Constitutional Alteration (Establishment of Republic) 1999

1. Covering clauses

The Constitutional Convention recommended that any provisions of the Constitution Act which have continuing force should be moved into the Constitution and those which do not should be repealed. That has not been done. The result will be puzzlement or confusion for any Australian or foreigner who wants to understand our constitutional system. Such a person would begin with the agreement of the people of the colonies to unite under the British Crown, which is expressed in the present -- "have agreed". There is then a definition of "the Queen", thus leading to a reasonable belief that Australia is not a republic.

The next two sections are spent and, contrary to the Convention's resolution, have not been repealed. Sections 5 and 6 have been re-enacted in a modern and altered form and placed in proposed ss 126 and 127 of the Constitution (Schedule 2, item 41 of the bill)'. Yet covering clauses 5 and 6 have not been deleted. A reader would not know until near the end that they had been superseded. The explanatory memorandum (para 1.8) does not point out that 5 and 6 have been impliedly repealed, even if not deleted.

2. Proposed s 59, last 12ara (Schedule 1, item 3)

Conventions

These provisions convert what many see as non-justiciable conventions into rules of law. I believe they may already have that status as a result of High Court decisions which declare that representative government is an object of the Constitution. Others, however, have a different view, and that would certainly be the case with the reserve powers. The provision in Schedule 3, item 8 referring to the evolution of the conventions does not render them non-justiciable. It has been recognised that many justiciable provisions have the capacity to evolve (e.g. the meaning of "foreign power" in s44(i).

Yet the explanatory memorandum on p.9, para 5.17 declares an intention to preserve the existing status of the conventions in relation to reserve powers as rules of practice rather than justiciable rules of law. That intention should be stated in clear language.

Advice to the President

Apart from the reserve powers, s 59 makes it clear that the President is legally obliged to act on appropriate advice. While the provision would be legally effective, an opportunity has been missed to make the working of our constitutional system clear to those who seek guidance from the Constitution.

For example, the President's power under proposed s 64 (Schedule 2, item 24) is subject to s 59, but the reader would not know that, in appointing the Prime Minister, the President is exercising a reserve power and is required, under the conventions, to appoint a person who has the confidence of the House of Representatives. On the other hand, in appointing other Ministers the President acts on the advice of the Prime Minister.

The constitutional alterations recommended by the Constitutional Commission would have made this position clear (Final Report, vol.2, p.1073). Under the present bill the Prime Minister is mentioned in the Constitution for the first time, but there is no provision indicating how he is appointed, except as one of the "officers to administer such departments- as the President in Council establishes (s 64).

3. Dismissal. Proposed s 62 (Schedule 1, item 3)

If it is not intended that the Prime Minister's exercise of power should not be subject to judicial review that should be clearly stated.

1 think it is misleading for the explanatory memorandum (p.14, para 8.6) to say that the proposed section is similar to the existing situation. At present the Prime Minister's action has no immediate effect in dismissing a Governor- Genera 1. The Queen has rights to be consulted, to encourage and to warn -- all of which takes time.

4. Acting President. Proposed s 63 (Schdule 1, item 3)

The explanatory memorandum states (p.17, para 9.11) that a decision on the President's incapacity has been left to the Prime Minister. In my view, it is strongly arguable that on the existing wording the Prime Minister's express power is dependent on the President having an incapacity and that that would be judicially reviewable. To give effect to the view expressed in the explanatory memorandum the provision should make the power dependent on the Prime Minister's opinion. On the other hand, as the provision is to operate "until Parliament otherwise provides", it could eventually be rectified by Act of Parliament.

5. Proposed Section 58 (Schedule 2, item 23)

Despite the existence of the phrase "subject to this Constitution", it might be argued that the words "in the President's discretion" are intended to mean personal discretion. That was the historical intention in relation to the existing provision. Such a phrase does not appear anywhere else. Normally the word "may" is used. There is, of course, a question whether the executive government should have a discretion to refuse consent to a bill that has "passed both Houses, particularly in the light of the power to refer it back.

Section 74 Repeal (Schedule 2, item 34)

This provision is now nothing but a relic and should be repealed. However, the explanatory memorandum is not correct in any legal sense when it says that no appeals now lie from any Australian court to the Privy Council (para 12.74). Section 74 remains the legal exception, even though a certificate will never be granted.

Leslie Zines
20 July 1999