

Committee Secretary
Select Committee on the Reform of the Australian Federation
PO Box 6100
Parliament House Canberra ACT 2600
Ph: 02 6277 3583
Email: reffed.sen@aph.gov.au

Thank you for the opportunity to make a submission on such an important issue. We would ask the committee to consider our contribution as a 'holding' submission, allowing CLA to continue to be part of any ongoing formal processes of this particular committee.

We ask this because it is our firm opinion that the Select Committee on the Reform of the Australian Federation should re-start the process, from the beginning. There should be, we believe, a new timetable for reporting to the Parliament, holding deliberations, and calling for submissions because:

- a. the original brief was too wide and demanding to be answered in a meaningful way in the time available with the resources allocated; and
- b. the federal election intervening between forming this select committee and its information-gathering process (with submissions closing the day before the federal election) of itself suggests an extension of the time needed to undertake the inquiry.

In CLA's opinion, the unfortunate intervention of the election is not the best way to engage the nation in discussing such a critical aspect of Australia's future as "priorities for reform of relations between the three levels of government within the Australian federation".

We therefore strongly recommend that the committee starts the consultation process again once the new Parliament is settled and people most concerned with the political process can devote appropriate time and energy to assisting the select committee's deliberations.

Civil Liberties Australia (CLA) is a not-for-profit association, which reviews proposed legislation to make it better as well as monitoring the activities of parliaments, departments, agencies and forces to ensure they match the high human rights standards Australia aspires to.

We work to keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority'.

We note the committee's brief is to:

(a) inquire into and report by 17 November 2010 on key issues and priorities for the reform of relations between the three levels of government within the Australian federation; and

(b) explore a possible agenda for national reform and to consider ways it can best be implemented in relation to, but not exclusively, the following matters:

- (i) the distribution of constitutional powers and responsibilities between the Commonwealth and the states (including territories),
- (ii) financial relations between federal, state and local governments,
- (iii) possible constitutional amendment, including the recognition of local government,
- (iv) processes, including the Council of Australian Governments, and the referral of powers and procedures for enhancing cooperation between the various levels of Australian government, and
- (v) strategies for strengthening Australia's regions and the delivery of services through regional development committees and regional grant programs.

CLA would like to comment in a 'holding' manner to ensure we can be part of the process should the select committee proceed on the timetable so far announced. We would make these brief comments on individual aspects of the inquiry:

(a) inquire into and report by 17 November 2010 on key issues and priorities for the reform of relations between the three levels of government within the Australian federation; and

The timetable for this gargantuan task – basically mid-June to mid-November – was too short, in CLA's opinion, even as envisaged before a federal election was called. We urge a new timetable be set, particularly as a new Parliament imposes far less time constraint on such a committee. The committee could report in 2010, or even 2011.

(b) explore a possible agenda for national reform and to consider ways it can best be implemented in relation to, but not exclusively, the following matters:

CLA believes that the widest-possible consultation should occur to develop 'a possible agenda'. There is not sufficient time, particularly because of the federal election, to canvas sufficiently widely the enormous scope of 'possible agenda' proposals.

We would hope that every university and think-tank in Australia should/would be involved in this process. However, with just a handful of hours to go to the submission deadline, only one university had made a submission, and only 12 people/groups in total had bothered to contribute. Hundreds, if not thousands, and people/groups should be contributing to this important inquiry. Achieving such wide input of ideas will require time to publicise and promote the process, which has been lacking.

(i) the distribution of constitutional powers and responsibilities between the Commonwealth and the states (including territories),

This sub-topic alone could occupy the deliberations of a full select committee for years. For example, just the parenthetical clause (*'including territories'*) involves consideration of:

- Equal voting powers between Territory electors, and between Territory/State electors;
- Equal rights of territory legislation to be recognised by all States and the Commonwealth;
- Racial Discrimination legislation currently;
- Removing the ability of a veto over Territory Parliament laws by, effectively, the federal Executive;
- Water rights, including rights to subterranean resources;
- The meaning and scope of 'capital territory' as defined in the Constitution

...among other issues

CLA believes that the select committee may find it is necessary to considerably expand the time allowed, its staff and its research resources to cater for the major issues which should be under consideration to produce a proper and full response to the brief.

(ii) financial relations between federal, state and local governments,

Again, without the need for a list such as in response to the question above, it is unrealistic to expect a parliamentary committee to produce a definitive response on such a sub-topic in five (5) months when the matter is obviously one for an extended committee to consider over a much longer time frame.

(iii) possible constitutional amendment, including the recognition of local government,

The 'possible constitutional amendment', in response to the brief, is limitless. In fact, a reasonable recommendation could well be the writing of an entirely new constitution. However, just consideration on whether local government should be recognised in the constitution is a matter for considerable public and parliamentary discussion and debate over an extended period.

It took the framers of the constitution more than a decade to decide to not include local government in the document: it should take more than five months for an under-resourced parliamentary committee to come to a different conclusion.

(iv) processes, including the Council of Australian Governments, and the referral of powers and procedures for enhancing cooperation between the various levels of Australian government, and

We refer the select committee to the CLA website, and to *CLArion* (our monthly newsletter) for our extensive writing over more than two years on this topic. In summary, CLA believes that the growth and out-of-the-limelight development of COAG, SCAG (Standing Committee of Attorneys-General) and the 41¹ other Ministerial Councils has been the most detrimental

¹ The figure 41 is correct: this is not a typographical error

development to Australian democracy since federation. We have been writing, speaking and lobbying parliamentarians on our opinion on this topic for more than two years.

What Executive government – that is, the elite-with-the-elite of the ruling political party federally, and in each State/Territory – sees as ‘efficiency’ of the COAG, SCAG and Ministerial Council process is in fact a way of denying parliamentarians their traditional role.

COAG, SCAG and Ministerial Councils are emasculating the power of parliaments, and the proper role and responsibility of parliamentarians, particularly backbenchers from all parties.

Increasingly, pre-agreed legislation is being tabled before federal, state and territory parliaments and MPs are told that: “*You can’t change that: it has been agreed by SCAG*” (or COAG, or any one of the 41 Ministerial Councils).

Some MPs sitting on this select committee will have experienced such an instruction from their party bosses: chairs of parliamentary committees are being told the same thing before even the first call for submissions and hearings of what has become a façade process of parliamentary and public consultation, when ‘agreed’ draft legislation stemming from COAG, SCAG or the Ministerial Councils is brought before a federal, state or territory parliament and its committee processes.

The extent of the problem was demonstrated earlier this year (2010), when the Labor Caucus stood up the Prime Minister and Ministers at a Caucus meeting and told them they were not to bring ‘agreed’ legislation before the Caucus, as it was Labor policy that it was the Caucus’s prerogative to decide what draft legislation would be introduced, not the prerogative of non-elected, cross-jurisdictional bodies with no direct responsibility to the people, where the agendas and ‘advice’ of bureaucrats outweighs that of the politicians meant to be representing the people.

CLA comments that, if ‘unelected judges’ can’t be trusted in the Australian democratic system (according to the – successful – opponents of a bill of rights for Australia), then unelected councils and standing committees can not be trusted to an even greater extent.

CLA reminds the select committee that the processes of these bodies do not involve the release of a formal agenda in advance (or, even, after the meetings); the bodies do not release public minutes (they report in ‘communiqués’ instead, drafted by public relations people); and at least one of the bodies – SCAG – operates to a ‘black ball’ system whereby any entity (federal, state, territory) can veto the placing on the agenda of any item. The black ball system went out of fashion even in conservative British men’s clubs last century...but the antiquated, undemocratic system still governs what can get on to the agenda of the self-selected, secretive bodies framing what’s good for parliamentarians and the Australian people.

The American, Thomas Jefferson, understood the danger of democracy being suborned, by the machinations of the Executive and their unelected bureaucrat advisers, in the way that is now happening with the development and expansion of unconstitutional COAG, SCAG and other Ministerial Councils:

"Free government is founded in jealousy, not confidence. It is jealousy and not confidence which prescribes limited constitutions, to bind those we are obliged to trust with power.... In questions of power, then, let no more be heard of confidence in men, but bind him down from mischief by the chains of the Constitution." – Thomas Jefferson, 1799

(v) strategies for strengthening Australia's regions and the delivery of services through regional development committees and regional grant programs.

Once again, this select committee is being asked to report in too short a time frame with very limited resources on structural 'reform' to Australian democracy of such a potentially enormous nature.

Perhaps the wisest course of action for the select committee is to decide to refuse the brief.

CLA recommends that course or, at least, to ask the parliament to vote the funds and allocate the resources, including particularly time, that such a demanding brief requires.

It could well be argued that, if an inquiry into whether or not to have a bill of rights required a four-person consultation committee, a dedicated departmental staff, meetings throughout Australia, polls, the expenditure of about \$2m, and the allocation of nearly two years, then an inquiry into Reforming the Australian Federation should involve about a doubling of all those elements. Five months, with an election taking up (and over) a third of that time, does not seem appropriate.

CLA refers you also to our earlier submissions which cover aspects of this inquiry:

Inquiry into the Machinery of Referendums, House Standing Committee on Legal and Constitutional Affairs Committee: Submission by Civil Liberties Australia
<http://www.aph.gov.au/house/committee/laca/referendums/report.htm> report tabled 8 February 2010
(see generally, but in particular, *Widening the franchise* on p13)

Inquiry into the proposed Human Rights (Parliamentary Scrutiny) Bill 2010 and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010, Senate Standing Committee on Legal and Constitutional Affairs (Note: Inquiry currently discontinued on proroguing of parliament): Submission by Civil Liberties Australia.
http://www.aph.gov.au/Senate/committee/legcon_ctte/human_rights_bills/submissions.htm (See generally, but in particular *Constitutional Rights* on p10 and following, and p16 and following)

Yours sincerely

(signed)

Bill Rowlings, CEO/Secretary

CLA Civil Liberties Australia
Box 7438 Fisher ACT Australia
Email: [secretary \[at\] cla.asn.au](mailto:secretary[at]cla.asn.au)
Web: www.cla.asn.au