

Australia's Constitutional Identity: a Conundrum for the 21st Century

By Helen Irving

What do we see when we look in our constitutional mirror? Is it a familiar face, one we know well, and have known for many years? A reflection that speaks to us of a long, but useful lifetime, its features clear and instantly recognisable? Or do we stare at it and find only something bewildering, like the face of a friend from the distant past, whose details are so altered with age that we have trouble being certain it is really the same person?

The Centenary of Federation is surely the right time to ask such questions, a suitable moment to clear away the dust and have a peep. Perhaps we will like the old face; perhaps we won't care one way or another. But, one hundred years after the Constitution started functioning, we owe it to ourselves to look long, even hard. The mirror is not yet cracked, and the silver is not yet beyond repair, but we may be surprised - indeed dismayed - at what we find, or fail to find, looking back at us.

Once upon a time, in the beginning, Australians looked in the mirror and saw themselves as the fairest of all. By 1901, after close to five decades of imagining a Constitution and ten years of building one, they were exhilarated. In the words of South Australian Premier, Charles Kingston - an uncompromising radical democrat - it was 'the most magnificent Constitution into which the chosen representatives of a free and enlightened people have ever breathed the life of popular sentiment and national hope'. As they celebrated the inauguration of the Commonwealth, those same free and enlightened people agreed, finding it a sublime and glorious instrument, a charter of democratic citizenship, a beacon for the future of world democracy. I am speaking of the Constitution that we have inherited - almost unchanged - from that time. What was going on? Let us assume that Australians in 1901 were not so dissimilar to ourselves that they actually got worked up over something that was objectively like a conveyancing contract or a grocer's bill. These were the high Victorians, after all. They were not familiar with modern art. They were not attuned to splashes of paint on canvass, or techno music, or 'dogma' realist cinema. They loved stories and decoration and colour and drama, and what we now find excessively sentimental poetry. Yet they thought the Constitution 'poetic'.

It is true that £6,000 was spent on champagne for the celebrations of the inauguration of the Commonwealth in Sydney alone. The Bulletin, with typical irreverence, depicted the 'dawn of the Commonwealth' as a bunch of politicians waking up in Centennial Park on 2 January 1901 with a massive hang-over. But, the national exuberance was not a matter of national inebriation. The Constitution included, indeed, some of the most democratic provisions in the world at the time. Both Houses of Parliament were to be directly elected. There was a ban on plural voting. Members of Parliament were to be paid a salary. Deadlocks between the two Houses would be solved by going to the people. The referendum would serve as the means of constitutional change. This Constitution, said the Victorian liberal democrat, Alfred Deakin, was 'vastly more liberal than any of the Constitutions under which we at present live.'

The Constitution's Preamble spoke of an 'indissoluble federal Commonwealth'. The name had been chosen at the first Federal Convention, in Sydney in 1891, to suggest the common weal or common good, and to remind people that this was the purpose of the union. The word 'indissoluble' would avoid the danger of civil war. The federal system would respect the autonomy and distinctiveness of the states, as a type of pluralist solution for maximising diversity in unity.

The Preamble also spoke of those federating as 'humbly relying on the blessing of Almighty God'. These words were chosen, said their mover, the Roman Catholic South Australian delegate, Patrick Glynn, as 'simple and unsectarian [...] ... expressive of ... the great elemental truth upon which all our creeds are based, and towards which the lines of our faiths converge'. They will thus become, he said, 'the pledge of religious toleration.'

The Constitution had been written by delegates elected to the 1897 Federal Convention. This Convention was open to the press and the public. Its work was reported and debated, and subjected to public criticism. At its completion, copies of the Constitution were sent to the electors. The Constitution was then approved by a referendum in each of the colonies, and only then was it adopted by the parliaments. This participatory process was unique, and the people

of the time knew it. It rested on a principle of democratic trust which we would find hard to improve upon today.

This is, I stress, the very same Constitution that we now believe to be so dull and pedestrian, that many find alien and some regard as democratically, even morally deficient. Certainly - like every other functioning federal Constitution in the world - it contains many mundane, 'business-like' provisions. Certainly, in its style, it is very different from what we might write today. But there is no historical evidence that it was the product of a deliberate strategy on the part of any particular interest group. The Constitution was written in response to a wide range of interests and wishes. People knew and understood the debates, and when they looked at the completed product, they saw in it almost nothing that they did not recognise.

This is not the case today. The Constitution is probably unintelligible to most Australians in 2001. I don't mean unintelligible because the vast majority has never seen it, let alone read it. I mean, even if they had seen it - indeed, particularly if they had seen it. There are a number of substantive reasons for this shift in understanding, and - one hopes - an equal number of solutions.

At the time it was written, certain sections in the Constitution were intended to be purely transitional, operating only during the first couple of years or so of the Commonwealth. They were included because it was necessary to make interim arrangements for certain things while the colonies underwent their metamorphosis into states.

Secondly, Australia's relations with Britain have undergone many changes since 1901, and a range of sections which refer to the old imperial ties are no longer operative. The Empire - once a great and familiar idea to Australians - is scarcely remembered, let alone understood.

Thirdly, the institutions created and authorised by the Constitution are described in confusing and even misleading ways. What they do say depends upon a body of unwritten conventions and lies largely 'between the lines'. This was probably better understood in the past than it is now.

Fourthly, many of the issues of the 19th century are not the issues of today. The Constitution, among other things, distributes powers to make laws between the levels of government. It gives the Commonwealth powers over 'national' matters, and in theory at least, leaves the rest to the state parliaments. What was thought of as 'national' one hundred years ago may not be what we think of as national today, and vice-versa.

In addition to all this - not a flaw in the Constitution itself, but a difficulty in the context - we are surrounded by American movies and courtroom dramas which reinforce the idea that Constitutions are declarations of great and passionate sentiment, or that they contain, necessarily, a Fifth Amendment. Even otherwise-educated commentators confuse the United States Constitution with the Declaration of Independence, or the fourteen amendments that make up the Bill of Rights with the whole Constitution. They conclude that Australia's is not a real Constitution, and that the means of rectifying this national deficiency is simply to put in references to values or rights.

*** Genuine and merited as was the sentiment surrounding the Constitution's birth in 1901, we cannot restore our faith in it merely by telling and re-telling the historical story. The Constitution was an example of best practice in its time, and the work of its framers makes an inspiring story, but so does the Magna Carta. Understanding the story is important ñ it saves us from making absurd claims or reinventing the wheel - but understanding the Constitution is more important. What is to be done? First - the easy part - remove the detritus. Those transitional sections that, without controversy, have no further currency in anyone's eyes. Send them to a constitutional elephants' graveyard for historians like myself to lament. Who, for example, would seriously cling to section 88, that tells us that '[u]niform duties of customs shall be imposed within two years after the establishment of the Commonwealth'?

Or that part of section 128 that says of proposals to alter the Constitution: 'until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails'? In other words, if there was a referendum before the Commonwealth Franchise Act was passed, those States in which women could vote were required to divide their number of votes by two, and count only one half.

This little provision is an important historical artefact, recording a time when women did not have the vote across the colonies. But it has had no currency for many years. The first Commonwealth Franchise Act was passed in May 1902, creating a uniform federal franchise, four years before the first referendum was held.

There are a good number of other such sections. On its own, the historical record is not a good enough reason to retain them. If it were, we should have hung onto section 127 - removed by referendum in 1967 - that said: 'in reckoning the numbers of the people of the Commonwealth ... aboriginal natives should not be counted.'

Now move to the dead-wood, those sections that were once living, but are now obsolete, because changes have taken place in Australia's constitutional relations with Britain over the 20th century. Sections 58, for example, discusses the procedure whereby the Governor-General may 'reserve' his assent to a parliamentary Bill 'for the Queen's pleasure' and, in the event that he has assented to a Bill but she subsequently does not find it pleasing, section 59 tells us that she may disallow the relevant law within one year. These sections were once the key to an Empire in which domestic autonomy for the self-governing colonies was balanced with British control over foreign policy, and with the principle of 'paramount force' of certain British statutes. Since Australia ratified the Statute of Westminster in 1942, the Queen can no longer disallow an Act of the Australian Parliament, and the Governor-General has nowhere to take a 'reserved' Bill, even if he were inclined to reserve it. There are a number of similar dead branches on the Constitutional tree, and we will have, perhaps, some argument about which to lop and which to leave. But one can be confident that agreement could be reached on much of the pruning.

The next step is to identify those sections of the Constitution that should be re-written or new sections that should be included, in order to give an accurate description of our fundamental democratic practices. These practices are neither temporary nor obsolete. They are indeed the core of our constitutional framework for a democratic polity, and as such they should be stated clearly, not merely inferred. To persist with our gardening metaphor, we are lifting the root-ball of the tree and freeing up its tangled, pot-bound roots. This will be a delicate task, but the tree will be much the better for it and its long-term survival all the greater.

The Constitution is far from simply what you see 'on its face' (as lawyers say), when you open its pages. It is a mixture of things that are stated, things that are implied, and things that depend upon unwritten rules or 'conventions', that is, on ways of doing things according to British parliamentary tradition. For those who do not understand British conventions, it must be utterly mystifying in places. As a guide to our political practices it is like using a 19th century road map to find your way around your capital city. In some cases, practices have changed over the years, but a good number of these sections have never actually corresponded to the practice. In addition, a good number of practices have never actually been stated or even alluded to in the Constitution's words.

Consider what the Constitution says: that the Queen appoints the Governor-General. That he makes the executive decisions and commands the naval and military forces, as her representative. That he appoints the members of the Ministry; that these members 'hold office during his pleasure.'

Consider what it does not say: That Australia is a representative democracy, with a system of responsible government under the rule of law. That the government is formed by the party that commands the confidence of the House of Representatives. That the leader of that party is the Prime Minister. That the members of the Ministry are nominated by the government. That the Governor-General acts upon the advice of his or her Ministers.

The Constitution says, in fact, nothing at all about even the existence of the Prime Minister, although it has never seriously been imagined that we should do without a Prime Minister. It says nothing at all about how a government should be formed. If on election night, we turned to the Constitution for guidance, we would find none. Antony Green is a far better guide.

Is it likely that people would seriously think it more dangerous to write such statements into the Constitution, than to leave what is there at present, for example: 'The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit ...'?

Some of the other misleading provisions serve to create an archaic tangle, like morning-glory vines wound tightly around the branches of the constitutional tree. The references to the Queen are in almost all cases misleading. The Queen simply does not exercise the powers, or engage

in the activities that the constitution says she does. The words tell us that she is part of the legislature; that the Executive power of the commonwealth is vested in her; that she is paid money out of Australia's consolidated revenue, so that she can pay a salary to the Governor-General and to the Ministers of State; that she can disallow Australian laws, and so on. Queen Victoria did none of these things. Nor do 'Her Majesty's heirs and successors'. Even in the days of close imperial ties, it was the Australian or the British government that exercised such powers.

There are other archaisms we might like to tidy up while we are at it. All the Constitution's references to individuals - except the Queen - are to the masculine third person singular. Since the late 19th century, 'he embraces she' in statutory interpretation, that is, unless otherwise intended, where we read 'he', we are to understand 'he or she'. But, why not now say 'he or she', and say what we mean?

I do not deny that our Constitution has worked and continues to work well. It is a restrained, 'minimalist' document and much of what it does say is still a functioning description of our practices. If you want to calculate a state's quota for seats in the House of Representatives, or find the last date on which a Federal election can be held, the Constitution's your man. The Chapter on 'the Judicature' gets particularly good marks for accuracy, mainly because it was substantially based on the written United States Constitution.

But even its staunchest defenders would have to admit that the Constitution often works well because what it says is ignored. The Queen does not appoint the Governor-General. He does not determine the dates of parliamentary sessions 'as he thinks fit'. He does not choose government Ministers, nor, in normal circumstances, do they hold office during his pleasure. The words of the Constitution are, of course, closely scrutinised by the High Court when a case arises, and the Court updates the meaning of words from time to time through its judgments. It has done so recently, for example, with the words 'citizen of a foreign power', reading 'foreign' to include Britain and concluding thereby that a dual Australian-British national was ineligible to stand for parliament, no doubt making the constitution's framers turn in their graves. But most of the provisions concerning the parliament do not come before the Court. They have to be 'interpreted' in practice, often by being ignored.

We may be quite comfortable with reading between the lines of our Constitution, but we should not be complacent. The Australian convention that a Senate casual vacancy was filled with a nominee of the outgoing Senator's party held good for the better part of three-quarters of a century. But the governments of NSW and Queensland departed from this convention in 1975. Replacements were chosen by the respective Premiers without consulting with the relevant Party - the governing Labor Party. The convention was deliberately breached, it appears, in order to change the distribution of power in the Senate. There was nothing in the Constitution to say this was not possible. There is now. People agreed at the 1977 referendum that the old convention was important enough to be written down. They believed that there should be a statement in the Constitution requiring outgoing Senators to be replaced by a nominee of their own party. I do not admire the cluttered and inelegant way in which the new section - section 15 - was drafted, but it does illustrate that problems can arise when fundamental practices are left to convention, and that it is possible to get agreement on turning unwritten conventions into written instructions.

Not all conventions can be easily converted into writing. Describing the Governor-General's so-called 'reserve powers' is difficult and even possibly risky, although there is no reason to believe that the dangers are any greater putting them in writing than leaving them unwritten. I happen to think that some sort of statement of the reserve powers is both possible and desirable, not in order to describe our actual practices - since there are no regular practices - but rather, to confine their use within our democratic system.

Whatever the eventuality or emergency, the reserve powers should always be subject to the Constitution. The Governor-General should only dismiss a government that has lost the confidence of the parliament and refuses to step down, or that persists in other forms of unconstitutional behaviour. The Governor-General should only call an election, refuse to call an election, or dissolve both Houses under the Constitution's double dissolution provisions. This will all make much better sense, once we have written into the Constitution the new, accurate descriptions of our fundamental democratic practices.

It may be difficult and would certainly take time to get things right, but why should we prefer a Constitution that says in places the opposite of what it means, in preference to a Constitution that strives for accuracy?

Finally, we are looking into the mirror, and deciding what else we recognise. We must ask ourselves: what was the original purpose of the Constitution; what was the basis of the 'federal compact' of 1901? Do we wish to affirm it, or renew it, or alter some of the terms and conditions? Should we simply assume that what people agreed upon one hundred years ago is sufficient for our needs at the Constitution's centenary?

I am - emphatically - not talking about dismantling the federal system and abolishing the states. For all the reasons Professor Greg Craven gave in his Barton lecture, we are stuck with the states. They serve us well, certainly better than a unitary system. I am talking about how well the Constitution still supports the 'indissoluble federal Commonwealth' for which it was designed.

The original federal compact was an agreement on the part of the colonies to give up some of their self-government, so they could enjoy the benefits of membership of an emerging nation-state. Many of these benefits were material - national defence; national quarantine; coordinated postal services and lighthouse keeping; uniform immigration restrictions and access to wider markets.

But many were 'sentimental' - opportunities for international greatness; expanded cultural circles; an enhanced commitment to national welfare, and so on. The colonies gave up only those powers that were thought to be naturally, or self-evidently 'national'. They retained or believed they retained - as much of their original autonomy as was compatible with membership of the Commonwealth.

This federal balance was clear in the distribution of powers between the levels of government. The problems it was designed to solve can be observed across a range of sections in the Constitution. Section 51 is a list of matters - like defence, lighthouses and quarantine, and so on - in respect of which the Commonwealth Parliament is empowered to make laws, 'for the peace, order and good government' of Australia as a whole.

Some of these powers are exclusive to the Commonwealth. Some are concurrent - able to be exercised by both levels of government, so long as there is no inconsistency between them. Many matters were left for the states because they were not thought 'national': education, health, policing, road-building, most natural resource regulation and development, and so on. Each level of government was entitled to raise revenue appropriate to its powers and responsibilities.

The colonies also gave a commitment not to exercise some of their former powers: for example, one famous section says: 'on the imposition of uniform duties of customs trade, commerce and intercourse among the states ... shall be absolutely free.' It would have been clear one hundred years ago that this meant: 'once all the colonies' protectionist tariffs have been removed', they should never be reimposed by the states.

One hundred years later, it is difficult for non-lawyers even to follow the construction of its words, principally because we have forgotten the experience of being stopped at the customs houses on the Victorian or South Australian borders, opening our luggage for inspection, and paying protectionist tariffs on any dutiable items. The Constitution was intended as a happy, indeed blessed union, an indissoluble marriage of good-sense and lasting affection. But is it exactly as we would want if we were going through the process in 2001? Are there things that we would now consider to be national, that are not currently able to be exercised by the Commonwealth except in very roundabout way? Should there be, for example, a Commonwealth power over the incorporation of companies? Should the Commonwealth have greater control over environmental or natural resource regulation? Should some of the so-called 'concurrent' powers be employed along more cooperative lines between both Commonwealth and the states? Is the exclusive power of the Commonwealth to collect customs and excise duties appropriate now, given that the bulk of government revenue comes from income taxes, and that the states have effectively lost their power to collect taxes?

We could multiply these questions. I give them simply as examples of what we would be likely to ask if the Federal Convention were meeting in 2001 instead of the 1890s, and we were contemplating the federal compact. Similar questions have been fruitfully posed during the 20th

century, and the Constitution has been altered a couple of times to meet the new understanding of what is properly 'national'. Powers over a range of social welfare provisions, once thought to be essentially local matters, were granted to the Commonwealth at a referendum in 1946. Laws for the aboriginal people were thought in 1901 to be a state matter, not a national concern. In 1967 the provision preventing the Commonwealth from passing 'special laws' for the Aboriginal people was deleted at a referendum.

Finally, it will follow naturally from most of these processes of Constitutional pruning and composting that a republican Constitution makes better sense than a monarchical Constitution. Let us repeat the questions: is the Constitution intelligible to people today?; does it describe our actual democratic practices?; does it fit with our sense of the federal compact's purpose?

I do not deny for one moment that the monarchy made sense to people in 1901, both as an institution and an object of affection. It was eminently sensible to federate 'under the Crown'. But, according to most available evidence, the monarchy is no longer intelligible to the majority of people. Almost all of the references to the Queen in the Constitution are now obsolete. The practices it ascribes to the Queen would be abhorrent to our sense of democracy if they were accurate. If, however, a thorough examination of the Constitution concludes that the Monarchy is still relevant, intelligible and accurately portrayed, then republicans should pull their heads in. But I would be almost as astonished at this conclusion, as I would to find Australians clinging to the statement that 'uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.'

*** In 1897, the Federal Convention received many petitions from individuals and groups, asking for particular things to be included in the Constitution. Some of these requests were met. For example, the reference to Almighty God in the Preamble, and a provision for individual states to control the sale or consumption of imported alcohol, ended up in the Constitution. A good number of other requests were rejected.

In our imaginary exercise of writing the Constitution in 2001, we will have to make similar decisions. A Bill of Rights and a statement of national 'values' will certainly be high on the list of requests, and many petitioners will support them. If I were a member of our imaginary Federal Convention, I would rise to my feet to argue the negative case.

A bill of rights - if entrenched in the Constitution - attempts to set down as eternal and unchangeable what is, in fact, constantly evolving. The framers of Australia's Constitution are often taken to task for failing to protect 'rights'. But what might they have included? No doubt, many things we would still approve of. But, also certain things that many would now find questionable, for example, the right to exploit and develop the country's natural resources; the rights of children to be born in a legal marriage. Or, even repugnant: the right to keep 'coloured' people out, in order to protect the white nation. And they would certainly not have included, indeed they would not even have identified, rights such as reproductive rights and sexual-choice rights. Although they accepted that the Aborigines once owned the land, they would not have recognised land rights. The fact that they did not entrench their own ideas of rights, based on their own values, is very much to their credit.

What - other than our confidence that we are right where others were wrong - makes us entitled to entrench our own view of rights? No doubt we live in more enlightened times. But, who is to say that the future will not be even more enlightened, and that the people celebrating the bicentenary of Federation will not look back on us with the same scorn we reserve for our forebears? And how do we decide with certainty what those rights are to be, so that everyone sees them as 'self-evident'? Even very simple, apparently innocuous rights will raise much debate. For example, the right of all adult citizens to vote should be uncontroversial in a democracy. But not all adult citizens can, in fact, vote. Currently, prisoners serving terms of more than five years are not entitled to vote in Commonwealth elections. I happen to believe they should retain the vote - indeed, that they probably have a greater need for representation in the parliaments than many outside the prisons - but many people would think otherwise. Yet, if we included a statement that all adult citizens have the right to vote, the upshot may be that prisoners would have it too. I also believe that permanent residents should have the right to vote. They pay taxes as citizens do, and have no less need for representation. But a statement of citizens' rights to vote might rule out residents ever getting the vote, short of through referendum.

It is probably widely imagined by those who support an entrenched bill of rights that constitutional provisions work of their own accord, like putting out a note for the milkman at night and finding a pint on the doorstep the following morning. This is fanciful. Although the parliament is unlikely to push Acts through where they are blatantly unconstitutional, rights provisions - no matter how noble - will only come into play where there is a challenge to the constitutional validity of the exercise of a power. Challenges only occur where an individual or a body, with standing - that is to say, whose interest in the issue at hand is recognised as valid by the court - perceives a constitutional problem and brings an action. And where the High Court gives leave for that action to proceed. Who has the resources, ability, skills and funds, to bring such actions? And what makes us so confident that the High Court will share our reading of rights anyway? If we marshal all the necessary resources and finally get before the bench, only to have our case dismissed, we will have no other place to turn to, and maybe even no cause for complaint. On the other hand, if rights are not entrenched in the Constitution, they remain in the political arena. They can be legislated for. They can be amended, modified, up-dated or repealed, when the necessity arises, without the need for a referendum. Individuals with claims can take them to lower-cost tribunals, rather than the High Court. Those who want recognition for new 'rights' can agitate for political parties to adopt them. Many claims over rights should simply never be decided in a win-or-lose form in any case, but require instead compromise, practical wisdom and recognition of the validity of differing perspectives. There are many other practical problems. But the greatest danger lies where the attempt is made to tie rights and values together in a Constitution. If you begin to list values, you run the risk that those who do not share them are left out of the picture, even regarded as 'un-Australian'.

We often think that our personal interests and values should be the basis of public interests and policy. The problem is not just that it is very difficult - impossible - to have an ordered polity in which all interests are equally and adequately met. This is not just a technical or organisational 'balancing' act. Personal interests and the public good are qualitatively different things. The public is a different domain from the aggregation of personal voices. The Constitution should serve the public good, not the separate parts.

*** Now - getting real. It all very well to propose such changes, but how will we ever achieve them? Most Australians know that the majority of referendums have failed. Only eight out of a total of forty-four questions have ever got through the net. All sorts of explanations have been offered for this history. We cannot be sure of the reason, but one thing is clear: people support referendums only when they can see some point in the proposed change. As time passes, and the Constitution makes less and less sense to people, it will become increasingly hard to see the point of piecemeal change.

But piecemeal or partial change is not the only problem. The 20th century saw many attempts at a wide-ranging, even total re-examination of the Constitution. Almost all of those commissions and committees and conventions produced detailed, distinguished reports and intelligent recommendations, but all in the end came to nothing.

Most recently, the 1998 Constitutional Convention concluded in an atmosphere of exhilaration, almost euphoria. Australians, it appeared, were on the verge of a breakthrough: a compromise over the way forward to a republic; an agreement over the contents of a new Preamble. Now, three years later, with all that water under the bridge, who can imagine that the euphoria was justified? There is no realistic hope that a republican referendum might succeed in the current climate.

When we contemplate the difficulties Australians face in achieving even a relatively small - indeed minimalist - constitutional change, the scale of writing an entire Constitution and of getting agreement on it, as they did in the 1890s, appears overwhelming. But, paradoxically, it may prove easier to begin again, than to tinker around the edges.

How can I possibly justify such a statement in the light of the failures I have just called forth? What made the 1897 Federal Convention successful? To begin with, it was directly elected. The successful candidates had to see themselves differently from the way the parliamentary appointees of the first Convention saw themselves in 1891. They had to think about why the electors had put them there.

I am not suggesting that direct election worked because the delegates were the mouthpiece of those who elected them. This view would be very problematic, if only because of the number of

different perspectives in the Australian population. But, being directly-elected, they were obliged to look to the intentions of the federalist movement in a broad sense, not merely to party policy or personal views. They were working towards something new, not building upon existing colonial practices. They were creating institutions that they knew they would not, in many cases, live to enjoy.

Of course, the 'ConCon' - the Constitutional Convention of 1998 - was itself partly directly elected, and it did not succeed. Furthermore, it was directly elected in a deliberate response to Australia's history which suggests that Parliaments are not sufficient for great changes in constitutional direction. But the differences were crucial. For all the money and effort of election, the ConCon lasted ten days only. Admittedly, its task was smaller than its 19th century predecessor's, but that earlier Convention ran for a total of around sixteen weeks, spread out over a one-year period, with a recess for parliamentary and public scrutiny.

Not only did the elected delegates of 1998 have ten days alone to change the Constitution, many of them could not even manage ten days. A disturbing number put proxies in their place for part of the time, and some of the prominent delegates attended for only two or three out of the total ten. If legitimacy was to come from direct election, how could it be maintained in these circumstances?

Above all the ConCon failed, because it consisted of people on opposing sides of the question - not people who all wanted to work together on the task of constitutional change. These people were of course absolutely entitled to be there. But the ConCon actually functioned as a ten-day public debate. It was a preliminary event - a Conference - not a Convention. It resembled the 1890 Federal Conference, held in Melbourne, where the principle of Federation was debated and a commitment to a future Convention was concluded.

The republican team won on points in 1998, but the work that should have been done at the ConCon - making decisions on all the matters that had to change if Australia were to become a republic - was then left to a Senate Committee and to the Commonwealth parliamentary draftsmen.

What should have been a considerable advantage - direct election - was not sufficient. In one respect, however, the ConCon was a genuine improvement on most of the various 20th century attempts, and closer to its 1897 counterpart. It was multi-partisan. It was not associated with onepolitical party or divided along party lines, or split by party loyalties. This is certainly a necessary pre-condition for the success of any attempt - large or small - to change our Constitution. There is another - perhaps the fundamental - requirement for a successful attempt to re-think the Constitution. An outlook that is genuinely broad, generous, constructive and 'national' is crucial. Not every single member of the Federal Convention had such an outlook - but the majority of them made a genuine attempt.

This type of outlook is, alas, becoming rarer and rarer in Australia, on every side of politics. In the 1890s, the problem was 'provincialism', but this was at least a manageable target. These days, however, we increasingly regard the political as a sphere in which our own individual identities - built around gender, sexuality, race, ethnicity, region, youth, and so on - must be directly represented and the interests that are assumed to arise from our identity must be met. We conclude that there are specific rights attached to these identities. We have lost sight of the fact that our values and the nation's values are not, and cannot, be the same thing.

The attempt to write a new Preamble in 1999 involved a scramble to list every major identity group in case someone got upset at being left out. And it represented a deeply disturbing attempt to define the nation's values. We were asked to commit ourselves to certain values and to be proud of certain things, as Australians. This had the effect in me at least of drawing out those other 'Australian' characteristics of stubbornness, perversity and the conviction that, however much I might agree, I wanted the right to change my mind. Fortunately, other Australians in 1999 thought something similar.

*** So, what am I telling you? That the Constitution needs changing, that it needs a total - not a piecemeal - re-think. But is my conclusion no more than that we need a practical, 'plain-words' Constitution, with the dead wood cut out, with our democratic institutions and practices stated in an intelligible way, and with the 'national' sorted out from the regional, and powers distributed accordingly? This would certainly be an improvement on a Constitution that is both uninspiring

and unintelligible. But for many there will remain something inherently unsatisfying - even empty - in a purely functional constitution.

A Constitution, as Edmund Barton said, is not a dog licence. It is not a simple Act or ordinance, that states bluntly what has to be done, and whether someone can or cannot do it. At the same time, it is not a desideratum. It cannot be a wish-list or a prayer or an alternative national anthem. It has to function, not just by having a practical connection with our political and legal system, not just because it has to guide our political institutions. It also has to serve a community of diverse and evolving values. It will simply not work if it tries to meet everyone's values - because values, like rights, 'collide', because they are not fixed and eternal anyway, and because the resources that support them are finite. We should not seek inspiration for its own sake. What will inspire some or even many, will certainly not inspire all. We should stop imagining that other countries have intrinsically better Constitutions, and that we are somehow being short-changed. We should emulate the restraint of our constitution's framers. We should avoid a 'feel good' Constitution, if only because it will soon look out of date and we will find ourselves wearing constitutional flares when constitutional straight-legs are in. Is it really impossible for us to be inspired by a simple, democratic constitution, one that makes sense and can be read by, even taught to, non-specialists? One that we feel we own?

When we look in the constitutional mirror we do not yet find the frame empty and the reflection blank. But, unless we engage with the Constitution in a manner unparalleled since its creation, unless we remove and renovate much of its content, and reaffirm what we want to retain, we will find in the future that this is the result. We shall have a constitutional identity only in our past, and our dreams of alternatives shall become surreal. The Justices on the High Court will become the nation's psychoanalysts. The silver will have come away completely from the back of the mirror. Re-silvering is an expensive and difficult business. Few tradesmen with this skill are still around. Let's not wait until they have all passed on.