



Australian Community Futures Planning

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18 October 2023

Ms Anita Coles
Committee Secretary
Parliamentary Joint Committee on Human Rights
Parliament House
Canberra ACT 2600
By email: Human.rights@aph.gov.au

Inquiry into Australia's Human Rights Framework Response to Questions on Notice from Senator Thorpe

Dear Ms Coles,

Thank you for your email of 5 October 2023 containing Questions on Notice from Senator Lidia Thorpe in relation to my appearance at the PJCHR's hearing in Sydney on Thursday, 28 September 2023.

Please find my answers below.

Question 1 from Senator Thorpe:

1. You say the AHRC proposal does not go far enough and unless human rights are constitutionally enshrined abuse of human rights will continue and we will see government enabled climate change, new stolen generations, state sanctioned violence, homelessness, poverty, health issues, pollution, corporate exploitation, and war. We look around and see this all currently happening and worst of all for First Peoples on our own land.

Can you confirm your submission that unless a Bill or Charter of rights is constitutionally enshrined, there is no domestic legal way to hold the executive government accountable for passing laws that abuse human rights beyond the government of the day choosing how they are held accountable for breaches through [sic.]?

Response from Bronwyn Kelly, representing Australian Community Futures Planning

Thank you for this question. My answer is provided in two parts.

A. In relation to whether there is no domestic legal way to hold the executive government accountable for passing laws that abuse human rights:

I refer the PJCHR to my previous evidence, namely that the High Court has in effect already confirmed that unless human rights are enshrined in the Constitution it is not possible for the courts to hold executive governments or parliaments to account for passing laws that abuse or revoke

human rights. The rights of humans in this country can be lawfully abused by Australian governments because there is nothing in the Constitution that says they can't be. It is almost entirely silent on human rights and fully silent on any attendant government obligations to uphold and protect those rights. As such, the Constitution gives the courts no basis to restrain abuses of human rights by executive governments or parliaments, either in law-making, policy development or administration. In *The People's Constitution* I cite no fewer than five major High Court judgements upon which I base this view. They are:

- *Al-Kateb vs Godwin*, 2004,¹
- *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh*, 1995,²
- *Kartinyeri vs the Commonwealth*, 1998,³
- *Comcare vs Banerji*, 2019,⁴ and
- *Maloney vs the Queen*, 2013.⁵

In relation to this question from Senator Thorpe, the judgement in *Al-Kateb vs Godwin* gives the clearest and most direct answer. In this judgement the High Court was forced to determine that amendments to the Migration Act did lawfully allow indefinite detention, and that the Act was not unconstitutional. As John Von Doussa, former president of the Human Rights and Equal Opportunity Commission observed, this ruling pertained "even though the detention was recognised as arbitrary, [and] contrary to Article 9 of the International Covenant on Civil and Political Rights. ... The Court held Parliament had sufficiently expressed its intention that children could be detained, notwithstanding that their detention ran foul of human rights principles."⁶

It is an indictment of Australia's Constitution that such horrible laws can be made under it. But the *Al-Kateb vs Godwin* case is also a landmark result for another reason. It clarifies the significantly diminished status of the courts in their judicial power relative to the parliaments in their legislative power (and for that matter, relative to executive governments in their administrative power). Justice McHugh was forced to proclaim in *Al-Kateb* that when it comes to human rights:

the justice or wisdom of the course taken by Parliament is not examinable in this or any other domestic court. ... The function of the courts in this [human rights] context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.⁷

And so, in confirming that the contested amendments to the Migration Act were within the powers conferred on parliament by the Constitution, the High Court also confirmed that Australian courts have lost any power they might have had to determine the justice of any laws made about human rights in Australia, and they have lost this power because of Constitution's silence on rights. In

¹ *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562, [High Court](#) (Australia).

² AustLII, [Australian Journal of Human Rights](#), Roberts, Susan --- "Teoh v Minister for Immigration: The High Court Decision and the Government's Reaction to it" [1995] AUJHRights 10; (1995) 2(1) Australian Journal of Human Rights 13.

³ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, summarised in the Agreements, Treaties and Negotiated Settlements Project, ATNS.

⁴ High Court of Australia, *Comcare vs Banerji* at <https://jade.io/article/657141?at.hl=Banerji>

⁵ High Court of Australia, *Maloney vs the Queen*, [2013] HCA 28; 252 CLR 168; 87 ALJR 755; 298 ALR 308.

⁶ John von Doussa QC, President, Human Rights and Equal Opportunity Commission, "[Why We Need An Australian Bill of Rights – a joint forum](#)", University of South Australia, 7 December 2005 accessible at <https://www.humanrights.gov.au/about/news/speeches/why-we-need-australian-bill-rights-joint-forum>

⁷ *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562, [High Court](#) (Australia).

further support of this I must repeat here part of an extract from *The People's Constitution* supplied already in [ACFP's main submission](#) to the PJCHR's Inquiry into Australia's Human Rights Framework:

Lawmakers and judges alike are well used to interpreting whether parliaments are behaving justly in relation to human rights treaties. And yet judges have felt the need for specific incorporation of treaties into domestic law – or rather, into the actual Constitution – before they will exercise the full measure of their judicial power in relation to rights under these treaties. In the Al-Kateb case, Justice McHugh shed some light on why. He said:

Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring – and many would say a just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights. But, desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country. It would be absurd to suggest that the meaning of a grant of power in s 51 of the Constitution can be elucidated by the enactments of the Parliament. Yet those who propose that the Constitution should be read so as to conform with the rules of international law are forced to argue that rules contained in treaties made by the executive government are relevant in interpreting the Constitution. It is hard to accept, for example, that the meaning of the trade and commerce power can be affected by the Australian government entering into multilateral trade agreements. It is even more difficult to accept that the Constitution's meaning is affected by rules created by the agreements and practices of other countries. If that were the case, judges would have to have a "loose-leaf" copy of the Constitution. If Australia is to have a Bill of Rights, it must be done in the constitutional way – hard though its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill.

This is a logical or at least understandable reason for the reluctance of judges to determine “whether the course taken by Parliament is unjust or contrary to basic human rights” when there is no specific rendering of any human rights treaties in the Constitution itself. And it is a plea from the judiciary to the people to take the chains off the courts that prevent them from protecting people against abuses of power and rights by governments. It is also a clear statement to the effect that mere legislation is not sufficient to protect human rights. It must be done in the Constitution. Otherwise there is no balance of power that can be achieved. No balance of power is possible if one of the powers (in this case the High Court) has no power at all under the only instrument that can give it power – the Constitution. The Court's lesson is that only the people can solve this problem, via a long overdue referendum to insert human rights into the Constitution.⁸

B. In relation to the utility of a Bill or Charter of Rights in the Constitution in holding governments accountable for breaches of human rights:

Notwithstanding the above, I would submit that the solution to the problem of executive abuse of human rights is not necessarily insertion of “a Bill or Charter of rights” into the Constitution, as per Senator Thorpe's question. Enshrinement of rights in the form of a bill or charter would be an

⁸ Bronwyn Kelly, [The People's Constitution: the path to empowerment of Australians in a 21st century democracy](#), Chapter 6 – The Constitution as a barrier to human rights. [ACFP Publications, 2023](#).

improvement, inasmuch as it would (depending on how it is drafted) create at least some limits to the power of governments or parliaments to force through laws that abuse or remove rights. However, in *The People's Constitution* I argue that human rights are not the fiat or gift of governments and that this is confirmed by official government policy, which states that rights are inherent and inalienable – i.e., they cannot be given up or taken away – and they are an indivisible whole. A charter or bill of rights is a concept or model of law-making that assumes that human rights are not indivisible and can be narrowed down to a selective list of rights a government is prepared to let people have. As such bills and charters inherently support the notion that rights are not inherent and inalienable, and more, that arbitrary executive government decisions to deny those rights are permissible, regardless of the genuine needs or will of either parliaments or the people.

Therefore, although a bill or charter of rights in the Constitution could (again, depending on how it is framed) restore a more reasonable balance of power between the parliament, executive governments and the courts in relation to human rights policies and decisions, we are nevertheless unlikely to experience the full measure of the benefit that may be experienced by this restoration of a reasonable share of power for the courts if a bill or charter is drafted in a manner that is:

- i. selective of rights, and/or
- ii. makes it lawful for a government to arbitrarily suspend any human rights laws, and/or
- iii. does not simultaneously enshrine the obligations of governments and parliaments to protect and honour the rights of Australians.

Should such a bill or charter, for example, leave the way open for governments to continue making executive decisions or statements which adversely affect or detract from rights in law, then the gains made through a bill or charter in the Constitution will be lawfully (albeit unjustly and undemocratically) reversible.

A bill or charter of human rights in the Constitution would reduce the potential for executive abuses of rights in one way, because it would help the courts to defend us from abuse more than they can now. But it will re-introduce the possibility of abuse by a different means because it would increase the potential for divisibility of what in policy is acknowledged to be indivisible. In other words it is likely to unjustifiably reduce access to certain rights (perhaps on a permanent basis, even though that would be contrary to international law), and it is likely to allow governments to escape obligations to protect human rights and to refrain from restricting access to rights when it is not necessary (eg., when a restriction is not vital to “the interests of national security or public order or for the protection of the rights and freedoms of others.”⁹).

The executive’s ability to escape obligations under international human rights law will persist particularly if the bill or charter confers rights on Australians but does not simultaneously confer the attendant obligations on governments. For a list of the obligations of State Parties to international human rights treaties, see [Appendix 3 of *The People's Constitution*, accessible as an extract here](#). Commitment to observe these obligations is essential for any State Party if human rights are to be protected.

It should be noted that, contrary to their own policies, Australia’s commonwealth governments have uniformly displayed a tendency to assume that an arrangement where rights are permitted only by government fiat (i.e., graciously conferred by a bill or charter) is an appropriate way to make laws about human rights in a democracy. The PJCHR’s Chair, Mr Josh Burns MP, made an assertion to this effect in his question to me at the hearing on 28 September 2023. He said:

⁹ Articles 12, 19, 21 and 22 of the [International Covenant on Civil and Political Rights- external site](#) and Article 8 of the [International Covenant on Economic, Social and Cultural Rights- external site](#).

No member of the committee is a member of the executive but, in your submission and your opening statement, you talk about how a member of the committee would feel if a future executive were to make contrary decisions. I would put to you that *absolutely* they should have the right to; that any future government should have the right to completely disband any piece of legislation or make changes, as they see fit, and there shouldn't be a restriction on any future government making decisions as the government of the day. You speak about protecting the democratic rights of Australians, and to not have that would be a gross violation of the democratic rights of Australians, wouldn't it? [My emphasis.]

I must assert in reply that if it is indeed proper that governments should not be subject to restrictions and should be able to change any law “as they see fit”, then this is a description of autocratic rule, not democracy. It assumes and attempts to enshrine arbitrariness into our governance system. A government which is subject to no restriction at all on what it may rightly do is licensing itself to be arbitrary and, moreover, is evading its constitutional responsibility to parliament. This level of executive overreach is essentially undemocratic. This difference of opinion with Mr Burns’ assertion about the rights of executive governments in a democracy is central to my answer to Senator Thorpe’s question.

To explain that – and to show how big a problem this executive overreach has now become in Australia’s democratic arrangements – I will state that since the decision in *Ah Hin Teoh* in 1995, successive governments have arrogated to themselves much of the legislative power of the parliament. They have achieved this by means of executive statements and other avoidances of parliamentary process (eg., reducing sitting days and refusing to allow the bills of non-government members to come forward for debate). It is this insistence on the “absolute” right of governments to sideline the parliament in this way that has the potential to cause and actually is causing violations of the democratic and human rights of Australians. See Chapter 6 of *The People’s Constitution* for Australia’s record of abuse of human rights since the 1990s. Australia has become a serial abuser of human rights and I suggest that is because executive overreach has been made possible by a Constitution which is silent on rights.

I also contend that in a democracy there should indeed be restrictions on any government’s ability to “disband” legislation on human rights. Human rights is the one area of law where executives and parliaments should not “make changes, as they see fit”. Any changes must be as the people see fit, if only because human rights are their inherent and inalienable property, not the parliament’s, and certainly not the government’s. In my submission I provided reasons for this argument, summarised as follows:

To the extent that the concept of parliamentary sovereignty gives parliaments the right to “make or unmake any law”,¹⁰ it embeds the possibility of unjust laws and arbitrary suspension of just laws. It is fundamental that if human rights are inalienable and if we are to be protected from the potential for injustice by an arbitrary sovereign (parliamentary or monarchical) then we need a system of law and law-making which will prevent parliaments and governments from overriding the rights that the government otherwise declares to be universal and inalienable.

¹⁰ Australian Human Rights Commission, [Free & Equal, Position paper: A Human Rights Act for Australia](#), 2022, page 71: *The principle of parliamentary sovereignty as explained by Dicey guarantees Parliament, as the democratically elected body, the right to ‘make or unmake any law’ and obliges courts to ‘uphold and enforce it’.*

ACFP therefore submits that the government should consider working towards a human rights framework in which it is a key principle that the people of Australia (not the parliaments or the executive governments or the judiciary) are to be accorded sovereignty in this particular area of law and that this sovereignty can only be protected by constitutional enshrinement of all rights and obligations in the human rights treaties and declarations to which Australia is already a State Party. This offers a safe course for both the people of Australia and elected parliaments inasmuch as instruments of international human rights law to which Australia is a signatory (and that in most cases the parliament has long since ratified) already set out the conditions on which the human rights in the treaties may be legitimately limited or temporarily suspended.

The Committee should note that in *The People's Constitution* I therefore proposed that rather than enshrining rights in the Constitution via a bill or charter, the valid and safe way is to create a process by which Australians may freely grant all rights to themselves and each other as equals and impose all necessary obligations on themselves and their governments. This may be done efficiently and fairly through a referendum to enshrine in the Constitution a National Agreement on Human Rights and Obligations. [A starting draft of a possible National Agreement on Human Rights and Obligations is available here](#) for use in community engagement.

Chapter 6 of *The People's Constitution* also contains a proposal for a democratic process that will allow Australians to at last enshrine whatever human rights and obligations they wish in Australia's Constitution by making a free Agreement as equals. The proposed democratic process is called "Prospect 2". It is premised on the principle that human rights are the inherent property of all humans from birth and therefore cannot be bestowed by governments. Instead, if we are to have them at all, they must be what we freely give to each other as equals.

Prospect 2 reverses the way laws on rights are currently made. In the reversal, *all* the human rights available in any treaty or instrument signed by an Australian government are automatically incorporated into the Constitution (even before ratification by the parliament) and the government must argue for permission from the people to remove a human right in law and/or be exonerated from its obligations under the treaties. Such permission must be sought by a referendum. Since the international treaties already set out the conditions on which the human rights in the treaties may be legitimately limited or temporarily suspended (for instance, in an emergency that threatens the life of the nation or public health) without the need for a referendum, there is no risk to the nation from Prospect 2.

Prospect 2 also contemplates the need for an "inception referendum" to establish that this Agreement between equals is indeed the means by which Australians wish to inaugurate enshrinement of their rights in domestic law. An option for a straightforward question for the inception referendum may be as follows:

Do you support an alteration to the Constitution that will allow the people of Australia to make a National Agreement on Human Rights and Obligations wherein the full set of human rights and obligations that are established in international instruments to which Australia is a signatory, or of which it is a supporter, will form the basis of The Agreement and will be maintained as the minimum of human rights and obligations under Australian law until such time as Australian enfranchised electors seek in a duly constituted referendum to vary The Agreement?

The Committee will note that the current method for making laws on human rights (I call this "Prospect 1" in *The People's Constitution*) is one where governments start with a list of whatever

rights they might be prepared to confer and they then let the parliament decide which items on the list might be allowed into law. Prospect 2, by contrast, starts with the full menu of possible rights and obligations in international law, taking them as a given (because they are inherent), and then lets the electors delete what they truly don't want or need – on the proviso that if they delete a right they must delete it for everyone and if they delete an obligation, the deletion will not adversely impact any particular group compared to others. In effect, invocation of Prospect 2 would transfer ratification powers on human rights away from parliaments and to the people. It would give the people the first and last word on their rights, which is as it should be. This would amount to a transfer of sovereignty from the parliament (or from the executive if it has usurped parliamentary sovereignty) to the people themselves but only in the area of human rights. It would not transfer legislative power away from parliament on human rights or any other area of law. It would simply provide limits to the use of power, preventing arbitrary decisions on human rights. At the same time it would clarify how truly legitimate lawmaking may occur – lawmaking that is consistent with the sovereign will of the people.

Prospect 2 runs entirely counter to Mr Burns' rendering of "democratic" arrangements which suppose that the executive and executive governments have "absolute" rights to "disband" any piece of legislation. But this rendering is invalid both under the Constitution and in democracy. As explained above, executive power of the magnitude assumed in the rendering is autocratic, not democratic. It disregards parliamentary sovereignty, arrogating it to the executive.

Among other things, this is inconsistent with the principle of responsible government which underlies the Constitution and which, according to the High Court is mandated by the Constitution.¹¹ It is inconsistent with that principle for the reason that in the current Constitution the executive government is responsible to the parliament, not the other way around. As the Australian Government Solicitor has stated, under the principle of responsible government:

the Crown (represented by the Governor-General) acts on the advice of its Ministers who are in turn members of, and responsible to, the Parliament. It is for this reason that section 64 of the Constitution requires Ministers to be, or become, members of Parliament.¹²

In Australia's constitutional arrangements executive governments are not meant to be able to overturn legislation. That is the preserve of the parliament. Therefore the Committee Chair's assertion that

absolutely ... any future government should have the right to completely disband any piece of legislation or make changes, as they see fit, and there shouldn't be a restriction on any future government making decisions as the government of the day

equates to an assertion of absolute power for the executive and a refutation of parliamentary sovereignty. This may be the preferred interpretation of a hierarchy among those already empowered by the Constitution and it may well suit the current government's preferences when it comes to decisions particularly on war, a power which the current government has recently refused autocratically to share with the parliament.¹³ But it is not an interpretation that implies a government acceptance of the need to act responsibly, as mandated by the Constitution. This issue is likely to be one that may take decades to resolve, but while that is occurring risks associated with

¹¹ Paragraph 20, *Comcare v Banerji* [2019] HCA 23, 7 August 2019, [Comcare v Banerji \[2019\] HCA 23 - BarNet Jade - BarNet Jade](#)

¹² Australian Government Solicitor, Canberra, [Australia's Constitution with overview and notes by the Australian Government Solicitor](#), November 2022, page iv.

¹³ Parliament of Australia, [Inquiry Into International Armed Conflict Decision Making](#), March 2023.

current forms of lawmaking about human rights – forms which imply the executive government should have absolute power to legislate – should at least be avoided. The safest way to avoid them is to establish a program of respectful nation-wide community engagement and genuine collaboration with Australians to establish a Constitution fit for a 21st century democracy. The Committee was provided with a copy of a possible seven-step program for this purpose. That program is repeated here in **Attachment A**.

Question 2 – Senator Thorpe:

2. What is the biggest danger in pursuing the weaker AHRC proposal as opposed to the constitutional model?

Response from Bronwyn Kelly, representing Australian Community Futures Planning

The dangers of relying merely on legislation to protect and secure the human rights of Australians have been outlined in ACFP's submission and in my answer to Question 1. They include:

- Danger 1: Division of human rights (in the seven core treaties and in the United Nations Declaration on the Rights of Indigenous Peoples), leading to loss of some or perhaps all rights at the will of an arbitrary government.
- Danger 2: Continued neutering of the courts in their capacity to justly protect people from abuse or reduction of human rights by a government. (A Human Rights Act may increase the chance of governments or others being held to account for breaches of legislated rights – but only those rights.)
- Danger 3: Continued diminution or possible negation of the power of Australians in their own democracy relative to any increase that may occur from a government's disregard of the principle of responsible government.

Perhaps the biggest of these dangers is the risk of executive overreach, which has the potential both to:

1. eliminate the democratic rights of Australians, and
2. expand the abuse of rights already on the record.

That abuse has increased in parallel with the apparent move of Australian governments towards executive overreach since 2002. If it persists, that overreach will, among other things, create an exposure for Australians to unnecessary wars, inasmuch there will be no potential to rightly moderate executive power in decision-making. This overreach needs to be called out for what it is – autocracy. It should not be disguised as democracy.

Apart from these risks, I have provided the Committee with a list of some other risks associated with reliance on legislation as opposed to constitutional enshrinement of human rights and obligations. I have also provided information on some key benefits of constitutional enshrinement. See [Attachment A: Five reasons why Australians must have human rights in the Constitution](#). In no particular order they are:

1. A stable treaty with First Nations will not be possible unless human rights are first assured for all Australians equally.

2. Referendums for constitutional amendment are unlikely to succeed unless Australians are first assured that human rights are the property of all as equals.
3. Australians would trust both parliaments and legislation more if they knew that laws were being made consistent with their stated interests.
4. Unless Australians have rights in the Constitution, we cannot have responsible government.
5. Unless Australians have rights in the Constitution, we cannot restore a proper balance of power between the parliament, the executive government, and the courts.

I thank the committee for this opportunity to provide answers to Senator Thorpe's questions.

Bronwyn Kelly

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Attachment A



Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework

**Submission Address by Dr Bronwyn Kelly
Founder Australian Community Futures Planning**

Attachment A – Supplementary Information 18 October 2023

This information was first supplied in hard copy to the PJCHR on 28 September 2023.

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Five reasons why Australians must all have human rights in the Constitution.

Here, in no particular order, are just a few reasons why human rights in the Constitution will be to the advantage of both everyday Australians and the parliamentarians they elect.

1. A stable treaty with First Nations will not be possible unless human rights are first assured for all Australians equally.

A stable treaty between First Nations, non-Indigenous Australians and the Australian State can only be achieved in a democracy if it has been made freely by a nation where all people are first confident of their status as political equals. The people of a nation can only be confident that they are both free and equal by declaring in law that rights are the equal property of all and that this cannot be negated by governments without the express permission of the people. Until they declare that, non-Indigenous Australians will not be confident that a treaty with First Nations people will not disadvantage them, relative to Indigenous. Nor will Indigenous be confident that the treaty is fair and that they have been acknowledged as equal.

Enshrinement of all human rights in the Constitution as the property of all people equally is therefore a condition precedent to any treaty with First Nations that all will agree is just and fair and will not result in disadvantage to any of the parties.

Development of a treaty without first enshrining all human rights in the Constitution will ensure no treaty is ever really viable. Human rights are the primordial treaty we must make with each other before we can make other treaties and laws that can be regarded as just and fair.

For more information in support of this see Chapter 6 of [The People's Constitution](#) in the section headed "Enabling orderly coexistence of sovereignties by agreement on human rights and obligations."

2. Referendums for constitutional amendment are unlikely to succeed unless Australians are first assured that human rights are the property of all as equals.

Constitutional change requires trust in the parliament proposing the change. The fact that Australians have rejected every constitutional change put to them since 1977 is core testimony that the majority of Australians have lost trust in those they elect to parliament.

Therefore if parliaments of the future wish to facilitate constitutional change that Australians as a majority will agree is good, they must first establish transparent terms of trust with the Australian electors. These terms must be capable of assuring the electors that the power they are handing over in each election and referendum will not be abused by parliaments or executive governments and that those they elect will always act in the public interest.

Human rights and obligations in the international human rights treaties to which Australia is a party come closer than any other statement in law to describing what the public interest actually is. They do not define the whole of the national interest but they are fundamental to the interests of any and all individuals who seek to be members of a democracy – since a state is not a democracy if its citizens have no rights.

Security of human rights must therefore be established before any population in a democracy will have the necessary confidence in a parliament to give assent to proposals for change to the Constitution. In effect, confidence in proposals for constitutional change can only be built if the Constitution itself stipulates the rights that shall not be lost by the proposed change.

It is very likely that Australians will hesitate in referendums about an Indigenous Voice and a republic if they are asked to give assent to changes in the absence of these terms of trust. They are very likely to keep saying No if parliamentarians do not offer to respect their rights. This respect must be paid by enshrining rights in the Constitution.

For more information on how establishing a [National Agreement on Human Rights and Obligations](#) in the Constitution can create confidence in Australians to build a Constitution fit for a 21st century democracy, see Chapters 6 and 7 of [The People's Constitution](#).

3. Australians would trust both parliaments and legislation more if they knew that laws were being made consistent with their stated interests.

Australians are increasingly sceptical that laws are being made in their interest. This is especially the case in relation to legislation on national security, war powers, defence, natural resource use, environmental protection and Indigenous wellbeing.

However, if we could be assured that laws were being framed consistent with a set of stated values and rights (including a right to express a voice about our preferred future), confidence could be restored that laws (a) are being made in the public interest, (b) do not undermine political equality, and (c) are consistent with what Australians consider to be good for their society. In short, it would create confidence in the rule of good laws, rather than the rule of bad laws.

4. Unless Australians have rights in the Constitution, we cannot have responsible government.

Australia's Constitution establishes a system of representative government and we are told that this system also creates a basis for *responsible* government because it is structured so that "the Crown (represented by the Governor-General) acts on the advice of its Ministers who are in turn members of, and responsible to, the Parliament."¹⁴ However, "responsible government" is merely a concept imputed to the Constitution by decades of interpretations and, in the absence of a specification of what the elected are responsible *for*, it is not likely to result in a system in which Australians can be confident that those they elect can be held accountable for being *irresponsible*.

Human rights are one of two key statements that should be included in any list of vital things that governments have a responsibility for. The other is values. Unless values and rights are specified in the one law that cannot be changed by anyone other than the people themselves (i.e., the Constitution), we will not have responsible government for the simple reason that none of the elected can know what they are responsible for.



Values and human rights must be enshrined in the Constitution as the bottom line of the people's tolerance of their consenting to be governed. Values and human rights provide the list of the powers of Australians that may not be abused by those they elect.

Chapter 7 – [The People's Constitution](#)

¹⁴ Australian Government Solicitor, *Australia's Constitution with Overview and Notes by the Australian Government Solicitor*, page v. [foi-2021-017.pdf \(pmc.gov.au\)](#)

5. Unless Australians have rights in the Constitution, we cannot restore a proper balance of power between the parliament, the executive government, and the courts.

High court rulings in various cases have culminated in a reluctance by federal judges to determine “whether the course taken by Parliament is unjust or contrary to basic human rights”.¹⁵ This reluctance has grown into outright refusal because there is no specific rendering of any human rights treaties in the Constitution itself.

Australians might expect that we have a system of governance based on a well-balanced separation of powers that will allow each of the three main parties empowered under the Constitution (the parliament, the executive government, and the judiciary) to moderate potential abuses of power by one or more of those parties. However, because fundamental human rights are not accorded to the people in the Constitution, one of those parties – the judiciary – has lost all capacity to moderate abuses of power by the other two. The federal courts cannot now protect Australians from complete loss of their rights.

Until human rights are specified in the Constitution, the courts will be unable to exercise their rightful, well-balanced share of power to protect Australians, and citizens will be vulnerable to loss of rights, even those they might currently assume they have – such as freedom of religion.

“Over the decades since 1901 the Constitution has been easily undermined by a series of laws and court cases that have left it seriously weakened in terms of the protections it should provide against abuse of power. I have recorded in earlier chapters no less than five major High Court rulings where it has become apparent that the judiciary – which is supposed to be able to ensure that the parliaments and executive governments operate in accordance with the Constitution and do not abuse their powers – has found itself unable to protect Australians from racism, human rights abuses, breaches of international law, and political exclusion, particularly by federal governments that have been able to force through laws that legitimise their power to behave in a manner most 21st century Australians would consider to be abhorrent. In short, the Constitution allows the making of laws which undermine political equality in our democracy. As such Australia does not have a structure in its polity capable of controlling the abuse of power. Nor does it have a democracy capable of supporting Australians as they attempt to chart a safe course to a better future.

Chapter 10 – [The People’s Constitution](#)

“[The Al-Kateb judgement] is a plea from the judiciary to the people to take the chains off the courts that prevent them from protecting people against abuses of power and rights by governments. It is also a clear statement to the effect that mere legislation is not sufficient to protect human rights. It must be done in the Constitution. Otherwise there is no balance of power that can be achieved. No balance of power is possible if one of the powers (in this case the High Court) has no power at all under the only instrument that can give it power – the Constitution. The Court’s lesson is that only the people can solve this problem, via a long overdue referendum to insert human rights into the Constitution.

Chapter 6 – [The People’s Constitution](#)

¹⁵ Al-Kateb v Godwin [\[2004\] HCA 37](#), (2004) 219 [CLR](#) 562, [High Court](#) (Australia).

A seven-step program to safely enshrine the rights of Australians in a Constitution fit for a 21st century democracy.

Chapter 9 of [*The People's Constitution*](#) outlines a program of community engagement and collaboration with Australians to establish a Constitution fit for 21st century Australia. This is a Constitution which gives all citizens a rightful but not overweening share of power in their own democracy without diminishing the rightful powers of the parliament, the executive government and the judicature.

The program envisages an orderly and well-informed collaboration that will allow Australians to freely express their sovereign will for the Commonwealth they wish to form and to build a Constitution containing all the things they need to realise their preferred future as a nation.

This new type of Constitution may be viewed not as a replacement or radical overthrow of the powers of the parliament, the executive government or the judicature, but rather as an augmentation of the sphere of power, achieving order by inclusion rather than exclusion, and transforming the current representative democracy to a participatory democracy in which all Australians have agency as political equals. This new type of Constitution also legitimises – for the first time – the current powers of the parliament, the executive government, and the courts, because it makes it clear that they are consistent with the sovereign will of the people.

For more about the principles of a constitution which makes a place for the people in their own governance and clarifies the rights and powers of all parties in that system, read [*The People's Constitution: the path to empowerment of Australians in a 21st century democracy*](#) by Bronwyn Kelly at www.austcfp.com.au/publications

Seven steps to build a Constitution fit for a democracy with equal rights for all its members.	
Step 1:	• Establish a Joint Parliamentary or a Senate Committee (with representation from the government, the opposition, independents and all other parties on the cross-bench) to commission development of a National Collaborative Process for Development of a New Australian Constitution. • Issue instructions to ensure the Process is designed to achieve the maximum inclusion of (and therefore the confidence of) the Australian people – recognising that: ○ the Constitution is for their nation and is therefore theirs to design collaboratively; and that ○ Australians value fairness and equality and must be given sufficient agency to collaborate on a Constitution that will ensure fairness for all. • Issue a charter to a group of suitably independent facilitators of the National Collaborative Process and appoint an independent person responsible for chairing the Process and providing reports on the progress of deliberations to parliament. • Ensure that the charter protects the complete independence of the facilitators to prevent the politicisation and corporate or interest group capture of the Collaborative Process. • Ensure fully adequate funding, based on an expectation that this Process of nation-wide engagement and collaborative design may take up to five years.
Step 2:	• Charge the appointed independent facilitators of the Process with development of a White Paper informing Australians about: ○ issues for consideration in a holistic review of the Constitution;

Seven steps to build a Constitution fit for a democracy with equal rights for all its members.

	○ the need for open-ended objectives of a program of reform to ensure the Constitution is fit for a 21st century democracy and will be something all Australians wish to own; and ○ initial details of a proposed program of nation-wide community engagement for collaborative development of the new Constitution. ● Ensure this paper plus suitable summaries (in both written and video format) are distributed to every household in Australia.
Step 3:	● Allow for feedback on the White Paper, taking care to ensure that overarching objectives can be designed for a new Constitution that will as a minimum: ○ not cause exclusion of or discrimination against any particular group from a place in the Commonwealth of Australia; and ○ will ensure capacity for formation of a strong democracy whose members are political equals.
Step 4:	● Depending on feedback from Step 3, charge the independent facilitation group with development of the essential components (chapter headings and sub-headings) of a new constitution that would accord with the essential objectives. ● If necessary, modify the originally proposed nation-wide community engagement program to schedule successive rounds of collaboration on the components – one at a time in a logical order.
Step 5:	● Commence the sequence of the nation-wide community engagement and collaboration program. ● Report to the joint parliamentary (or senate) committee at the end of each phase of collaboration on the results for that component.
Step 6:	● As the optimal content of any proposed component of the new Constitution becomes more obvious, ensure that the option remains open for the conduct of non-binding plebiscites and/or opinion polling to canvass the support of the Australian people for the component. For example: ○ if Australians have signalled that they want human rights in the Constitution, conduct a non-binding plebiscite to assess the level of support; or ○ if they have collaborated in a sub-group to design a new preamble to the Constitution which includes, say, a statement of Australian values, conduct any necessary community engagement, surveys or polling to assess the probable level of support; or ○ if the collaboration has resulted in the design of a Constitution which would imply that Australia should become a republic of some sort, scope out any necessary surveys and polling (perhaps with options) to assess preferences; or ○ if there is evident support for a Constitution capable of establishing a peaceful coexistence of sovereignties or treaty with First Nations, consider the most appropriate method of canvassing the views of Australians on feasible forms of fair and stable treaty capable of benefitting all parties.
Step 7:	● Based on the results of the collaborative process and any plebiscites, surveys or polling, charge the joint parliamentary (or senate) committee with design of an agenda for referendums for amendment of the Constitution.

Note: The above program assumes that it will not be necessary to revoke the entirety of the current Constitution and that many parts of it will be unaffected. This assumption may prove incorrect, although that is unlikely. Nevertheless, a program for bringing a new constitution into law by means of:

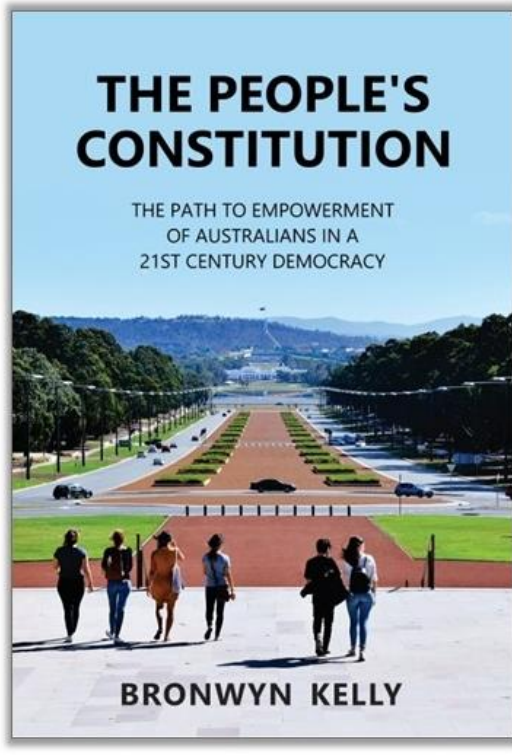
- a collaborative design process,
- a series of surveys of public opinion and plebiscites, and
- a logical sequence of referendums for individual amendments that will make sense to Australians (because they can see how they are part of a holistic reform that fits their objectives)

is more likely than any other engagement process to lead to development of a Constitution fit for 21st century Australian democracy.

Access *The People's Constitution*

**What human rights
do Australians need?**

**Find out in Chapter 6 of
The People's Constitution.**



The People's Constitution is available at
<https://www.austcfp.com.au/publications>

An audio version of *The People's Constitution* can be heard in *The Australia Together Podcast*, accessible on Apple podcast at
<https://podcasts.apple.com/au/podcast/the-australia-together-podcast/id1691025007>



An extract of the abovementioned [National Agreement on Human Rights and Obligations](#) (draft for community engagement) is accessible at:

https://www.austcfp.com.au/files/ugd/2b062e_5229705bdd3a46b6a25660c859462648.pdf

[Extracts of other suggested constitutional amendments](#), including:

1. a new preamble featuring a Statement of Australian Values,
2. a National Agreement on Human Rights and Obligations, and
3. an enshrined constitutional process for expression of the National People's Voice

are accessible as starting drafts for community engagement purposes at:

https://www.austcfp.com.au/files/ugd/2b062e_38d4d5db852240f693a27621e6cbb613.pdf



Australian Community Futures Planning

The People's Constitution – Three proposed amendments to the Constitution: Values, Rights and Voices

Starting drafts for community engagement

This extract contains the starting draft wording of the three major amendments proposed for Australia's Constitution in Chapters 5, 6 & 7 of

The People's Constitution: the path to empowerment of Australians in a 21st century democracy.

by ACFP's Founder, Bronwyn Kelly. The extract provides the full wording of the starting drafts of:

1. a new preamble featuring a Statement of Australian Values;
2. a National Agreement on Human Rights and Obligations; and
3. an enshrined constitutional process for expression of the National People's Voice

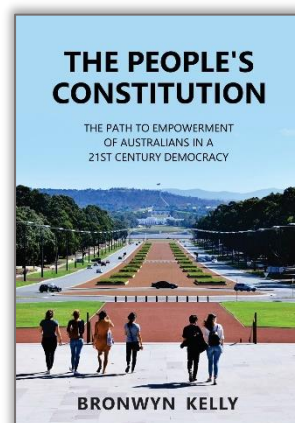
These drafts are offered to assist in community engagement.

[Listen to the audio version of *The People's Constitution* on Apple Podcast](#) or on Substack at bronwynkelly.substack.com

Visit <https://www.austcfp.com.au/publications> for the full publication of ***The People's Constitution***.

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The People's Constitution: the path to empowerment of Australians in a 21st century democracy

Extract from Chapter 5 – Starting Draft Preamble to the Australian Constitution containing a Statement of Australian Values

Australian People's Constitution – Preamble (draft for use in community engagement)

We the People of Australia,

- in enacting this Constitution as Sovereign in our own land, and
- in affirming that self-determination and self-governance are our inalienable rights as citizens of the democratic, independent sovereign nation hereby constituted with a federal system of government and henceforth to be known as the Commonwealth of Australia,

place our trust in the parliaments and governments we elect on the following terms:

That laws may only be enacted and upheld which:

- demonstrably support the public interest as a whole, the interests of future generations and the sustainability of the lands, seas, species and natural resources of Australia as determined from time to time in accordance with processes and requirements of law set out here and elsewhere in this Constitution; and which
- ensure the maintenance of the human rights of current and future generations as established here and elsewhere in this Constitution; and which
- are consistent with our values as a nation, these values for the present being specified in the following Statement of Australian Values:

Statement of Australian Values

We the people of Australia are at one in this our Sovereign Will to chart a course to a future where peace prevails and the common wellbeing is secured for all in a manner consistent with the preeminent value we place on:

- the safety of all members of the nation and the stability, security and cohesion of society as a whole;
- honesty, integrity and ethics in all relationships, in governance and in corporate responsibility;
- creation and maintenance of a fully inclusive, participatory democracy which exhibits openness, transparency and respect for the voices of all Australians in matters of policy and governance;
- universal human rights;

- social harmony and appreciation of diversity;
- Australia's First Nations particularly in relation to:
 - our recognition of their rightful and essential place at the Heart of the nation's past, present and future,
 - truth-telling on the history of colonisation and the violence and injustice of their dispossession,
 - Makarrata, reconciliation with and just treaty between First Nations and non-Indigenous Australians,
 - celebration of the culture and heritage of Aboriginal and Torres Strait Islander peoples,
 - our acknowledgement of their ancestral tie to the land and the sovereignty that arises from that as coexistent with the sovereignty of all Australians, and, consequent on that acknowledgement,
 - the equal right of First Nations alongside all Australians to their own Voice in the Constitution;
- equality and egalitarianism – in ensuring wellbeing and in respect for all regardless of gender, sexual orientation, age, disability, race, national or ethnic origin, cultural heritage, religious persuasion or secularity, or wealth;
- benevolence and compassion for those close to us, for distant communities and for refugees;
- equal opportunity for all;
- social justice – meaning fair outcomes for all, fair sharing of national wealth, fair sharing of the burden and benefit of taxation, fair access to services, and equality before the law;
- life-long health, including physical, mental and societal health and happiness;
- life-long accessibility of education;
- life-long opportunity for expansion of the mind and human creative capacity;
- scientific intelligence and research capacity;
- unobstructed access to public information and protection of privacy and personal information;
- information markets that are properly regulated for the purpose of promotion of truth;
- national resilience, preparedness for crises and capacity to avert preventable crises;
- protection of the natural environment and conservation of natural resources;
- the planet, its ecosystems and species diversity;
- future generations and intergenerational equity;
- freedom of speech, expression, information, peaceful assembly and association, protest, choice in life path and partner, travel, belief, religion, secularity and atheism, political communication, freedom of the press, and freedom from discrimination, unlawful or arbitrary detention, political persecution, fear and want;

- the contributions and dignity of everyone, regardless of employment status, disability and working life stage;
- the formation and ongoing support of a human-centred economy capable of providing continuous full employment and opportunities for meaningful work and life satisfaction;
- the formation and ongoing support of an environmentally sustainable economy capable of ensuring proper conservation of scarce natural resources;
- fairness and ethics in foreign and domestic trade and finance;
- decency, humanity, cooperation and integrity in our international citizenry;
- independence in national sovereignty; and
- self-determination through a voice in our own governance.

We affirm that these values stand as the shared values of the People and are indicative of the purpose of the nation and national character We seek to build. Therefore We also affirm that:

- these values shall stand as guidance to law and policy makers and to authorised justices of the courts as to whether laws and policies are in accordance with our Sovereign Will; and that
- laws and policies which are demonstrably inconsistent with these values are inconsistent with the Australian People's Sovereign Will and shall not stand.

These values shall be reviewed every ten years from the date of this enactment by establishment of fully open constitutional conventions whose considerations shall not be constrained by the parliaments or laws of the Commonwealth or the states or other entities, which from time to time may comprise the Federation or may be otherwise empowered by this Constitution in accordance with our Sovereign Will.

Extract from Chapter 6 – Starting draft of a National Agreement on Human Rights and Obligations

Part 3: *The National Agreement on Human Rights and Obligations* (draft for use in community engagement)

We the People of Australia, being satisfied that the processes as specified in Parts 1 and 2 of this section for inception and enshrinement of *The National Agreement on Human Rights and Obligations* has been conducted lawfully, in full consideration of the public interest as expressed in the *Statement of Australian Values* in this Constitution, and in complete accordance with our Sovereign Will as expressed here and elsewhere in this Constitution, do hereby affirm and declare that we freely agree to:

- 1) confer all universal human rights in full and equally on all natural persons in accordance with and to the extent specified in the following international human rights instruments:

- i. the International Covenant on Civil and Political Rights (ICCPR),
- ii. the International Covenant on Economic, Social and Cultural Rights (ICESCR),
- iii. the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),
- iv. the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),
- v. the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),
- vi. the Convention on the Rights of the Child (CRC),
- vii. the Convention on the Rights of Persons with Disabilities (CRPD),
- viii. the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),
- ix. the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1),
- x. the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP2),
- xi. the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OP-CRC-AC),
- xii. the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC),
- xiii. the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (OP-CEDAW),
- xiv. the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD),
- xv. the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT); and

2) impose on each other as responsible persons and communities, and on all parliaments and executive governments of the Commonwealth, as well as all State and Territory governments, lawfully elected from time to time under this Constitution or State Constitutions, full obligations to:

- a) uphold and observe the rights conferred in (1) on all natural persons as their just and equal entitlement, and
- b) build a society and democratic governance system capable of realising these rights for all on an equal basis and in a manner that is demonstrably in the public interest and is consistent with the underlying principles and legal requirements of the instruments listed in (1).

We further affirm and declare that:

- a) No obligation that is specified or implied in the instruments listed in (1) as an obligation which “shall” be observed by a State Party to or supporter of these instruments may be obviated, evaded, escaped or derogated from by a parliament in lawmaking or by an executive government in policy, action, administrative practice or executive statement, except as provided for by the

listed instruments and except as may be demonstrably consistent with the national interest and the values of the nation as expressed in the *Statement of Australian Values* in this Constitution.

- b) The rights conferred and the obligations imposed consistent with the instruments listed in (1) are law in Australia unless and until We the People say otherwise in a referendum held in accordance with the referendum processes permitted in this Constitution for its amendment or alteration.
- c) Parliaments may make laws which confer human rights on natural persons which are additional to the human rights conferred under the above instruments, but no parliament or executive government, either of the Commonwealth or a State or Territory, may take any action in law, policy, administration or executive statement to reduce or restrict these duly conferred human rights, except insofar as the instruments themselves allow.
- d) No parliament or executive government may take action to dismiss, deny or derogate from a State Party obligation set down in the above instruments except to the extent that may be permitted by international law or to the extent permitted by any processes that are or may be established for this purpose elsewhere in the Constitution in accordance with our Sovereign Will.
- e) No parliament or executive government may frustrate, delay or reduce access to the benefits of any right or obligation in the listed instruments by unreasonably applying a reservation to or withholding support for any aspect of the listed instruments.
- f) No parliament or executive government may seek to frustrate, delay or deny the inclusion of human rights and obligations in Australian law by unreasonably refusing to become a State Party to or supporter of human rights declarations or treaties in international law and no barrier shall be imposed by parliaments or executive governments to referendum processes for inclusion of new human rights in Australian law when rights conferred in instruments of international law or declarations are demonstrably consistent with the values of Australians as expressed in the *Statement of Australian Values*.
- g) Parliaments shall ensure the full protection of all natural persons from abuse of their human rights by ensuring that any provisions in this and all other laws and subordinate legislation made by the parliaments of the Commonwealth, the States and the Territories, which are in part or in whole demonstrably inconsistent with the terms of *The National Agreement on Human Rights and Obligations*, are deleted or amended in a manner that ensures this Constitution and all other laws are brought into accord with the public interest as expressed in *The Agreement*.

- h) No human rights may be accorded to corporations or to any entity that is not a natural person.
- i) Parliaments and executive governments shall take any and all other necessary action to ensure that all Australian peoples, including First Nations, have the right of self-determination and that by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

We also declare and affirm that the human rights and obligations encompassed in the instruments listed in (1) in this *Agreement* stand as the rights and obligations that are indicative of the public interest and are necessary for its protection, and that it will be contrary to the public interest to make laws which withhold these rights, either in whole or in part, from any or all natural persons. Therefore we also affirm that unless and until We the People agree otherwise in a duly constituted referendum conducted pursuant to and in accordance with Part 2 of this section:

- *The Agreement* here made shall stand as guidance to law and policy makers and to authorised justices of the courts as to whether laws and policies are in accordance with our Sovereign Will; and that
- laws and policies which are demonstrably inconsistent with *The Agreement* are inconsistent with the Australian People's Sovereign Will and shall not stand.

Extract from Chapter 7 – Starting draft of an enshrined constitutional process for expression of the National People's Voice

Australian People's Constitution – The National People's Voice (draft for use in community engagement)

As the source of sovereignty, the People of Australia shall be enabled to exercise their right to express their Sovereign Will for the future of their society, environment, economy and democracy. Expression of this Sovereign Will for the future shall take the form of a collaboratively assembled and regularly monitored and reviewed, integrated plan for the wellbeing and security of all Australians over the longer term (up to 30 years). The process for expression of the Sovereign Will for the future and any emergent statements and plans from that process shall be known as The National People's Voice.

For purposes of assisting the People in the orderly composition of their National Voice, there shall be an Independent Commission for National Engagement and Integrated Planning. The Commission shall have a charter of independence from the Parliament and Executive Government, shall be accountable by annual reports to the People of Australia, and shall be charged as a minimum with responsibility to the People of Australia for development and maintenance of fully open forums and accessible processes by which all Australians may be enabled to:

- accurately assess the state of their health, wellbeing and security as a nation;

- participate at will in planning processes to articulate a vision for their preferred future and their preferred safe paths to that future; and
- receive independent reports on the progress of the nation towards or away from that future.

The Commission shall be established and maintained with sufficient funding and resources to support Australians in the orderly composition, review and revision of their National Voice, including as a minimum:

- all research resources necessary to ensure that The National People's Voice can be formulated and monitored on the basis of credible and comprehensive data and information on all aspects of the performance of the Australian society, environment, economy and democracy; and
- all communications and facilitation resources necessary to enable best practice in inclusive community engagement and active citizen participation in building a cohesive nation.

The Commission shall also be entitled to access and rely on the financial and economic planning capacities of the Treasury and the Parliamentary Budget Office for any information necessary to conduct dialogues with Australians on options for sustainably financing their preferred future.

Statements and plans arising from the operation of the National People's Voice shall be understood to be non-binding on the Executive Government and shall not constrain the Parliament in its power to make laws in accordance with this Constitution but shall constitute guidance to the Parliament as to the People's Sovereign Will for the future and shall therefore be accorded the status of a primary consideration in all parliamentary deliberations. In making laws (including laws pertaining to budgets and appropriations) and in reviewing the appropriateness of administrative decisions on and adherence to policy, Executive Governments shall accordingly be obligated to prepare and Parliaments shall be required to consider comprehensive Statements of Compatibility with the National People's Voice and to provide reasons for any incompatibility with its expression of the People's Sovereign Will.

Further questions may be forwarded to ACFP at info@austcfp.com.au

**If you would like to become involved in building a plan for a better Australia, visit the Australian Community Futures Planning website at www.austcfp.com.au
Everyone is welcome to participate.**