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The Parliament of the Commonwealth of Australia

# Reforming our Constitution:

**A roundtable discussion**

House of Representatives  
Standing Committee on Legal and Constitutional Affairs

June 2008  
Canberra

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## 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 21<sup>st</sup> 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:



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- 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<sup>1</sup>

Mr Daryl Melham MP

The Hon Kevin Andrews MP

Mr Mark Butler MP

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<sup>1</sup> 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

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## 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.

