The Parliament of the Commonwealth of Australia

Reforming our Constitution:

A roundtable discussion

House of Representatives
Standing Committee on Legal and Constitutional Affairs

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Canberra

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Contents

Foreword

It is now nine years since the last referendum was held to amend the Australian Constitution. It is over thirty years since there was a successful referendum to amend Australia's Constitution. The present decade may be the first since Federation during which there is no referendum held. This stasis in terms of change to the Constitution, or even attempts to change the Constitution, is remarkable.

It would not be quite so remarkable if the Constitution had originally been drafted with some expectation of unchanging permanence. Or, if it was generally agreed that all aspects of the Constitution remained relevant and appropriate to Australia as a nation in the 21st century.

However, neither situation is the case. The stepping stone to nationhood that the Constitution represented in 1901 is now in some aspects a boulder placed in the way of cooperative federalism, Indigenous reconciliation, and public engagement in our governance.

To progress debate on constitutional reform – the purpose of our Constitution, the need for reform and the process for reform – the Committee decided to conduct a roundtable discussion on 1 May 2008. The roundtable took place shortly after the 2020 Summit and consequently was able to apply some of the ideas raised in the governance stream of that forum to the context of constitutional reform.

Fourteen invited participants with an interest and expertise in constitutional reform took part in the roundtable. That discussion and this report have focussed on those areas of the Constitution which appear most at odds with current approaches in Australia and not reflective of contemporary Australia.

In considering any constitutional reform, the obvious starting point is the mechanisms for change. There are three primary means of changing the operation of the Constitution:

- amendments to the Constitution using the process set out in section 128

- judicial interpretation of the Constitution, and
- inter-governmental negotiations and the referral of State powers.

It is telling that seeking amendments to the Constitution, while the most transparent and publicly accountable means of change, has become the least often used. This has led to some criticism regarding the high benchmark for change that is set by section 128, and the absence of any trigger to bring issues to a referendum and so ensure regular public engagement on issues shaping the structure of our nation.

Another area of the Constitution often reliant on judicial interpretation and characterised by a lack of certainty is the disqualification provisions for members of parliament, in particular those relating to:

- 'foreign allegiance' referred to in section 44 (i)– which excludes citizens of another country and those Australians holding dual citizenship
- 'holding an office of profit under the Crown' referred to in section 44 (iv) – which may exclude a range of occupations such teachers, public servants or employees of a university depending on how the particular organisation is legally constituted.

In addition to the complexity of unravelling just how these disqualifications are applied to each individual case, there are questions regarding certainty of interpretation and relevance of these provisions in the 21st century.

The three-year election cycle for the House of Representatives, which is established under section 28 of the Constitution, is a constitutional provision that appears contrary to best governance processes at the Commonwealth level. Options for change include a move to fixed election terms, and extending the length of term to four years.

Discussions noted that, with the exception of Queensland, all states have now moved to four year election cycles.

Federal-State responsibilities and negotiating more cooperative Federal-State approaches are other areas of constitutional contention. Section 51 of the Constitution establishes the respective responsibilities of Federal and State governments; the possible reform of these provisions is complex.

However, the referral of powers by States and the escalation in the number of intergovernmental agreements are indicative of the recognised need for a national and cooperative approach to certain issues. This report summarises the discussions on:

- the practical cooperative approaches that have developed, such as State referral of powers and intergovernmental agreements, to navigate around constitutional provisions, and
- methods to bring the Constitution more in line with current practice and enable cooperative federalism to operate effectively.

There are concerns regarding the escalation of intergovernmental agreements and the lack of transparency and oversight applied to these agreements. For this reason the Committee has recommended scrutiny of intergovernmental agreements by a parliamentary committee, as currently happens with international treaties.

During the last two sessions of the roundtable, discussion focussed not on what needs to be changed in the Constitution but rather on what is currently absent and possibly should be included in our Constitution. These debates raised the recognition of Indigenous Australians in the Constitution, the inclusion of a preamble that provides an aspirational statement for all Australians, and the inclusion of a concept of citizenship and the constitutional protection of rights.

The report provides some background to previous changes to the Constitution and the current provisions which have been applied to Indigenous Australians. In particular section 25 is now considered discriminatory in today's context and there was general agreement from the Committee that it should be removed.

Further discussions on constitutional recognition for Indigenous Australians and a preamble included proposals to:

- amend the Constitution to recognise the special position of Indigenous Australians; and
- develop a preamble to the Constitution which could encompass:
  - ⇒ the recognition of Indigenous people as the first Australians and traditional custodians of the land; and
  - ⇒ a broader statement of identity and belonging for all Australian people.

There was no consensus on these proposals and discussions indicated a certain caution about how to draft an inclusive and aspirational preamble for all Australians. However there was agreement that the process of consultation and debate could itself be a positive and nation building exercise.

Finally the roundtable considered citizenship in the Constitution – or rather the absence of citizenship in the Constitution. Key issues raised were:

- the definition of citizenship and its associated rights, and

- the main mechanisms for the protection of rights in Australia, and the merits of possible models such as:
  - ⇒ a statutory Bill of Rights, or
  - ⇒ a constitutional Bill of Rights.

I have strong views on a number of these issues. However, even stronger is my belief that we need to inspire Australians to engage with our Constitution – to recognise its importance as the founding document for our nation, to seek reforms so it is a relevant document that reflects our current nation, and to debate how it might shape our nation into the next century.

This report provides a summary of the discussions around key areas of possible reform. It does not suggest specific changes to the Constitution or put forward amended text. Rather the report places these roundtable discussions and other debates within the broader issue of Australia's identity and future direction.

The question this report puts to the Parliament and the people of Australia is whether the Constitution should be revised to:

- acknowledge where we have come from;
- set out our rights, protections and practical national governance structures; and
- articulate aspirations for a nation.

Public engagement on these issues is critical. It is my hope that this report builds on the dialogue of the 2020 Summit and challenges the current freeze on constitutional change.

I thank all Members of the Committee for demonstrating their commitment to constitutional reform in Australia. I also thank the participants in the roundtable who engaged in robust and constructive debate to help bring these complex issues into a form that is meaningful and relevant to all Australians.

Mark Dreyfus QC MP
Chair

Membership of the Committee

Chair	Mr Mark Dreyfus QC MP
Deputy Chairman	The Hon Peter Slipper MP
Members	Mr Shayne Neumann MP
	Mr Petro Georgiou MP
	Ms Belinda Neal MP
	Mr Graham Perrett MP
	Mrs Sophie Mirabella MP[1]
	Mr Daryl Melham MP
	The Hon Kevin Andrews MP
	Mr Mark Butler MP

1 Mrs Mirabella was granted leave of absence for maternity reasons from 16 June 2008, could not attend Parliament and could therefore not participate in consideration of this report. Mrs Mirabella does not endorse all of the statements in this report.

Committee Secretariat

Secretary	Dr Anna Dacre
Inquiry Secretary	Ms Jane Hearn (21.04.2008 to 28.05.2008)
Assisting writers	Dr Mark Rodrigues
	Dr John Carter
	Mr Kevin Bodel
Research Officer	Ms Clare James (to 20.04.2008)
Administrative Officer	Ms Melita Caulfield

Recommendation

Recommendation 1 (paragraph 4.54)

The Committee recommends that the Australian Government introduce the requirement for intergovernmental agreements to be automatically referred to a parliamentary committee for scrutiny and report to the Parliament.

1

Introduction

1.1 Since 1901 when Federation was declared, the political, economic and social life of Australia has undergone profound changes. Despite the change and growth of Australia as a nation, the Constitution remains very much as it was originally drafted in the 1890s.

1.2 Over that time there have been forty-four referenda of which only eight have been successful. Another five have failed because, despite passing on a majority of national votes, they did not pass in the majority of States.

1.3 With the last successful referenda to amend the Constitution in 1977, we are now in the longest period without even minor reform to the Constitution since Federation. Despite the lack of reform, there has been no lack of national debate on the Constitution.

1.4 Calls for constitutional reform have been continual since 1977—from Parliamentary committee reports, a variety of conferences and in academia and the wider community.

1.5 One of the most thorough reviews was conducted by the Constitutional Commission in 1988 which considered the changes required if Australia was to become a republic. As part of that extensive consultation and report process, the Commission made a number of recommendations to bring the distribution of powers as set out in the Constitution more into line with the practicalities of governance practices in Australia. Many of the issues examined by the Commission are raised in this report.

The need for a roundtable

1.6 Despite the extensive debates over the need for constitutional reform that have taken place in the thirty years since a successful referendum, all too often these debates are limited to academic spheres. While the Constitution is, and always will be, of great interest to academia it belongs in the public arena, to the nation as a whole.

1.7 In undertaking a roundtable on constitution reform, the Committee hoped to free the subject from being considered solely in an academic, legal or political context. Constitutional reform should be a debate about principles, about the appropriateness of existing provisions and, most fundamentally, about a set of democratic and governance structures that best give voice to the people of Australia.

1.8 The roundtable and subsequent report aims to show that debate about constitutional reform continues to be vital and relevant. Unresolved issues continue to mount and, particularly in regards to the distribution of powers, the complexity of these issues increases with successive layers of intergovernmental agreements, High Court challenges and State referrals of powers.

Building on the 2020 Summit

1.9 In resolving to undertake the roundtable, the Committee was also hoping to build on the momentum of the 2020 Summit held in Canberra in April 2008**,** and the discussions in the governance session of that Summit.[1] A major theme of the Australian Governance stream of the Summit was the 'strengthened participation of Australians in their governance'.[2]

1.10 Among the ideas put forward from the governance stream were:

- a review of all levels of governance to build a modern Federation;
- innovative mechanisms to increase civic participation;
- national consultation on a Charter or Bill of Rights; and

1 The Prime Minister, the Hon Kevin Rudd MP, convened the Australia 2020 Summit at Parliament House on 19 and 20 April 2008.

2 Department of Prime Minister and Cabinet, *Australia 2020 Summit – Final Report*, May 2008, p 317. < australia2020.gov.au/final_report/index.cfm> accessed 13 June 2008.

- a new preamble which formally recognises Indigenous Australians.[3]

1.11 These ideas also featured prominently in the more than 800 submissions received for the governance stream, along with calls for the accessibility, transparency and open dialogue with government required to achieve greater civic participation.[4]

1.12 During the roundtable, Summit ideas were raised on several occasions, as was the model of public consultation of both the Summit and the National Apology to Aboriginal and Torres Strait Islander peoples delivered on 13 February 2008.

1.13 The topics of the Committee's roundtable also responded to some of the issues raised at the 2020 Summit.

Conduct of the roundtable

1.14 The roundtable was held in Canberra on 1 May 2008. All members of the Committee participated as did fourteen invited individuals. Individuals were invited based on their experience in engaging with issues of constitutional reform and their ability to discuss them in a manner that was open and accessible to all. The list of invited participants is at Appendix A.

1.15 The Committee did not seek to undertake an extensive inquiry into constitutional reform. Wanting only to open a public discussion on the issues, submissions were not sought. However, the roundtable was open to the public and was webcast. The full transcript of proceedings is available on the Committee website.[5]

1.16 The roundtable consisted of five separate sessions focussing on processes and possible areas of constitutional reform. The sessions were:

- processes for altering the Constitution;

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3 Department of Prime Minister and Cabinet, *Australia 2020 Summit – Final Report*, May 2008, pp. 307-317. <australia2020.gov.au/final_report/index.cfm> accessed 13 June 2008.

4 Department of Prime Minister and Cabinet, *Australia 2020 Summit – Final Report*, May 2008, p. 308.

5 House of Representatives Standing Committee on Legal and Constitutional Affairs, Round Table Seminar—Reforming the Constitution, at: <aph.gov.au/house/committee/laca/reformcon.htm>

- parliamentary terms and qualifications of Members of Parliament;
- recognition of Indigenous people and a new preamble;
- harmonising Federal-State relations; and
- citizenship and a Bill of Rights.

Report structure

1.17 The sessions outlined above form the structure of the report. Each chapter gives a summary of the issues raised during roundtable discussions and provides some Committee comment on possible future directions for both reform and ongoing debate.

1.18 This report does not make any recommendations for change to the Constitution itself. While the roundtable directly identified some outmoded provisions of the Constitution, and some which warrant further scrutiny, it was not the Committee's purpose to add to the volume of recommendations for constitutional reform.

1.19 It is intended that the report makes the issues identified at that roundtable accessible and of interest to the broader public. While the participants at the roundtable are all eminent professionals in their field, as their discussions revealed, these are not esoteric issues. They are among the issues that define us as a nation.

1.20 Many of the reforms debated at the roundtable and elsewhere have at their core the desire to expand the Constitution beyond its current purpose of establishing our systems of government, to encompass a document that provides a modern identity to Australia as a nation of people.

1.21 The report makes no conclusions on these points beyond the insistence that the debate on constitutional reform belongs in the public arena and mechanisms for ongoing public engagement are critical.

1.22 The roundtable and this report are intended as initiating dialogue that brings constitutional reform onto the Parliament's agenda. It also seeks to renew the call for public debate and engagement on these issues.

1.23 In essence, the aim of this report echoes that of John McMillan, Gareth Evans and Haddon Storey in their text *Australia's Constitution: Time for Change*, written a quarter of a century ago:

> This book is intended to stimulate a serious national debate on the desirability and possibility of changing the Australian Constitution. Its aim is not to argue for any particular change, but simply to expose the problems that appear to exist in the present operation of the Constitution, to identify possible solutions to those problems, and to suggest some ways in which constructive debate might actually be encouraged.[6]

1.24 Through this report, the Committee hopes to invigorate the debate on constitutional reform, to question how the people of Australia engage in constitutional debates and identify areas of reform, and to consider what Australians might want from our Constitution in terms of its role in defining the governance, democracy and identity of our nation.

6 J McMillan *et al*, *Australia's Constitution: Time for Change?* Allen and Unwin, Sydney, 1983, p. ix.

2

Altering the Constitution

Introduction

2.1 This chapter discusses the ways in which the operation of Australia's Constitution has been altered over the years, highlighting the three principal mechanisms:

- amendments to section 128;
- judicial review; and
- inter-governmental negotiations and referral of State powers.

2.2 The chapter also discusses the appropriateness of these mechanisms for change and the constraints they may place on the possibilities for Constitutional renewal.

2.3 Although the main issues discussed at the roundtable focussed on amendments to section 128 and the machinery of referenda, for completeness, this chapter also reviews the other mechanisms of change.

Amendments via referenda

Background

2.4 Section 128 provides for the initiation and ratification of proposals to alter the Constitution. It arose from the Convention negotiations of the 1890s as a compromise between the States and the Commonwealth, and between the electorate and politicians.[1]

2.5 The section stipulates the following stages:

- a Bill is submitted to the Commonwealth Parliament proposing an amendment to the Constitution;
- the Bill is passed and a referendum is held;
- for the amendment to be ratified a majority of voters must agree in a majority of the States, and there must also be an overall majority nationwide (Territory votes are included in the national vote but not in the state figure.)

2.6 Parliament prescribes the machinery by which referendum votes are taken. Usually each elector receives a pamphlet containing separate arguments in favour and arguments against the proposal. These arguments must be authorised by a majority of those parliamentary members who voted for or against the proposed law.

Success of referenda

2.7 During the roundtable Professor Williams stated that Australia was 'going through the longest drought in our history when it comes to constitutional change.' He noted that only eight of the 44 referendum proposals since Federation had succeeded. Indeed, the rate of change had slowed over time and no referendum had succeeded since 1977.

2.8 This period of 31 years was 'the longest period of no constitutional change in Australia's history.' Professor Williams also suggested that the rate at which referenda were being put had also slowed and it was

1 S Bennett and S Brennan, 'Constitutional Referenda in Australia', Information and Research Services *Research Paper, No. 2, 1999-2000*; Parliamentary Library, August 1999; S Bennett, 'The Politics of Constitutional Amendment', Information and Research Services *Research Paper, No. 11, 2002-03*, Parliamentary Library, June 2003.

likely that the present decade would be 'the first decade of Australian history where no referendum has been put to the Australian people.'[2]

2.9 Roundtable participants identified several factors underpinning successful referendum outcomes. These were:

- bipartisanship—although not a guarantee of success, 'no referendum has been passed without it'
- adequate popular education—this enabled Australians to feel confident they understood the issues and could make a considered choice[3]
- popular ownership of a proposal— for example, the 1967 referendum deleting discriminatory references in the Constitution had resulted from a popular campaign conducted over several years[4]
- substance of the proposal—the public had to consider the proposal useful and 'a real addition to our constitutional arrangements.' Proposals seen as promoting a short-term political agenda tended to be viewed with suspicion[5]

2.10 Regarding the number of proposals put at one time, Professor Blackshield felt the public was able to discriminate between individual proposals in a package. For example, in 1946 only one proposal out of several was agreed to; in 1977 there was again mixed success; and in 1988 all proposals failed but by very different majorities. Professor Blackshield considered, however, 'that it is better and more reasonable to put up not too many but, say, four proposals at a time.'[6]

2.11 Professor Williams concluded that the lessons to be learnt from the high failure rate of referenda in Australia was that there had been:

> … a conspicuous failure to learn the lessons of the past and, indeed, what we see in referendums are the same mistakes being repeated again and again when proposals are put to the Australian people.[7]

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2 Professor Williams, *Transcript of Evidence,* p. 3.
3 Professor Williams, *Transcript of Evidence,* p. 4.
4 Dr O'Donoghue, *Transcript of Evidence,* p. 12.
5 Professor Saunders, *Transcript of Evidence,* p. 8.
6 Professor Blackshield, *Transcript of Evidence,* p. 11.
7 Professor Williams, *Transcript of Evidence,* p. 4.

Amending section 128

2.12 Participants at the roundtable discussed ways by which the success rate of referenda could be improved. It was suggested that two aspects could be changed: the terms of section 128 itself and the way in which proposals were determined and presented to the people.

2.13 Section 128 has two main components. First, it requires there to be a Bill for the alteration of the Constitution which is passed by an absolute majority of at least one House of the Parliament.[8] There follows a referendum which to succeed must receive approval from a majority of the electorate nationwide and a majority in a majority of the States—the so-called 'double majority'.

2.14 Professor Williams considered that it was only worth considering changing one aspect of section 128, that being the broadening of the scope for initiating proposals.[9] Professor Blackshield also commented that the Bill for change emanated from politicians and so often failed the test of public ownership. He added that the solution occasionally raised was for citizen-initiated referenda. This would entail a certain percentage of the electorate putting up a suggestion for a referendum.[10] The concept was supported by Professor Zines.[11]

2.15 Two objections to citizen-initiated referenda were raised. Professor Blackshield felt it was a good idea but noted that many thought:

> … that the people will come up with stupid proposals, as they do seem to do in California. I do not believe that the rest of the world is like California. I think we can trust our electorate better than that.[12]

2.16 A second objection raised by Professor Flint was that it tied up the legislative process of the Federal budget:

8 If both Houses pass the Bill the referendum is to be conducted within two and six months of passage through both Houses. If only one House passes the Bill it can be resubmitted after three months. If subsequently passed by the House which originally passed it, irrespective of its success or failure in the other House, the Governor-General may submit the proposed change to the people.

9 Professor Williams, *Transcript of Evidence,* p. 15.

10 Professor Blackshield, *Transcript of Evidence,* p. 12.

11 Professor Zines, *Transcript of Evidence,* p. 17.

12 Professor Blackshield, *Transcript of Evidence,* p. 12.

> Imagine if the Rudd Government came in and they found that they were forced to spend about 30 per cent of the budget on particular things because of [citizen-initiated referenda].[13]

2.17 An alternative way in which to involve the public in referendum proposals was the introduction of constitutional conventions. This is discussed later in the chapter.

2.18 Regarding the double majority requirement, it was noted that four of the failed referenda would have been passed on a national majority. One of these, Professor Williams advised, was a referendum to remove the 'majority in the majority of States' requirement. He added that this may have been due to voters in the smaller States not wishing to lose their influence.[14]

2.19 By and large, participants did not support removing the double majority requirement, although Professor Zines noted that if the requirement was changed to require a majority in just half of the States (ie three States), the number would return to the current situation of four States if, as he believed likely, the Northern Territory were to become Australia's seventh State.[15]

Adjusting the machinery of referenda

2.20 Section 128 states that 'when a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes.'

2.21 The usual procedure adopted for referenda in Australia is the production of a booklet putting forward the yes and no cases. Professor Saunders considered this provided a fair opportunity to state the opposing positions in a referendum, but should only be a first step because it was not a good mechanism to promote understanding.[16]

2.22 Professor Zines agreed:

> I think the yes and no cases have sometimes been an absolute disgrace. If you look back into the past, particularly the no but also the yes cases have often just been pretty scurrilous political tracts. That has often been the case were perhaps

13 Professor Flint, *Transcript of Evidence,* p. 16.
14 Professor Williams, *Transcript of Evidence,* p. 9.
15 Professor Zines, *Transcript of Evidence,* p. 17.
16 Professor Saunders, *Transcript of Evidence,* p. 17.

> only a minority of people in the parliament are opposed to it. There have also been other occasions in which the public could not possibly get a clear, objective view as to what the issues were about. That is because it is left to those persons in the House who are opposed or in favour of it to draft them.[17]

2.23 Professor Blackshield agreed and suggested that if it was not possible to take the drafting of the cases out of the hands of politicians at least 'you could take the second reading speech and the reply from the opposition and simply reprint them in an intelligible format.'[18]

2.24 The preparation of the yes and no cases by politicians in the Commonwealth jurisdiction contrasts with that in New South Wales. As Professor Twomey stated, in that jurisdiction opposing arguments are prepared by bureaucrats and subsequently checked by constitutional lawyers and others to prevent bias. She added that the resulting referendum booklets were seen to be more 'educational' and referenda in that state had a higher success rate. She acknowledged, however, that there might be other factors contributing to the success rate in NSW. Notably, issues were more confined to the State and, unlike Commonwealth referenda, did not focus on providing more power to the Commonwealth.[19]

2.25 In contrast, Professor Flint felt that it was appropriate for politicians to write the opposing cases in the pre-referendum booklet:

> I think that the yes/no case should be written by those who are responsible for it—that is, the members of parliament. They are the ones we rely on in elections to put out their agendas and so on. I think it is perfectly proper and appropriate to have them write a yes/no case, rather than have some other body do it and who would purport to be objective but who would have the same prejudices as members of parliament.[20]

2.26 Professor Williams felt that while people have enough understanding of the referendum proposal to come to a decision, more should be done to address the serious problem in Australia of 'a lack of understanding and engagement with the basic political and

17 Professor Zines, *Transcript of Evidence,* p. 8.

18 Professor Blackshield, *Transcript of Evidence,* p. 11.

19 Professor Twomey, *Transcript of Evidence,* pp. 12–13.

20 Professor Flint, *Transcript of Evidence,* p. 16.

governmental processes.'[21] He considered there was a lack of imagination in relying solely on a booklet with the opposing cases. For example, not one of his constitutional law students had read the booklet produced for the republic referendum.[22]

2.27 Professor Saunders agreed and suggested New Zealand could provide a model of creativity as they had reviewed arrangements and imaginatively considered ways to assist people to understand the proposals and be properly involved.[23]

2.28 Professor Lavarch also argued that a yes/no booklet would not adequately engage the public and advantage should be taken of advances in technology such as those which enable social networking opportunities.[24] Mr Black added that 'digital natives' should be engaged via recent technological innovations:

> [Digital natives] spend more of their recreation time each week surfing the net than they do watching television, let alone any other recreational activity. They have grown up in this environment. The ability to make the case through YouTube or Facebook applications, or through a range of other online tools, should be an important part of any education and public ownership process.[25]

2.29 Several participants suggested that holding conventions was a way to educate and engage citizens in constitutional change.

The use of conventions

2.30 Professor Williams suggested that regular constitutional conventions should occur every decade. They should become:

> … a regular feature of our public life that engages with questions of constitutional reform—not something that must necessarily lead to outcomes but, if you like, part of our civic life that involves a regularity in dealing with these issues that means that people see it as an ongoing, continuous process,

21 Professor Williams, *Transcript of Evidence,* p. 14.
22 Professor Williams, *Transcript of Evidence,* p. 5.
23 Professor Saunders, *Transcript of Evidence,* p. 8.
24 Professor Lavarch, *Transcript of Evidence,* p. 13.
25 Mr Black, *Transcript of Evidence,* p. 13.

> not just a matter of a referendum being put up every few years that they tend to vote no to.[26]

2.31 Support was provided by Professor Behrendt who noted that the successful 1967 referendum resulted from a 20 year process of engaging the public.[27]

2.32 Professor Zines reminded the Committee that during the 1970s and 1980s there had been a regular review of the Constitution by the Australian Constitution Convention.[28] Professor Saunders highlighted the strengths and weaknesses of these conventions:

> [E]ach of the delegations had to comprise government and opposition. Some of them worked better than others in involving both sides of politics … one of the weaknesses of that exercise was that the Commonwealth never adequately committed itself to the outcomes of convention recommendations, and one of the consequences of that was that the Commonwealth itself did not take many of the convention deliberations seriously enough.[29]

2.33 Professor Flint also noted the value of government commitment saying that Australia 'would not have federated had the colonial parliaments not promised to put the decisions of the convention to the people.' A second factor which ensured federation, Professor Flint noted, was that most of the conventions comprised of elected delegates. However he preferred 'a convention partially elected and partially ex officio.'[30]

2.34 Support for partially elected conventions was also provided by Professor Williams, Professor Craven, and Professor Behrendt.[31]

2.35 Nevertheless, Professor Craven emphasised that just convening a convention was insufficient to ensure a successful outcome:

> [I]f you were really going to look at something at a constitutional convention, you would have a clearly thought out discussion program of epic proportions before you began.

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26 Professor Williams, *Transcript of Evidence,* p. 5.
27 Professor Behrendt, *Transcript of Evidence,* p. 14.
28 Professor Zines, *Transcript of Evidence,* p. 7.
29 Professor Saunders, *Transcript of Evidence,* p. 7.
30 Professor Flint, *Transcript of Evidence,* p. 9.
31 *Transcript of Evidence,* pp. 6, 10, 14.

> You would not just launch a convention into the ether and have it talking about anything …
>
> The second thing is that it would have to go for a long time. …
>
> The third thing is that, once you come up with your model on anything, you would adjourn for a significant period of time. That would enable what you have come up with to go to the people to be debated. Then it would come back with thoughts and improvement, you would debate it again and your improved referendum machinery would come back.[32]

Judicial interpretation

2.36 Given the lack of success of constitutional referenda over the years, by default the primary method by which the Constitution has evolved is through judicial interpretation by the High Court.

2.37 Resulting changes to the Constitution have not been systematic, but have been driven by the issues brought before the bench by various litigants, by the preferences of individual judges, and by the High Court's understanding of the 'spirit of the times.'

2.38 Over time High Court decisions have changed interpretations of the Constitution without any referendum altering the wording of the Constitution. Changed interpretation has resulted in an expansion of Commonwealth powers, altering the power of the Commonwealth in its relationship with the States. Examples include:

- the 1920 *Engineers* case from which emerged the principle that grants of Commonwealth legislative power in the Constitution should be given a broad interpretation in accordance with the ordinary English meaning;
- the interpretation of section 96 allowing the granting of financial assistance to the States on such terms and conditions as the Commonwealth Parliament thought fit; and
- the 1983 *Tasmanian Dam* case which allowed the Commonwealth to halt work on the Gordon below Franklin Dam on environmental

32 Professor Craven, *Transcript of Evidence,* pp. 10-11.

grounds under the external affairs power because it was subject to a treaty—the World Heritage Convention.[33]

2.39 In some instances High Court decisions have achieved outcomes which had been rejected at a referendum. Such decisions have extended Commonwealth powers over corporations and telecommunications, and made changes in the areas of aviation, marketing schemes for primary products, and freedom of speech.[34]

2.40 On the other hand, the public's view demonstrated at a referendum can confirm a High Court's decision. This occurred in 1951 when the public rejected a referendum proposal to ban the Communist Party, confirming the High Court's rejection of legislation enacted by the Menzies government.

Inter-governmental negotiations and referral of State powers

2.41 Since the 1990s Commonwealth, State, and Territory jurisdictions have become progressively entwined. Negotiated solutions with the States and Territories to address financial and political objectives are extremely difficult. The low success rate of referenda, however, has provided significant motivation for negotiations to establish practical arrangements to, in essence, circumvent some constitutional provisions.

2.42 For example, when in 1990 the High Court negated a single national corporations law, rather than seeking constitutional amendment, the Commonwealth negotiated with other jurisdictions resulting in the creation of 'mirror' legislation to achieve the same result. This strategy was jeopardised by a subsequent High Court ruling, but the States and Territory governments countered by using sections 51 (xxxvii) and (xxxviii) of the Constitution which allow them to refer powers to the Commonwealth.[35]

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33 *Commonwealth vs Tasmania* (The Tasmanian Dam case) (1983) 158 CLR 1.

34 M Coper, 'The People and the Judges: Constitutional Referenda and Judicial Interpretation', in G Lindell , ed., *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines*, Federation Press, Sydney, 1994, pp. 78–80.

35 T Blackshield and G Williams, *Australian Constitutional Law and Theory, Commentary and Materials*, 2nd edn, Federation Press, Sydney,1998, p. 1194.

2.43 Other recent instances when State and Territory powers have been referred to the Commonwealth have been in the areas of regulatory standards for goods and occupations, anti terrorism laws, and financial matters relating to the breakdown of de facto relationships.

Committee comment

2.44 On the face of it, the history of defeated referenda and the length of time since any referenda on constitutional change suggest caution on the part of Australians about enacting change to the Constitution.

2.45 The Committee also notes that the section 128 constitutional requirements for change through referenda set a high bar in order to effect change. Despite some criticism of these requirements, the Committee does not consider changes to section 128 as feasible or necessarily desirable.

2.46 Instead, the Committee supports examining the process of how arguments are framed and debated in referenda and how this process may impact on referenda as well as the mechanisms for bringing issues to referenda.

2.47 The Committee supports the suggestion of regular constitutional conventions. The process should be measured and deliberate with opportunities for the public to engage in the debate. It would be important for such conventions to be seen as effectual and not to follow the course of history as described by Professor Saunders in her research paper:

> On average, there has been one comprehensive review of the Australian Constitution every 25 years since Federation. Each has identified a large number of proposals for change. Each also has been largely ineffective in securing sufficient consensus on change, within either Parliament or the electorate. Very little has followed from any of them, as a result.[36]

2.48 Judicial interpretation and intergovernmental agreements are both practical means by which problems in the Constitution can be overcome. However the framers of the Constitution intended that the

36 C Saunders, 'The Parliament as a Partner: A Century of Constitutional Review', in G Lindell and R Bennett, eds, *Parliament – The Vision in Hindsight,* Federation Press, Sydney, 2001, p. 483.

Constitution itself be changed to meet challenges and issues which arise. The Committee has reservations if judicial interpretation and intergovernmental agreements become the primary means of resolving constitutional issues as these avenues remove public engagement, certainty of interpretation and transparency of process. For these reasons, formal change of the Constitution should remain a viable mechanism for resolving issues.

2.49 As discussed in the following chapters, there are a number of areas of the Constitution which warrant consideration for reform. Any consideration of reform also necessitates further consideration of the processes by which Australians engage in the debate for reform and potentially give effect to constitutional amendments.

3

Parliamentary terms and members' qualifications

Introduction

3.1 The second session of the roundtable discussed two key, though unrelated, topics:

- the duration of parliamentary terms; and
- the qualifications for membership of Parliament.

3.2 Section 28 of the Constitution sets out the term of the House of Representatives and thus the election cycle. Discussions considered options for:

- fixed or non fixed terms; and
- extending the length of term.

3.3 Section 34 of the Constitution sets out the qualifications for membership of Parliament, while section 44 sets out five disqualification provisions. Discussion focussed on two of the disqualification provisions:

- section 44 (i)—foreign allegiance; and
- section 44 (iv)—holding an office of profit under the Crown.

The duration of parliamentary terms

3.4 The parliamentary cycle is driven by the term of the House of Representatives because the Government is formed from the majority party in that House.

3.5 Section 28 of the Constitution stipulates three year terms for the House of Representatives, but with the option of an early dissolution:

> Every House of Representatives should continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

3.6 The term of the Senate is covered by section 7. It specifies that Senators serve for six years and that every three years there be an election for half of the Senate.

3.7 Professor Lavarch noted that at the time of Federation all the States except Western Australia had adopted three-year terms. It was not long, however, before debate began on the possibility of extending the Commonwealth's parliamentary term from the three years stipulated in the Constitution. In 1927 the first referendum on the issue was defeated.

3.8 Currently, all the States except Queensland have a four-year parliamentary term. Queensland, which has a unicameral Parliament, retains the three-year parliamentary term.[1]

3.9 There are three options commonly discussed for changing the length of parliamentary terms at the Commonwealth level. These are:

- fixed three-year terms;
- fixed four-year terms; and
- non-fixed four-year terms.

3.10 At the roundtable the fourth option of a hybrid model consisting of a four year non-fixed term with a minimum of three years was also raised.[2]

3.11 Professor Behrendt suggested it was important to separate discussion of the length of the term of Parliament from whether it was fixed or

1 Professor Lavarch, *Transcript of Evidence,* pp. 18–19.

2 Professor Lavarch, *Transcript of Evidence,* p. 21.

not.[3] She maintained there are separate issues to consider around each proposal.

Fixed or non-fixed parliamentary terms

3.12 Fixed terms, Professor Behrendt suggested, provide a greater degree of certainty for governments and the electorate. She suggested fixed terms would also impact on the ability of people to enrol in time for an election since the deadline would be known—before the 2007 election changes to the electoral laws had set the deadline at when the election was called.[4]

3.13 Fixed terms, whether of three or four years, would extend the life of the Parliament (this was true even for a fixed three-year parliamentary term because the current interval between elections averages two and a half years.) A longer and more certain parliamentary term in the House would enable more business to be transacted.[5]

3.14 A fixed three-year parliamentary term for the House of Representatives would continue the close alignment with the six-year fixed term for Senators. This would allow for simultaneous elections, removing the current delay between an election and the subsequent appointment of new Senators.[6]

3.15 On the other hand, fixed terms removed the advantage of incumbency because the Prime Minister would be unable to take advantage of circumstances in the political cycle and call an early election. Professor Saunders felt the ability to call an early election was an anachronism:

> [T]he view that the head of government, whoever it may be, can pick and choose a time for an election to suit his or her political advantage seems to me to be really rather odd in this day and age. So I would go for fixed terms …[7]

3 Professor Behrendt, *Transcript of Evidence,* p. 25.
4 Professor Behrendt, *Transcript of Evidence,* p. 25.
5 Professor Lavarch, *Transcript of Evidence,* p. 19.
6 Professor Saunders, *Transcript of Evidence,* p. 23.
7 Professor Saunders, *Transcript of Evidence,* p. 23.

3.16 Professor Zines noted that several issues arose from the introduction of fixed parliamentary terms:

- If the Prime Minister lost the power to call an election at his/her discretion, is it sensible for the Opposition in the Senate to have the ability to force an election?
- What would happen if the House of Representatives moved a motion of no-confidence?
- Presumably the possibility of a double dissolution during a fixed term would need to be excluded.

3.17 Professor Zines also drew attention to the situation in the United States where 'the Senate retains power to reject supply but has no reason for doing so to get rid of the government; they cannot get rid of the government because there are fixed terms.' Eventually supply is provided but not for a week or two, during which public servants are not paid.

3.18 Some or all of these issues, Professor Zines suggested, could be addressed by building in exemptions into any fixed term requirement of an amended Constitution.[8]

Extending parliamentary terms to four years

3.19 Currently the three-year term of the House of Representatives is in broad harmony with the six-year terms of Senators (a half term Senate election occurs every three years). As noted earlier, however, there is a time lag because elected Senators take their position on 1 July after a general election.[9]

3.20 Extending the parliamentary cycle to four years would break the harmony with the Senate, but would enable more time for parliamentary business before the commencement of the election cycle.[10] As one Committee member noted:

> [G]enerally, for the last six months or so there is often a fairly directionless government, very much affected by the day-to-day media stories… certainly a lot of the legislative program is cut short. As everyone knows, any bills remaining when an election is called generally go into the ether—some to return

8 Professor Zines, *Transcript of Evidence,* pp. 24–25.

9 Professor Saunders, *Transcript of Evidence,* p. 23.

10 Professor Lavarch, *Transcript of Evidence,* p. 19.

> and some never to return—so a lot of good work of both the parliament and the executive is lost.[11]

3.21 Another member of the Committee questioned whether extending the life of the Parliament guaranteed improved outcomes:

> I do not think we have seen, at the state level, the extension of a four-year term, fixed or otherwise, improve policy or the quality of government.[12]

3.22 On the other hand, a fixed term would be an opportunity to harmonise the Commonwealth and the majority of State parliamentary cycles. Professor Williams considered alternating State and Federal elections was worthy of debate. The proposal would be for all of the States to hold an election on one day, with two years later there being a Federal election.[13]

3.23 However Commonwealth–State electoral alignment was not supported by Professor Saunders on the grounds that it would:

> … preclude further experimentation in the timing of elections. One of the ways in which this debate about whether we should have fixed terms or partly fixed terms has come about is by the various states experimenting with their electoral cycles.[14]

3.24 Support was provided by Professor Craven who strongly opposed Commonwealth–State alignment, stating:

> … it would be yet another thing downplaying the character of the states as genuine polities within the Australian Constitution. They would just become electoral cabooses tied to the engine of the Commonwealth.[15]

The term of the Senate

3.25 Extending the term of the House of Representatives without altering the term of the Senate would significantly increase the number of elections in the Commonwealth jurisdiction.[16] The term of the Senate is an important issue, as Professor Craven noted:

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11 Ms Neal MP, *Transcript of Evidence,* p. 26.
12 Mrs Mirabella MP, *Transcript of Evidence,* p. 21.
13 Professor Williams, *Transcript of Evidence,* p. 22.
14 Professor Saunders, *Transcript of Evidence,* p. 23.
15 Professor Craven, *Transcript of Evidence,* p. 24.
16 Professor Lavarch, *Transcript of Evidence,* p. 20.

> [I]f you are into checks and balances in this country you are probably pretty fond of the Senate … unless you can come up with some sensible answer to what you do with the Senate in a proposal like this … you have got another massive problem.[17]

3.26 Participants identified several issues which would arise if the term for Senators was increased to eight years:

- Would Australians accept an eight-year term for Senators?[18]
- Was it 'desirable for someone who slips through on some complicated flow of preferences but with a fairly small percentage of the vote' to become a Senator for eight years?[19]
- How should party defectors in the Senate be treated? Should the loss of endorsement trigger a casual vacancy and consequent replacement by a member of the same party?[20]

3.27 Lowering the Senate term to four years, on the other hand, may not receive popular support. Professor Lavarch noted that the referendum in 1988 proposing a four-year term for both Houses of Parliament resulted in the lowest support for a referendum since Federation.[21]

Committee comment

3.28 In relation to options and recommendations for changing the parliamentary term, the Committee notes the recommendations of the Joint Standing Committee on Electoral Matters in its report on the 2004 Federal Election. That report makes the following recommendations:

- … that there be four-year terms for the House of Representatives
- …. that the Government promote public discussion and advocacy for the introduction of four-year terms during the remainder of the current Federal Parliament
- …that in the course of such public discussion, consideration be given to the application of consequential changes to the length of the Senate term

17 Professor Craven, *Transcript of Evidence,* p. 24.
18 Professor Saunders, *Transcript of Evidence,* p. 23.
19 Professor Lavarch, *Transcript of Evidence,* p. 20.
20 Mr Melham MP, *Transcript of Evidence,* p. 21.
21 Professor Lavarch, *Transcript of Evidence,* p. 19.

> ■ … that proposals be put to the Australian public via a referendum at the time of the next Federal Election. If these proposals are successful, it is intended that they come into effect at the commencement of the parliamentary term following the subsequent Federal Election[22]

3.29 Although there was dissent on some aspects of the Electoral Matters Committee report, there appeared to be bipartisan agreement for these recommendations.

3.30 The Australian Government response to the report indicated in principle support for these recommendations.[23] However, the response also stated that there was no intention on the part of the Government to take the issues to referenda at this stage.

3.31 During the roundtable discussions, the issue of possible changes to the electoral cycle was debated without coming to a consensus position. However there was general agreement from both participants and Committee members that a bipartisan position was critical. [24]

3.32 The Committee notes Professor Williams' point that on the topic of extending the parliamentary term it would be very easy to mount an emotive 'no' case in any referendum:

> It is hard to think of a better example of something people would love to vote 'No' to than the idea that politicians, through their own self-interest, correct or otherwise, have drafted a proposal to give them an extra year in office. That is very easy to defeat.[25]

3.33 Consequently, the Committee considers that the referendum would have to be preceded by extensive public engagement on the issue.

3.34 The debate regarding fixed four-year terms has been a persistent one. However the Committee is of the view that a changed climate renews the impetus for change at the federal level. The Committee considers

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22 Recommendations 32 to 35, Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: The Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto,* Canberra, September 2005 <aph.gov.au/house/committee/em/elect04/report.htm> accessed 13 June 2008.

23 *Government Response to the Report of the Joint Standing Committee on Electoral Matters on the 2004 Federal Election,* August 2006 <aph.gov.au/house/committee/em/elect04/Report/govres.pdf> accessed 13 June 2008.

24 Professor Lavarch, *Transcript of Evidence,* p. 21.

25 Professor Williams, *Transcript of Evidence,* p. 21.

that the Australian public, having now experienced four-year terms in all States except Queensland, may be ready for the Commonwealth to 'catch-up' and introduce fixed four-year terms.

3.35 The Committee supports greater engagement in the debate around parliamentary terms. It suggests that this debate needs to be taken up in public fora, to avoid it being perceived as a purely parliamentary push for constitutional reform.

3.36 In addition, the Committee considers that the concerns raised regarding how any alteration to the parliamentary term might be emotively opposed adds weight to the need to examine the processes of referenda (as discussed in Chapter 2).

Qualifications of Members

3.37 Two sections of the Constitution determine eligibility to become a Member of Parliament. Section 34 sets out the qualifications of members but contains the phrase, 'until the Parliament otherwise provides'. This has allowed legislation to override the original provisions of section 34. Consequently, under the *Commonwealth Electoral Act 1918*, to be elected a person must:

- have reached the age of 18 years;
- be an Australian citizen; and
- be either an elector entitled to vote at a House of Representatives election or be a person qualified to become such an elector.

3.38 Section 44, which sets out grounds for disqualification, contains no qualifying phrase allowing Parliament to override the section by way of legislation. The section disqualifies a candidate if he or she:

(i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power: or

(ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii) Is an undischarged bankrupt or insolvent: or

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons.

3.39 At the roundtable, discussion focussed on two aspects:

- section 44 (i)—foreign allegiance; and
- section 44 (iv)—holding an office of profit under the Crown.

The need to disavow foreign allegiance

3.40 Professor Lavarch noted that recent High Court decisions determined that adopting Australian citizenship was insufficient for holders of dual citizenship unless they had taken 'additional steps or reasonable steps' to disavow any allegiance to the foreign country.[26]

3.41 Professor Williams suggested this provided a degree of uncertainty because it required knowledge of the citizenship laws of the candidate's country of origin:

> It means that Australian lawyers have to give legal advice based on the law of an African country, of Israel or of any country around the world to determine the answer. People are left in enormous uncertainty because they may be entitled to citizenship under a foreign law, going back to their ancestry, which will disqualify them even though they have never taken any positive steps to actually enliven that citizenship, and that is a wholly unsatisfactory situation …[27]

3.42 This view was challenged by a member of the Committee:

> We are actually asking them … to make a choice. Whether we like it or not, there are different standards expected of the legislators in the federal parliament in whether they deal with potential, perceived or imagined conflicts of interest … Everything has to be seen to be above board because it goes to

26 Professor Lavarch, *Transcript of Evidence,* p. 20.

27 Professor Williams, *Transcript of Evidence,* p. 28.

> the very confidence that people have in their members of parliament.[28]

3.43 Professor Rubenstein countered, arguing that a formal renunciation of citizenship might not affect the 'continuing affection, association and sense of commitment' to the country whose allegiance was being renounced. What was needed, she added, was a register which listed candidates' and Members of Parliament's other citizenships. This disclosure would provide transparency and Members could be held to account in their decision making processes. [29]

3.44 Professor Rubenstein concluded that a more positive view should be taken of dual citizenship:

> I do think that in a globalised world we can think much more positively about dual citizenship and not see it as undermining Australia… I always make the distinction of people who see citizenship like marriage or parenting: you can have more than one child and have a commitment to each of them without necessarily undermining the other.[30]

3.45 On a different tack, Professor Saunders argued that the Constitution had been drafted at a time when there was no concept of Australian citizenship. Had there been, the founding fathers:

> … would have created the status of Australian citizenship, given them the right to vote and given them a right to stand for Parliament—basic, democratic rights… I think it would be much more desirable to face the reality that we need a concept of citizenship in the Constitution and deal with it appropriately, and then I think you probably would leave these matters to legislation, and very properly so.[31]

3.46 The possible inclusion of a concept of citizenship in the Constitution was discussed further in a later session of the roundtable. That discussion is summarised in Chapter 6.

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28 Mrs Mirabella MP, *Transcript of Evidence,* p. 28.

29 Professor Rubenstein, *Transcript of Evidence,* pp. 29–30.

30 Professor Rubenstein, *Transcript of Evidence,* p. 30.

31 Professor Saunders, *Transcript of Evidence,* p. 34.

The need to not hold an office of profit under the Crown

3.47 Section 44 (iv) provides a general disqualification for candidates who receive a benefit from the Crown. There is an exception, however, applying to:

> … the office of any of the Queen's Ministers of State for the Commonwealth,[32] or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

3.48 The issue is clear for government employees who have to resign their positions before they nominate as an election candidate. As the High Court determination against Victorian candidate Phil Cleary in 1992 showed, being on leave without pay for some years was insufficient to prevent disqualification.[33]

3.49 It was noted that there was uncertainty around the description of office for profit and whether employees of universities and other quasi-independent bodies were captured by section 44 (iv.)[34]

3.50 Two possible constitutional amendments were suggested. The first option was changing the point at which the provision took effect, from requiring the candidate to resign before nomination to resignation after election but before taking a seat in Parliament.[35] Professor Williams agreed with this suggestion noting that the current provision cuts in too early.[36]

3.51 The second option was introducing a provision similar to that in New South Wales whereby the Parliament was allowed to 'vote to excuse very minor problems in relation to "office of profit" to get rid of the really ridiculous aspects of it.'[37]

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32 The exemption does not cover Parliamentary Secretaries, who were consequently not remunerated until an amendment of the Ministers of State Act in 2000 provided for them to be sworn in as Ministers, but without that title. Harry Evans, ed., *Odgers' Australian Senate Practice,* 11th edn, Canberra, 2004, p. 128.

33 Professor Lavarch, *Transcript of Evidence,* p. 20. See also *Sykes v Cleary* (1992) 176 CLR 77.

34 Dr Twomey and Professor Williams, *Transcript of Evidence,* pp. 26-8.

35 Professor Saunders, *Transcript of Evidence,* p. 27

36 Professor Williams, *Transcript of Evidence,* p. 28.

37 Dr Twomey, *Transcript of Evidence,* p. 26.

3.52 Notwithstanding these options, the situation current in the Commonwealth jurisdiction for some 50 years is that public servants resign before nomination and have an automatic right of re-entry should they fail at the subsequent election.[38] Some participants cautioned, however, that the validity of Commonwealth legislation establishing this right may not survive a High Court challenge.'[39]

3.53 It was also noted that the provision was not effective in terms of determining an electoral outcome. Each time someone in the House of Representatives had won a seat and then faced disqualification under a provision of section 44, at the subsequent by-election he or she had again won the seat. In effect the provision did not solve the problem; it simply created further problems.

Committee comment

3.54 The Committee notes that a report on *Aspects of Section 44 of the Australian Constitution* was released in 1997 by the Standing Committee on Legal and Constitutional Affairs. The focus of this report was on sections (i) and (iv) and the following recommendations were made:

> The Committee recommends that if the parliament proceeds with a referendum to amend subsections 44(i) and (iv) of the constitution, consideration should be given to the need for amendments to the other parts of section 44, especially subsection 44(v).
>
> The Committee recommends that a referendum be held to make the following changes to the constitution:
>
> - delete subsection 44(i)
> - insert a new provision requiring candidates and members of parliament to be Australian citizens
> - empower parliament to enact legislation determining the grounds for disqualification of members of parliament in relation to foreign allegiance.
>
> The Committee recommends that subsection 44(iv) be deleted and new provisions be inserted in the constitution.

38 Mr Georgiou MP, *Transcript of Evidence,* p. 31.

39 Dr Twomey, *Transcript of Evidence,* p. 30.

> One provision should require a person who holds a judicial office under the Crown in right of the Commonwealth or a state or a territory to resign from the office before he or she nominates for election to the federal parliament.
>
> Under the second provision certain other public offices, specified by the parliament, would be automatically declared vacant if the occupant of any such office nominated for election to the Senate or the House of Representatives.
>
> Under the third provision certain other public offices, specified by the parliament, would be automatically declared vacant if the occupant of any such office were elected to the Senate or the House of Representatives.[40]

3.55 The Government response indicated support in principle for the amendment or removal of subsections 44 (i) and (iv). However it suggested the Attorney-General should give the issues further consideration to develop a specific response.[41]

3.56 While discussions at the roundtable focussed on two of the disqualification subsections, the Committee agrees that significant problems exist with section 44. As Professor Blackshield concluded:

> The whole of section 44 is a mess. The provisions that have proved to be judicially enforceable are not justified, and the ones that are justified have proved not to be judicially enforceable. Most of it is obsolete… I think it is possible to make a public case that these are outmoded, in some cases 18th century, political problems, and that whatever real problems there are about disqualification need to be thought through again.
>
> … we should take the disqualification problems out of the Constitution altogether and whatever we do regard as sensible disqualifications should be regulated by act of

40 Recommendations 1 to 3, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution: subsections 44 (i) and (iv)*, Canberra, August 1997, <aph.gov.au/house/committee/laca/Inquiryinsec44.htm> accessed 13 June 2008.

41 *Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Aspects of Section 44 of the Australian Constitution'*, December 1997 <aph.gov.au/house/committee/laca/governmentresponse/section44.pdf> accessed 13 June 2008.

> parliament, precisely because they do become obsolete and need to be looked at again from time to time.[42]

3.57 It is apparent that the uncertainty concerning section 44 is less than desirable. One Committee member suggested that the disqualification-for-office provision should:

> … be something that people are able to pick up, read and understand. At the moment, we have a provision which not even constitutional lawyers—not even the eminent people in this room—can pick up, read, interpret and understand.[43]

3.58 Professor Williams advocated raising the issues with the public:

> I am very attracted to section 44 being the subject of popular debate… It throws up issues of citizenship and representation. It is exactly the sort of issue, I think, that is well suited to a public debate… We have so many good parliamentary committees that have established the problem. If we are serious about fixing it we should be asking people what they see as the appropriate qualities and disqualifications of their representatives in the Australian parliament, including as to issues of citizenship and the like.[44]

3.59 The Committee is supportive of the need to situate this debate in public fora, as is suggested in relation to parliamentary terms.

3.60 The Committee considers that engaging the public over an extended period, perhaps by way of a constitutional convention and an education campaign to build a more participative democracy, is essential. It is the Committee's conclusion that such a strategy would enable a fruitful examination, and perhaps constitutional reform, of the disqualifications considered appropriate in the 21st century for members of parliaments.

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42 Professor Blackshield, *Transcript of Evidence,* p. 27.

43 Mr Dreyfus QC MP, *Transcript of Evidence,* p. 32.

44 Professor Williams, *Transcript of Evidence,* p. 28.

4

Federal – State relations

Introduction

4.1 This chapter reviews the main issues raised at the roundtable session on Federal-State relations. It outlines:

- the nature of federalism as envisaged by the original drafters of the Constitution;
- how federalism has operated in practice; and
- possible areas for reform including:
  - ⇒ identifying areas for reform;
  - ⇒ methods of implementing reform; and
  - ⇒ gaining support for reform.

The history of Federal-State relations

4.2 The original drafters of the Australian Constitution were careful to preserve as many existing State powers as possible by establishing equal representation in the Senate, specifying the powers of the Commonwealth (primarily in s. 51), providing for considerable legislative powers for States in residual areas and recognising State constitutions, powers and laws. It was expected that the States would

continue to serve as the primary mechanism of government in Australia.[1]

4.3 However, the nature of federalism has changed considerably since federation. There has been a gradual shift in the balance of power towards the Commonwealth. This shift results from constitutional amendments, the Federal government's increased use of special purpose or tied grants to the States, High Court decisions changing interpretations of key constitutional provisions, and the increasing diversification and overlap of areas subject to public policy at all levels of government.

4.4 While historically federalism has been seen to 'work' in Australia, there has also been a growing concern that it could work much better. Some of the criticisms levelled at the current arrangements include:

- policy and regulatory duplication, inconsistency and overall complexity generated by the State and Federal levels of government;
- the high cost of compliance with multiple jurisdictions which imposes an excessive regulatory burden on the community and business;
- public confusion about which level of government is responsible for what service (or aspect of service) especially where there are overlapping responsibilities; and
- the tendency of governments to shift the blame for policy failures to a different level of jurisdiction.

4.5 Governments have created new cooperative mechanisms to coordinate and target policy and overcome inconsistencies between and jurisdictions. For example, since the 1990s the Council of Australian Governments (COAG) has given its attention to harmonising efforts across a number of areas including improving national efficiency and competitiveness and developing national regulation systems. Other major areas for national cooperation have included rail, electricity, food standards and environmental protection.

1 See J McMillan, G Evans and H Storey, *Australia's Constitution: Time for Change*, Allen and Unwin, Sydney, 1983, pp. 39-48.

4.6 As a consequence, Australia now has a system of government that relies on hundreds of complex agreements between Federal and State authorities made through inter-governmental forums that have no formal authority under the Constitution.

4.7 In her opening statement to the roundtable, Professor Saunders expanded on some of the criticisms of federalism:

> It is clear from much of the debate in Australia in recent years that individual Australians and groups of various kinds – for example, the Business Council – want more laws to be harmonised and want many areas of decision making to be streamlined, and a lot of the studies that have been produced have identified costs associated with what are seen to be inefficiencies, although sometimes they are just the consequences of having a federal system of government.[2]

4.8 Professor Williams highlighted a recent finding by the Organisation for Economic Cooperation and Development (OECD) in relation to the dysfunctional nature of Australia's federal system:

> [T]he Australian system of government has the highest levels of unnecessary government duplication amongst all OECD nations in terms of the basic amount of taxpayers' money that is being wasted.[3]

4.9 Professor Behrendt noted that the problems of federalism are felt acutely by Indigenous communities:

> There is no doubt that since the 1967 referendum [granting the Commonwealth legislative power in Indigenous affairs] the unintended consequence of that was that the split between federal and state governments of responsibility for Indigenous affairs has created one of the biggest structural barriers to our ability to effectively deal with some of the pressing needs of the Indigenous issues.[4]

4.10 Family law is a particular area where both Indigenous and non-Indigenous Australians have to confront the problem of multiple jurisdictions, as Ms Thomas explained:

> [I]n my day-to-day work as a family law practitioner I have to explain to people why it is that they have to bring their

2 Professor Saunders, *Transcript of Evidence*, p. 34.
3 Professor Williams, *Transcript of Evidence*, p. 44.
4 Professor Behrendt, *Transcript of Evidence*, p. 43.

> de facto law application in one court but all the married people get to have their children's and property matters dealt with in one jurisdiction. When it affects them in a negative way, having to explain to the broader community why that is is very difficult. It does not make sense to them why one group or class of people get treated better than they do.[5]

4.11 These current Federal-State arrangements are not consistent with the intentions of the original drafters of the Constitution, and nor do they meet public expectations for the appropriate and effective delivery of government programs. Federalism in practice and the need for reform are considered further in the sections below.

Federalism in practice

4.12 There was consensus among roundtable participants that the Constitution no longer reflects the way Australia is actually governed in relation to Federal-State relations. Informal conventions of inter-governmental approaches through COAG, ministerial councils and working groups have attempted to respond to cross-jurisdictional issues by various means including mutual recognition between States of their differing legislative provisions.

4.13 However, this approach, known since the 1960s as 'cooperative federalism', brings with it additional problems. For example, inter-governmental bodies have no formal status, are slow in responding to complexity, often do not generate legislative responses and generally lack accountability and transparency.

4.14 Professor Saunders noted that there are literally hundreds of inter-governmental agreements in Australia. Closer relations with New Zealand also mean that many agreed arrangements include an international dimension. Professor Saunders pointed out that the Commonwealth has no tradition of scheduling inter-governmental agreements to Acts of Parliament, nor is there any specific arrangement for parliamentary scrutiny of inter-governmental agreements, although such schemes exist for legislative instruments and international treaties.[6]

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5 Ms Thomas, *Transcript of Evidence*, p. 49.

6 Professor Saunders, *Transcript of Evidence*, p. 36

4.15 Cooperative schemes are also vulnerable to High Court interpretation because the concept of 'cooperative federalism' is not part of the Constitution.[7] This point was illustrated by the decisions of the High Court in *Re Wakim* and *R v Hughes*.[8] For example, in *R v Hughes*, the High Court indicated that Commonwealth officers cannot exercise duties under a cooperative arrangement unless the duty is also supported by a specific head of Commonwealth legislative power. Dr Twomey noted:

> [I]n one of the High Court judgments, one of the judges said, 'There is nothing in the Constitution requiring cooperative federalism. Cooperative federalism is just a slogan'… we need to put something in the Constitution that allows for and supports cooperative federalism at the judicial, the legislative and the executive levels so that it deals with the cross vesting problem, with the Hughes problem and with making section 51 (xxxvii) [regarding state referrals to the Commonwealth] an effective procedure[9]

4.16 According to Professor Saunders, the lack of accountability and transparency is a major problem with current Federal-State relations:

> It is manifested in all sorts of ways – in the conditions attached to grants, in the accessibility of intergovernmental agreements and in the transparency of intergovernmental debates on questions of public policy, which might enable the public to understand and evaluate competing views. If people understood a lot better how these arrangements worked, more pressure might be put on politicians to ensure that they work quicker and more effectively.[10]

4.17 Professor Lavarch also considered that there is need for reform to facilitate cooperative federalism:

> Certainly some improved architecture around intergovernmental arrangements, agreements and transparency is I think quite valuable and would be a signpost to the way in which we would like our Federation to operate.[11]

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7 Dr Twomey, *Transcript of Evidence*, p. 40.

8 *Re Wakim; ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

9 Dr Twomey, *Transcript of Evidence*, p. 40.

10 Professor Saunders, *Transcript of Evidence*, p. 36.

11 Professor Lavarch, *Transcript of Evidence*, p. 44.

Areas for reform

4.18 In recent years there has been much discussion about the need to 'fix federalism', however there has been little consensus on the very nature of the problem to be fixed. Professor Craven commented on the 'fix federalism' rhetoric:

> I worry about the 'fix federalism' rhetoric. The verb can be problematic. When my father talked about 'fixing the dog', it did not mean something nice. I am happy to look at federalism. I am happy to refine federalism and all those sorts of things, but I think we do need to think about whether we like federalism or whether it is a problem. A lot of what is said now says to me 'federalism is a problem', which I do not agree with. It seems to me that federalism is a good system of government. [12]

4.19 There may be some areas such as water management or industry regulation where the Commonwealth could take a much greater role in responding to national challenges. However, it is difficult to generalise what aspects of public policy could be better served through greater centralisation or decentralisation, as Professor Saunders noted:

> How we go about dealing with harmonisation and streamlining depends on the area in question and on identifying these areas accurately. I think that to have a study that actually does identify the areas that need harmonisation and streamlining is a first priority in this area. There are lots of generalisations that are thrown around, but they need to be properly probed. [13]

4.20 It is also important not to devalue the role of the States. Professor Saunders reflected on the value of decentralisation within the Federation:

> There are many ways in which our attitudes to the federal system waste opportunities for experimentation and innovation, waste opportunities to further deepen our democracy and, in some respects I think, jeopardise our attitudes, not just to federalism but also to parliamentary

12 Professor Craven, *Transcript of Evidence*, p. 41.

13 Professor Saunders, *Transcript of Evidence*, p. 34.

> democracy, as we continually erode the states and their capacities and therefore their levels of performance. [14]

4.21 Mr Black suggested that there are two steps in determining possible areas for reform. The first is to identify the very specific concerns for which there is likely to be bipartisan support:

> There is then that second step, which might be the need to think boldly … which could involve a longer term consideration and debate about exactly what we do want our federal system to be in the 21st century.[15]

4.22 Some participants noted that local government is a major area omitted from the Constitution and neglected in current debates on Federal-State relations. Professor Williams advocated a more in-depth look at the role of local government and warned that a referendum on simple recognition of local government would be a waste of time and entrench 'something that appears to give little but carte blanche to the High Court to determine the meaning of what such a provision would achieve'.[16]

4.23 Dr O'Donoghue argued that local government is important to Aboriginal people and should be part of a discussion on federalism:

> The two levels, federal and state, are always at loggerheads with each other, particularly about our issues. And local governments are much closer to our people, and our people are very involved in local government …and local government is much more involved with our people…[17]

4.24 If a consensus could be reached on particular areas for reforming Federal-State relations, the question then becomes one of how such reform could be implemented. There are a number of means possible including the referral of State power to the Commonwealth, cooperative legislation and constitutional amendment. Participants noted some issues with those methods.

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14 Professor Saunders, *Transcript of Evidence*, p. 34. A similar view was also expressed by Professor Flint, *Transcript of Evidence*, pp. 42-43.

15 Mr Black, *Transcript of Evidence*, p. 47.

16 Professor Williams, *Transcript of Evidence*, p. 45.

17 Dr O'Donoghue, *Transcript of Evidence*, p. 42.

4.25 The Constitution enables Commonwealth legislative authority over matters that are referred to it by States. Section 51 (xxxvii) provides Commonwealth power with respect to:

> … matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

4.26 In relation to the reference power, Professor Saunders observed that:

> [T]he reference power sits quite neatly with our system of federal parliamentary government. It can be used in a way that does not create significant accountability problems.[18]

4.27 However, Professor Saunders and Dr Twomey advised that some questions had recently arisen about the operation of section 51 (xxxvii).[19] Recent statements by the High Court have given rise to doubts about the usefulness of the reference power and uncertainty about whether a reference of power can be revoked; how section 109 (inconsistency) works in relation to the use of referred powers; and how the States can influence the way in which their referred power is used.[20]

4.28 The need for codification of Federal-State relations through constitutional amendment should be carefully considered. According to Professor Lavarch:

> What is unwritten about the way our system of government operates is as fundamental as what is written, and no document can ever fully capture the reality of the way in which the system operates, nor could it endeavour to capture all the nuances that the system of conventions and understandings and practices allow.[21]

4.29 Professor Williams advised that, in principle, reform should be achieved without a referendum unless it is absolutely essential:

> We ought to recognise that, in federal-state relations, many of the problems are fixable to a large extent by other means… It

18 Professor Saunders, *Transcript of Evidence*, p. 35.

19 Dr Twomey, *Transcript of Evidence*, p. 40.

20 Professor Saunders, *Transcript of Evidence,* p. 35.

21 Professor Lavarch, *Transcript of Evidence,* p. 44.

> is possible, without a referendum, to reallocate powers and responsibilities through accepted constitutional means. [22]

4.30 He suggested that issues of accountability and transparency of current federal arrangements could be an example of matters that would be better addressed by legislation, rather than constitutional change.[23]

4.31 Professor Saunders warned that a new provision may make the Federal-State arrangements even more incomprehensible and stressed that any constitutional amendment on inter-governmental relations must be done in a way that is clear and understandable.[24]

4.32 Professor Craven argued that it is neither possible nor desirable to reflect every aspect of how government works in the Constitution.[25] He went on the say that:

> … once you start mucking around with things on which you have some sort of functional consensus and trying [to] write them down explicitly, you can get into very significant problems. [26]

4.33 However, Professor Williams also noted that some aspects of federalism, which are structural in nature, do require constitutional change. For example, he argued that a constitutional amendment is needed to establish:

> ... a suitable framework for agreements and the like, that simply enables cooperation to be achieved for mutual judicial enforcement and to enable things like a national regulator. No-one gets any more power; it simply fixes a flaw, enabling us to deal with cooperation. [27]

4.34 Where particular areas for federal reform are identified for codification through constitutional amendment, the problem then becomes one of how to achieve change through a referendum. The possibilities of achieving change in Federal-State relations through constitutional referenda are explored further below.

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22 Professor Williams, *Transcript of Evidence*, p. 37.
23 Professor Williams, *Transcript of Evidence,* p. 37.
24 Professor Saunders, *Transcript of Evidence*, p. 42.
25 Professor Craven, *Transcript of Evidence,* pp. 40, 41.
26 Professor Craven, *Transcript of Evidence*, p. 47.
27 Professor Williams, *Transcript of Evidence,* p. 38.

The impetus for change

4.35 Chapter 2 addressed some of the main issues discussed at the roundtable in relation to mechanisms for altering the Constitution. The following section discusses the particular problems of changing the structure of Federal-State relations through the Constitution.

4.36 Four of the eight successful referenda since Federation expanded the power of the Commonwealth with regard to State debts (1910 and 1928), social security benefits and health services (1946) and Indigenous affairs (1967). However, the majority of attempts to expand Commonwealth power through constitutional amendment have failed.[28]

4.37 The roundtable discussed the lack of public engagement and interest in federalism and constitutional matters. It is often said that Australians simply do not care which level of government provides a service, as long as the service is delivered in an efficient and effective manner.

4.38 Professor Flint argued that Australians are less engaged in their Constitution than Americans because self-government was given to the colonies whereas the United States fought a War of Independence.[29]

4.39 Mr Black suggested that young people generally are disengaged because they are disillusioned with politicians and the political process. He considered that it may, in part, be a generational problem and the election of younger people to the Parliament might improve the situation.[30]

4.40 On the other hand, Professor Behrendt argued that young people are engaged in politics in quite different ways compared to older generations:

> [W]e sometimes think, 'Where are all the young people?' But you go home and find you have been invited to join 50 groups on Facebook. Perhaps they are just not as visible to us in some ways … [younger people have] a whole different way of talking about these issues and a whole different way of activism, and that is where I think there is actually a lot of

28 Professor Craven, *Transcript of Evidence*, p. 41.

29 Professor Flint, *Transcript of Evidence*, p. 50.

30 Mr Black, *Transcript of Evidence*, p. 48.

> promise for re-engaging younger people with the Constitution.[31]

4.41 Interest in federalism and constitutional change could also be generated through civics education and experiments in deliberative democracy. Professor Charlesworth spoke of her experience with the use of deliberative polling in public consultation on a Human Rights Act for the Australian Capital Territory. That deliberative polling process involved the provision of information from all sides of the issue, and discussion and debate.[32] Although it may not be possible to use deliberative polling on a regular basis, Professor Charlesworth considered that it offered some lessons for public education on constitutional matters.[33]

4.42 Professor Williams considered that the *ad hoc* nature of referenda has meant that thinking about constitutional issues is not part of Australian political life. The nature of the referenda process can also alienate people because the development of ideas is dominated by politicians. The experience of most Australians is that they are simply asked to vote 'yes' or 'no' but rarely have an opportunity to participate in the development or debate of ideas.[34]

4.43 A proposal advanced by Professor Williams is to establish a regular cycle of engagement based on particular issues about our democracy. A constitutional convention on Federal-State relations in 2009 would develop a more informed debate on federalism and build momentum for change.[35] Expanding on the proposal, the Professor argued:

> Once you have held a convention, you have the possibilities of developing bipartisan support, providing a democratic framework for reform and providing expectations that something will happen. If a convention is held, the odds are that we will get reform to fix the Federation that will go beyond putting out the bushfires in health, education and the like, which are critically important, but none of which tend to go to the longer term structural problems that are giving rise to those issues in the first place.[36]

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31 Professor Behrendt, *Transcript of Evidence*, p. 51.
32 Professor Charlesworth, *Transcript of Evidence*, p. 50.
33 Professor Charlesworth, *Transcript of Evidence*, p. 50.
34 Professor Williams, *Transcript of Evidence*, p. 48.
35 Professor Williams, *Transcript of Evidence*, p. 38.
36 Professor Williams, *Transcript of Evidence*, p. 39.

4.44 Professor Craven agreed:

> It would be good to get discussion into a group of people where there were multifarious points of view and you could talk about both productivity and division of powers.[37]

4.45 Professor Saunders also supported the concept of periodic constitutional conventions but stressed again the need for debate to be focussed on real problems:

> If you really want a discussion on federalism, identify what it is that you want to talk about, or at least begin the process by identifying what you think the real problems are, and then put in place a process for producing solutions for dealing with them.[38]

Committee comment

4.46 In 2006 the Legal and Constitutional Affairs Committee of the 41st Parliament considered the problems of federalism as part of inquiry into the harmonisation of law within Australia and with New Zealand. The Committee recommended that the Australian Government seek bipartisan support for a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court in *Re Wakim* and *R v Hughes*. The Committee also recommended that:

- the Australian Government draft this constitutional amendment so as to encompass the broadest possible range of cooperative legislative schemes between the Commonwealth and the States and Territories;
- a dedicated and wide-ranging consultation and education process should be undertaken by the Australian Government prior to any referendum on the constitutional amendment; and that
- any referendum on the constitutional amendment should be held at the same time as a federal election.[39]

37 Professor Craven, *Transcript of Evidence*, p. 41.

38 Professor Saunders, *Transcript of Evidence*, p. 42.

39 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems within Australia and between Australia And New Zealand*, Canberra, November, 2006, p. xv.

4.47 In relation to federalism and issues of transparency and accountability, the Committee recommended:

- the circulation of draft intergovernmental agreements for public scrutiny and comment;
- the parliamentary scrutiny of draft intergovernmental agreements; and
- the augmentation of the COAG register of intergovernmental agreements so as to include all agreements requiring legislative implementation

with a view to the implementation of these reforms throughout the jurisdictions.[40]

4.48 The Committee also heard first-hand the intense personal cost of jurisdictional inconsistencies in its 2007 inquiry into older people and the law. The inquiry drew attention to the critical need for national approaches to decision making mechanisms in the areas of powers of attorney, advance health care planning, and guardianship and administration procedures.[41]

4.49 Australian Government responses to both these reports have yet to be released.

4.50 The Committee also notes the proposal put forward by the governance section of the 2020 Summit. The idea put forward was to 'create a modern federation' by reinvigorating the federation to:

- enhance Australian democracy and make it work for all Australians by reviewing the roles, responsibilities, functions, structures and financial arrangements at all levels of governance (including courts and the non-profit sector) by 2020.

  A three-stage process was proposed with:

  ⇒ an expert commission to propose a new mix of responsibilities;

  ⇒ a convention of the people, informed by the commission and by a process of deliberative democracy; and

  ⇒ implementation by intergovernmental cooperation or referendum.
- drive effective intergovernmental collaboration by establishing a national cooperation commission to register,

40 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems within Australia and between Australia And New Zealand*, Canberra, November, 2006, p. xx.

41 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Canberra, September 2007.

monitor and resolve disputes concerning intergovernmental agreements.

- engage the Australian community in the development of an ambitious long-term national strategic plan that delivers results.[42]

4.51 The Committee notes the similarity of the themes raised in its previous inquiries into Federal-State relations and the 2020 Summit and roundtable discussions. They all suggest that Australia's experience of federalism is a muddle of complex routes around the Constitution, supported by governments choosing a 'path of least resistance' which in turn leaves the public confused and disengaged.

4.52 The Committee acknowledges that the current practical functioning of Australia's Federal-State governance arrangements is far removed from the intention of the Constitution. However, gaining consensus for particular areas of Constitutional reform of Federal-State relations is a daunting task, particularly given the low success rate of referenda in Australia.

4.53 Ideas such as a periodic constitutional convention are worthy of further consideration. Mechanisms to increase the accountability and transparency of inter-governmental agreements should also be pursued.[43] These initiatives may assist in laying the foundation for a more cooperative federalism and more importantly for a public expectation of greater accessibility and accountability in our governance structures.

4.54 The Committee recommends that a requirement is introduced to automatically refer intergovernmental agreements to a parliamentary committee for scrutiny and report to the Parliament. This is similar to the requirement for treaties and would introduce the appropriate oversight that is currently lacking in intergovernmental agreements.

Recommendation 1

The Committee recommends that the Australian Government introduce the requirement for intergovernmental agreements to be automatically referred to a parliamentary committee for scrutiny and report to the Parliament.

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42 Department of Prime Minister and Cabinet, *Australia 2020 Summit – Final Report*, May 2008, p. 308, <australia2020.gov.au/final_report/index.cfm> accessed 13 June 2008.

43 See Professor Saunders, *Transcript of Evidence*, p. 36.

5

Indigenous recognition and nation building through a new preamble

Introduction

5.1 This chapter reviews the main issues raised at the roundtable session on constitutional recognition of Aboriginal and Torres Strait Islander peoples (Indigenous Australians) and a possible new preamble. It outlines:

- previous changes to the Constitution and the current provisions which refer to Indigenous Australians;
- amending the Constitution to recognise the special position of Indigenous Australians; and
- the development of a preamble to the Constitution which could encompass:
  - ⇒ recognition of Indigenous Australians; and
  - ⇒ a broader statement of identity and belonging for all Australian people.

The Constitution

Background

5.2 Indigenous people were not represented at the constitutional debates of the 1890s and the only references to Indigenous Australians in the Constitution reflected that they were not full and equal members of Australian society.

5.3 The successful referendum of 1967 removed two exclusionary references to Indigenous Australians in the Constitution concerning:

- the power of the Commonwealth to legislate for the people of any race 'other than the aboriginal people of any state' (section 51 xxvi)
- the counting of 'aboriginal natives' as part of determining state and Commonwealth populations (section 127).

5.4 Although these references do not mention Indigenous identity, the campaign for the 1967 referendum focussed not on the two constitutional provisions, but on the identity of Indigenous Australians and their place as equal members of the national community.

5.5 Ms Thomas succinctly summarised the importance of identity and belonging to Indigenous Australians:

> At the core of this issue for Aboriginal people is how we can be considered by people in Australia and by other Australian people around us as equals—as having equal citizenship rights. I think that starts from the top, in affecting people's attitudes regarding cultural rights and how we are treated as Aboriginal people and Australian citizens here.[1]

5.6 Roundtable participants identified a range of possible areas for reforming the Constitution including the two discriminatory provisions (section 25 and section 51 xxvi, discussed below) and addressing the lack of positive recognition of Indigenous Australians and provisions to protect their rights.

1 Ms Thomas, *Transcript of Evidence*, p. 56.

Counting the population to determine representation: Section 25

5.7 In introducing the session, Professor Charlesworth identified section 25 of the Constitution as a particularly discriminatory provision. Sections 24 and 25 of the Constitution are concerned with the composition of the House of Representatives. Section 25, 'Provision as to races disqualified from voting', provides that:

> For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

5.8 As Dr Twomey noted, the original intention of section 25 was not overtly racist but to 'discourage the disqualification of people by virtue of race in the state by reducing the representation of that state in the parliament if they did it'.[2]

5.9 Section 25 no longer has any significant legal effect, as the *Racial Discrimination Act 1975 (Cth)* would prevent the States from discriminating against people on grounds of race. Nevertheless, section 25 'recognises that people might constitutionally be denied the franchise on the ground of race'.[3] The 1988 Constitutional Convention described section 25 as 'outmoded' and 'odious' and recommended that it be repealed.[4]

5.10 There was strong agreement among participants on the need to repeal section 25 due to its overtly racist reference notwithstanding the fact that the provision is now redundant. It was noted that the repeal of section 25 is unlikely to attract opposition.[5]

The power to legislate on the grounds of race: Section 51 (xxvi)

5.11 The power of the Commonwealth Parliament to legislate on the grounds of race presents a more complex constitutional problem. Section 51(xxvi) enables the Commonwealth to make laws for the

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2 Dr Twomey, *Transcript of Evidence*, 1 May 2008, p. 61.

3 Constitution Commission, *Final Report of the Constitutional Commission*, Summary, Australian Government Printing Service, 1988, p. 16.

4 Constitution Commission, *Final Report of the Constitutional Commission*, Summary, Australian Government Printing Service, 1988, p. 16.

5 For example, Professor Zines, *Transcript of Evidence*, p. 62.

peace, order and good government of the Commonwealth with respect to:

> … the people of any race for whom it is deemed necessary to make special laws.

5.12 While the provision does not directly discriminate against Indigenous Australians, and indeed can be employed to their benefit, Professor Charlesworth advised that the provision could also be employed to the detriment of Indigenous people as evidenced by the Hindmarsh Island Bridge case.[6]

5.13 In 1998 the High Court was unable to reach a majority view on the meaning of s. 51(xxvi) in relation to the Hindmarsh Island Bridge.[7] Professor Zines confirmed that, while the High Court held that a law made under the race power may be withdrawn, it did not resolve the question of the scope of section 51(xxvi).[8]

5.14 It appears therefore, that section 51 (xxvi) may support laws that discriminate on the grounds of race in ways that are either adverse or beneficial to a particular racial group. Commenting on this provision Dr Twomey notes:

> My problem with the argument about the 1967 referendum and the suggestion that that power can only be exercised in a way that is beneficial to Aboriginal people is to say, 'How do you decide what is or is not beneficial?' There are all sorts of tricky questions – beneficial to whom? [9]

5.15 Dr Twomey advised that any amendment to the provision would need careful consideration:

> Obviously on the face of it the provision is racist. It allows racist laws, it allows discriminatory laws and on the face of the Constitution that is a bad thing. The question is how you deal with it. A possible way of doing it is to get rid of it altogether. But if you do get rid of it altogether, do you still want the Commonwealth parliament to have some sort of

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6 Professor. Charlesworth, *Transcript of Evidence*, p. 53.

7 *Kartinyeri v The Commonwealth* [1998] HCA 22. The case concerned the validity of *Hindmarsh Island Bridge Act 1997* (Cth), which partially repealed the Minister's power to make a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). See E Barker, 'The Race Power under the Australian Constitution: Altered Meanings', *Sydney Law Review,* vol. 21 (1), 1999.

8 Professor Zines, *Transcript of Evidence*, p. 53.

9 Dr Twomey, *Transcript of Evidence*, p. 61.

> legislative power to legislate for and in relation to Aboriginal and Torres Strait Island people? So you have to think about that. And if you do want that, can you sensibly constrain that in a way that is beneficial?

5.16 Participants discussed possible options for reforming section 51 (xxvi) including repealing the provision entirely and creating a new legislative power in Indigenous affairs subject to the rule of non-discrimination on the grounds of race.[10]

5.17 There are a number of ways in which this could be achieved. Professor Zines raised the possibility of inserting a general provision of equality for all people into the Constitution and noted that there are different options to achieve this, including the inclusion of a substantive provision on equality.[11]

5.18 A general provision on equality for all people would be subject to judicial interpretation which cannot be wholly controlled but can be directed. Professor Blackshield noted:

> [Y]ou cannot preclude judicial interpretation, but you can try to control it a bit on some issues. For example, you can have some form of words to make it clear that you do not just mean formal equality or equality before the law; you also mean some kind of real, substantive equality. If you are having an antidiscrimination provision, you have to think about whether or not you want to permit so-called benign discrimination. You can settle that issue one way or the other in the way you draft it. [12]

5.19 Ms Thomas supported a general provision on equality for all people as long as it also recognised the unique rights of Indigenous Australians:

> What I would like to see within the Constitution in terms of recognition for Aboriginal people is a very broad, encompassing principle of equality and equal rights that recognises Aboriginal people as having unique rights as well as human rights and citizenship rights—a broad principle but one that also recognises our unique position in Australia.[13]

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10 Professor Williams, *Transcript of Evidence*, p. 69.

11 Professor Zines, *Transcript of Evidence*, p. 62.

12 Professor Blackshield, *Transcript of Evidence*, p. 64.

13 Ms Thomas, *Transcript of Evidence*, p. 63.

5.20 'Unique rights' are seen as:

> [A]ccess to customary law or our rights to engage in our cultural practices and also our traditional laws and restorative justice. Those things would be dealt with on the ground, at the community level, because of our right to practice our culture, our right to self-government and things like that.' [14]

5.21 In addition to the suggestion of a general provision of equality for all people there was also discussion of the need to specifically recognise Indigenous Australians in the Constitution either through substantive provisions or though a preamble.

Recognition through substantive provisions

5.22 The roundtable considered the means available for positive recognition of Indigenous Australians in the Constitution from symbolic statements through to substantive provisions detailing specific rights. This section focuses on possible substantive recognition provisions. Symbolic recognition through a preamble to the Constitution is discussed in the section below.

5.23 Professor Behrendt argued that the issue of a treaty between Indigenous and non-Indigenous Australians warranted further consideration, particularly in relation to engagement and consultation mechanisms with Indigenous people. She explained that the Aboriginal and Torres Strait Islander Commission developed the concept over ten years ago.[15]

5.24 Dr O'Donoghue also noted, with some frustration, that discussions about a treaty, agreement, compact or makarrata have been on going for many years:

> A lot of this stuff has been around us forever, it seems. We have had discussions on agreements and compacts. I do not know if anybody remembers the makarrata—also an agreement. It seems that this has gone on forever, and nobody takes enough notice of what has been happening.[16]

5.25 Participants stressed the importance of learning from the experience of other countries in recognising the rights of Indigenous people

14 Ms Thomas, *Transcript of Evidence*, p. 63.

15 Professor Behrendt, *Transcript of Evidence*, p. 65.

16 Dr O'Donoghue, *Transcript of Evidence*, p. 56.

through treaties. Canada and New Zealand were cited as particularly relevant examples.

5.26 For example, Professor Charlesworth noted that Section 35 of the Canadian Constitution preserved the existing rights of Indigenous people, created a framework for negotiation and a duty to consult in good faith on Aboriginal claims.[17]

5.27 Similarly, Dr O'Donoghue argued that the Treaty of Waitangi in New Zealand had continued to be important for Maori people, more so than the provision for separate parliamentary representation:

> [T]he thing that is very high there is the Treaty of Waitangi. I think that has been by far the biggest step there. It has given them lots of rights and so on which we in Australia miss out on.[18]

5.28 The negotiation of a treaty or statement of rights is complex. Professor Charlesworth noted that the *United Nations Declaration on the Rights of Indigenous Peoples* is a source of guidance on the content of Indigenous rights. She also reiterated that it is an example of a highly negotiated statement of rights, taking over 20 years to draft.[19]

5.29 Professor Williams suggested that a provision could be inserted into the Constitution to enable the recognition of agreements, settlements or other forms of negotiations between Indigenous people and local, State and Federal governments. The purpose would be to provide a framework for negotiation, rather than setting out specific terms. This has the potential to provide the capacity for a longer term process of engagement and the encouragement of local leadership.[20]

5.30 A further approach to Indigenous representation and rights protection was suggested by Professor Rubenstein who put forward the potential role for a special Indigenous executive council. The council would review government legislation and seek an explanation in Parliament on legislation that did not meet its approval.[21]

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17 Professor Charlesworth, *Transcript of Evidence*, p. 54; *Constitution Act 1982* (Canada).

18 Dr O'Donoghue, *Transcript of Evidence*, p. 57.

19 Professor Charlesworth, *Transcript of Evidence,* p. 54.

20 Professor Williams, *Transcript of Evidence*, p. 69.

21 Professor Rubenstein, *Transcript of Evidence*, p. 67.

A preamble to the Constitution

5.31 The suggestion of a new preamble dominated the discussion as a means to provide symbolic recognition of Indigenous people in the Constitution.

5.32 The Australian governance session of the 2020 summit also put forward as its top ideas:

- that the Constitution be amended to include a preamble that formally recognises the traditional custodians of our land and waters—our Indigenous people [and]
- that the Constitution be amended to remove any language that is racially discriminatory.[22]

5.33 Preambles are used extensively in international instruments and national constitutions. Generally a preamble will contain references to the sources of power and to the object and purposes of the instrument. In a national Constitution a preamble may also express the broader aspirations of the nation and reflect the principles on which the society is based.

5.34 The Australian Constitution is section 9 of the *Commonwealth of Australia Constitution Act 1900* and as such has no preamble. There is, however, a preamble to the Act which states:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:
>
> And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:
>
> Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in his present Parliament assembled, and by the authority of the same, as follows: …

22 Department of Prime Minister and Cabinet, Australia 2020 Summit – Final Report, May 2008, p. 308, <australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf>, p. 307, accessed 13 June 2008.

5.35 A preamble does not have direct legal effect or give rise to substantive rights and obligations but may be used as an aid to interpretation or to resolve ambiguities.

5.36 In 1999 the Government drafted a new preamble to coincide with the referendum on the republic. That preamble was designed so as to prevent it from being used to interpret the Constitution. Professor Saunders considered this appropriate as the preamble 'had nothing to do with what was in the Constitution.'[23]

5.37 Professor Saunders also suggested that a preamble should be consistent with the rest of the Constitution and therefore it would be appropriate that a preamble recognising Indigenous people is accompanied by the repeal of section 25 as discussed above.[24]

Recognition in a new preamble

5.38 The text of the preamble proposed in 1999 included the following statement recognising Indigenous Australians:

> … honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.[25]

5.39 Professor Williams suggested the preamble was rejected because it lacked public involvement and was seen as 'the politicians' preamble':

> I think it was a process problem rather than being an objection to the idea of encapsulating aspirations in a document, as other nations tend to do.[26]

5.40 Most roundtable participants supported the recognition of Indigenous Australians in a new preamble. Professor Williams stressed the importance of having a general preamble that expressed the identity and aspirations of the nation as whole while also specifically recognising Indigenous Australians.[27]

5.41 Similarly, Professor Rubenstein emphasised the need for the preamble to be a 'meta-narrative,' or a grand story encompassing Australians

23 Professor Saunders, *Transcript of Evidence*, p. 60.

24 Professor Saunders, *Transcript of Evidence*, p. 60; Professor Williams, p. 69.

25 The 1999 Referendum, Civics and Citizenship Education, <civicsandcitizenship.edu.au/cce/default.asp?id=9546> accessed 4 June 2008.

26 Professor Williams, *Transcript of Evidence,* p. 59.

27 Professor Williams, *Transcript of Evidence*, pp. 58-59.

from all backgrounds, while also acknowledging the Indigenous story as the starting point.[28]

5.42 Professor Behrendt considered the development of a preamble as a crucial opportunity to engage Australians in discussions about national identity and belonging. Such discussions could have 'an enormous symbolic importance and the ability to be a nation-building exercise in terms of the dialogue that can be had.'[29]

5.43 She argued that inclusive broad based discussions on a new preamble would be critical in gaining widespread support:

> Unless we feel that a majority of Australians are invested in this document in a really sincere way, it is not going to be possible. So I think there is a lot of potential with the preamble and I think we should be prepared for it to be a very long but important dialogue.[30]

5.44 A number of suggestions were made to encourage the involvement of the public in discussions about the Constitution and a preamble. Ideas put forward included the use of civics education and national competitions.[31]

5.45 However, some participants were less supportive of a preamble for a variety of reasons. Dr O'Donoghue did not consider the preamble the way to lead real change, preferring consideration in the body of the Constitution: 'That is where most of our people would be asking for recognition—not in the preamble but in the body of the Constitution'.[32]

5.46 Professor Craven expressed concern that the preamble could inappropriately drive interpretations of the Constitution:

> If you put enough abstract values in a preamble and you put it in a constitution with the right High Court, that preamble could drive interpretations which I think would be unacceptable and not properly referable.[33]

28 Professor Rubenstein, *Transcript of Evidence*, p. 59.
29 Professor Behrendt, *Transcript of Evidence*, p. 59.
30 Professor Behrendt, *Transcript of Evidence*, p. 60.
31 Professor Charlesworth, *Transcript of Evidence*, p. 72.
32 Dr O'Donoghue, *Transcript of Evidence*, pp. 56-57.
33 Professor Craven, *Transcript of Evidence*, pp. 60-61.

5.47 Dr Twomey was also cautious about this and indicated a preference for addressing substantive aspects of the Constitution, such as section 25 and the 'races power' in section 51(xxvi).[34]

5.48 Professor Craven suggested that a preamble should not contain elements that would be better dealt with in substantive provisions. He noted that this has the potential to become deeply divisive as was evidenced by the bitter debate at the 1998 Constitutional Convention.[35]

Committee comment

5.49 The roundtable session on the recognition of Indigenous Australians took place following the historic and bipartisan Apology to the Stolen Generations delivered at Parliament House on 13 February 2008. The session also complemented the related discussions at the 2020 Summit by focusing on the question of how Indigenous Australians could be recognised in the Constitution rather than the question of why such recognition was important.

5.50 As noted earlier, while the original purpose of section 25 was not overtly discriminatory, it does not reflect the values of contemporary Australian society and should be removed. The Committee agrees with Professor Charlesworth's summary:

> [Section 25] is quite an extraordinary provision to have in a constitution. Were a Martian to pick up our Constitution, they would get quite a shocking reflection on current modern Australia.[36]

5.51 The Committee also notes the current uncertainty regarding the application of the 'race power' of the Commonwealth under section 51(xxvi) and is concerned about the potential for it to be used to disadvantage Indigenous people. However, it is important that the Commonwealth retains its power to legislate in Indigenous affairs and any legislation under section 51 (xxvi) should continue to be carefully scrutinised.

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34 Dr Twomey, *Transcript of Evidence,* p. 61.

35 Professor Craven, *Transcript of Evidence*, p. 61.

36 Professor Charlesworth, *Transcript of Evidence*, p. 52.

5.52 Clearly, there is no one answer as to the best way to provide recognition of Indigenous Australians in the Constitution. There are areas in which substantive provisions are warranted, but there are also questions surrounding the need for recognition within a preamble.

5.53 However, the process of developing a preamble may in itself resolve some of the tensions surrounding the appropriate recognition of Indigenous Australians in the Constitution. A preamble, based on extensive consultation and engagement with *all* Australians, has the potential to be an important aspirational statement of how we define our national identity. The process of developing such a preamble has the capacity to act as a nation-building exercise that embraces all aspects of our nation's history, including the contribution of Indigenous Australians.

5.54 Many of the points raised in the session reflect the need for legislative, policy and cultural solutions to address the needs of Indigenous Australians. However, these points also call into question the very purpose of the Constitution and any preamble. There is no easy solution to these issues but it is essential that the discussion continues.

6

Citizenship and the protection of rights in Australia

6.1 This chapter summarises the roundtable discussions on citizenship and mechanisms for the protection of rights in Australia. It outlines:

- the constitutional basis of Australian citizenship and legislative arrangements that further define its scope;
- the key issues raised at the session on citizenship and rights; and
- the main mechanisms for the protection of rights in Australia, and the adequacy of those mechanisms including:
  - ⇒ the need for a Bill of Rights; and
  - ⇒ the merits of possible models of a Bill of Rights.

Citizenship and the Australian Constitution

6.2 In its broadest sense, citizenship refers to membership of a political community and can include both formal legal aspects and symbolic aspects of identity and belonging. Citizenship is associated with the protection of civil, political and social rights, such as the right to vote, freedom of association and freedom of speech.

6.3 The terms of citizenship in Australia are based on a mix of limited constitutional provisions, specific legislation and the common law system. Reflecting the prevailing values of its drafters, the Australian Constitution does not directly refer to citizenship, but rather to 'subjects of the Queen' (for example, at section 34).

6.4 The most relevant constitutional provisions directly concerning citizenship:

> Section 44:
>
> Any person who:
>
> (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power … shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.
>
> Section 117:
>
> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

6.5 At section 51 (xix) the Constitution also provides for the Commonwealth to make laws about naturalisation and aliens. This section is generally understood to imply a nationhood power to define who may be a citizen. The Constitution does not prevent the Parliament from imposing a citizenship test for native-born Australians.[1]

6.6 In other sections the Constitution does recognise membership of the Australian community in a variety of ways. Sections 7 and 24, which set out the composition of the Senate and the House Representatives, refer to 'the people of the State' and 'people of the Commonwealth' respectively.

6.7 The Constitution does not provide any clear definition of citizenship. As Professor Rubenstein outlined, most provisions use an inherently exclusionary approach to define who is a member of the community:

> Those who were not British subjects were aliens, and it is that terminology around which our Constitution revolves in terms of membership. It is a point that I think continues to be significant in public policy and the discussion about membership of the Australian community. Its source is very much in the fact that membership is defined in a negative

1 Some Members noted that such a test for native-born Australians could result in citizenship being denied. However, some Members doubted whether the High Court would interpret the Constitution in this way. See *Transcript of Evidence,* pp. 80-81.

> sense, through alienage, rather than through a positive statement of who we are as an Australian people and who the Australian Constitution speaks to in terms of membership of the Australian community. I think that is something that is really deserving of serious attention and change.[2]

Citizenship legislation

6.8 The legal category of Australian citizenship was first established by the Commonwealth through the *Nationality and Citizenship Act 1948*. That Act was since been reviewed and replaced by the *Australian Citizenship Act 2007*.

6.9 Professor Rubenstein explained how the machinery of citizenship law is linked to immigration policy rather than defining what citizenship should mean for all. [3] Professor Blackshield agreed with this analysis, commenting that 'our citizenship law, such as it is, has been the tail wagged by the immigration dog'.[4]

6.10 The lack of defining provisions on citizenship in the Constitution has given the Commonwealth significant power in this area. As Professor Rubenstein explained:

> If we think about the current framework of the rights we attribute to citizenship, they are rights that come from legislation. So the Electoral Act is the act that gives citizens the right to vote and of course the duty to vote. It is the Migration Act that gives citizens the right to free entry in and out of the country. But those are legislative rights that can be changed.

6.11 Participants at the roundtable discussed whether the definition of citizenship should be incorporated in the Constitution. This is considered further in the following section.

Issues and possible areas for reform

6.12 The Individual Rights Committee of the 1988 Constitution Commission recommended inclusion in the Constitution of a section that stated:

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2 Professor Rubenstein, *Transcript of Evidence,* p. 73.

3 Professor Rubenstein, *Transcript of Evidence*, p. 76.

4 Professor Blackshield, *Transcript of Evidence*, p. 79.

> All persons who are:
>
> - born in Australia;
> - natural born or adopted children of an Australian citizen;
> - naturalized as Australians
>
> are citizens of Australia and shall not be deprived of citizenship except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice. [5]

6.13 However the Commission did not support this recommendation, as Professor Zines outlined:

> [T]he Constitutional Commission deliberately rejected the individual rights committee's recommendation of defining 'citizenship' in the Constitution for the very reason that changes were being made and other changes could be made to citizenship. The commission said that before it could agree to a provision that had been recommended by the committee it would have to indicate very clearly to what extent that would override existing law. It decided that it would be undesirable.[6]

6.14 While some participants expressed concerns about the inclusion of a definition of citizenship in the Constitution, there was support for the use of the term. Professor Zines commented:

> I certainly would be opposed to defining citizenship, but I think it would be a good idea to change 'subject of the Queen', wherever it appears, to 'Australian citizen' because it is confusing to people.[7]

6.15 It was noted that Australian citizens lacked a constitutionally protected right to return to the country. Professor Rubenstein explained:

> [I]n argument before the High Court recently, the Solicitor-General was making the point that it would be within the power of the Commonwealth to restrict Australian citizens from re-entry into Australia, if the parliament so determined. In other words, there is no protection of that

5 Professor Rubenstein, *Transcript of Evidence*, p. 76.

6 Professor Zines, *Transcript of Evidence*, p. 78.

7 Professor Zines, *Transcript of Evidence*, p. 77.

> fundamental right that I think most of us would agree citizens have—that is, to live in their country of citizenship.[8]

6.16 Professor Blackshield advised that such a provision was part of a proposed Bill of Rights in the 1980s.[9]

6.17 It was also observed that the rights of non-citizens or 'aliens' are not well protected. Many people reside in, positively contribute to and shape the Australian community for long periods without obtaining formal citizenship. Professor Rubenstein suggested that current arrangements can discriminate against resident non-citizens who have a substantial connection with Australia:

> A good example in terms of current public policy, of course, is those individuals who have lived all of their lives in Australia—one case involved someone who was 27 days old when he came to Australia—but have the potential to be removed from Australia by virtue of the fact that they have not taken out formal citizenship. There is a question of whether those are appropriate rights standards that should apply within a constitutional understanding of membership of the community.[10]

6.18 In some circumstances, however, the different treatment of non-citizens may be appropriate. According to Professor Saunders, while it may be reasonable to deny non-citizens the right to vote in elections:

> … once you start moving into other areas like detention, for example, I think you should look at other sorts of rights to create those safeguards.[11]

6.19 Participants also discussed the need to link the concept of citizenship with rights in the Constitution. Professor Saunders stated:

> I would favour a clear statement of the basic democratic rights of Australian citizens in the Constitution and the creation of a constitutional status of Australian citizen. I am actually less fussed about defining the basis of citizenship. I

8 Professor Rubenstein, *Transcript of Evidence*, p. 76.
9 Professor Blackshield, *Transcript of Evidence*, p. 78.
10 Professor Rubenstein, *Transcript of Evidence*, p. 73.
11 Professor Saunders, *Transcript of Evidence*, p. 81.

> would probably be happy to do that too, but, as long as the status was there and the rights attached to it were there ...[12]

6.20 In the view of Professor Charlesworth, it is not necessary to entrench any more than the most basic rights (such as the right to vote) in the Constitution. In her view, rights need not be tied to citizenship because rights have a universal quality and should not be restricted to national boundaries:

> One issue is that human rights as expressed at the international level are not tied to citizenship, generally speaking. It seems to me that one way into this argument—this is an international way of speaking—is to just talk about the simple fulfilment of our international obligations.[13]

6.21 This issue of the protection of rights in Australia is considered in more detail in the sections below.

The protection of rights

6.22 The Constitution is limited in terms of the elaboration and protection of rights. Governments and courts provide the primary means of establishing and protecting rights in Australia. Professor Rubenstein noted:

> [W]ithin our constitutional structure there is no protection of rights that we think of as inherent in citizenship. Similarly, it is open to discussion as to how well voting rights are protected in the Constitution. So basic rights that we think of as civic and citizenship rights are not in our constitutional document. If we look at the rights that are in the document—and the point has been made several times—this Constitution was not framed within the context of thinking about the protection of rights by constitutions.[14]

6.23 Professor Charlesworth noted that the right to vote in particular was seen as an issue of some importance for inclusion in the Constitution:

> The one thing that I think we do need in the Constitution in terms of rights is the right to vote. I think that is a great flaw

12 Professor Saunders, *Transcript of Evidence*, p. 79.

13 Professor Charlesworth, *Transcript of Evidence*, p. 82.

14 Professor Rubenstein, *Transcript of Evidence*, p. 75-76.

> in the Constitution. If you think about it, that is the most fundamental right that the whole Constitution should hang off—the whole notion of the people, the whole notion of representative government, the notion of responsible government.[15]

6.24 According to Professor Behrendt, the key test of a Constitution is how well it protects less privileged members of society:

> I firmly believe that, when we talk about considering whether or not the Constitution works, the test we should apply is how it works for the poor, the marginalised and the culturally distinct and historically disadvantaged. If it does not work for that most vulnerable sector of the community then we have to question how good it is. It is not good enough if constitutions work well for members of the middle class ...[16]

6.25 Similarly, Professor Blackshield expressed concerns about the lack of protection of the rights of minority groups:

> I have a fundamental problem with a constitution that does not guarantee rights, especially the rights of minorities, because, for me, a society that does guarantee those rights is an essential part of my concept of democracy.[17]

6.26 Roundtable participants also debated the merits of a Charter or Bill of Rights, among other mechanisms, to enshrine the protection of rights in Australia.

A Bill of Rights for Australia?

6.27 A Bill of Rights is generally understood to be a declaration of certain rights, freedoms and protections afforded to citizens. Unlike many other comparable liberal democracies such as the United Kingdom, the United States and New Zealand, Australia does not have a Bill of Rights.

6.28 Since the 1890s there has been considerable debate in Australia over the need for a constitutional or statutory protection of rights. The omission of a Bill of Rights from the Constitution was a deliberate decision taken by the drafters, predominantly on the basis that it would undermine state autonomy. It was also thought that a 'due

15 Dr Twomey, *Transcript of Evidence*, p. 86.

16 Professor Behrendt, *Transcript of Evidence*, p. 78.

17 Professor Blackshield, *Transcript of Evidence*, p. 79.

process' provision would undermine some of the racially discriminatory colonial laws in place at that time.[18]

6.29 Various models for a Bill of Rights have been considered in Australia. Debate has centred on whether the instrument should be entrenched in the Constitution and binding on all governments, or established through government legislation and, as such, subject to amendment by the government of the day.

6.30 A constitutionally entrenched Bill of Rights is significantly more robust, as it can only be amended by referendum. However, the difficulty in amending an entrenched Bill of Rights can lead to the document becoming outmoded, and not reflective of modern values. A Bill of Rights established through legislation is easier to implement and amend but can thus be altered by governments when convenient.[19] Both Victoria and the Australian Capital Territory (ACT) have established their own Charters of Rights through the legislative approach.[20]

6.31 Professor Charlesworth noted that in relation to the ACT rights legislation, the real effect has been on the operation of the bureaucracy. The legislation requires the ACT public service to consider the protection of human rights, which are essentially those in the Covenant on Civil and Political Rights, in the development of any policy and in the development of legislation.[21]

6.32 Professor Charlesworth described the benefits of the ACT approach:

> [T]here have been very lively debates within the bureaucracy about whether particular policy proposals are actually consistent with human rights. In fact, I think it has had quite a positive effect in that it has made the executive arm of government really scrutinise its plans. Some of the wilder rushes of blood that occasionally come to the head of elected

18 H Charlesworth, 'Who Wins Under a Bill of Rights?', *University of Queensland Law Journal*, vol. 25 (1), 2006, p. 39; The Hon. David Malcolm, 'A Human Rights Act for Australia', *Australian Law Review*, University of Notre Dame, Vol. 8, 2006, p. 20.

19 There has been a great deal of literature produced on the need for, and possible models of, an Australian Bill of Rights. For example see, G Williams, *A Bill of Rights for Australia*, University of New South Wales Press, 2000.

20 See *Charter of Human Rights and Responsibilities Act 2006* (Victoria), *Human Rights Act 2004* (Australian Capital Territory).

21 Professor Charlesworth, *Transcript of Evidence*, p. 89.

> governments about a quick, knee-jerk response to a particular problem have had to go through a human rights filter.[22]

6.33 Professor Behrendt was also supportive of the ACT legislation on rights, and noted its broad implications for policy development:

> The more you get into it, even a simple piece of legislation … can have huge impacts on people … I was amazed that a simple piece of legislation like the transportation legislation could have such a large interaction of basic human rights. It provided a very good example of the very important role that a charter of rights can play. It can also give many of us comfort that middle-level bureaucrats go through the process when they draft legislation of thinking how to make it compliant with simple things like due process before the law.[23]

6.34 Professor Blackshield emphasised that the Bill of Rights was important as just one instrument in a spectrum of protections:

> We have a whole variety of instrumentalities for protecting human rights. One of the most effective is the work that individual members of parliament do on behalf of their constituents. This is a very important function. But the proponents, such as I, of a bill of rights are not saying we should have a bill of rights instead of those other things; we are saying there is room for this protection too, as part of the whole panoply of protections of human rights.[24]

6.35 However some roundtable participants expressed reservations about the role of judges in interpreting any Bill of Rights. Professor Craven explained:

> [I]t fundamentally offends my notion of democracy, which says that basic policy decisions are going to be made by people who are elected and electorally accountable. That lets out the judges, and I do not buy it … I just do not think the judges are competent to do it. I do not see why I would place confidence for fundamental policy decisions and rights decisions in a group of people awfully like myself and the

22 Professor Charlesworth, *Transcript of Evidence*, p. 91.

23 Professor Behrendt, *Transcript of Evidence*, p. 91.

24 Professor Blackshield, *Transcript of Evidence*, p. 85.

> rest of us who have not been trained in that position and have no particular claims to serve as social arbiters.[25]

6.36 In a similar vein, Professor Flint stated:

> What I find difficult is that I think [interpretation of the Bill of Rights] gives the judges a political role which is inappropriate for the judiciary. It is almost at times a corrupting role.[26]

6.37 Professor Flint also noted that even a constitutional Bill of Rights can be breached, citing the example of the internment of United States citizens of Japanese descent during the Second World War.[27]

6.38 In contrast, Professor Behrendt argued the appropriateness and capability of judges to deal with the complex issues that a Bill of Rights might raise:

> I know there is a strong argument against the entrenchment of rights because of the role the judiciary plays in deciding them, but I think that argument sits very curiously beside the fact that every day our courts make really important decisions about our rights—for example, the rights of a custodial parent against a non-custodial parent.[28]

6.39 Professor Craven considered judicial review as inevitable:

> If you have a statutory bill of rights and you have judicial review, I think it is reasonable that people are going to focus quite strongly on the courts. There is nothing you can do about that. Whenever I hear that nothing has gone wrong in the ACT and nothing has gone wrong in Victoria, my response is: 'Yet'. We have not had enough time to see how that goes.[29]

6.40 While there are some clear arguments against a statutory Bill of Rights for Australia, its introduction could serve as a test for rights provisions before these are enshrined in the Constitution, which is harder to amend. Professor Blackshield supported a constitutional Bill of Rights, but accepted that:

> … what you should have is a statutory bill or charter first. The theory is that it would operate for 10 years or so and then

25 Professor Craven, *Transcript of Evidence*, p. 82.
26 Professor Flint, *Transcript of Evidence*, p. 86.
27 Professor Flint, *Transcript of Evidence*, p. 86.
28 Professor Behrendt, *Transcript of Evidence*, p. 81.
29 Professor Craven, *Transcript of Evidence*, p. 92.

> you would put it into the Constitution, partly so that the community has experience of how it is working and to see that some of the threatened, horrible consequences do not in fact ensue; and partly so that when judges do make mistakes in interpreting it, the parliament has an opportunity to correct the mistakes before you put it into the Constitution.[30]

Committee comment

6.41 It is the view of the Committee that some of the language of the Constitution, especially the references to subjects of the Queen, is not reflective of the contemporary approach in Australia.

6.42 The concept of citizenship and the rights of both citizens and those residing in Australia are key issues for the Australian community. This raises the question as to the purpose of the Constitution and whether it is appropriate for it to include a concept of citizenship.

6.43 It was not the original intention of the Constitution to articulate a concept of citizenship, nor to specifically protect the rights of those residing in Australia. As a consequence some Australians believe that the current Constitution ties Australia to a historical foundation rather than contributing to building a nation for the future.

6.44 Even in terms of meeting its original intention, there appear limitations to the Constitution in its current form. Primarily the Constitution sets out the federal-state powers and responsibilities, and establishes the governance structures for Australia. However, as the roundtable and debates elsewhere have demonstrated, some of these provisions now appear outmoded and can even impede the coordinated national management of key issues.

Mark Dreyfus QC MP

June 2008

30 Professor Blackshield, *Transcript of Evidence*, p. 85.

A

Appendix A: Roundtable participants

Professor Larissa Behrendt

Mr Peter Black

Professor Tony Blackshield

Professor Hilary Charlesworth

Professor Greg Craven

Professor David Flint AM

Professor the Hon. Michael Lavarch

Dr Lowitja O'Donoghue

Professor Kim Rubenstein

Professor Cheryl Saunders

Ms Khatija Thomas

Dr Anne Twomey

Professor George Williams

Professor Leslie Zines

The Hon Peter Slipper MP – Additional comment

While I broadly support the outcome of the roundtable, I have some reservations with respect to paragraphs 5.53 and 6.41, as agreed to by the majority of the Committee.

The Hon Peter Slipper MP