

**SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE
ON SOCIAL POLICY AND LEGAL AFFAIRS INQUIRY INTO CONSTITUTIONAL
REFORM AND REFERENDUMS**

Dr Bede Harris
Senior Lecturer in Law
Faculty of Business, Justice and Behavioural Studies
Charles Sturt University
Albury NSW 2640

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1. This submission addresses items 1 and 2 of the inquiry's terms of reference – the need to improve public awareness and education about the Australian Constitution and what mechanisms should be adopted to review the Constitution.
2. As a preliminary point, there is no doubt that the Constitution is long overdue for reform. The last comprehensive examination of the Constitution was initiated in 1985 and led to the publication of the *Final Report of the Constitutional Commission* in 1988, which made several recommendations, none of which were implemented. There are major defects in the Constitution (discussed in Paras. 23-31 of this submission) which need to be addressed.

Public awareness of the Constitution and civics education

3. Multiple surveys reveal widespread ignorance on the part of voters about the Constitution and how it works. A 2015 survey found that only 65% of Australians knew that we have a constitution – fewer than in 1992. Most recently, the 2019 National Assessment Program – Civics and Citizenship published by the Australian Curriculum and Assessment Reporting Authority (ACARA) found that only 38% of Year 10 students achieved the requisite standard for proficiency, compared to 49% in 2010.¹
4. Surveys also show a decline in confidence in governmental institutions. A 2018 survey by the Museum of Democracy and the University of Canberra found that whereas 86% of respondents were satisfied with Australian democracy in 2007, satisfaction had dropped to 41% in 2018. The 2019 *Australian Electoral Study* published by the Australian National University showed a decline in satisfaction with democracy from 86% to 59%.
5. These results evince public disenchantment with the political system as a whole. A belief that the system is not to be trusted is likely to lead to disengagement from public affairs, which in turn makes it more difficult to persuade voters of the need for constitutional reform.
6. The source the problem lies in shortcomings in the way civics is taught in Australia. Chief among these is the fact that civics is compulsory only up until Year 10. Students in Years 11 and 12 – who are at an age when they will want to become increasingly engaged in the world and who are on the threshold of becoming voters – obtain further exposure to civics only if they study legal studies or politics.

¹ Australian Curriculum and Assessment Reporting Authority (2019). *National Assessment Program – Civics and Citizenship* <https://nap.edu.au/docs/default-source/default-document-library/20210121-nap-cc-2019-public-report.pdf>

7. So far as the curriculum content is concerned, although it provides students with an explanation of how the Constitution works, it is singularly lacking in any critique of the Constitution or how it might be improved. Also noticeably absent is comparison with institutions in other countries and whether we have anything to learn from them. As one commentator stated, the problem with the curriculum is that it can lead to a ‘non-critical understanding and assessment of what democracy is, and what it should be.’² This clearly does not satisfy the development of ‘critical citizenship’ which is what the Australian Curriculum itself states is one of its objectives.
8. For example, Year 7 students study ‘how ministers are subject to the scrutiny of other members of the parliament led by an officially recognised opposition,’ – but that statement presumes that ministers *are* indeed subject to scrutiny and does not question whether scrutiny is effective. Although the Year 8 curriculum examines whether the courts or parliament should resolve conflicts between rights, it does not discuss whether the range of rights protected by the constitution is adequate, which is the most obvious question pertinent to the (in)adequacy of protection of human rights in Australia. The only comparative material in the curriculum appears in Year 10, but this is limited to a single country (Indonesia) and students only the operational features of that country’s constitution in comparison to Australia’s. The point of comparison should not be on a different country or countries, but rather on different *institutions* (wherever they may be drawn from), and that the question students should discuss is not only the different ways in which systems *operate* but how they differ in relation to consistency with constitutional *values*.
9. A key deficiency in the curriculum is its failure to develop an ethical framework against which to evaluate institutions. Although in Year 7 students study a module on ‘How values, including freedom, respect, inclusion, civility, responsibility, compassion, equality and a ‘fair go’, can promote cohesion within Australian society,’ the curriculum provides no coverage of philosophy, without a knowledge of which it is surely impossible to understand and evaluate the values underlying a constitution. As one researcher states³

Of all the learning areas in the curriculum, civics and citizenship is uniquely placed to provide opportunities for young people to develop their ideals, values, morals and ethics as individuals and as members of society, and to learn how to act in accordance with them in various contexts.

10. This is all the more significant because one of the capabilities that the Australian Curriculum requires to be developed is Ethical Understanding.⁴ How can this be achieved unless students are exposed to philosophy, which is the foundation of ethics? Of course this would have to be done bearing in mind the levels of complexity appropriate for secondary students, but it is naïve to think that students can properly understand concepts such as ‘democracy’ and ‘freedom’ without some prior knowledge of political philosophy.
11. Australia has lagged far behind other countries in introducing philosophy to the curriculum. We compare unfavourably Europe, where philosophy is a standard part of the curriculum, and where in some countries such as Spain, Italy and France it is mandatory right through high school. Educationalists in those countries act on the principle that knowledge of philosophy is necessary not only to produce high school graduates who are capable of analysing the ethical questions arising from the study of civics, but also to produce well-rounded citizens.

² Zyngier D (2012) Monash University press release. Monash University. 20 August 2012 <https://www.monash.edu/news/opinions/teaching-for-democracy-not-just-about-it-how-should-we-teach-civics>

³ Henderson D (2017) ‘Current practice and future challenges in teaching civics and citizenship’ in Petersen A, Tudball L (eds) *Civics and citizenship education in Australia*. Bloomsbury, London, 142.

⁴ Australian Curriculum, Assessment and Reporting Authority (2019) *Ethical understanding*. <https://www.australiancurriculum.edu.au/f-10-curriculum>

12. In the *Shape of the Australian Curriculum: Civics and Citizenship Paper* (drafted to guide the Civics and Citizenship curriculum)⁵ ACARA stated that

The values on which Australia's democracy is based include freedom of the individual, government by the people through a representative parliament, free and fair elections, the rule of law, equality of all before the law, social justice and equality, respect for diversity and difference, freedom of speech and religion, lawful dissent, respect for human rights, support for the common good, and acceptance of the rights and responsibilities of citizenship.

13. However the curriculum fails to recognise that the meaning of these concepts ultimately depends upon values, that the content of these concepts is contestable, that they may clash with each other and that when such a clash occurs, value-based judgments are needed in order to achieve a resolution. The curriculum needs to go behind labels such as 'liberal democracy', 'the rule of law', 'equality' and 'human rights' and explore the philosophy upon which these concepts are based. Unless it does so, students will not only fail to understand the constitution, but will be unable to evaluate the extent to which the constitution actually embodies these values and, therefore, whether it needs to be reformed. In summary, the curriculum needs to teach students about the value of justice as a necessary corollary of teaching them about law, which can be done only by integrating philosophy into the curriculum. Without knowledge of philosophy there can be no critique, and without critique there will be no reform.
14. The defects of the civics curriculum and the resultant lack of knowledge of how the constitution works has malign consequences for constitutional development. The low rate of success of constitutional referenda is notorious. A number of factors affect this, but chief among them is the fact that voters are understandably reluctant to change a system they do not understand.
15. Another factor is, unfortunately, that politicians have a vested interest in citizens *not* being knowledgeable about the constitution or being able to critique it, because many of the reforms it needs (discussed in Paras. 23-31 below) would have adverse consequences for them.
16. Evidence of this is provided by the following interchange I had with Senator George Brandis when I gave evidence before the Joint Standing Committee on Electoral Matters in 2006:⁶

Senator BRANDIS – ...When we talk about our system and the Constitution I do not think we should necessarily be teaching students – unless they are law students – about the particular provisions of the Constitution; what we should be teaching them about is democracy. It is in the high concept of democracy, rather than in the prosaic words of the Constitution, that we are going to capture people's imaginations.

Dr Harris – I agree that you have to inspire in the students an appreciation of democracy, but their next question will be: how is this theory implemented in Australia? The answer is: through the mechanism of the Constitution. Then they will ask: how does the Constitution work and does it actually deliver what you say it promises?

Senator BRANDIS – Do you think they do say that? Or do they – because, with all its limitations, I think we all have a sense that Australia is a pretty well-functioning

⁵ Australian Curriculum, Assessment and Reporting Authority (2012) *Shape of the Australian curriculum: civics and citizenship paper*.

http://docs.acara.edu.au/resources/Shape_of_the_Australian_Curriculum_Civics_and_Citizenship_251012.pdf

⁶ Joint Standing Committee on Electoral Matters, Hansard, 11 August 2006, EM 39 <https://www.aph.gov.au/binaries/hansard/joint/commttee/j9566.pdf>

democracy – merely accept that, without requiring the statutory verification of it?.....

Dr Harris – They do accept that, but they are unconcerned with the defects of it – for example, the idea that you can win a general election with significantly fewer popular votes than the opposition. They do not think that far ahead, unless you point it out to them, because the Constitution conceals that possibility.

Senator BRANDIS – I know that has happened a couple of times but that can happen in the most sophisticated democracy, can't it?

Dr Harris – The risk of it happening if you have proportional representation is very, very small. I was in New Zealand when they introduced the MMP system. At least you knew then that whatever government was formed had a majority of voters behind it. I think we should want our students and young people to ask those questions, and to say: 'This is a wonderful theory you are teaching us. Now show us how it works in the document.'

Senator BRANDIS – That is where I do not agree with you because, apart from teaching law students and perhaps politics students, I would not have thought you need to make the language of the document itself accessible to teach students, particularly secondary students, about the way Australian democracy works.

Dr Harris – But isn't it their Constitution?

Senator BRANDIS – I am not saying you should not, but I do not think you need to.

17. This attitude should stand as a warning to us of the difficulties that need to be overcome if meaningful constitutional reform is to be realised.
18. It is vital that the teaching of civics be re-vitalised in schools. But to rely on that as a method of increasing public knowledge of the Constitution would be to defer reform for another generation. Therefore it is also necessary that a programme be devised for education of the broader public, incorporating the same elements that a revised school curriculum would cover. This would be a large undertaking, both in relation to writing a document that explained how the constitution works and the philosophical theories that underly a free society, and in distributing it. However one can point to the large-scale distribution of the constitution in booklet form that happened in South Africa when its post-Apartheid constitution was promulgated, and the explanatory material distributed in Australia at the time of the 1999 referendum. Of course the task would be made far easier by the use of electronic distribution methods now available.

Mechanisms for review of the Constitution

19. In my view, thoroughgoing constitutional reform should be founded on two strategies: the broadest possible consultation with the public and, without at all circumscribing what reforms people might want to suggest, the provision of a list of aspects of the constitution which need reform in order to guide people making submissions.
20. So far as the consultation process is concerned, the task of conducting an inquiry and reporting to the government could be given to
 - an existing committee of either or both houses of parliament, or an ad hoc committee established for the specific purpose of inquiring into constitutional reform

- the Australian Law Reform Commission or
 - a special commission established to conduct the inquiry, similar to that established to conduct the National Human Rights Consultation in 2008.
21. Whichever of these options was used, the terms of the inquiry should be drafted in such a way as to require that the report of the inquiry be released to the public as soon as it is completed. We cannot afford the situation, which is increasingly common, of reports being sent to the government with months elapsing before they are published.
 22. There are a number of areas of the Constitution which are in urgent need of reform.
 23. A striking feature of the Constitutional Convention debates of the 1890s was the absence of consideration of what value or values the constitution should be based on. Delegates did not discuss fundamental questions such as what the relationship should be between the individual and the state and what principles should underlie the relationship of the institutions of government with each other. A key preliminary step before engaging in the mechanics of constitutional reform is to determine what ethical principle the constitution should be based on, because unless decisions about the direction in which the Constitution will be developed is founded upon values, those decisions will be determined by the powerful and, because they are not developed in accordance with an underlying theory, will also suffer from the defect of inconsistency. In other words, unless we take the conscious first step of debating and agreeing upon the meta-framework that should govern law, the law we produce (or maintain) will either be ethically deficient (if it is based on the wrong values) or contradictory (if partly based on good values and partly not). A value that should be discussed as the foundation for a reformed Australian Constitution is that of human dignity. The major international human rights documents – the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (all of which Australia has ratified) – are all founded on the value of human dignity. Human dignity is also expressly stated as the fundamental value upon which modern constitutions, such as those of Germany and South Africa are based and, most importantly, to which their provisions and interpretation must conform. An inquiry on reform of the Constitution ought also to consider whether human dignity should be expressly mentioned as the value upon which the Constitution is based and in conformity with which it must be interpreted.
 24. The Constitution lacks an express right to vote. Furthermore, the structure of the electoral system is left to parliament, and that has resulted in a system which is highly unrepresentative of voters' sentiments as reflected in their first preference votes, and which makes the effect of a vote entirely dependant on the accident of the location of votes relative to electoral boundaries. This in turn leads to gross under-representation of smaller parties. The system also allows parties to form governments with less than a majority of the popular vote - and not infrequently with fewer votes than the largest opposition party – and also leads to domination of politics by two blocs. The distorting effect of the single member electoral system is accentuated by the fact that the size of the House of Representatives is small in relation to Australia's population as compared to countries such as the United Kingdom and New Zealand. In addition, federalism creates distortions in voting-power between citizens because of the equal allocation of seats to states despite their vastly differing populations.
 25. The fact that the Constitution lacks a comprehensive Bill of Rights creates a vast imbalance in power between the individual and the state and also puts Australia in breach of its obligations under international human rights conventions.
 26. Executive accountability to parliament is all but dead as a result of a combination of factors. Chief among these is the domination of politics by two blocs, Labor and Coalition, who,

whatever their antagonism towards each other, collude in not using against each other parliament's powers to compel members of the executive and public servants to give evidence before parliamentary committees. In addition to this, parliamentary procedures do not permit individual members of committees to compel witnesses to attend and give evidence. Finally, even on the rare occasion when contempt proceedings are initiated, the rules of parliamentary privilege dictate that they be decided by members of the legislative chambers, inevitably along party lines, rather than being adjudicated by the courts. All these factors enable governments to defy parliamentary attempts to scrutinise their conduct.

27. The federal system, based on the happenstance of colonial boundaries rather than serving any objective need, is archaic, burdensome and purposeless. If we were drafting a constitution from scratch, would we replicate the state boundaries that we have and if so, why? If the answer to this question is in the negative, why should we retain the states, as opposed to having a single, efficient national government, whose powers were constrained by a bill of rights and effective legislative scrutiny, with a single system of law but with local functions delegated to regional or local governments, whose responsibilities were adjusted flexibly to meet the exigencies of the time? Abolition of the states would also necessitate changes to the structure of parliament and the way in which the Constitution is amended.
28. Despite more than ten years of discussion, we have made no progress on the issue of the recognition in the Constitution of the rights of Indigenous peoples. Governments have rejected proposals for all but the most symbolic reforms. Any reform of the Constitution must include legally enforceable measures which alter the power-relationship between Indigenous peoples and the state.
29. Significant aspects of constitutional law are governed by legally unenforceable conventions rather than by rules of law. This is fundamentally at odds with the doctrine of constitutionalism and the rule of law, which require that law be certain in its content and judicially enforceable if breached. The conventions ought therefore to be codified. The fact that many other countries in the Commonwealth – both those that have retained the monarch as the source of executive power and those that have become republics – took this step decades ago indicates that the task is not as difficult as some would argue. In addition, codification and legal enforceability would make it much easier for Australia to take the step of becoming a republic, as it would nullify the argument that having an elected president would create the risk of constitutional conflict.
30. The fact that the Constitution locates the source of executive power in an hereditary monarch of another country is incompatible with Australia's identity and with the principle that in a democracy, people should be able to aspire to any office of state. Constitutional reform should therefore include a mechanism by which Australia would become a republic, with an elected president exercising the powers currently vested in the Queen and exercised by the Governor-General.
31. The pivotal role of the courts in a constitutional system, and the fact that the government is a frequent party in court proceedings, makes it important that, as far as possible, the preferences of the government of the day not play a role in the selection of judges. The current system of appointment of judges being under the sole control of the government needs to be reformed by the establishment in the Constitution of an independent body charged with assessing applicants for judicial office and making recommendations to the government as to whom to appoint.
32. In light of the above, I would propose the following terms of reference for any body given the task of consulting the public and presenting recommendations for constitutional reform to the government:
33. The [body] will inquire into reform of the Constitution in such a way as to determine whether, and how, the Constitution should be reformed in relation to the following matters

whether the Constitution should expressly state that it is founded on the principle of human dignity and should be interpreted in accordance with that value

the fairness of the electoral system and the degree to which it produces results that accurately represent the views of voters and give adequate effect to each voter's vote

protection of human rights and remedies in cases of breach

legal accountability of the executive to the legislature

the federal system and alternatives to it

processes for constitutional amendment

the structure of parliament

constitutional protection of the rights of Indigenous peoples

codification of constitutional conventions

the severance of links to the monarchy and the establishment of a republic

the method of selection of judicial officers and

any other relevant matters.

34. The opportunity for constitutional reform arises infrequently. I would urge the Committee to take the broadest view possible in determining what aspects of the Constitution should be reviewed.