

REWORKING AUSTRALIA'S REFERENDUM MACHINERY

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Since the election of the Rudd government in November 2007, there has been much discussion about the possibilities of constitutional reform. After all, like Labor Prime Ministers Curtin, Chifley, Whitlam, Hawke and Keating before him, Rudd came to office with ambitious plans to change the *Constitution*. His election commitments include referendums on fixed four-year terms for the federal parliament, an Australian republic, recognising local government and restoring co-operation in federal-State relations. Further ballots have also been flagged on taking over State hospitals and recognising Indigenous peoples in a new preamble to the *Constitution*.

As it turns out, the first significant move on constitutional reform has been something different entirely. It comes in the form of a House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into Australia's federal referendum machinery legislation. Announced on 10 September 2009, the inquiry's main objective is to assess the effectiveness of the *Referendum (Machinery Provisions) Act 1984* with an eye to developing better ways to engage and inform people about the *Constitution* and proposed changes.

The inquiry represents an historic, long overdue opportunity to reassess the way in which referendums are conducted in Australia. The decision to hold such an inquiry at a time when no specific referendum is being proposed is especially welcome because the Committee can consider reforms to that legislation on their merits, removed from the partisan atmosphere of a referendum campaign.

There is a great deal for the Committee to consider. Australia's referendum record is a poor one: of the forty-four referendum proposals put to the Australian people, just eight have succeeded. It is now thirty-three years since the last successful change to the *Constitution*, the longest period on record. Some people see this as evidence of the strength and resilience of the *Constitution*; for others, it suggests a fear of change that is preventing much-needed renovations to Australia's system of government. Whichever way you look at it, it is clear that the Australian referendum process is not now set up to involve citizens in a way that educates and provides a feeling of ownership. After the 1999 republic referendum, many people felt short-changed by the process — it was hard to find accurate, reliable information, and the public debate often seemed dominated by deception and fear-mongering. These shortcomings are bound to be repeated at future

referendums unless fundamental changes are made to the referendum machinery.

We put forward several suggestions in this article for improving Australia's federal referendum machinery legislation. In the first section, we outline the shortcomings of existing arrangements. We then specify four goals that the referendum machinery should meet in contemporary Australia. In the final section, we advocate a range of reforms to improve the existing machinery so that it better meets these goals.

Effectiveness of the Referendum (Machinery Provisions) Act 1984

Amendment of the *Australian Constitution* is provided for by section 128. To be successful, a proposed law for the alteration of the *Constitution* must be:

1. passed by an absolute majority of both Houses of the Federal Parliament, or by one House twice; and
2. at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states (that is, in at least four of the six States).

When it comes to the referendum stage, section 128 merely provides: 'When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes'. Accordingly, the framework for the actual conduct of referendums is set out in the *Referendum (Machinery Provisions) Act 1984* ('the Act').

In addition to setting down rules on the mechanics of referendums (such as the issuing of writs, pre-poll voting and scrutiny of returns), section 11 of the Act prescribes mechanisms for educating and engaging voters in the lead-up to a referendum. Surprisingly, those mechanisms have remained mostly unchanged since 1912. In that year, the Commonwealth Parliament passed an amendment to the *Referendum (Constitution Alteration) Act 1906* which, for the first time, authorised public funding of an information pamphlet setting out 'Yes' and 'No' cases of up to 2000 words each. The pamphlet, which also contains a statement showing the proposed textual changes to the *Constitution*, is sent to all voters. To this day, the Yes/No pamphlet remains the centrepiece of government initiatives to inform and engage ordinary citizens in constitutional change.

This was a novel initiative at the time, and was seen as an effective way of providing voters with basic facts about the proposed constitutional change, as well as protecting them against the misapprehension, misrepresentation and partisanship that had

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characterised Australia's first three referendum campaigns in 1906, 1910 and 1911. Attorney-General William Hughes envisaged the cases for either side being put in an 'impersonal, reasonable and judicial way', and appealing to 'reason rather than to the emotions and party sentiments'.¹ Prime Minister Andrew Fisher was also optimistic about the Yes/No pamphlet, remarking: 'I have no doubt at all that the case will be put from both sides impersonally and free from any suggestion of bias or misleading on the one side or the other'.²

Despite the optimism surrounding its introduction, experience shows that the Yes/No case (and the referendum machinery in general) has failed to meet its public education objectives. First, it does not succeed in aiding voter understanding of reform proposals, or in protecting voters from misapprehension and misrepresentation. The pamphlet tends to obscure basic facts about the proposed change, is adversarial in nature and often leaves voters feeling confused (one of the first arguments in the No case for the 1999 referendum was 'Don't know? — Vote "NO"'). Also, contrary to the vision of Fisher and Hughes, referendum campaigns are often marred by partisanship, deception and misrepresentation as both sides compete for tactical advantage. The failure of the pamphlets in communicating basic facts means that voters are vulnerable to being misled by both sides. It is also noteworthy that the existing framework gives Parliament the option of suspending the provision of the Yes/No cases to voters. Thus, in 1919, 1926 and 1928, Australians did not have access to a publicly funded information pamphlet. As flawed a document as it is, the prerogative of Parliament to suspend voter information is not ideal.

Secondly, the distribution of a printed information pamphlet is out-of-date and ineffective as a communication strategy in contemporary Australia. Today, Australians access information from a huge variety of sources, including television, radio, the internet and text message. With the exception of radio, none of these media existed in 1912. Back then, sending educational material by post was the most effective way of conveying information to a large number of voters. That is no longer the case, and it has become commonplace to receive information via audio, audio-visual and interactive means. In the modern world, relying on a lengthy, printed pamphlet as the sole means of communicating information is counter-

productive, as there is a high probability that many Australians will not read it.

Thirdly, under current arrangements, citizens have few opportunities for meaningful engagement in the process of constitutional reform. They have no role in framing the issue to be put to referendum, and few structured opportunities to participate in public debate about the proposed change. Their main contribution is at the very end of the process, when they cast a vote on the day of the referendum. As a result, few Australians feel like they have ownership over the proposed change, nor of the *Constitution* as a whole.

Finally, the current approach to informing voters about referendum proposals does not provide value for money. The current framework for referendums allocates significant public resources to a process that leaves voters feeling confused and alienated. In 1999, the republic model considered by Australians was supported by a \$24.5 million government-funded advertising campaign, and a 71-page 'yes' and 'no' book sent to every voter, not to mention saturation media coverage. Despite this, most Australians had little idea of what a republic would mean or how the proposed model would have worked. Australians have a right to expect more from a publicly-funded process.

Reassessing the goals of referendum machinery

Almost a century after the rules for the conduct of referendums were set down, it is time to reassess the main goals of the legislation. We believe that the referendum machinery should aim to meet four goals:

- **Fairness and efficiency:** The Act should establish a fair and efficient process for the conduct of referendums. The process should build community confidence in the outcome. Australians must be given a fair opportunity to participate, and voting procedures should meet democratic principles at a reasonable cost to the taxpayer.
- **Deliberation:** The Act should open up space for community debate and deliberation about constitutional change. In so doing it should provide voters with the information they need to cast an informed vote by exposing citizens to a variety of viewpoints and perspectives.
- **Popular participation:** The Act should enable an environment in which as many Australians as possible have an opportunity to make a meaningful contribution to debate about constitutional change. Changes to the

REFERENCES

1. *Commonwealth Parliamentary Debates*, 16 December 1912, 7154.
2. *Commonwealth Parliamentary Debates*, 16 December 1912, 7156.

Constitution alter the very machinery of government, and have the potential to affect policy-making across all areas of government far into the future. Widespread participation also improves understanding, gives citizens a sense of ownership over the process and strengthens acceptance of the outcome.

- **Education:** The Act should seek to further constitutional education. Referendums provide an excellent opportunity for citizens to learn more about not only a specific reform proposal, but also their system of government as a whole. This should reinforce the learning that takes place in other forums, such as federal elections and civics education programs.

The current Act fares poorly when assessed against these four goals. The existing referendum machinery succeeds in establishing a fair and generally efficient process, but is underperforming in the areas of deliberation, popular participation and education.

Fortunately, as we outline in the next section, there are a range of reforms that will ensure that the referendum machinery can meet all of these goals.

An agenda for reform

Expenditure of Commonwealth money on referendums

As an important first step, the Act should be amended to remove restrictions on Commonwealth expenditure on referendums. Section 11(4) of the Act limits Commonwealth spending on the presentation of arguments about a referendum proposal to several narrow purposes, including the preparation, printing and posting of the Yes/No pamphlets, their translation into other languages and their adaptation for the visually impaired. These strict limitations on the purposes for which the Commonwealth can spend money are a barrier to Australia developing a referendum process that effectively meets all of its key goals. Increased, or even just better targeted, public expenditure could support important reforms to Australia's referendum machinery, including more effective voter education, the creation of 'Yes' and 'No' committees, and the use of innovative mechanisms for engaging the general public in constitutional reform.

Public money must be spent prudently and in a way that provides value for money. To this end, we support the creation of an impartial 'Referendum Panel' to supervise public expenditure on referendums and to ensure that it meets minimum standards of fairness, openness and accountability.

Referendum Panel

A Referendum Panel should be constituted for each referendum to oversee public education initiatives and to help ensure a fair and open public debate.³ It would be up to the government of the day to determine its lifespan — for example, it might only operate for a few months prior to the referendum poll, or it could be in existence for a year or more if the government considered there to be a longer period of public debate and education. The roles and responsibilities of the body should include:

- preparation of a Voters' Booklet and other educational materials for voters — this is preferable to the current arrangement where members of the Federal Parliament prepare the Yes and No cases in a way that contributes to a perception of partisanship;
- oversight of the Yes and No committees, including:
 - requiring that they meet standards of objectivity, accountability and fairness in their use of public funds, and
 - reviewing the accuracy of factual claims made by the Yes and No committees in advancing their cases for/against reform; and
- the planning and operation of deliberative forums and other methods of public engagement.

The functions of the Panel for each referendum will depend on the amount of funding granted to it by the government of the day. For an issue like the republic, the government might consider that substantial funds are appropriate, while more technical changes may attract less funding. We envisage the Panel having wide discretion to spend the available money on public education in a manner it thinks appropriate. With the exception of the preparation of the information pamphlet, the Panel should not assume any of the existing functions of the Australian Electoral Commission. Sole responsibility for administering the referendum should remain with the Commission.

The Panel should be appointed by the Prime Minister in consultation with the Leader of the Opposition and other party leaders. It should include Australians from a variety of perspectives, including experts in constitutional law and public communication, and a representative from the Australian Electoral Commission. One or more positions might be reserved for members of the general public.

Information for voters

The practice of sending voters an information pamphlet in the lead-up to a referendum should continue. However, both the content of, and the approach to preparing, the Yes/No pamphlet are in need of a major overhaul. Any information pamphlet must also be supplemented by other methods of communicating information to voters.

The Yes/No pamphlet should be replaced by a Voters' Booklet. A short information pamphlet which sets out basic information in a fair and balanced way will be far more effective as an educational tool than the current Yes/No pamphlet. The aim of this Booklet would be to provide voters with basic, accurate and unbiased information about each reform proposal. The Booklet should contain:

- a 'plain English' explanation of the relevant parts of the *Constitution* and of the proposed change;
- an outline of the arguments for and against the proposed change, and
- a copy of the relevant constitutional provisions, with a clear indication of how they would be altered.

While the Act should not impose a word limit on the Booklet, it should be expected to be short.

3. For a similar proposal to establish a 'Referendum Commission', see John Uhr, 'Rewriting the Referendum Rules' in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (2002) 195–97.

Methods might include encouraging public submissions on a specific question of reform, national plebiscites, holding extensive community level consultations or recent innovations in public deliberation such as deliberative polls, citizens' assemblies, citizens' juries and local constitutional conventions.

Under the Act, the earliest that the Yes/No pamphlet can be distributed is 14 days prior to a referendum. This is too short a timeframe — by that time, voters' perceptions have already been shaped by public debate and media commentary. To give voters more time to consider the material, the Act should be changed to allow governments to distribute the Voters' Booklet well in advance of the referendum.

The Voters' Booklet should be prepared by the Referendum Panel. The experience of other places shows that entrusting the preparation of referendum information to a neutral body is workable and effective. In New South Wales, for instance, an information pamphlet containing summaries of the Yes/No cases is prepared by public servants, and then vetted by constitutional lawyers and other experts to ensure its fairness.⁴ In California, the information pamphlet sent out to voters is something of a hybrid: it contains an official summary prepared by the Attorney General; a copy of arguments and rebuttals for and against the measure, prepared by parliamentarians; and, an impartial analysis prepared by the Legislative Analyst, a public servant. The impartial analysis contains background information, an assessment of the effect of the law, and any monetary implications, and is subject to input from educational specialists and vetting by a panel of ordinary citizens.⁵

Future efforts to educate voters about reform proposals will be far more effective if they take advantage of the full range of communications media. To this end, in addition to the Voters' Booklet, information should be disseminated through radio and television. An effort should also be made to distribute information through internet forums such as social networking sites in recognition of their increasing popularity among Australians of all ages. Information that is disseminated in this way should be based upon the material contained in the Voters' Booklet.

Adopting a diversity of approaches of information delivery is critical if educational material about a referendum is to reach a maximum audience. It recognises that different people absorb information in different ways. Some people may ignore a pamphlet received in the mail, but read a message that is posted on Facebook. The proliferation of communications media, which is such a central part of the modern world, presents an excellent opportunity to give more Australians the information they need to cast an informed vote in a referendum.

'Yes' and 'No' committees

The Act should allow, but not mandate, the practice of the 1999 referendum on the republic of providing public funding to separate 'Yes' and 'No' committees. Such committees — through their spokespersons, advertisements or other means — have the potential to enrich public debate by exposing citizens to arguments both for and against reform. Where public money is used for this purpose, the funding provided to each committee should be equal — this ensures that each side has an identical capacity to present arguments in support of its case.

Given that the 'Yes' and 'No' committees may receive substantial sums of public money, it is reasonable to expect them to meet minimum standards of objectivity, accountability and fairness in the way they spend it. To this end, the public statements and activities of the committees should be subject to the oversight of the Referendum Panel. The Panel should be empowered to review the accuracy of factual statements made by the committees, and issue instructions to withdraw, amend or retract those statements where it finds them to be inaccurate, deceptive or misleading. Some material, such as campaign pamphlets or advertising, would be subject to Panel scrutiny before being approved for release into the public domain. This would allow the Panel to play a preventative role. The Panel's oversight should be limited to statements of fact, and should not extend to expressions of opinion, which are properly understood as a feature of robust debate and disagreement. The actions of the Yes and No committees, and those of the Referendum Panel, should also be subject to ongoing scrutiny by the Auditor-General.

Initiating referendum proposals

The mechanisms by which referendum proposals are brought about should be broadened. Currently, change can only be initiated by the Commonwealth Parliament. This is not ideal, for three reasons. First, it places the authority to hold referendums in the hands of the government of the day alone, making it more likely that proposed changes will be partisan. Second, it increases the likelihood that proposed reforms will only increase, or at least protect, federal power. Third, it excludes the general public from any direct role in framing a proposed change.

A process should be put in place which enables States, constitutional conventions and members of the general public to play a role in formulating reform proposals.

4. Anne Twomey, *The Constitution of New South Wales* (2004) 320.

5. *California Elections Code*, ss 9040–9044 to ss 9080–9096.

6. *Final Report of the Constitutional Commission*, vol 2, Australian Government Publishing Service, Canberra, 1988, 851.

7. Constitutional Centenary Foundation, *Report on a Decade of Experience*, Final Report (2000).

8. Issues Deliberation Australia, *Australia Deliberates: A Republic — Yes or No?*, Final Report (1999).

Addendum

On 10 December 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs delivered its inquiry report, *A Time for Change: Yes/No?* The report makes 17 recommendations for improving referendum machinery. The key recommendation concerns the establishment of an independent Referendum Panel prior to each referendum to determine an appropriate information and communications strategy. The Committee also recommended that:

- the Yes/No pamphlets be retained, but that they be sent to every household rather than to every elector; parliamentarians continue to authorise the Yes/No arguments;
- current restrictions on Commonwealth spending on referendums be removed;
- the Australian government develop and implement a national civics education program to enhance public engagement and improve knowledge of the *Australian Constitution*.

The report was tabled in Parliament on 8 February 2010, and the Government is expected to respond later in the year.

Rather than entrench this process by amendment of section 128 of the *Constitution*, it should be created by legislation as a precursor to the formal initiation of change by Parliament.

With respect to the States, a mechanism should be created by which State Parliaments can present proposals for constitutional change to the Commonwealth Parliament and recommend that they be put to referendum. The House of Representatives' Standing Committee on Legal and Constitutional Affairs could be given the task of considering such proposals. Where four or more States were in agreement on a proposal, this should carry considerable recommending force. The 1988 Constitutional Commission recommended that a constitutional referendum be initiated where, in addition to other conditions being met, at least half of the State Parliaments supported it.⁶

A mechanism should also be created for the holding of constitutional conventions to consider and propose ideas for constitutional change. Conventions — whether elected, appointed, or a combination of each — signal serious intent to address major questions and, by establishing an inclusive process that draws in voices and perspectives from across the nation, also indicate respect for the democratic nature of the *Constitution* itself. In some cases it will be appropriate to hold a Convention to consider a specific issue, as was the case with the 1998 Convention on the republic. However, a framework should also be put in place for the holding of regular constitutional conventions as part of a continuing cycle of engagement. A convention every decade, or half-generation, to consider options and to determine national priorities would provide the necessary structure, entrench an expectation of debate about change and provide for a consultative mechanism. This would also allow for careful consideration of constitutional issues without the pressure to meet short-term political needs. The recommendations of constitutional conventions should be issued to the Commonwealth Parliament to form the basis of future referendum proposals.

Citizens should also be given a formal means of petitioning the Commonwealth Parliament to consider proposals for constitutional change. As part of this process, Parliament should be required to give a response within a certain period of time. Again, the House Standing Committee on Legal and Constitutional Affairs could be given a role in considering the proposal, perhaps as part of an annual report.

In all three areas, the final decision to initiate a referendum would remain with the Commonwealth Parliament. However, these new processes would add important new opportunities for the States and the general public to contribute ideas for constitutional reform.

Achieving greater public engagement in referendums

The Act should be amended to facilitate better public engagement in the lead-up to a referendum. Methods might include encouraging public submissions on a specific question of reform, national plebiscites, holding

extensive community level consultations or recent innovations in public deliberation such as deliberative polls, citizens' assemblies, citizens' juries and local constitutional conventions. These mechanisms can give citizens the opportunity to learn about a reform issue in-depth, ask questions of experts and engage in face-to-face discussion. They are being employed increasingly around the world on constitutional issues and broader policy questions.

Some of these deliberative methods have already been used in constitutional debate in Australia. Examples are the Constitutional Centenary Foundation's program of 58 local constitutional conventions⁷ and the 1999 deliberative poll on the republic.⁸ The benefits for individual participants include increased knowledge and a feeling that they have made a meaningful contribution to public debate. Media coverage can also prompt debate in the broader community. For governments, such mechanisms give an indication of what citizens would think about an issue if they had the time and the resources to study and discuss it in an in-depth fashion.

Innovative methods of public engagement should be part of the 'toolbox' of referendum machinery in Australia. The Act should be amended to permit governments to make use of these methods without having to pass additional special legislation.

Conclusion

Australians have been justifiably dissatisfied with the standard of public debate in many prior referendums, including that on the republic in 1999. Voters have often found it difficult to find accurate, reliable information, something that campaigners on both sides have been able to exploit.

The House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into Australia's referendum machinery is a welcome first step towards improving the framework for constitutional change. The goal ought to be a new set of rules that are not only fair and efficient, but also deliberative, participatory and educational. By reforming the system, the Rudd Government can ensure that, irrespective of which proposal is put to voters at the next referendum, Australians are better informed and more fully engaged in the debate.

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