

Friday 6th August 2021

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Attention: House Of Representatives Standing Committee On Social Policy And Legal Affairs

Re: Enquiry Into Constitutional Reform And Referendums

Dear M.H.R.'s (as addressed),

I write to submit an individual submission to your Enquiry Into Constitutional Reform And Referendums.

I am an individual republican activist supporting the direct election republican model. That said, this submission deals with current matters of concern and controversy in constitutional law, rather than with the draft Republican Constitution Of Australia 2060 a document I have been spruiking on social media. If the Committee wish it, I could table and speak to my constitution draft.

I do hope that the committee read and considers my submission carefully and adopts the recommendations thereof.

Yours Faithfully,

Andrew Oliver

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1.0 Mechanisms That Allow Constitutional Amendment

The traditional manner of amendment of Australia's constitution is to submit a referendum to the people setting out in express terms the textual amendment so to do. Depending on whether the amendment amends the provisions regarding the states it is required to carry overall and in all six states or if a more minor amendment to details then it is required to carry overall and in four of the states.

This set the bar high in terms of getting an amendment carried. In 1976 when there was a mood of despair about change, I read somewhere in undertaking fifth form politics an alternative means of amendment advocated namely using section 51 (xxxviii) to use delegated power from the Parliament Of The United Kingdom to amend the covering clauses or even the text of the constitution itself. This would require the request or concurrence of all six state parliaments and the federal parliament to agree to the express change in question.

I do not believe that the Australia Acts 1986 prevents this sort of amendment as, for example, the Commonwealth has recently carried an act in conjunction with the United Kingdom Parliament to change the rules of succession and to allow the monarch to marry a Catholic.

I would predict that the left-right deadlock in reform will continue until an international crisis with economic sanctions against Australia for climate irresponsibility will force the seven parliaments to agree to federal environmental powers in a worldwide climate emergency pact in a few years.

2.0 The Problem Of Section 44 And Citizenship

The purpose of section 44 (i) is a series of variational tests of allegiance to Australia, as opposed to allegiance to a foreign power. It is intended to prevent people holding dual allegiances from being capable of being elected. I do not believe that the people will vote to liberalise this provision.

However modern developments in citizenship law worldwide have led to liberal international travel and modern tourism as a phenomenon and the laws are written to allow people to travel easily to the countries where their ancestors lived. These modern laws in turn cause trouble for Australians children or grandchildren of migrants wishing to stand for parliament.

The obvious solution to this is to pass a Recognition Of Foreign Laws Act and a The International Covenant On Civil And Political Rights Justiciable In Australian Courts Act so that foreign laws defective in procedures for renouncing citizenships are not recognised.

It has been suggested hypothetically that some dictator in some hypothetical Stalinist regime might sign a decree granting the right to travel to their country without visas to “all members of the second third and fourth internationals as fellow participants in the class struggle” and that that might lead to many current parliamentarians being ineligible to be elected say. One can’t abide the thought of the political freedoms of Australians being affected by such a decree and in the modern world there are many foreign laws which shouldn’t be recognised whether they be tantamount to legalised slavery or whatever.

If Australia deprived recognition to foreign laws that contradict the International Covenant On Civil And Political Rights (the ICCPR hereafter) then the precedence of our applicable laws would allow the High Court to in good faith not recognise in part such foreign laws as they apply to Australian citizens in Australian Courts.

3.0 The Nationhood Power

There has been a trend in recent High Court judgments to consider an implied nationhood power in determining lawsuits alleging unconstitutionality. Frequently this arises because of the federal parliament is trying to pass laws on areas of state responsibility without a proper referral of power from the states concerned. Sometimes a treaty is negotiated between the Commonwealth and other foreign powers with respect to the matter in question, without the states being represented in the treaty process.

I'm someone of the opinion that the nationhood power should not be used anti-politically when negotiation and compromise between the federal parliament and the state parliaments using the powers in section 51 (xxxvii) and section 51 (xxxviii) should allow any really necessary legislation to be implemented by so using the right procedures.

4.0 Human Rights And Other State Powers

The essential difference between two views of the constitution between the view (1) that the federal power to spend money extends only to express powers in sections 51 and 52 and elsewhere and that grants to the states must fit within federal spending powers, and the view (2) that the federal parliament has power via states grants to spend money on anything whatsoever has consequences.

It has been argued that the various policy covenants on federal power included in sections in Chapters II, IV, V, and VI of the constitution can be overridden anyway by legislation under section 51 (xxxviii) but getting the six state parliaments to agree to the piece of legislation in question might prove difficult.

The reason why I support only making the ICCPR justiciable in the courts but not the International Covenant On Economic Cultural And Social Rights is that I believe in elected parliaments making decisions about budgets rather than the judiciary.

For example, an unlimited justiciable right to health care in the context of rationing might sanction organ transplant tourism overseas by people who don't meet rationing criteria. This is sometimes of organs stolen from murdered members of religious minorities. With much reduced car travel in the cities with a few expensive self-driving electric cars greatly reducing availability of organs from young traffic accident victims in the future this problem will worsen. This contradicts others' human rights obviously. Rather it should be up to parliaments in designing budgetary programmes to design them to fairly ration health care, which is better manageable if it is not a recognised human right.

And making education a justiciable human right might lead to compensation claims against the teacher unions for their policies of dumbing down affecting some students who might otherwise not have failed. This obviously has deleterious legal consequences. And one doesn't want civil engineers who have failed to pass technical competence exams to be accredited by lawsuit or bridges and blocks of flats will more likely collapse. A compromise of making equal opportunity in education a human right has been suggested, and will work unless people interpret it in court as equal outcomes.

The ICCPR however is drafted to be able to be adopted as justiciable rights without major or excessive budgetary impact.

5.0 Planning For The Eventual Passing Of Our Monarch

There is an opinion among some in different branches of the republican movement that upon the passing of Queen Elizabeth II it might be opportune to give the Australian people a vote on a new Republican Constitution.

As someone trenchantly opposed to a minimalist republic the whole constitution is so outdated in so many ways I think it appropriate to call for a fully elected constitutional convention to prepare an entirely new draft republican constitution so that we are ready to proceed when the moment happens.

6.0 Emergency Powers In A Pandemic

The Covid-19 pandemic has led to constitutional development in that now we are having weekly Premiers' Conferences to utilise the plenary powers of state quarantine and state public health emergency via the so-called National Cabinet. It has been argued by some troublemakers that section 92 guarantees freedom of interstate travel. But section 112 re state inspection laws which no doubt include state quarantine and public health emergency laws provides that it is at the discretion of the federal parliament to annul such state inspection laws not the courts. In addition the full faith and credit given to otherwise valid state laws under section 118 means that the states can close their borders when absolutely necessary by a pandemic, even if the Commonwealth to do likewise to breach the section 92 policy covenant needs section 51 (xxxviii) legislation to so do.

There was not time in the pandemic to alter the constitution to help fight it, but the federal and state governments have cooperated in fighting it and I do hope the spirit of cooperation and compromise will continue into the future.

7.0 Environmental Powers

The next crisis I can foresee in our federation will be the climate emergency, as predicted by the Club Of Rome and others from the 1960's onwards. In a few years if Australia continues on its current course we will be subject to economic sanctions as an international pariah state.

That in the 1890's the protection of the environment was not seen as the major issue it has become is taken.

To stop buck-passing and undo the deadlocks that prevent urgent climate change remediation measures I'd suggest adding a clause 51A as follows:-

"51A. The federal parliament shall have power to enact legislation necessary and expedient in addressing the climate emergency to protect the environment until the international authorities declare the said climate emergency over."

Otherwise, I do not see any urgent changes needed whilst we prepare for the eventual passing of our monarch.

8.0 Recommendations

- 8.1 The obvious solution to this is to pass a Recognition Of Foreign Laws Act and a The International Covenant Of Civil And Political Rights Justiciable In Australian Courts Act so that foreign laws defective in procedures for renouncing citizenships are not recognised.
- 8.2 Have an elected constitutional convention to prepare a new republican constitution.
- 8.3 Recommend to the parliament enacting a federal environmental power as a matter of urgency.