

20 August 2021

Mr Andrew Wallace MP
Chair
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

By email: spla.reps@aph.gov.au

Dear Chair

Inquiry into Constitutional Reform and Referendums

The Law Council of Australia welcomes the opportunity to provide input to the Standing Committee on Social Policy and Legal Affairs' inquiry into constitutional reform and referendums. This contribution is informed by the Law Society of New South Wales Public Law Committee and responds to Terms of Reference 1 to 3 below.

Opportunities to improve public awareness and education about the Constitution

The Constitution is a necessarily technical and complex document, which does not lend itself well to broad understanding, or general awareness. One of the lessons that could potentially be learned from the 1999 referendum campaign is to not overestimate the level of public understanding about the Constitution.

Improved public awareness of the Constitution is critical to ensuring that the debate on the Constitution, and proposed changes to it, can be accessible to all Australians. This will ensure stronger co-ownership over any changes (of particular importance with recent proposals of constitutional recognition of Aboriginal and Torres Strait Islander Australians and local government), as well as address the risk of misinformation campaigns de-railing potential reforms.

Efforts to improve public awareness of the Constitution should be focused on specific messages targeted broadly, as well as at specific cohorts within the community, and with a clear sense of the level of awareness being aimed for (i.e. success measures). Any efforts to uplift understanding should not only focus on the operation of specific parts of the Constitution but the very value of it to our system of government and our nation as a whole.

It is understood that educational efforts in the past included education of school-aged children and young people, through methods such as dedicated curriculum items; bodies such as the Constitution Education Fund Australia providing focused attention to lifting awareness; and Government funding of trips to Canberra to learn more about our system of government (including a trip to the Australian Constitution Centre in the High Court).

However, it is unclear whether these measures have resulted in any increased understanding of the Constitution, or an ability to apply generalised awareness of the Constitution to specific questions about whether or not change to parts of it to respond to emerging issues should take place. Of particular interest to the Law Council is whether this knowledge and understanding, if developed at school, is maintained as students leave school and enter the broader community.

Public understanding will not change if the same methods are employed, particularly without evaluation. In our view, there needs to be a re-examination to understand what lessons can be learned from successful public information campaigns, such as the recent campaigns on COVID-19, to apply to a very important issue that unfortunately does not strike many in the community to be of immediate relevance, and therefore of interest.

Mechanisms to review the Australian Constitution and for community consultation on any proposed amendments before they are put to a referendum

The constitutional reform process in Australia continues to be a relatively ad hoc one. This approach limits the opportunity to engage the public in regular awareness raising and educational efforts, not just on the issue for reform at hand, but on the prerequisite knowledge about the Constitutional, and the reform processes.

While the movement to recognise Aboriginal and Torres Strait Islander Australians in the Constitution has rightly garnered significant community interest, there is a risk that the community's unfamiliarity with the Constitution will create misunderstandings that could undermine legitimate debate on the merits of the amendment.

Further, the impact of fear of the unknown or unfamiliarity as to the likely success of constitutional reform should not be dismissed. With only eight successful referenda out of 44, it is clear that a 'No' campaign that capitalises on these insecurities will almost invariably be successful.

To address this, it may be useful, if not necessary, to ensure that the process of constitutional reform, as well as the amendment proposals, are co-designed and co-owned by the public, to the extent allowed by section 128 of the Constitution. Popular ownership is likely to involve:

- extended national debate and consultation on a proposal;
- debate and consultation occurring across a wide variety of forums;
- a process that is open and responsive;
- a process that makes full use of available media; and
- a commitment that public engagement will permeate and drive the whole process

For example, establishing a standing Constitutional Convention (with a preference for community rather than political representatives), to meet on an annual basis to discuss issues relating to the Constitution, will allow a forum where the community is engaged in regular debate about the Constitution. It may legitimise the debate to offset the concern that reforms are decided by a small segment of the population by allowing broad representation in a regular discussion. Investing the Convention with the authority to decide the form of final proposals submitted to Parliament will go some way to ensuring that the public is truly owning the final process.

The effectiveness of the arrangements for the conduct of referendums set out in the *Referendum (Machinery Provisions) Act 1984* (Cth) and the need for any amendment

Some possible suggestions to assist with improving the conduct of referenda include:

1. Abolishing restrictions on expenditure by the Commonwealth Government, including money to a dedicated neutral campaign to lift understanding of process and providing Commonwealth funding to a dedicated 'Yes' and 'No' committee. In many cases equal funding makes sense, however, unequal funding may be appropriate if there is not widespread support for one side. It is suggested that that parliamentary support for unequal funding should be required in order to allocate funding unequally.
2. Modernising section 11 of the *Referendum (Machinery Provisions) Act 1984* (Cth) to allow the use of digital platforms to disseminate information on Yes/No campaigns, rather than restricting the dissemination of information to voters via hard copy. The rationale for maintaining section 11 in its current form is unclear, as there is no basis to suggest that disseminating information only via printed material (as opposed to digital information dissemination) is more likely to increase understanding and interest in the process.
3. It may be prudent to consider the value of attaching voting on a referendum to an election to reduce costs that could be redistributed to campaigns to lift awareness. While there are risks that this could politicise the campaign, or draw attention away from it, if the other proposals referred to above are adopted to de-politicise and normalise constitutional reform, these issues may not impact the overall outcome as significantly.

Thank you for your consideration on the above matters. If you would like to discuss further, please do not hesitate to contact me directly on [REDACTED] [REDACTED] [REDACTED] or at [REDACTED]. Alternatively, please contact the Law Council's Director of Policy, [REDACTED] or on [REDACTED].

Yours sincerely

Dr Jacoba Brasch QC
President