and to appoint and dismiss ministers; their acquiescence must be obtained for the introduction of money bills into the Parliament and all legislation must have their consent before it becomes law. They issue commissions to judges and make all key appointments to public office. They have, in sum, not only ultimate control of the exercise of executive power but have a veto over the legislative process and sole discretion over appointments to the judiciary.

Many of these functions require the advice of the executive council, a formal advisory body whose role, composition and operation is as familiar to the average citizen as the nature of a medieval theological dispute or the far side of the moon.

All this arcane machinery of the formal executive operates in practice at the behest of the political executive, the premier and the ministry. These elected officials derive their political authority from having been elected at free elections to represent the citizens of their political community. In most circumstances, the formal organs of executive power act only on the advice of popularly elected officials. But there is no statement in our constitutional documents setting out the relationship that should exist between the formal executive and the political executive. Most of these critical relationships are governed by accepted practices often called conventions. It is no doubt fruitless to try to reduce every aspect of government to a series of written rules, but the relationships we are talking about are basic to the operation of government in a parliamentary democracy. They are vital to an understanding of how our system of government operates, and yet they are not spelled out in our constitutional documents.

This issue was of great concern to the Western Australian Commission on Government. In its final report, *Report No.5*, presented in August this year, the Commission pointed out that it had been asked to consider twenty-four specified matters under the broad heading of preventing corrupt, illegal and improper conduct in the public sector of Western Australia. The Commission argued that all of its many detailed recommendations for increasing openness and accountability in government required a constitutional framework that specified the key relationships between all the important agencies of government. This was patently lacking in the documents that currently comprise the Western Australian constitution.

To deal with this problem, the Commission recommended that sections be inserted into the Western Australian *Constitution Act* to deal with five critical sets of relationships. It should be noted that the aim of the Commission was not to draft the precise responsibilities of each office, but to recommend that the general role that each institution was expected to play should be stated in the State's constitution in plain English. Nor were the Commission's

recommendations intended to change existing practice, just to spell out what the relationships actually were.

The first topic dealt with was the role of governor as head of state. The Commission recommended that the constitution should stipulate that the governor has a duty to safeguard the constitution of the State, and that the governor acts on the advice of elected officials except in circumstances where the governor acts independently to safeguard the constitution of the State. In addition, the procedures for appointing the governor and for removing the governor from office should be set out, including the role of the premier in these procedures.

At first glance, this might look like some radical plan to change the role of the governor, but after a moment's thought, it is clear that the statements are simply describing what happens now. The difference is that it requires current procedures to be stated in a few plain words and in an authoritative document that is open to public scrutiny. The events of 1975 dramatised the dilemmas in the relationship between the head of government and the head of state. All the recommendation of the Commission on Government tries to do is to set out the dilemma and be explicit about the conflicting claims to constitutional legitimacy.

The same is true for the second set of relationships, those dealing with the executive council and the governor in council. The executive council is a meeting of at least two ministers usually chaired by the governor at which a range of official business is transacted. The Commission on Government recommended that there should be provisions in the constitution which set out the nature and function of the executive council, the procedures for appointment to and removal from the office of executive councillor, and the role of the governor and the premier in these procedures. In addition, the role and responsibilities of the governor and the premier in the function, duties and operation of the executive council should be specified. Again, no change is recommended, just the setting out of existing practice and the assumptions on which it is based.

The third set of recommendations dealt with perhaps the single most important omission from our constitutional provisions, the absence of any specification of the role of head of government, premier or prime minister. The Commission on Government recommended that the constitution provide that the premier is head of government of Western Australia, and that there should be a clear statement that the premier has a duty to uphold the constitution and laws of the State. In addition it should be stated that, the premier must be a member of the lower house, and appointment to the office of premier is made by the governor on the condition that the premier will lead a ministry which can secure the support of a majority of members of the lower house present and voting on a motion of confidence. This is to be the case except when such a requirement is inconsistent with the governor's duty to safeguard the constitution of the State.

Clearly some delicate matters are touched on here but, again, the recommendations do no more than specify the present position of the premier. This is also true of the recommendations of the Commission on the situation in which the governor may terminate the appointment of the premier. It was recommended that the constitution should provide that this can occur at the request of the premier, on the passing of a vote of no confidence in the premier's ministry by the lower house, or in circumstances where the governor has a duty to safeguard the constitution of the State.

The refrain 'duty to safeguard the constitution of the state' is inserted to focus on the important issue of the interests that the role of the governor should protect on those rare occasions when the governor acts independently of the advice given by elected officials. This is surely a more productive way of looking at the role of the head of state than sterile discussions about the so-called reserve powers of the governor.

A similar motivation led the Commission on Government to recommend that the constitution recognise the cabinet as a meeting of ministers, chaired by the premier to determine the policies of the government of the state. The Commission had previously made recommendations about publishing the procedures for calling cabinet meetings, for the conduct and record keeping of such meetings, and for the promulgation of cabinet decisions. Investigations of the questionable government activities of the WA Inc years had pointed to serious shortcoming in cabinet procedures. Many of the problems with the operation of cabinet had resulted from the constitutional invisibility of the body, and the sloppiness and deceit fostered by a lack of public accountability.

The final set of relationships dealt with by the Commission concerned the role of ministers. It recommended, in addition to some matters of special concern to the Western Australian constitution, that there should be constitutional provisions which specified that ministers are appointed by the governor on the recommendation of the premier, and may be removed from office by the governor on the advice of the premier. It should also be stated that a minister's commission is terminated on the resignation or removal from office of the premier. The Commission on Government was concerned that there should be a clear statement of ministerial responsibilities. It recommended that the constitution provide that each minister should be required to make an oath of accountability on taking office, that ministers are accountable to the Parliament for the operation of those departments and agencies listed in their commissions, and that ministers are accountable to the Parliament for decisions of cabinet.

None of this is surprising, new or controversial, except that these key relationships, without which parliamentary democracy cannot function, are nowhere to be found in our constitutional documents at present. Setting out these rules in a constitutional document is of vital importance for two reasons. The first is that it provides a coherent framework for the conduct of government and can remind the holders of executive office of the broader responsibilities of their office. Such a coherent framework is vital to establish and maintain the openness and accountability of the public sector. The second, and perhaps even more important reason, is that the absence of constitutional documents that accurately describe the way in which government operates does little to encourage public trust in the governmental system. To retain constitutional documents that wilfully mislead the citizen as to the role and nature of the executive fosters cynicism and distrust. Attempts made to encourage public knowledge of our constitutional system are seriously hindered by the obscurity and incompleteness of our constitutional documents.

All that is proposed here is an attempt to set out in our constitutional documents the way our governmental system actually works. If these changes are so desirable, why have they not been adopted years ago, and why is there no public debate on the topic? The answer is that constitutional reform of any kind that affects the role of the executive is especially difficult. That is why the subtitle of this talk is constitutional reform for grown-ups. It is not that altering the constitutional allocation of powers between the states and the Commonwealth, or

changing the composition of the Commonwealth Parliament is especially easy, but these changes are as child's play when compared with reforming the executive.

Some of the reasons for this have already been pointed out. The constitutional obscurity of executive power hampers informed public debate, but there are other reasons which compound the problem. The first is that, in several areas, there is disagreement over exactly what the rules are or should be. During the discussions of the Constitutional Convention from 1973 to 1985, for example, there was disagreement over the scope of the governor-general's ability to act independently of the advice of elected officials. The partisan hostilities of 1975 were an element in this disagreement, but there were also deeply-held differences of opinion over what the responsibilities of the head of state were and should be. Even so, the Constitutional Convention did come up with a list of the functions of the head of state that might well have been included in our constitutional documents. This has not been used as the basis for constitutional reform even though the ambiguity in the relationship between the head of state and the head of government is an acknowledged area of weakness in our constitutional system.

The executive has little to gain from removing this ambiguity. Who is to know which of various interpretations of the role of head of state would be to the partisan advantage of the government of the day in some particular circumstance? Writing the rules down might limit the discretion of the government. Worse, it might enable a constitutional challenge to be made in the courts in an area which is now largely outside the competence of the judiciary. Writing down the constitutional relationship between the prime minister and the governor-general for example, might, by the very act of reducing it to writing, change the relationship in a subtle way.

All these points have some truth, but if the government of the day might lose under a constitutional reform that sets out the rules governing the exercise of the executive power, who might gain? The answer is, of course, everybody else. This is precisely what constitutions are for. They are designed to make life difficult for governments by requiring them to justify their actions in public. For this reason, governments do not like constitutions any more than they like elections. Both of these institutions are regarded as unpleasant necessities, and the idea of more constitutional restraints is as unpopular with governments as the suggestion of more frequent elections.

The unfortunate consequence of this is that governments are unlikely to initiate constitutional reform of the executive even if it is simply making clear the nature of executive power. Even more unfortunate is the fact that governments have a monopoly of the machinery for initiating formal constitutional change. The very institution that most needs reforming is the one in charge of the reform process. This is one of the few faults in the design of the Commonwealth constitution and explains why so few proposals for Commonwealth constitutional amendment have gained the necessary popular support at constitutional referendums. Reform of the constitution has been regarded by successive governments as a device to be used predominantly for the short-term partisan gain of the government of the day. In these circumstances it is not surprising that all but eight of the forty-two proposals put to the people have failed.

The situation is even worse in the states where most constitutional change can occur without any direct reference to the people. Since the granting of self-government in the nineteenth

century, most state constitutions have evolved in ways which have reduced the limits on the executive rather than enhanced them. The pattern of constitutional reform for both the Commonwealth and the states would have been very different if proposals for constitutional amendment could have been initiated without the veto of the government of the day.

Notwithstanding all these reasons for pessimism, there are some grounds for not despairing entirely about reform of the executive. One of these is, perhaps paradoxically, the widespread distrust of government. Governments are aware that an electorate that is genuinely aggrieved about the conduct of government is a highly unpredictable electorate. This not only means that a party associated with a lack of openness and accountability in government will be punished at the polls, but that if both the major parties are seen to be insensitive to reform the voters may turn to radical solutions. This is what has happened in New Zealand where widespread concern about the accountability of government has led to a number of reforms including a major change to the electoral system.

The unhappiness with many aspects of government in Australia has meant that both major party groupings have a public commitment to improving accountability, particularly in the state sphere, and parties with rhetorical commitments to reform may find they are doomed to implement them. This is particularly the case where there are sections of the legislature that can keep the issue of executive reform on the public agenda. It is not as if public support for major change is absent. The overwhelming impression derived from the public hearings of the Commission on Government was that there was a large constituency in Western Australia at least, willing to support genuine attempts to entrench openness and accountability in all aspects of government and particularly in the executive branch.

Another factor is the republican debate. For all the inanities talked about the Australian republic, it is an issue that has the potential to raise core issues about the role of the head of state and the relationship with the head of government. The three commonly discussed options about choosing a president—the existing procedure for choosing the governor-general or governor, election by a two thirds majority of members of Parliament, and direct popular election—are really options about the relative power of the head of state and the head of government. The more the head of state has a constitutional and political authority that is distinct from that of the head of government, the greater the limits on the discretion of the head of government. Whether such a change is desirable is a matter of opinion and political judgement about the likely consequences. Both sides of politics have gone out of their way to avoid talking about this aspect of the issue, but it may yet surface as a key component of any serious move away from a monarchical executive. The debate would certainly be better informed if the existing relationship between the Crown and the head of government were clearly set out in our constitutional documents.

The final element in constitutional change is the glorious unpredictability of politics. Just as the republican issue may mutate into a real debate about executive power, other events may occur which prompt further consideration of the need to define executive power. The talk of people's conventions to consider constitutional issues in both state and Commonwealth spheres is another potential source of unpredictability that may lead to constructive action to define executive power.

The most important point is that the basic assumption about the need to reform our constitutional documents to make them coherent statements of the basic elements of our

system of government appears to be almost universally accepted. Sooner or later, this will oblige governments to move the constitutional debate in this direction. Whether we are to be a monarchy or a republic, it is no longer good enough to justify the maintenance of a defective constitutional structure by pointing to the foibles of English constitutional history. If our constitutions are to serve our common purpose, we must remedy their most glaring omission, the lack of openness and accountability that results from not defining executive power. This is not the only kind of constitutional reform, but it is the one that best reflects the aspirations of an adult citizenry aiming for a mature and fully accountable system of government.

Questioner — Last week the Attorney-General, Mr Williams, was talking about the current free-speech cases preparing for the High Court and was saying that it was the government's opinion that the current direction of the High Court was leading to a fundamental shift in political power between Parliament and the Court. Is this part of what you are talking about in terms of reform, that the government wants to keep the power all for itself and not to give anything back to anyone else which might dilute its power?

Professor Sharman — Well, yes and no. No, in that it doesn't really deal with the major issue of executive power that I'm talking about, which is writing down the basic way in which the executive operates; but yes, in that the problem with the High Court's implied rights is because there is no written bill of rights, and whether you want a bill of rights or not is a matter for debate. If you like, the High Court is doing to the constitution in the area of rights what the Constitution already does in relation to the executive. The High Court is saying 'well it's not actually there but we think we know how it should be, and therefore we're willing to imply these things'. What the Attorney-General is saying is 'well, we would rather the High Court didn't find too much that wasn't there because that might make life even more uncomfortable than it is already thank you very much'.

Questioner — Professor Sharman, I'd like you to comment on the elected head of state and the impact that might have on the way in which the executive is structured.

Professor Sharman — Well, at the moment the way the head of state is appointed, as you know, is that the premier or prime minister makes a recommendation to the palace and it comes back and is made flesh and appears as the governor-general, and the premier does the same thing for the governor. One of the characteristics of the notion of the Crown is that it does give the governor or governor-general a certain status separate from simply being the premier or the prime minister's person. Of the three options which are talked about in terms of changing the way in which you appointed the head of state, the question is how each would vary depending on what machinery you used. If you chose the minimalist option, which would simply be replicating the existing process, if you took away the Crown, the president would look very much as though he or she was the poodle of the prime minister of the day. Now, the other extreme is a directly elected head of state who would have not only the constitutional authority of the head of state, particularly enormous authority if the constitution were left as it was, but would have a political authority which would mean that the head of state would rival the prime minister, the head of government, as spokesperson for the interests of the federal government or the state government. So the president could say to the prime minister, 'well I'm elected and you're not', so that if you left the powers in the constitution exactly as they are you would have a head of state who had enormous power and might have the political legitimacy to use it. Now whether or not that's a good thing, you can understand

why the prime ministers are most unenthusiastic about that kind of change. I think it's interesting if people talked about that because if that option were to be a viable one, it would guarantee that the role of the head of state would be defined much, much more explicitly in the constitution. You would have to write down what the head of state was supposed to do, otherwise you would make a radical transformation, or potentially a radical transformation, in our system of government.

Questioner — I was just amused by four innocent little words of yours where you described the recommendations of the WA Constitutional Commission as only seeking to spell out existing powers in 'a few plain words' and that amused me for having a resemblance to the description of section 92 of the federal constitution which was once described as 'a little piece of laymen's language' and of course we all know the quagmire of legal history that has ensued since then. My main concern is that words become wedges for aggressive judicial interpretation and expansion of executive powers, and courts of course are the least accountable of supreme institutions, often dominated by centralists and lefties, and my main concern is that your very desire to restrain executive power would be contradicted by the tendency of judges interpreting such powers, the moment you set them down in writing.

Professor Sharman — Now that's a very real question, a very very real problem and I believe that one of the functions of lawyers is to make what seems relatively straight forward, fairly complicated. I should say, just in passing, if you want to make the judges more accountable, there are all kinds of mechanisms for doing it. Changing the way they're appointed, even using the US system (most of the US states elect their judges) would not be particularly popular, at least with the judicial fraternity. To the important question, yes, that is a problem and it was a problem for the Commission on Government because we asked lawyers to comment on recommendations to make sure we hadn't made any terrible mistakes, and we wanted to stress to our lawyers two things. First, that what the Commission was doing was not attempting to draft sections that would go into the Constitution Act but saying what those sections should achieve. Secondly, that it was not our intention to encourage judicial intervention in the constitutional process. I agree nothing is going to stop it, or at least nothing under the existing rules is going to stop it, but it is possible to make clear that the purpose is not to define the office but to make general statements of accountability. I agree there is no way that you can stop things being justiciable but the purpose would be to set out in broad language what the goals and responsibilities would be. And if you look at the recommendations of the Commission on Government, in Chapter Five you will find that most of them, or all of the ones dealing with that matter, are intended as much as a guide to the participants as they are an opportunity for the citizens to find out what is going on. I think if in the WA case, ministers had been required to take an oath of accountability, you would be able to say to a minister, well look, you've sworn to do this, why aren't you doing it? Whereas at the moment, of course, in the past few years ministers could say, well we're not responsible for this or it's not at all clear, there's some ambiguity, whatever, so it's not intended to be justiciable. But I agree nothing can stop it becoming so, and in hard cases, there would be occasions when it would be justiciable.

Questioner — I thank you for your address. I think a very valuable part of it was highlighting how useless, if I may say so, the word executive has become because of the range of meanings it carries. Meanings which can often be in conflict with each other, as illustrated I guess by the roles of the different sections of the executive in relation to fiscal matters. Do you think that we've now reached the stage with our simple framework terminology where it

would be useful for us to allocate one meaning to the term executive and to have alongside it the administration rather than to continue with one term, executive, sometimes covering administration and sometimes covering the ministry and the higher level functions. If we were to expressly say, instead of having threefold division of power, we've got a fourfold—legislature, judiciary, executive and administration—that might help us simplify our thinking about the matter and it might be a very good means of communication with the wider community. Parallel with that I would ask whether or not there is an argument for further simplifying the concept of the executive and limiting it to the ministry effectively, or to those higher level functions, by identifying a ceremonial arm of government alongside the other four, which would effectively be most of the core, real functions left to the governors.

Professor Sharman — Yes. One of the problems is you can always be Humpty Dumpty and say, well, by this I mean this, but the point is that the term has general usage and on most occasions you can tell from the context what people are talking about. But even in that last example you gave about the ceremonial parts, well they are ceremonial, except when they're not, and that was Mr Whitlam's problem, he thought it was all ceremonial and he found it wasn't. I'm sympathetic with what you're saying. I think it would be made easier if the different offices in the constitution were specified and then you would know the executive included this, this, this and this. The problem is the constitution said it's this, when we all know it's that, and hence we all know it's partly that, hence the confusion.

Questioner — From your studies, is the precondition for significant constitutional reform to limit the power of the executive, that the power in the Parliament has to be shared? In other words, that an executive of either side hasn't got the ability to impose its will. Is proportional representation, or a form of that, a very close electoral contest, a precondition for significant change?

Professor Sharman — I thank the Senator from Western Australia for that. I thought he was going to say something else. So now I'll answer what I thought you were going to ask. I thought you were going to say, is it important to take the executive out of Parliament, because one of the things I haven't mentioned here is, it always seems to me a great shame that the executive is so closely enmeshed in the operation of the Parliament. I would like to see the legislature defined as the two houses of Parliament. Perhaps the executive would be required to sign bills, have some veto, perhaps overrideable like the US one. I happened to look at the South Australian *Constitution Act*, just the first page, and I notice that it says that, the Parliament of South Australia is the House of Assembly and the Legislative Council. So I must have a look at that to see whether they've actually made radical change. I don't think they have. I think it's just a drafting change. But now to your real question. I think your question implies that the executive would be much more accountable if it was unsure of its parliamentary base and always had to pass legislation on its merits, and that that would almost guarantee to be the effect if you had proportional representation in both houses of Parliament or in the New Zealand system in the only chamber or whatever. I think that deals with part of the problem. I agree, I think governments should always be given a hard time. I think the statement that governments are here to govern is a nonsense. Governments are here to operate the machinery of state and to try to pass legislation and regulations if they can convince people. They have no God-given right to pass their legislation, mandates notwithstanding. So that's what the Parliament is for. It is to make life exceptionally hard for governments. But that isn't really the problem I'm dealing with because even if all governments were minority governments, and even if the balance of power was held

universally by the Australian Democrats, it still would not deal with the basic problem which is the structural deficiency in the locus of executive power. As long as we have the existing machinery in place, then minority governments, whatever their benefits, still don't deal with that problem.

Questioner — I find this happens to me all the time in Parliament, that people don't understand my question, so I'll rephrase it if I may. My assumption is that you're not going to get any executive in Parliament in Australia to initiate strong constitutional reform to address your problem unless the Parliament itself is already finely balanced. In other words, for as long as they're secure and dominant they won't initiate strong constitutional reform.

Professor Sharman — I believe in constitutional reform by mistake. I think that's the most likely avenue. The best example is the Senate itself. The Labor Party introduced proportional representation, and I am told by a number of people that the Labor caucus was told it would guarantee the Labor Party a permanent majority in the upper house. So the motivation for changing the electoral system was a disaster for the people who designed it, but a benefit for everybody else. So for example, I believe that the Labor Party in Western Australia which has a very small chance in the polls of winning, has committed itself to almost everything in the Commission on Government's Reports. If, in the unlikely event it found itself to be in power, it might have to do some of those things and it might do them before it had thought about them for too long, in which case useful and interesting things might be done. But otherwise, I agree about the importance of a section of the legislature, not controlled by the government of the day, that can keep these issues before the public and I think that for example, if the Upper House in Western Australia is not controlled by the government of the day as is possible, indeed perhaps even likely, even if the government is returned, then it can do the same thing as the Senate does here. That is to remind people that things need to be changed, to do deals, that if you change this thing here maybe we will agree with this. So I agree with the premises that 1) parliaments should not be dominated by government majorities in both houses, and 2) that the role of minor parties and balance of power and upper houses is to act to keep the government honest and to keep issues before government that they may not wish to be kept before them.

Questioner — From your studies, what would you recommend as the most effective way of choosing a new head of government?

Professor Sharman — Head of government or head of state?

Questioner — Head of state.

Professor Sharman — Believe it or not I have an open mind. I'd like to be persuaded. I think if we are to keep something like our current constitutional arrangements, the proposal for indirect election is probably not a bad idea, that is, to have the head of state chosen by two-thirds of the majority of Parliament. I think the Republican Advisory Committee provided a plausible justification for that process. I certainly would insist, personally, that if we went to a direct presidential election then major changes would have to be made in describing what the head of state was. But if that were on the agenda, then I think an elected head of state has got considerable merit.