

Written Evidence Submitted by Vince Pescod (31/12/2014)

Written Evidence Submitted by Vince Pescod Senior Lecturer University of Huddersfield specialising in Constitutional and Administrative Law and PhD student Kings London supervised by Robert Blackburn and Vernon Bogdanor. My thesis title is 'Should there be an entrenched process of constitutional reform and if so what form should it take?' My initial research has focused on 'manner and form' provisions in Australia at both Federal and State level and I set out below observations and recommendations in light of that preliminary research in relation to 'manner and form' issues.

Any views expressed in this paper are entirely my own personal views.

Executive Summary

- The UK needs a codified constitution with transparent amendments procedures and, where appropriate, manner and form requirements for alteration to fundamental or core components of the constitution, such as its representative and democratic nature.
- If model C (Written Constitution) were adopted it should be entirely subject to a special enhanced amendment procedure and thus form a 'controlled' constitution.
- If model B (Consolidation Act) were adopted an attempt could be made to use special procedures for amendment of particular provisions, such provisions should themselves be subject to the same special amendment procedures otherwise they could be amended by an ordinary procedure.
- Brief illustration and explanation of the issues arising in a 'manner and form' case in Australia (*Marquet*) which are likely to arise in the UK unless a properly drafted and enacted manner and form scheme is adopted.
- Should a Consolidation Act or written Constitution be enacted it is recommended that a 'commentary on the constitution' should also be produced.

[1] On the basis that the answer to the question, 'does the UK need a codified constitution?' is yes, this submission seeks to highlight particular issues in relation to any proposed 'special amendment' procedures in relation to Model B (Consolidation Act) and Model C (Written Constitution). It is assumed that Model A (Constitutional Code), as a non-legal code, would not seek legally enforceable amendment procedures.

[2] The case of *McCawley v The King* is authority for the proposition that constitutions are either, 'uncontrolled' and can be amended by an ordinary procedure, or are 'controlled' and can only be amended by a special or enhanced procedure.¹ The UK is considered to be 'uncontrolled' and the Australian Constitution is a good example of a 'controlled' constitution. It can only be amended by following the procedure in section 128. If Model C (Written Constitution) were adopted then the Constitution should be protected ensuring that the whole constitution could only be amended by a special procedure. This would mean it would become a 'controlled' constitution. Provided the whole scheme of the 'special amendment procedures' were properly considered starting with the process of enactment of the constitution, the Constitution's relationship with the judiciary ie as a higher form of law to be upheld, and the issues set out below considered and provided for within the scheme of amendment procedures, and it is unlikely that the courts would not accept the status of the constitution is being 'controlled' and give legal effect to the special amendment procedures.

[3] Issues are likely to arise if the UK was to become federated. The component parts of the Federation would either be given devolved powers or plenary status. In either case it is likely that they would attempt to use 'manner and form' provisions to provide for special amendment

¹ *McCawley v The King* [1920] AC 691

procedures. The current request by Scotland for a permanent Parliament is such an example. The legal basis and extent of such powers must be given full consideration.

[4] If Model B was adopted then the Consolidation Act could be amended in two ways. It will be subject to the doctrine of implied repeal in that any subsequent Act with provisions that were directly inconsistent with the Consolidation Act, would repeal the inconsistent provision in the Consolidation Act to the extent of the inconsistency.²

[5] There has been judicial support for the proposition that constitutional statutes be excluded from the doctrine.³ A Consolidation Act provides the opportunity to try to put this common law principle into a statutory form.

[6] If an attempt were made to exclude the Consolidation Act from the doctrine of implied repeal it is submitted that a properly drafted legislative scheme needs to be included within the Consolidation Act. Nothing less than a clearly laid out statutory scheme is likely to work. Such a scheme, if effective, puts the onus on Parliament to be clear when it proposes to amend the Constitution.

[7] Secondly, a Consolidation Act can be expressly amended. In the UK there has been a long ongoing debate on the open question as to whether or not, and if so to what extent, Parliament can bind its successors with regards to 'special or enhanced' procedural requirements to amend or repeal legislation. On the one hand, Dicey, Wade and others, the 'traditionalists', argue for 'continuing sovereignty', that is to say, that Parliament cannot bind its successors and any such procedural requirement can be ignored. Wade has famously suggested that to alter this principle would take nothing less than a 'revolution'⁴. Alternatively, Jennings and his supporters claim that Parliament can bind itself with regards to 'manner and form' requirements.⁵ That is to say there may be circumstances where Parliament would have to follow an enhanced or special procedure in order to amend or repeal an Act.

[8] Model B provides an opportunity to put the 'self-embracing' theory to the test and perhaps enact the 'revolution' Wade has suggested is required. If, subsequently, the courts rejected this position and allowed Parliament to ignore special or enhanced procedures and amend or repeal an Act in complete disregard of such procedural protection, this could form the impetus to enact Model C, where entrenchment procedures (as highlighted earlier) are potentially more effective.

[9] The UK has never properly attempted to enact manner and form requirements, whereas Australia, both at the federal level and State level, has. The Australian case of *Marquet*⁶ which dealt with the validity of manner and form requirements at State level, provides an extremely useful illustration of the many difficulties that can arise with regards to such provisions. In addition, Australia inherited the common law from the UK, and therefore, it is not too unreasonable to assume that the UK courts, faced with similar issues, could adopt a similar position. The following paragraphs set out (briefly) the key issues and how the Australian High Court (their Supreme Court) dealt with each.

[10] In essence, the issue in *Marquet* revolved around the wording of The Electoral Distribution Act 1947 (the 1947 Act) s 13 which provided that:

It shall not be lawful to present to the Governor for Her Majesty's assent any Bill to amend this Act, unless the second and third readings of such Bill shall have been passed with the

² *Ellen Street Estates v Minister of Health* [1934] 1 KB 590 (CA).

³ *Thoburn v Sunderland City Council* [2003] QB 151.

⁴ Wade, 'The Basis of Legal Sovereignty' [1955] CLJ 172.

⁵ Jennings WI, *The Law and the Constitution* (4th edn, University of London Press, 1952).

⁶ *Attorney General (WA) v Marquet* [2003] HCA 67

concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively.

[11] The main question before the court was, whether it was lawful for, the Clerk of the Parliaments of Western Australia, to present for Royal Assent either a Bill entitled the Electoral Distribution Repeal Act 2001 (the Repeal Bill) or the Bill entitled the Electoral Amendment Act 2001 (the Amendment Bill). The first Bill was intended to repeal the 1947 Act, thereby removing the entrenched provision, and to put in place some transitional arrangements pending the reforms contained in the second Bill, the Amendment Bill, the purpose of which was to remedy the unequal electoral distribution in Western Australia.

Justiciability

[12] The first issue was whether or not the court had jurisdiction to determine the case. The Court confirmed there were, 'between ... the legislatures of the nation and the courts ... constitutional principles of mutual respect and deference' which [they were] 'careful to observe'.⁷ The Court approved the justiciability of the issue in light of the language used in s 13 of the 1947 Act, namely the words, 'shall not be lawful', which, 'indicates that the State Parliament envisaged (in the event of a dispute) that resort might be had to a court in order to determine conclusively the extent of any lawfulness or otherwise of the conduct proposed.'⁸ The 'deliberative stages' had been concluded and '[n]o injunctive or other remedies were sought against Parliament or any of its officers or employees.' The remedy sought was 'declaratory relief' as to whether it was lawful to present a Bill without the required majority.⁹

[13] Thus, any special procedure requirements contained in Model B must include the phrase; 'It shall not be lawful', to ensure the issue is justiciable. It also, crucially, means that if the challenge is made prior to the Royal Assent being given, the manner and form procedures will still be in existence. In *Marquet*, the Bill in issue was intended to repeal the manner and form provisions.

[14] It is also important to highlight here that any manner and form provisions must themselves be protected. There is not, at least in Australian jurisprudence, an implied limitation on their repeal. S 13 of the 1947 Act above was doubly entrenched, as it provided special procedures for the amendment of the whole 'Act'. If however, the special procedures only applied to ss 1 – 7, then s 13, setting out those procedures could be amended or repealed by a simple majority.

Prorogation

[15] The case of *Marquet* was initially heard by the Supreme Court of Western Australia and then appealed to the High Court of Australia. After the first case had been heard the Western Australian Parliament was prorogued and the issue arose as to whether or not the prorogation affected the validity of the Bills in question. It was argued that 'once the two Houses of the Parliament were prorogued ... any Bills to which the Royal Assent had not then been given lapsed and, for that reason, could not be lawfully presented for or given the Royal Assent.'¹⁰ Whilst this argument was rejected for reasons not relevant to the UK position the practice in the UK Parliament, ensures that Royal Assent is pronounced before prorogation. Therefore, if manner and form provisions are to be effective in the UK, any challenge would have to be made prior to the Bill being granted Royal Assent. Therefore Parliamentary procedures in relation to the granting of Royal Assent would have to be considered carefully, and potentially amended or adapted to ensure such Bills did not fail due a prorogation during lengthy court procedures.

⁷ *Marquet* [107].

⁸ *Marquet* [108].

⁹ *Marquet* [108, 110].

¹⁰ *Marquet* [82].

The Implied Repeal Issue

[16] It was also argued in *Marquet* that s 13 [the entrenching section] had been impliedly repealed. The Acts Amendment (Constitution) Act 1978 (WA) (the 1978 Act), inserted s 2(3) into the Constitution Act 1889 of Western Australia. The new s 2(3) provided:

Every Bill, after its *passage* through the Legislative Council and the Legislative Assembly, shall, ... be presented to the Governor for assent by or in the name of the Queen and shall be of no effect unless it has been duly assented to by or in the name of the Queen.¹¹

[17] It was argued that s 2(3) had impliedly repealed s 13 of the 1947 Act on the basis that s 13 of the 1947 Act was directly inconsistent with s 2(3), and it was not possible to comply with both provisions at the same time.

[18] The majority of the High Court rejected the applicants argument stating:

The two provisions can be readily reconciled. Where s 2(3) speaks of “passage through” the Houses of the Parliament it necessarily means “due passage” or “passage in accordance with applicable requirements”. It does not mean, as the implied repeal argument necessarily entailed, passage in accordance with the requirements for Bills to which no manner and form provision applied.¹²

[19] The issue highlights the type of arguments that could be raised, when subsequent legislation is enacted or prior legislation amended, in light of the doctrine of implied repeal. If the applicants arguments had been accepted, the consequence would be that all Western Australian legislation containing manner and form provisions, except s.73 Constitution Act 1889 (WA), would be of no effect and any protection afforded by the provisions removed. This could have been the position even if that had not been the intention of the Western Australian Parliament in enacting s 2(3).

The amend/repeal question also referred to as the ‘construction question’.

[20] In the High Court the applicant, the Attorney General of Western Australia, representing the Government, argued that:

“[s]13 of the [1947 Act] spoke only of a “Bill to amend this Act”. It did not refer to a Bill to *repeal* the Act ... that s 13 should not be construed as extending to a Bill which itself did no more in relation to the [1947 Act] than repeal it.”¹³

[21] When considering the historical background, the majority in the High Court found that all parties agreed, ‘that legislative provision for the definition of electoral boundaries was essential to the holding of an election for either House of the Western Australian Parliament.’¹⁴ The majority held that:

such legislation ... is legally essential ... If the *Electoral Distribution Act* were to be repealed, some replacement provisions would have to be made, at least to the extent of defining electoral boundaries. If that was not done, there could be no election.¹⁵

[22] In addition, they accepted that the words ‘amend’ or ‘repeal’ had distinct meanings when the original legislation was drafted, ‘but concluding that the words have different meanings is not to say that the distinction between them always depends upon the *form* in which a particular piece of legislation is cast. The distinction must depend upon consideration of substance not form.’¹⁶ The ‘substance’ here was that defining electoral boundaries was legally essential to enable elections

¹¹ Emphasis added

¹² *Marquet* [61-62]

¹³ *Marquet* [13]

¹⁴ *Marquet* [42]

¹⁵ *Marquet* [43]

¹⁶ *Marquet* [47]

to the Western Australia Parliament. The majority applied a purposive approach to the interpretation of s 13, where substance prevailed over form. Thus, the complete repeal of the Act must have been, '... a precursor to the enactment of other provisions on that subject of electoral boundaries. The evident purpose of the provision should not be defeated by preferring form over substance.'¹⁷

[23] The consequence of this reasoning is that where an Act is 'legally essential' to the 'constitution' it can only be amended and not repealed.

The 'effectiveness of entrenchment' or the 'manner and form question'

[24] The dispute here was that s 13 of the 1947 Act could only be effective under s 6 Australia Act 1986 (Cth) if the manner and form provision related to the 'constitution, powers or procedures of Parliament'.

[25] The Attorney General argued that the Bills were not Bills 'respecting the constitution powers or procedure of the Parliament' and therefore s 6 of the Australia Acts 1986 (Cwt) and (UK) did not apply. Case law, suggested the word 'constitution' should be restrictively interpreted, and apply only in relation to the composition of the Parliament, to an abolition or addition of a House, or the requirement for Members of a House to be directly or indirectly elected. Moreover, the court had previously excluded the qualification or disqualification of members, or Members' privileges or immunities from the application of s.6 and from these cases the applicants formulated the proposition that laws providing for an 'administrative process', in this case the determination of electoral boundaries, were not laws respecting the constitution of the Parliament. Therefore, as the Repeal Bill only effected the administrative machinery for determining electoral boundaries, it was not a law 'respecting the constitution, powers or procedure is of the Parliament' and s 6 of the Australian Acts 1986 had no effect.

[26] The Court held that word 'constitution', 'extends to features which go to give it, and its Houses, a *representative character*.' So a change from proportional representation to first past the post voting would mean, 'Parliament would be differently constituted,' and thus s 6 engaged. The Court, applying that meaning in light of the effect of the two bills in question held, the Repeal Bill and the Amendment Bill were laws 'respecting the constitution of the Parliament of Western Australia.'¹⁸

[27] The above paragraphs highlight the complex issues that can arise with regards to the effectiveness of 'manner and form' provisions. Most issues could be avoided provided the scheme for such provisions is properly thought out and drafted in light of a comparative analysis of such provisions.

[28] When the Commonwealth of Australia was enacted Sir Robert Garran also produced the *Commentaries on the Constitution of the Commonwealth of Australia*.¹⁹ This monumental work provided commentary to virtually every word of every section of the constitution with a comparative analysis to similar provisions in the United States, Canadian, German and Swiss constitutions. Should a Consolidation Act or written Constitution be enacted a commentary on the constitution should also be produced. The Commentary Could Include the Historical Statutory Provisions which could be updated for the Consolidation Act. A comparative analysis could also be provided for provisions, such as manner and form/amendment procedures, where there is a lack of case law in the UK.

¹⁷ *Marquet* [52]

¹⁸ *Marquet* [76] emphasis added.

¹⁹ Garran Robert, *Commentaries on the Constitution of the Commonwealth of Australia* [original edition published by Angus and Robertson Sydney 1901] available as a digital pdf text at: <http://purl.library.usyd.edu.au/setis/id/fed0014> accessed 14/12/2014