Committee Secretary
House of Representatives Standing Committee on Social Policy & Legal Affairs
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Submission – Inquiry into constitutional reform and referendums

Introduction

While our Constitution is far more than an Act of Parliament that came into effect on 1 January 1901[1], I make the following suggestions in response to the terms of reference

- I am not persuaded that our Constitution or the means by which it is amended need reform.
- However, to put that to one side, the government might usefully establish a respected non-partisan body to review, endorse or oppose any proposal before it is put before Parliament or to the people
- The government might establish a permanent body tasked exclusively with educating people about our Constitution. It would generate informative documents and set up meetings and discussion groups
- The government should avoid attempts to change our Constitution to deal with current political controversies or for partisan political reasons
- The government should take account in its thinking that the meaning of the Constitution is always uncertain because its practical application is determined by the High Court of Australia. The consequential uncertainty also applies to amendments to the Constitution.

Our System

In our country we have a written Constitution along similar lines as is the case in the United States of America. When the Constitution commenced it established a federal system which comprises specified and limited powers reposed in a newly established Commonwealth and the remaining powers are vested in the former colonies, henceforth to be called States, which also had their own constitutions. Any inconsistency in laws of the states on the one hand and Commonwealth on the other, are resolved in favour of the Commonwealth (see Section 109). It also established a form of separation of commonwealth power as between the executive, legislature and judiciary documented under the relevant chapter of the Constitution. Our Constitution was framed in order to delineate structures of government power. It set down arrangements that while changes are possible any changes must be expressly approved by the people. In particular any change must receive majority support of the electorate across the nation and of the electorate in a majority of the states. That is consistent with the notion of a written Constitution designed to lock in place structures that cannot be changed at the whim of the Government.

Of course the Founders could have established a structure of government power that could have simply set out a system of Parliamentary supremacy similar to the system

[1] *Commonwealth of Australia Constitution Act* 1900 Imp

that now exists in a post EU Great Britain. The UK has an unwritten Constitution comprising various conventions, legislation and until recently including Treaty arrangements reflecting UK membership of the European Union. In Great Britain Parliamentary power is not constrained by a written Constitution[2]. But our system has some elements of the UK system, for instance our Executive government is closer to the UK system than the USA in that our Ministers must be members of Parliament.

Quick & Garran, on 7 December 1900, in the preface to their great work examining the Constitution said: "Clear as is the language of the Constitution, it cannot be fully understood without the study of a large correlated literature."[3]Obviously with reference to correlated literature, Quick & Garran were talking about the literature and thinking that fed into the process of settling the terms of the Constitution including the various political debates and conventions. Since the Commonwealth of Australia was established on 1 January 1901 those observations remain on point. The subsequent correlated literature now includes Court decisions that expound the meaning of the various provisions, described above in Quick & Garran as 'clear…language'. It also includes legislation such as *Statute of Westminster Adoption Act 1942* & *Australia Act 1986*. Against that backgound it is clear that our Constitution is much more than a legislative measure comprising 128 sections which commenced operation on 1 January 1901 creating a new country.

Changing our system

Section 128

The Hawke Government established a Constitutional Commission in 1987 to conduct a review of our Constitution. That body published 'Background Paper 12 Amending the Constitution' dated January 1987 which looked closely at matters fairly close to the issues for examination set forth in these Terms of Reference. It is an excellent brief examination of this topic. The point is made that 'the record of voting at referendums shows that amending the Constitution in accordance with section 128 is very difficult'[4]. The voting record to date is set out in that document and is posits a number of alternate means by which changes to our Constitution might be made. They include change by means of approval in half of the States (as distinct from a majority) with a majority of eligible voters across the country[5], by means electors initiative, by means of State initiative, by means of Convention initiative or at the behest of an ordinary Bill passed into law by Federal Parliament.[6] Those alternative means of amending the Constitution would require amending section 128 by means set out in that section. I think it would improve our Constitution if the ability to initiate proposals for change were not limited to the Commonwealth. The Commonwealth is unlikely to initiate a proposal that, for instance, reduced its power in some fashion even if such a change is objectively a good idea.

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[2] *Miller v Secretary of State for Exiting the European Union*, 2017 [UKSC], para 40-67. We see in this analysis affirmation of the supremacy of Parliament in the UK notwithstanding the hitherto constitutional arrangements regarding the power of the Executive in relation to Treaties.

[3] *The Annotated Constitution of the Commonwealth of Australia, Quick & Garran*, John Quick & Robert Randolph Garran, Revised Edition, Lexisnexis Butterworths Australia, 2015

[4] *Constitutional Commission Background Paper No 12 Amending the Constitution* (AGPS) p. 7

[5] In 1974 such a proposal was rejected. Blackshield, Williams & Fitzgerald, *Australian Constitutional Law Theory Commentary & Materials*, Federation Press 1996, p972

[6] Constitution Commission Paper *Op cit* n 4 pp 11-23

If we look at this fate of proposals to change our Constitution, the studies I've seen on this topic look at the outcome of the referendum proposals as to the majority votes across the nation and in each state. The focus is on the numbers. In that vein most failed proposals do not attract support from more than 50% of eligible voters. Only 6 of 44 proposals attracted more than half of the votes across the country but failed because they did not win a majority in a majority of states. Most proposals simply fail to garner support. As a result of those outcomes I don't accept that the statistical review of referendum results leads necessarily to a conclusion that s 128 needs to be reformed or that failure is in any sense undesirable. If you accept that the Constitution frames the structure of government on an ongoing basis that can be changed only if strict procedures are followed (in contrast with the UK system of Parliamentary supremacy). I think the better conclusion is that section 128 has protected us from measures that may not have improved our Constitution.

As stated above, since federation 44 proposals to change our Constitution have been submitted to the people. The fact is most proposals fail. If we want to look at why those proposals failed we should engage in a discussion of the real merits of a particular question as well as possible marketing shortcomings and distrust of politicians by the electorate. Perhaps a particular propsal fails because it has no merit or insufficient merit to justify a change to our Constitution, a document that by its nature should only be changed in order to rectify a significant problem or to address a grave deficiency that has arisen. On that point consider this: proposals were put to the people in 1974 and in 1988 to recognize local government (the earlier proposal authorizing Commonwealth financial assistance to local government and the latter establishing and ratifying the existence of local government under the Constitution). In 1988 the form of words put forward to the people were:

> "119A Each State shall provide for the establishment and continuance of a system of local government, with local government bodies elected in accordance with the laws of the State and empowered to administer, and make by-laws for, their respective areas in accordance with the laws of the State."[7]

There appeared to be no compelling reason to adopt this change. It's failure has not led to any difficulty in the operation of local government. Had it been adopted it is hard to see from the innocuous formulation of words what real work that measure would have done. On the other hand the amendment would have radically changed the structure of the Constitution by formalizing a 3rd tier of government and offered an opportunity for the Commonwealth to sideline the States. Unsurprisingly the case for voting yes was weak and unconvincing while the vote no case drew attention problems that might arise were the proposal adopted.[8] Another measure put to the people in 1951 was to ban the Communist Party. That measure was rejected. Had it been adopted it may have constrained our democracy by limiting choice at subsequent elections.

It seems to me that many of the proposals could be easily characterized as attempts to expand the power of the Commonwealth at the expense of the States or a response to a current political controversy. Those do not justify Constitutional amendment.

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[7] *Yes or No? Referendums. Saturday 3 September 1988. The cases for and against,* AGPS 1988, p31
[8] *Id* pp18-20

Reform of our Constitution is not, in my opinion, a topic that occupies the minds of ordinary folk going about their lives. That appears to me to be a key problem faced by proponents of change. If the lives of ordinary folk met significant difficulties in the conduct of their lives on account of Constitutional problems then change might be less problematic.[9] In that vein it might be argued that the growth in legislative measures that to enact laws that curtail citizens rights under the political guise of protecting us from terrorism or terrorists[10] has resulted in a need for a bill of rights to be added to the Constitution. It seems to me that would be a measure that responds to a problem. The Constitution does not protect citizens from unjustified government intrusions into their rights and governments are ramming laws through Parliament on a regular basis that create new serious criminal offences that do things like reversing the onus of proof and often establish draconian secrecy provisions none of which have a place in a liberal democracy such as ours. Invariable those law pass through Parliament with the support of both major political parties. When those laws are tested in the Courts they are usually upheld[11] I think a good argument can be made that an amendment creating some form of bill of rights is justified. Of course a proposal such as that has no prospect because it would most likely fail to get through Parliament.

To conclude this part of my submission, section 128 works fairly well and the focus that should occupy the minds of those who want to change the Constitution should be on the real merit of any proposed change. If there is a meritorious proposal then a good argument to adopt it can be mounted.

Although Quick & Garran said 'Clear as is the language of the Constitution…'[12] If someone were to read the text of the Constitution they would find it difficult to reconcile it with the current reality of our government. For instance we have a Commonwealth Minister for Education and Youth and a Minister for Health and Aged Care. Each of those areas of activity are primarily undertaken by the States and Territories and they also have government Ministers, Departments and infrastructure. There are no enumerated heads of power in regards to the Commonwealth in either of those areas. The Commonwealth is not responsible for the matters set forth in section 51 unless Parliament decides to legislate in that area. Nor does the constitution constrain the role of the Commonwealth to enumerated matters or expressly exclude the States. This leads me to the High Court of Australia.

The High Court of Australia

The law reports show that the High Court of Australia has examined the text of the Constitution and expounded what it means since the Court was established subsequent to Federation. Over time the Court has tended to favour an expansive view of the power of the Commonwealth. For instance an examination of the evolution of s51(xxix) of the Constitution (the external affairs power) the High Court has found a capacity of the Executive branch to enter a Treaty and in doing so triggering a

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[9] In a well knows movie called *The Life of Brian*, released in Australia on 22 November 1979, Reg, leader of the Peoples Front of Judea posed the following question 'What have the Romans ever done for us?' After a bit of thought his colleagues responded with things like the aqueduct, sanitation, wine & public order etc etc. Perhaps, in a similar vain, most referendum proposals had been thought of as a threat to a system that works well and change should to implemented sparingly?

[10] Criminal Code Act 1995 s100.3 of the Schedule

[11] *Thomas v Mowbray* 233 CLR 307. This case is a good example of the timidity of the High Court in protecting citizens rights against state power.

[12] Quick & Garran *Op cit* N 3 pxi

domestic legislative power of the Commonwealth which hitherto did not exist. That view of the external affairs power is far beyond what appears to have been intended by the drafters of the Constitution[13]. To illustrate that point, in the Tasmanian Dams case[14] The High Court found, *inter alia,* that the external affairs power of the Commonwealth supported Commonwealth legislative power to prevent the Tasmanian Government building dam on the Franklin River to produce hydroelectric power. The High Court has also found that section 109 of the Constitution allows the Commonwealth law to 'cover the field'.[15]This means that it is not necessary for a direct inconsistency between a Commonwealth and a State law to result in the State law to be struck down. In that manner the Franklin River dam was stopped by the Commonwealth by means of an expansive reading of Commonwealth combined with section 109 striking down State law. Constitutional amendment is in this sense implemented by the High Court. Over time the Court evolves its analysis. It has the power to overrule its own previous decisions which enables it to give effect to its policy changes. In a recent decision which examined the implied right to political communication, one of the Justices observed that a legitimate question arises as to whether that implied right really exists[16]. If that prospect were to gain the support of the Court over time, that will serve to illustrate the Courts central role in changing our Constitution.

If the desire is to reduce the High Courts role in changing the Constitution, because the High Court is not an elected body and its members cannot be removed (except in exceptional circumstances), perhaps the appointment process of Judges should be reformed. For instance it might be preferable for the judges to be appointed by the States rather than by the Commonwealth. Perhaps the Constitution should be amended to require the Court to interpret the Constitution in a certain expressly stated manner. In the end I can't see a realistic practical way to constrain the way in which the Court interprets the Constitution while retaining its independence.

The Constitution can also be changed by a State referral of power to the Commonwealth under section 51(xxxvii) in the sense that although section 51 (xxxvii) is part of the Constitution, when it is activated by a State it augments the power of the Commonwealth and concomitantly diminishes State power (although referrals of state power are usually formulated as being reversable by the referring state).

Conclusion

Since Federation on 1 January 1901 44 proposal have been put to the people to amend the Constitution under the mechanism established by section 128 of the Constitution. That represents 1 proposal in every 2.7 years since Federation on average.

For reasons stated above most of those proposals should not have been put to the people because they lacked substance and fell well short of a measure calling for so grave a response as constitutional reform.

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[13] *Ibid* pp749-750

[14] *Commonwealth v Tasmania* (1983) 158 CLR 1192

[15] Fitzgerald & Ors *Op cit* n 4 pp 482-490

[16] *LibertyWorks Australia Inc v Commonwealth of Australia* [2021] HCA 18 at para 249 Steward J suggested the implied right of political communication does not exist.

If any further referendum proposals are put before the people they should first be endorsed by an independent expert body. One reason for this is that political leaders are often thought of in the community as short term opportunists who are not always focused on the importance of telling the truth.[17]Having said that, the proposal to establish a republic followed a pretty extensive review by experts but it failed nonetheless. Perhaps that is because ordinary folk saw no problems with our existing system. Perhaps it had insufficient merit.

Any proposal for change should be subject to extensive dialogue over many years as was the case before the Constitution was first enacted. The following test should be applied:

- What substantial defect is there in our Constitution?
- Having identified a defect how will the proposed amendment address that defect?
- Having identified a defect and addressed it in a formulation of words, can a strong rational argument be mounted to convince the people to support it?

While I acknowledge symbolism matters and it may have a place in our Constitution, my focus here has obviously been on other issues.

I hope the Committee finds these comments helpful and interesting.

My details are:

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[redacted]

[17] I don't necessarily subscribe to that view, however it is hard for many of us to forget words like 'there will be no carbon tax under a government I lead' or 'I'll never ever introduce a GST' etc etc.