



28 June 2021

Committee Secretary  
House of Representatives Standing Committee on Social Policy and Legal Affairs  
Parliament House  
Canberra ACT 2600

Dear Secretary

## **INQUIRY INTO CONSTITUTIONAL REFORM AND REFERENDUMS**

Thank you for the opportunity to make a submission to this inquiry. I do so in a personal capacity.

I have written and participated in community debates about these matters over many years, including through my co-authored book (with David Hume) entitled *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010). That book, from which this submission has been adapted, analyses Australia's record of holding referendums and proposes several reforms that respond to the terms of reference for this inquiry.

The four proposals below are put forward as a means of improving the conduct of referendums in Australia, including to make best use of public moneys. These reforms should be brought about separately to any referendum campaign. Given that, the timing of this inquiry is welcome.

### **1. A Constitutional Commission**

Constitutional reform in Australia has often been approached in an ad hoc manner according to the immediate political needs of the government. The results can be seen in the referendum record. Rather than seeing public funds and reform energy wasted on failed short-term proposals, it is more sensible to invest funds earlier in the process to generate better ideas that are more likely to attract popular support.

Australia should establish a small, ongoing Constitutional Commission charged with reviewing the Constitution, generating proposals for constitutional reform, consulting with the public on draft proposals and, after consultation, recommending them to Parliament. The Commission's agenda of constitutional review should comprise topics recommended for its consideration by:

- any Australian government, Parliament, or parliamentary committee, whether these be at the Commonwealth, state or territory level;
- local government bodies;
- other forums of constitutional debate, such as prior Constitutional Conventions;
- members of the public; and
- the Commission itself.

The Commission has the potential to receive a large number of ideas, and should promote education about the Constitution and open debate about reform. It would exercise its judgment on which ideas to progress and what priority to give them as part of its work.

The membership of the Commission must be broad and inclusive. Former parliamentarians, local government representatives and constitutional experts should all be involved. So too should members of the broader community. The Commission should be appointed not only by the Commonwealth Government, but also by other Australian governments. There should be an opportunity for the Opposition and minor parties within the federal Parliament to have a say on the Commission's membership. There is no point in creating a body that is incapable of bringing about broad political and community support for whatever proposals it puts forward.

A Constitutional Commission of this kind would bring scrutiny to Australia's most important law, as well as a connection to the Australian people. There is precedent for sustained, expert review. Bodies such as Reconciliation Australia and the Australian Law Reform Commission are expert in their fields and can speak with sufficient authority to move governments to act.

The Constitutional Commission must not suffer the same fate of prior, short-term Australian constitutional review bodies. It should be a regular (not temporary) part of the nation's political life with a membership selected in a way that brings legitimacy and authority. The idea is to create a body capable of producing good ideas, public education and of bringing about a political commitment from the Commonwealth, the states and Australia's main political parties.

## **2. A constitutional convention each decade**

The recommendations of the Constitutional Commission should feed into a regular, popular Constitutional Convention, convened once each decade or 'half-generation'. The Convention should consider the recommendations of the Constitutional Commission as well as proposals put to it by the federal Parliament, a majority of the states or by petition of a large number of Australians. The Convention should be charged with debating proposals for constitutional reform and recommending proposals to the federal Parliament for submission to a referendum.

Whether elected or appointed on each occasion, the Convention must be broadly representative. It should be large enough to give its recommendations legitimacy and small enough to allow for meaningful debate and compromise. Australia's most successful Conventions have followed this model of inclusivity and practicality: representatives to the 1897–98 Conventions were, by and large, popularly elected in representing their states; and Australia's next most successful Convention in terms of referendum outcomes (the 1973–85 Constitutional Convention) involved broad representation across many stakeholder groups. Both, though broadly representative, were small enough to allow for real debate.

In other cases, it will be appropriate to hold a Convention to consider a specific issue, as was the case with the 1998 Convention on the republic. This will be a matter for individual governments based on an assessment of the nature of the issue and the timing of the constitutional reform cycle. These should, however, be the exception, and only ever in addition to the systematic deliberation promised by the regular Convention model.

A regular Constitutional Convention would provide a much-needed means of regular community engagement in constitutional reform. It would also build an expectation of debate about change and provide a consultative mechanism. This would allow careful consideration

to be given to constitutional issues in an environment not dominated by the pressures of short-term political needs.

### **3. A referendum panel**

Just as there is a need for a systematic, consensual approach to initiating proposals for constitutional reform, so too is there a need for a similar approach to managing the way in which those proposals are put to the people. Australia should establish a Referendum Panel to oversee public education initiatives in the lead-up to a referendum. Its role should include:

- developing and distributing neutral information about the referendum in a way that promotes community participation and enables Australians to cast an informed vote;
- overseeing any Yes and No committees to ensure that they make appropriate use of any public funding; and
- reviewing and reporting on the accuracy of factual claims made during the referendum.

As with the Constitutional Commission, the composition of the Referendum Panel will be of great importance. The Panel should:

- have a small membership;
- be appointed by the Prime Minister in consultation with the leader of the Opposition, other national party leaders and the states;
- include a representative of the Australian Electoral Commission; and
- include members who are widely respected and known to be impartial on the issues being debated in the referendum, such as former Governors-General, State Governors and High Court Judges.

A Referendum Panel of this kind was recommended in late 2009 by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its inquiry into the holding of referendums.

### **4. Reform the *Referendum (Machinery Provisions) Act 1984***

Australia's present system for the holding of referendums is set out in the *Referendum (Machinery Provisions) Act 1984* (Cth). That law was adopted in 1912, and has changed little since then. It was designed at a time when voting was not compulsory, Australia's population was far smaller and far less diverse, and the print media and public speeches were the dominant modes of communication. The system is showing its age and is not suited to contemporary Australia. To modernise Australia's referendum process, the Referendum Act should be changed to:

- abolish expenditure restrictions on the Commonwealth Government;
- rethink the official Yes/No pamphlet; and
- continue the Yes and No committees from the 1999 referendum.

These changes are reflected in the late 2009 recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs in its inquiry into the holding of referendums.

### *Abolish expenditure restrictions on the Commonwealth*

The Referendum Act prohibits most Commonwealth expenditure on advocating a Yes or No vote in a referendum. Australia's history of referendums shows that this restriction can allow the public debate to be monopolised by groups that have an interest in opposing reform or, even, in confusing voters. This, for example, was what happened in Western Australia and, particularly, Queensland during the referendum campaign of 1977. As that campaign shows, state governments, which are free of any such spending restrictions, can use their own resources to advocate an outcome without the Commonwealth being able to mount an effective response.

The decision to hold a referendum is a considered decision of the federal Parliament. The Commonwealth Government should not be prevented from spending money informing electors of the arguments for and against constitutional reform. The check on this (and the quid pro quo for removing restrictions) should be a principle of even-handedness: where the Commonwealth does spend money, it must spend equal amounts on the Yes and No campaigns.

### *Rethink the official yes/no pamphlet*

It is important that Australians are informed of the pros and cons of constitutional reform. Unfortunately, the history of constitutional reform in Australia shows that there are problems with the Commonwealth informing voters solely through 2000-word Yes and No cases prepared by parliamentarians.

The way in which the Yes and No cases are currently developed means that the focus is on winning the argument at all costs, not on informing people. That fosters partisanship, exaggeration and misinformation. All can be fatal to constitutional reform.

The means by which the official pamphlet is now structured means that, virtually from the outset, Australians are encouraged to divide into two camps – to be either for or against a proposal. This has value – it can force people to really think about an issue. But adversarial rhetoric should not be the only information the Commonwealth Government provides in the official pamphlet.

The Yes and No cases in the official pamphlet have a role to play. However, the cases should be preceded in the official pamphlet by neutral material prepared by the Referendum Panel. That material should include a clear explanation of the proposal and a clear explanation of its context, including where it fits into the constitutional structure.

The kind of work that the Referendum Panel would undertake in preparing the voter's booklet is not unprecedented in Australia. Most Bills introduced into Parliament are now accompanied by 'explanatory memoranda' prepared by public servants that set out the general purpose and effect of the Bill.

There are also similar examples in other countries. For example, in the state of Oregon in the United States, the Secretary of State produces a 'voter's pamphlet' for each elector before referendums. The pamphlet includes an explanatory statement about the referendum drafted by a committee of five citizens. The citizens are selected by proponents and opponents of the reform. The statement is limited to 500 words. After it has been drafted, the citizen panel submits it for a period of public comment before preparing the final version.

The official Yes/No pamphlet also needs to move on from being just a print-based publication. Print remains an important source of information, but Australians are

increasingly getting information from other sources. Research more than two decades ago on the 1999 referendum showed that over 80 per cent of respondents had received the Yes/No pamphlet and only 51 per cent had read some of it. Today, few Australians would expect to receive information on a referendum only in print form. Presenting information only in this form risks not engaging with a large segment of the population that now expects to receive information about public affairs online.

The Referendum Panel should be permitted to use all available methods of delivery to distribute the Yes/No pamphlet and other information about the referendum. Those methods should include radio, television, email and the Internet. The available methods of delivery should not be specified and narrowed. Just as communication technologies have changed over the last century, so may we expect them to continue to change in the future.

In addition to the method of delivery, the timing of delivery is critical. The present approach – according to which the pamphlet can be delivered just 14 days before the referendum – can leave insufficient time for deliberation. If referendums are to be successful, information, deliberation and citizen engagement need to be at the core of the referendum process from the beginning of the campaign.

#### *Yes and No committees*

The 1999 republic referendum introduced the experiment of having publicly funded Yes and No committees take part in the public debate. The Referendum Act should allow for such committees to be used in future referendums.

Information and advocacy produced by the Yes and No committees should be subject to the oversight of the Referendum Panel. That supervision should extend only to ensuring statements of fact are not inaccurate before release to the public. To give a greater role to the Panel would risk its neutrality and stifle public debate.

Yours sincerely

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