

An Argument in Favour of Constitutional Reform*

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The research we do is inevitably affected by our life experience. I grew up in what was then Rhodesia, now Zimbabwe, and did my law degree in South Africa, where I began teaching constitutional law. Both countries were in the midst of conflict over their constitutional futures and debate on constitutional change was the norm, not only among politicians but in social life as well, at all levels of society.

I subsequently taught in New Zealand for five years. This was in the wake of the reformist tenure of Prime Minister Sir Geoffrey Palmer, which had seen the enactment of the Constitution Act 1986 and was followed by the enactment of a statutory bill of rights¹ and the adoption of proportional representation.²

I moved to Australia in 1997. In contrast to Southern Africa and New Zealand, constitutional debate in Australia—and here I am referring to debate on systemic, fundamental change—has been striking by its absence. So what I am going to do today is to take the licence, which I hope I am allowed as someone who was originally an outsider but who has taught and researched constitutional law in Australia for 19 years, to cast a critical eye over our institutions from the perspective of pure theory, taking an a-historic, blank sheet approach, and asking: if we could re-design the Commonwealth Constitution, how would we do it, and what would we adopt from other jurisdictions? I also approach this task from the position of the academic who has the luxury—in fact I would say the duty—of discussing reforms without regard to how such reforms might be achieved, a question which lies in the province of political actors. I do, however, offer some thoughts on issues of political practicality at the end of this paper.

I am going to discuss reforms in five key areas: parliamentary representation; parliamentary control over the executive; rights protection; federalism; and the republic, including codification of the reserve powers. I conclude with a discussion of the practicalities of reform and of the pressing need to enhance civics education.

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¹ See the New Zealand Bill of Rights Act 1990.

² See the Electoral Act 1993 (NZ).

Representation

The quality of an electoral system must be measured by the extent to which it fulfils its purpose in a democracy, which is surely to produce results that accurately reflect the views of the voting population. One can thus say that an electoral system is democratic to a greater or lesser extent depending on how representative it is. Applying this criterion to the system for elections for the House of Representatives contained in the *Commonwealth Electoral Act 1918* one can say that, while falling within the spectrum of democratic systems, it falls far short of giving equal effect to every citizen's vote. It is nothing novel to state that the single-member electorate system is the most distorting available when compared to the range of systems on offer. The key factor in determining how many seats a party obtains is not the number of votes it obtains nationwide, but rather the accident of where voters live relative to electoral boundaries. Furthermore, this arbitrary system (i) always leads to parties receiving a different percentage of seats to that which their percentage share of the nationwide vote entitles them to, (ii) frequently leads to a party winning government without obtaining a majority of votes and (iii) sometimes even leads to a government winning a majority of seats with fewer votes than the major opposition party, as happened in Australia in 1954, 1961, 1969, 1990 and 1998.

So, for example, while 12,930,814 votes were cast in the 2007 election, the outcome was effectively decided by 8,772 voters in 11 electorates³, who would have handed victory to the Coalition instead of Labor if they had given their first preferences to the former—and this in an election after which the allocation of seats in parliament (83 to Labor and 65 to the Coalition) gave the appearance of a Labor landslide. In 2010 the margin was even closer—13,131,667 votes were cast, but had just 2,175 voters in two electorates⁴ voted for the Coalition instead of Labor, the Coalition would have won power. How can an electoral system possibly be considered representative of voter sentiment when the winning of government depends upon the arbitrary fact of the geographical location of a tiny number of voters?

Another result of systems using single-member electorates is that they inevitably lead to a never-ending transfer of power between two parties, and thus the establishment of a duopoly rather than a democracy. A reflection of popular dissatisfaction with this state of affairs is the fact that an ever-increasing number of voters are expressing their frustration with the major parties by directing their first preference votes to parties other than Labor or the Coalition. In the 2007 election 14.5 per cent of first preference

³ These electorates were: Bass, Bennelong, Braddon, Corangamite, Cowan, Deakin, Flynn, Hasluck, Robertson, Swan and Solomon.

⁴ The electorates of La Trobe and McEwen.

votes went to minor parties or independents⁵, but this increased to 18.2 per cent in 2010 and to 21 per cent in 2013—and this is despite the fact that a first preference vote cast other than for one of the major parties amounts, in most instances, to no more than a gesture before having to make a reluctant choice between parties that can actually win a seat but with which the voter may have no affinity whatsoever.

I would therefore argue that we should adopt a system of proportional representation and suggest the single transferrable vote (STV) system, with its multi-member electorates, best balances the requirements of overall proportionality and voter control over the identity of their representatives. This system has the advantage of already being used in the ACT and Tasmania.⁶ It is also used in countries such as Ireland and Malta. The key determinant of how representative the results produced by this system are is how many members are allocated to each electorate. A comparative analysis of election results from jurisdictions using STV indicates that one can state with a high degree of confidence that, if we had a system where each electorate returned at least seven members to parliament⁷, the possibility of a government coming to power with a minority of votes would be negligible.⁸ If this system were adopted, constitutional amendment would be required, as proportionality would be compromised unless the boundaries of the multi-member electorates could be drawn without regard to state boundaries, which would currently fall foul of s. 29 of the Constitution. I would also recommend that the size of the House of Representatives be increased, both in order to keep the new electorates to manageable size and in order to reduce the ratio

⁵ That is, to parties other than the Liberals, Labor and the various manifestations of the Nationals (Liberal Nationals, Nationals and Country Liberals). The calculation ignores informal votes.

⁶ I refer to those jurisdictions because they are the ones in which STV is used in houses in which government is formed. STV is also used for elections to the Senate and for state upper houses other than that of Tasmania.

⁷ Using the Droop quota method, the threshold for winning a seat in a seven-member electorate would be 12.5 per cent of the votes cast plus one.

⁸ The effect of the number of seats per electorate and the representivity of election results on government formation becomes clear when one contrasts Malta and Tasmania. In Malta, which uses five-seat electorates, a government has won power with less than a majority of votes six times (1921, 1927, 1981, 1987, 1996 and 2008) in 23 elections. Tasmania had seven-seat electorates between 1959 and 1986, during which period eight elections were held and no government won power with less than a majority of votes. From 1989 the number of seats per electorate was reduced to five, and in the eight elections held since then, governments were twice able to win power with a minority of votes (in 1982 and 1989). Thus, based on the available data, seven seats per electorate appears to be the threshold at which formation of government by parties who have less than a majority of nationwide votes is highly unlikely. See the discussion of Maltese election results at University of Malta, 'Malta Elections', <http://www.um.edu.mt/projects/maltaelections/elections/parliamentary>. See the Tasmanian Electoral Commission at <http://www.tec.tas.gov.au/>; a summary of Tasmanian election results since 1909 can be found at Tasmanian Parliamentary Library, 'House of Assembly Election Results 1909-2014', <http://www.parliament.tas.gov.au/tpl/Elections/ahares.htm>.

between voters and their elected representatives, which is currently significantly higher in Australia than is the case in comparable democracies.⁹

Of course, any proportional representation system would almost inevitably lead to coalition government, but the argument that coalition governments are inherently unstable is not supported by research evaluating government stability under different electoral systems across a wide range of jurisdictions¹⁰ and is, in any event, a pragmatic argument, not a principled one, and should not trump the fundamental principle that each voter's views should, as far as is reasonably practicable, have an effect upon the composition of the legislature.

Parliamentary control over the executive

Although in theory the doctrine of responsible government applies in Australia, the system is barely functional in so far as the ability of the opposition to scrutinise the executive is concerned. This is because there is nothing that either house of parliament can do to force the executive to provide the information necessary for that scrutiny.

This was revealed most starkly in 2002, when former Minister for Defence Peter Reith refused to appear before the Senate committee investigating the Children Overboard affair, and the cabinet also ordered that his staffers not comply with the committee's requests to attend.¹¹ At the time, the Coalition lacked a majority in the Senate, which meant that Labor, in conjunction with the minor parties, had sufficient numbers to compel Reith's attendance, and could have used their majority to initiate contempt proceedings against him. However, despite the fact that the Australian Democrats and Greens supported such steps, Labor refrained from using its Senate votes to exercise the contempt powers.¹² The most that ever happens when ministers refuse to provide evidence to committees is that they are subject to a motion of censure, and both major political blocs are careful when in opposition not to initiate contempt proceedings leading to significant penalties, such as suspension from parliament, a fine or imprisonment, that could be used against them once they are

⁹ At the 2010 elections the average number of voters in each House of Representatives electorate was 93,921, compared with 76,875 voters per electorate in Canada, 70,276 in the United Kingdom and 42,153 in New Zealand. For a full discussion of STV as it could be used in elections for the House of Representatives see Bede Harris, 'Does the Commonwealth Electoral Act Satisfy the Constitutional Requirement that Representatives be "Directly Chosen" by the People?', *Journal of Law and Politics*, vol. 9, no. 4, 2016, pp. 85–8.

¹⁰ For the results of a comprehensive survey analysing the relationship between electoral systems and durability of governments see David Farrell, *Electoral Systems: A Comparative Introduction*, Palgrave Macmillan, Basingstoke, 2001, pp. 194–6.

¹¹ See the Senate Select Committee on a Certain Maritime Incident, Report, October 2002, available at http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/index.htm.

¹² See Megan Saunders, 'Truth is out there, somewhere', *The Australian*, 25 October 2002, p. 12.

back in power.¹³ This provides yet another example of the negative consequences for the Australian body politic of the Labor-Coalition duopoly.

The most striking recent example of ministerial defiance of legislative oversight occurred in 2013–14 when the then Minister for Immigration and Border Protection, Scott Morrison, refused to answer questions posed by a Senate committee on migration matters.¹⁴ Similarly, in February 2016 officials from the Department of Immigration and from Operation Sovereign Borders refused on public interest grounds to answer when a Senate committee asked whether the government had paid people smugglers to return asylum seekers to Indonesia.¹⁵ The fundamental problem with claims of public interest immunity is that there is no test—other than the government’s own assertion—for determining whether the public interest indeed justifies non-disclosure of information to parliament.

How then is this to be remedied? Clearly constitutional conventions have lost their binding force in Australia and thus it is no longer satisfactory to leave the workings of responsible government to the goodwill of ministers. The answer is therefore to replace these conventional rules with statutory provisions, which would compel executive subordination to legislative oversight, with penalties for non-compliance.¹⁶

Obviously provision would have to be made for genuine cases where the national interest militated against public disclosure—but this would not mean allowing the executive to claim immunity from providing information merely on its own assertion

¹³ For discussion of the political dimension of this issue see: Laurie Oakes, ‘Hypocritical oath’, *The Bulletin*, 13 March 2002, p. 17; Margo Kingston, ‘Labor backdown opens black hole of accountability’, *Sydney Morning Herald*, 1 August 2002, <http://www.smh.com.au/articles/2002/07/31/1027926912621.html>; Sarah Stephen, ‘Refugee drownings: Labor sabotages inquiry’, *Green Left Weekly*, 11 September 2002 <https://www.greenleft.org.au/node/26737>; and Margo Kingston, ‘Labor’s latest travesty’, *Sydney Morning Herald*, 23 October 2002, <http://www.smh.com.au/articles/2002/10/23/1034561546910.html>.

¹⁴ See Emma Griffiths, ‘Immigration Minister Scott Morrison defies Senate order to release information about Operation Sovereign Borders’, *ABC News*, 19 November 2013, <http://www.abc.net.au/news/2013-11-19/morrison-defies-senate-order-to-release-information/5102342>; and Joel Zander, ‘As it happened: Scott Morrison fronts Senate committee over asylum seeker policies’, *ABC News*, 31 January 2014 <http://www.abc.net.au/news/2014-01-31/scott-morrison-fronts-senate-committee-over-asylum-seeker-policy/5230098>.

¹⁵ Stephanie Anderson, ‘Senior officials refuse to answer questions on payments to people smugglers’, *ABC News*, 5 February 2016, <http://www.abc.net.au/news/2016-02-05/officials-refuse-to-answer-questions-on-people-smuggler-payments/7143162>.

¹⁶ In 1994 Senator Kernot of the Australian Democrats introduced in the Senate the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill, which would have made it a criminal offence, prosecutable in the Federal Court at the instance of a house of parliament, to fail to comply with an order of a house or a committee. The bill would also have empowered the court to order compliance with the legislature’s request. The bill provided for a public interest immunity defence, with the onus being on the accused to prove that the public interest in not complying outweighed the need for open parliamentary inquiries. Courts could conduct in camera hearings to determine whether the defence had been established. Unsurprisingly, the bill was not proceeded with due to opposition by the major parties.

that the public interest requires it. Rather what is required is a set of rules under which (i) the default position is that there is a legal, not just political, duty on ministers to answer questions and provide such other evidence as is required by parliamentary committees, (ii) proceedings can be taken in the courts in cases of non-compliance, with an appropriate regime of penalties and (iii) the onus of making out a defence of public interest at those court proceedings, in camera if necessary, is cast upon ministers. It would be critical to the success of such a system that the right to initiate proceedings for non-compliance should vest not only in a house and or its committees as a whole, but should also vest in individual committee members. This would be a radical change from the current position.

Putting executive accountability to the legislature on a legal, rather than a conventional, footing, and making the application of penalties no longer vulnerable to political majorities, would have dramatic consequences for the doctrine of responsible government. The experience of the United States, where the legislative branch has far stronger coercive measures at its disposal to ensure executive compliance with requests for information, is instructive. Long-standing precedent gives Congress the right to obtain information from the executive¹⁷, and to have recourse to the courts to enforce subpoenas against members of the administration. This was most famously demonstrated in cases which came before the Supreme Court during the Nixon era.¹⁸ More usually, however, the two branches reach a political compromise¹⁹, and it is a quite normal feature of the political process for members of the executive, including members of the cabinet, to appear voluntarily before public hearings of congressional committees²⁰, or for information to be provided at a confidential committee hearing.²¹ The fact that the judicial branch is the ultimate determiner of the degree to which the executive is accountable has not led to the courts being confronted with policy questions that they are incapable of deciding—there is sufficient case law for the courts to engage with in determining whether a claim of executive privilege is valid. It is a matter of supreme irony that the legislative branch in the United States has far greater scrutiny power than is the case under the system of responsible government we have in Australia.

¹⁷ See *Anderson v Dunn* 19 US (6 Wheat.) 204 (1821) and *McGrain v Daugherty* 273 US 135 (1927).

¹⁸ See *United States v Nixon* 418 US 683 (1974) and *Nixon v Administrator of General Services* 433 US 425 (1977).

¹⁹ See Louis Fisher, 'Congressional access to information: using legislative will and leverage', *Duke Law Journal*, vol. 52, no. 2, 2002, p. 325; and William Marshall, 'The limits on Congress's authority to investigate the President', *University of Illinois Law Review*, no. 781, 2004, pp. 806–8.

²⁰ Fisher, *op. cit.*, pp. 394–401. Although an incumbent President has never been summonsed to appear before a congressional committee, President Ford agreed to do so voluntarily to answer questions relating to his pardoning of former President Nixon—see Mark Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability*, Johns Hopkins Press, Baltimore, 1994, p. 90.

²¹ *ibid.*, p. 150.

Rights protection

It is a truism to say that the purpose of a constitution is to allocate powers between institutions of the state and to define the powers of the state vis-à-vis the individual. Although our Constitution does the first, it does the second hardly at all, as it grants protection to only five express rights. Yet of course a constitution is the only document capable of protecting the individual from legislative power.

The usual justification advanced for the absence of a bill of rights from the Australian Constitution is that Australians prefer to put their trust in democratically elected representatives rather than in the courts. The classic enunciation of this by Robert Menzies was as follows:

There is a basic difference between the American system of government and the system of ‘responsible government’ which exists both in Great Britain and Australia ... With us, a Minister is not just a nominee of the head of the Government. He is and must be a Member of Parliament, elected as such, and answerable to Members of Parliament at every sitting ... Should a Minister do something that is thought to violate fundamental human freedom he can be promptly brought to account in Parliament.²²

Menzies’ comments reflect a glib fantasy: as already discussed, the executive is not subject to control by parliament—the strength of the party system and the way the rules of parliamentary privilege operate serve to make the government a virtual elective dictatorship. Furthermore, Menzies’ argument, which is still re-stated in various forms by opponents of a bill of rights, ignores the fact that it is parliament itself that poses the principal threat to rights. As Geoffrey Robertson states, a bill of rights:

... means justice for people whose particular plight would never be noticed by parliament, or prove interesting enough to be raised by newspapers or by a constituency MP. Far from undermining democracy by shifting power to unelected judges, it shifts power back to unelected citizens: democracy from its inception has relied on judges (‘unelected’ precisely so they can be independent of party politics) to protect the rights of citizens against governments that abuse power.²³

²² Robert Menzies, *Central Power in the Australian Commonwealth*, Cassell, London, 1967, p. 54. See also Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law*, UNSW Press, Sydney, 2009, pp. 34–5, 54–9.

²³ Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights*, Random House Australia, Sydney, 2009, p. 8.

Robertson's point is important. It is precisely because judges are unelected that the protection of rights should lie in their hands, as the issues they would be charged to determine, which in aggregate boil down to the protection of human dignity, are not ones which should be decided through the interplay of party political forces. Furthermore, few seem to have grasped the inconsistency inherent in the argument based upon democracy: democracy, in the sense of an entitlement to political participation can itself be justified only by reference to an external norm, namely the political equality of individuals and the corollary that each person has a right to participate in the law-making process. In other words, democracy is itself logically subordinate to, and dependant on, the concept of rights.

The absence of comprehensive rights protection from the Australian Constitution is all the more cynical, given that Australia is signatory to all the major human rights conventions—and you will search these documents in vain to find an asterisk directing the reader to a footnote which says, 'These rights do not apply to democracies.' There seems to be an attitude of exceptionalism at play in relation to fundamental rights that puts us at odds with the post-World War II international consensus that emerged in the wake of the Nuremberg trials, which rejected positivism and called for the universal recognition of fundamental rights by all legal systems. Given that our Constitution already grants express protection to five rights and that legislation inconsistent with those rights can be invalidated by the High Court, it cannot be said that the constitutionalisation of the full range of rights we have pledged to uphold internationally would be alien to Australian constitutionalism. Such a step, while expanding the range of rights protected, would certainly not confer any new function on the courts. However, if the existence of justiciable rights is offensive to constitutional principle, then surely opponents of a full bill of rights should be calling for the Constitution to be amended so as to remove such rights as it does protect. Yet calls to remove provisions such as s. 116, which protects freedom of religion, have been conspicuous by their absence, so the question needs to be asked: if freedom of religion is protected, why should that not be so in the case of other fundamental rights?

The absence of a full bill of rights leaves the individual vulnerable in the face of legislation which infringes fundamental freedoms. Let me give just a few examples. It puts Australia in the position where there is no express constitutional right to due process—it being a terrible irony that, in the very week of the 800th anniversary of Magna Carta last year, the principal concern of the government was the drafting of legislation to allow deprivation of citizenship without the need to go to court, the very

antithesis of due process promised by article 39 of Magna Carta.²⁴ The absence of constitutional protection of the right to privacy, in the sense of personal autonomy, means that there is no recognition that in relation to intimate personal choices—and here I am thinking specifically of same-sex marriage—the individual should be shielded from the prejudices of parliamentary majorities. Similarly, the fact that there is no constitutional prohibition of cruel and unusual punishment means that there is no limit to the harshness to which asylum seekers may be subjected, either on or offshore.

I cannot leave the issue of human rights without discussing the constitutional recognition of Indigenous people. It is scarcely credible that there are mainstream voices in 21st century Australia who are either openly antagonistic towards the inclusion in the Constitution of a right prohibiting racial discrimination²⁵ or who, while they may support such a right in theory, argue that its incorporation would frighten the conservative horses and thus lead to defeat at a referendum.²⁶ We are left in the truly bizarre position that the Constitution protects the right not to be discriminated against on the grounds of which state one resides in, yet does not offer protection against racist legislation. This is not the time to propitiate conservatives. What is needed is the same moral leadership as was in evidence during the 1967 referendum, which confronts the constitutional conservatives on this issue and overcomes their arguments. We must reject any approach which makes concessions bargaining away the rights of Indigenous people—and even before battle has been properly joined—in order to win conservative support for watered-down reform. Above all, we need to move away from the idea that consensus is the only basis for constitutional change. Sometimes change requires that its opponents be confronted head-on, and their arguments refuted in the public arena. A commitment to non-discrimination is certainly such an occasion.

²⁴ Eleanor Hall, ‘What can Tony Abbott learn from the Magna Carta?’, *The World Today*, 15 June 2015, <http://www.abc.net.au/news/2015-06-15/modern-australian-politicians-could-learn-from/6546728>.

²⁵ See, for example, press statements by Tony Abbott as reported in Anna Henderson, ‘Government renews reservations about race discrimination ban in constitution ahead of Indigenous recognition summit’ *ABC News*, 4 July 2015, <http://www.abc.net.au/news/2015-07-04/government-renews-reservations-about-race-discrimination-ban/6594726>; and by Cory Bernardi as reported in Anna Henderson, ‘Senator Cory Bernardi warns “divisive” Indigenous constitutional referendum “doomed to fail”’, *ABC News*, 21 May 2015, <http://www.abc.net.au/news/2015-05-21/senator-warns-against-'divisive'-indigenous-referendum/6485538>.

²⁶ See, for example, Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia*, University of Queensland Press, St Lucia, 2015, pp. 6-7, 220, 244-7 and 270-1; and ‘Frank Brennan on abuse within the Catholic church, and constitutional recognition of Indigenous Australians’, *ABC RN Breakfast*, 19 May 2015, http://mpegmedia.abc.net.au/rn/podcast/2015/05/bst_20150519_0806.mp3, accessed 23 June 2016.

Federalism

Seen at its best, the adoption of federalism in preference to unitary government was the necessary price of creating Australia as a nation. At its worst it can be seen as a base compromise pandering to colonial jealousies, which saddled the country with an unnecessarily complex and expensive form of government and, although I hesitate to say it given where I am speaking today, a second chamber which has never performed its designated function as a states' house.

If the federal system is looked at with cold, a-historical objectivity one must conclude that it is difficult to believe that a country with a population the equivalent of a major city in many other countries should have nine governments. The economic cost of federalism is enormous: as long ago as 2002 it was estimated that, at an absolute minimum, the existence of the federal system drained the economy of \$40 billion per year²⁷, a figure which would now be much higher. This covers obvious costs such as running state and territory governments, costs to the Commonwealth of interacting with the states and compliance costs to business. It excludes intangible costs in terms of time and inconvenience—think of simple matters such as car registration or trades licensing—experienced by anyone who has moved interstate.

Furthermore, this cost is not balanced by any benefit. It would be idle to pretend that US Supreme Court Justice Louis Brandeis's famous statement that federalism creates circumstances where a 'state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country' operates in any real sense in Australia.²⁸ It cannot be said that Australia presents a vibrant diversity of social dioramas. The other supposed major benefit of federalism, is that it provides protection against tyranny by diffusing power.²⁹ But federalism does not affect *what things* government may do to individuals, only *which government may do them*. As I have argued above, only a bill of rights can do that.

De-federalisation would obviously remove a key rationale for the existence of a second chamber. Yet this would not mean a diminution of legislative scrutiny over the executive, because the enhancement of the powers of committee members recommended earlier in this paper would enable members of committees of the House of Representatives to subject the government to more scrutiny than even the Senate can today. Furthermore, the adoption of proportional representation for the House of

²⁷ Mark Drummond, *Costing Constitutional Change: Estimates of the Financial Benefits of New States, Regional Governments, Unification and Related Reforms*, PhD thesis, University of Canberra, 2007, p. 442.

²⁸ *New State Ice Company v Liebmann* 285 US 262, 311 (1932).

²⁹ See the discussion of federalism in the dissenting judgment of Kirby J in *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 222-9.

Representatives would make anomalous the continued existence of an upper chamber elected under an inherently disproportionate allocation of an equal number of senators to each state irrespective of population.

Finally on this topic, there is already a degree of public appetite for the abandonment of federalism. A 2014 survey on public attitudes by the Griffith University Centre for Governance and Public Policy found that 71 per cent of respondents favoured changing the current system (among whom there were differing preferences for the allocation of functions to national, regional and local governments).³⁰ This is consistent with a survey commissioned by the public lobbying group Beyond Federation that same year, which found that 78 per cent of respondents favoured having a single set of laws for the country.³¹ It therefore seems that de-federalisation is a reform proposal which would be well-received by voters. I leave consideration of this issue by posing the following question: if we were writing the Constitution *de novo*, would we really create this nine-government system again? And if the answer to that is 'no', then why would we now not abandon it?

The republic and codification of the reserve powers

I have left the issue of a republic until last because, although it is the most frequently discussed constitutional reform, it is in my view the least important. This is not to say that issues of symbolism are without any importance. I remain committed to the view that a severing of the constitutional link between the monarchy and Australia would serve to signal Australia's separate identity on the world stage, and would ensure that there is no office under the Constitution to which Australians may not aspire.

However, of far greater importance than this, in my view, is codification of the conventions regulating the use of the reserve powers, a step which should be taken irrespective of whether we retain the link with the crown or abandon it. This issue is of course linked to that of a republic in so far as significant political capital is made by monarchists out of the supposed risk that an Australian president would abuse the reserve powers by departing from the conventions which govern their use. This problem must therefore be addressed if there is to be any chance of a republic, particularly one involving a popularly elected president, which opinion polls indicate is the preferred model. Yet, to repeat what I said at the outset, codification is necessary even in the absence of a move to a republic. It remains a puzzle as to why,

³⁰ Griffith University Centre for Governance and Public Policy, *Australian constitutional values survey: results release 1*, October 2014, https://www.griffith.edu.au/__data/assets/pdf_file/0015/653100/Constitutional-Values-Survey-Oct-2014Results-2.pdf.

³¹ Galaxy Research, *State government study*, report prepared for Beyond Federation, May 2014, <http://members.webone.com.au/~markld/PubPol/GSR/Polls/Galaxy%20State%20Government%20Study%20May%202014.pdf>.

in the wake of the 1975 constitutional crisis, no attempt was made to do this in order to remove uncertainty in relation to the circumstances in which the powers should be exercised.

There is no shortage of examples from the international Commonwealth which could be drawn upon. Several Commonwealth countries have maintained the office of governor-general but have codified the conventions.³² The same is true of others that have become republics with a figurehead president exercising the powers formerly exercised by a governor-general.³³ Finally, one can point to Germany and Ireland, republics whose constitutions are based on parliamentary government and contain codified rules almost identical to those which operate by convention in Australia.³⁴ I would therefore argue that codification of the conventions would be beneficial in itself as well as being a necessary corollary of a move to a republic.

Prospects for reform and the need to enhance civics education

Turning finally to the question which I deferred at the start of this paper: what are the prospects for constitutional reform? In answer to this I would make three key points.

First, public opinion in Australia reveals a paradox of extreme conservatism in relation to constitutional change, coupled with disenchantment with, and disengagement from, the political process. Yet there seems to be a failure to recognise that, unless people become accepting of constitutional reform, none of the shortcomings which are the source of disillusionment with the political process can be addressed.

Second, history supposedly shows that successful constitutional amendment requires bipartisan endorsement by Labor and the Coalition. This has a number of invidious consequences: only the most uncontentious amendments—which in reality means those which have the least impact—have a chance of passing at referendum. The perceived need for bipartisan support means that the major political parties enjoy a de facto stranglehold over reform. Furthermore, since the major parties are unlikely to endorse changes that alter the balance of power in the Constitution in a direction that is adverse to their own interests, the capacity they have to derail constitutional reform perpetuates the political status quo. Why do the public allow this to continue, given

³² See, for example, the Constitution of Barbados 1966, arts 61, 65, and 66; the Constitution of Bahamas 1973 arts 73, 74 and 66; the Constitution of Grenada 1973 arts 52 and 58; and the Constitution of Jamaica 1962 arts 64, 70 and 71.

³³ See, for example, the Constitution of Dominica 1978 arts 59, 60 and 63; the Constitution of Malta 1964 arts 76, 79, 80 and 81 and the Constitution of Mauritius 1968 arts 57, 59 and 60.

³⁴ See Constitution of Ireland 1937 arts 13.1.1 and 28.10, and the Constitution of the Federal Republic of Germany 1949 arts 63 and 68.

their disillusionment with the political process in general and the major political parties in particular? Much of the answer to this lies, in my opinion, in the fact that a lack of civics education puts voters at a significant disadvantage when evaluating constitutional reform proposals, making them easy prey for politicians who exploit ignorance about constitutional matters and stoke groundless fears about the effect that constitutional change would have. In my view this means since most of the necessary reforms are antithetical to the interests of the major parties, true reform will happen in spite of them, not because of them, and that the only hope of achieving real reform lies in mass mobilisation of public opinion to an extent which puts the major parties under irresistible pressure to put reform to the people.

Third, it follows from the first two points that the key to constitutional reform lies in harnessing prevailing public disenchantment with the political order to whichever constitutional reform measure has sufficient populist appeal to overcome the voters' notorious suspicion of constitutional change. In my view, a campaign advocating the adoption of proportional representation might have the greatest chance of success. It has the advantage that its case can be based squarely on the concept of fairness and would be able to draw upon rising levels of dissatisfaction with the major parties, who are so obviously and unfairly advantaged by the current electoral system.

Leaving aside this immediate strategy, it is clear that, in the long term, constitutional reform depends upon having a citizenry sufficiently knowledgeable about the current Constitution and its shortcomings to be able to critique it. Here the deficiencies in civics education need to be considered. The Commonwealth syllabus *Discovering Democracy*³⁵, made available in 1997, and the Civics and Citizenship subject contained in the new *Australian Curriculum*, published during the period 2011–13³⁶, do a good job at explaining the Constitution as it is, but fail to critique the existing constitutional order. We desperately need a new model of civics education, which enables students to become both informed and critical.

Finally, academic lawyers, who one would normally expect to be bold in their critique of public institutions and innovative in suggesting alternatives but who have in general not done so, also need to discuss broad constitutional reform from the perspective of principle, leaving aside, at least initially, consideration of the politics involved in changing the Constitution. Public resistance to constitutional change is

³⁵ Education Services Australia, *Discovering Democracy*, 1998, <http://www.civicsandcitizenship.edu.au/cce>. See also Stacey Hattensen and Robyn Platt, *Australians All!: Discovering Democracy Australian Readers – Lower Primary*, Curriculum Corporation, Carlton South, 2001.

³⁶ Australian Curriculum, Assessment and Reporting Authority, '7-10 Civics and Citizenship', 2015, <http://www.australiancurriculum.edu.au/humanities-and-social-sciences/civics-and-citizenship/curriculum/7-10?layout=1>.

seen as being so ingrained that academic writers rarely venture into this area, presumably believing that anything that is truly significant is doomed to failure. This approach sacrifices principle for pragmatics and ignores the fact that meaningful reform rarely occurs by following public opinion. Radical reform is, by its nature, controversial, and so the role of the advocate must of necessity be that of leading, rather than following. We ought not to be daunted by the apparent difficulty of the task confronting those of us who seek progressive constitutional change in Australia today.



Question — I am provoked by many issues, but I am going to focus on one and in fact take issue with one of your propositions: there is nothing that either house of the parliament, or committees of the parliament, can do to compel the disclosure of information. I would put it to you that that is simply wrong. Let me reminisce: as a former Commonwealth officer I have been telephoned on more than one occasion to bring my toothbrush because I might be committed to Goulburn jail if I refuse to answer some questions. Also as a Commonwealth officer I have on more than one occasion provided legal advice that the committee of the parliament did have the power to compel an answer to a question and that it was a matter for the political judgment of the committee whether it wished to compel that. My understanding is that both sides of politics, on the basis of reciprocity, don't exercise that power because on another occasion they will be on the other side.

Your solution was that this should go to the courts. Now there is a threshold question: Would this be an advisory opinion or would it be a matter? Would it be something for the courts? There is also the question of how it would go to the courts. Would it be a referral from the committee? If the members of the committee are so reluctant themselves to compel someone to answer a question, why would they be less reluctant to refer this to a court when the ultimate conclusion would be one they are wishing to avoid?

Bede Harris — That is a very good question and it really serves to emphasise the importance of the very final point I made in relation to my suggested process. Yes, a public servant can be compelled to attend a committee meeting, but if that public servant's minister tells them not to then it becomes a matter for the minister and the minister will usually attend in the place of the public servant who declines to attend. The point is that, because of this reciprocity, the big stick of proceedings for refusal to answer questions is not used. I see this reciprocity as a great evil and it was

demonstrated clearly in the children overboard case. Neither Labor nor the Coalition would want to create a precedent such that a minister could be dragged before parliament. As in the old case of Fitzpatrick and Browne from the 1950s, a breach of parliamentary privilege exposes you to detention in a dungeon, which I presume we have somewhere in Parliament House—

Rosemary Laing — False!

Bede Harris — or the ACT watch-house.

Rosemary Laing — Yes.

Bede Harris — It is precisely for that reason that standing to initiate such proceedings must be given to individual members of committees. So it is truly revolutionary what I am suggesting. I am saying the jurisdiction to initiate proceedings for contempt should not vest in a committee of the house or in the house itself; the individual member should initiate those proceedings. The immediate effect of that would be ministerial compliance in 99 per cent of the cases and it is only in the cases where there is genuine, provable national interest in not complying, for which a case can be made out to a court, that there would be non-compliance. It would change the whole dynamic to one of there being a presumed need to comply, failing which there would be a penalty, and that would change the mindset of ministers.

There was a bill put forward in 1994 by Cheryl Kernot, which proposed exactly this sort of measure. Of course it got nowhere because of the opposition of the major parties. You can read *Odgers' Australian Senate Practice* where Harry Evans says that, under the common law, there is an obligation to attend. But for every right there has to be a remedy and if the remedy is never used against recalcitrant ministers, because ultimately you have to get the cooperation of the major parties to use it, then there is no remedy. That is why I am advocating such revolutionary change.

The legislation which I propose would establish an obligation—that is, a minister would be, under a Commonwealth statute, obliged to answer questions. If you look at cases from the New South Wales Parliament, like *Egan v Chadwick*, there it is said that under the system of responsible government the houses have an appropriate right to scrutinise members of the executive. That I think would give rise to the interest, the standing, of the individual committee member, who had failed to have their question answered, to get that question answered and, if it isn't, to bring the matter to court, not for an advisory opinion, which of course the courts can't give, but for a definitive binding opinion.

Question — I have lived in four countries. I was born in Canada. I lived for three years in Scotland, which is irrelevant. I lived in New Zealand from 1960 to 1965 and I have lived in Australia since then. In each of these three countries we have indigenous people—Indians in Canada, Maori in New Zealand, and the Aborigines here. In New Zealand there was the Treaty of Waitangi with the British many years ago, which is yet to be ratified by the New Zealand Parliament. It seems to me that we are very biased against indigenous people, even though in each case, Canada, New Zealand and Australia, they were the first people in those countries. I am a pale face in Canada, a pakeha in New Zealand and a white man in Australia, which is a close as we can get. Does this not show that we have a bias against indigenous people?

Bede Harris — I certainly think that there is unfinished constitutional business in relation to the recognition of Indigenous people. As we know, there were a number of recommendations by the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. I think that removing racially discriminatory provisions in the Constitution is an important starting point. I think, as I have said in my paper, that you have to have a right to non-discrimination. I would also think, and I said this myself in a submission to that panel, that you need to have something in the Constitution which recognises the cultural rights of Indigenous people. There is actually a very good model for this in section 19 of the Charter of Human Rights and Responsibilities in Victoria. Unfortunately it is not justiciable, but the phraseology of it is an excellent template which could be used to ensure redress for past wrongs and protection for the future for the rights of Indigenous people. I have also written elsewhere about recognition of Indigenous law. When I went to university in South Africa we had to study what was called ‘customary law’ because it is still part of the law of the country and the courts, right up to the top court in the country, will hear cases involving customary law which might have arisen in a headman’s court in a village. But in Australia currently there is no recognition of Indigenous law and it is one of the things that I am very interested in progressing.

Question — More than half a century ago, I came across the words ‘politics purges the system’. This place has plenty of politics—the politics of the ivory tower, imperfect; the politics of the courts, imperfect; the politics of the variety of state legislatures, imperfect. The whole range of imperfections conspire against each other but somehow we muddle through to what turns out to be, despite the Constitution, a pretty jolly good outcome. If I might make comparisons with many of the other countries in which I have lived or indeed visited, it is not too bad. So why don’t we leave things be?

Bede Harris — Because I think that the good is the enemy of the best. ‘She’ll be right. If it ain’t broke, don’t fix it’: this is phraseology that I just do not think is

acceptable if there are defects in the Constitution. Yes, it lumbers along. Let's take the example of the conventions. The principal convention that I am thinking of is that the Senate ought not to block money supply. That was one of the contentious issues in the 1975 crisis that still is not resolved. We could have the same events as happened in 1975. Many academics say, 'The solution to that is: just don't press the issue.' It is like saying, 'Buy this car but do not drive it over 70 kilometres per hour or the wheels will come off.' I think what we have got to do is aim for the best we can have, not just for that which is barely acceptable. We have got to set the bar higher. I would not even go so far as to say the system works. In relation to ministerial accountability, it patently does not work. In relation to the electoral system, it does not give everyone's vote an impact upon the outcome in the House of Representatives. If I were a voter for a minor party in a safe Labor or Coalition electorate, I would feel embittered going to the polls year in, year out knowing that my vote has no effect whatsoever. I do not think that is a functional system. I think that is a system where problems are suppressed and I think we need to confront them and deal with them.

Question — One wonders about Ricky Muir in Victoria with 457 votes.

Bede Harris — The electoral system I am suggesting would, because of the size of the electorates, lead to different outcomes. It is not for me to say Ricky Muir should not be in the Senate. It is whether or not there is an adequate level of representation of the voters. I am looking at the voters' power. That is the critical issue for me and having 2,000 voters on one side of an imaginary line and 2,000 on a different side and that being critical to the outcome of who forms government is just not fair.

Question — I am not sure how you form your opinion that people would be ready to change the federal system. I came to Canberra in the 60s and in those days Canberra was pretty well the only place where you had a mixture of people from all the states. Having come from a smaller state, what struck me after a few months of being exposed to people from everywhere was that the Victorians, the Queenslanders, the South Australians, the Tasmanians and the Western Australians, when you asked them what they were, all said: Victorians, Queenslanders, South Australians, Tasmanians and Western Australians. If you asked people from New South Wales, they said they were Australians. Having gone back to my home state of South Australia quite often over the years, people have very strong state identities, which go right back to colonial days, in all the outlying states. While I think we could reform the federal system, I just don't think it is at all realistic to think we could do away with it altogether.

I still see the difference today. If you are with a group of people who were brought up in New South Wales, they tend to still think of themselves fundamentally as

Australians. Although it has weakened, I think there is still a very strong feeling in all the other states. I think perhaps you are being a little idealistic. I also note that you are from a university based in New South Wales.

Bede Harris — I admit quite candidly that I am being idealistic and I do not underestimate the difficulty in these changes. As to the basis for my assertion, it was those surveys done in 2013, where people were asked: How many levels of government do you think there should be? Which levels should there be? Should there be one with general law-making powers which delegates powers to local government? Of course states have and always will maintain a strong identity in their residents. There is no problem with that and those identities can carry on for sporting purposes or for anything else. All I am saying is: do we want to waste \$40 billion a year on having them as levels of government? I do not see the rationale for doing that. The identities can be preserved. They will not disappear. But from a political point of view, I question their ongoing relevance.

Question — My question is based on the fact of having lived in Canberra and being politically interested for most of my life and now living in regional New South Wales. Does the recent hubbub about the amalgamation of councils in New South Wales, and some of the violent reactions to it in some areas, indicate to you that this notion of changing boundaries, of changing the way systems work, is going to be a much tougher job than you would anticipate from the political analytical level rather than at the ground level? I am also from an electorate that has just changed boundaries, where people have no idea what their new electorate is and no idea who the candidates are and they are not particularly interested. I just wonder how you would see that fitting into—I actually agree with what you are saying—an idealistic view. I come to your final issue: how do you practically implement it?

Bede Harris — I think that is important. Raising local government is very interesting because these surveys showed that there was quite a degree of support for the concept of a single national government enacting laws and delegating powers to local and regional governments, which people would then continue to elect as they do now but there would not be any question of those governments' laws being superior or the Commonwealth's legislative power being constrained. The Commonwealth would have plenary powers and then you would have local or regional governments. There was a degree of support for strengthening the functions that were allocated to local and regional governments in exchange, if you like, for getting rid of the states. I think that often people identify very strongly with local governments—you are quite right, the amalgamation issue has demonstrated that—and that might in fact be a positive in a de-federalisation campaign. So, yes, it would be difficult, but I think that would be an important part of it.

Rosemary Laing — I would just like to throw one thing in at this point. You started your lecture on this theme and we keep coming back to it. It is the simple fact of geography. Geography matters and I think it was one of the triumphs of our constitution writers to recognise the significance of geography. In a huge country, in terms of square miles and geographical area, with a relatively small population, federalism was the model that seemed to meet the demands of the idea that some states were larger than others and you would have the population majority represented in the House of Representatives in numerous seats but you would maintain that equality across the nation, including recognition of minorities, by having the Senate as a house in which the partners in the federation were represented equally. I think that there is a snowflake's chance in hell of ever letting go that idea of the states being equal partners in the federation. It is based largely on geography, different communities of interest, different economic, social, physical and industrial conditions in the different parts of our great, big diverse nation.

Bede Harris — I suppose I have always approached constitutional law by looking at the smallest unit, which is the individual, and to me there is something offensive in the fact that, if I lived in and was a registered voter in Tasmania and I got on a plane and took up a job in Sydney, my effective voting power in the Senate would be one thirteenth of what it was in Tasmania. That is the first point. On the second point about communities of identity, surely it is the case that the owner of a small mine in Western Australia has more in common with the owner of a small mine in Queensland than they do with a person who owns a mansion in Mosman Park, Perth. In other words, I think the communities of interest in society now, compared to 1901, are more economic based, they may be ethnic based, rather than geographically based. I concede to you of course the difficulty in this project. What I am trying to do is shine a bright light of principle on these issues.

