Submission to the Joint Standing Committee on Electoral Matters

Inquiry into the Conduct of the 2019 Federal Election

I have been encouraged by the Shadow Special Minister of State, Senator Don Farrell, to make a submission to your inquiry into the conduct of the 2019 Federal election. My understanding is that your inquiry wishes to identify issues that may emerge in future elections and this submission is made in that context. If I stray too far from your Terms of Reference but you find merit in the argument, please refer my comments as appropriate.

My central point is that as Australia's population grows, the work-load on conscientious Members of Parliament can only increase, matched by a distancing of constituents and further decline of the respect and trust which should be due to the people's representatives. This will happen unless section 24 of the Constitution is amended.

Following the 2019 election I wrote individually to every member of the House of Representatives providing information about the bloating of their electorates and the way in which population growth would impact on their work with constituents, unless a way is found to expand the number of lower house seats. The fact is that since the last increase in the number of seats, in 1984, the number of people eligible to vote in Australia has increased from 9.2 million to 16.4 million. According to projections by the *Australian Bureau of Statistics*, by the time a current 30 year old reaches retirement age, the number of electors will have increased to around 32 million. Attachment 1 gives examples of how these figures translate to sample electorates in each state.

The bloating of electorates is a result of section 24 of the Australian Constitution which limits the number of seats in the House of Representatives to twice the number of Senators. The Chifley Government overcame the immediate problems of population growth after World War 2 by increasing the number of senators per state from six to ten, allowing the number of MHRs to increase from 72 to 120. The Hawke Government similarly reduced the impact of population growth by increasing the number of senators from ten to twelve, lifting the number of seats to 148. In 1967 the Holt government, with ALP backing, sought to amend section 24 to break the nexus between the size of the two Houses. This was defeated by two arguments: the first being the populist assertion that Australia did not need any more politicians, the second that reform would reduce the influence of the smaller states.

Because of the successful 'no' campaign, South Australia has now lost one lower house seat. A report by Jacob Kagi of the ABC on 28 May 2019 suggests Western Australia may be next to lose a seat - perhaps in the next redistribution. Tasmania would lose a seat were it not for the provision that ensures that no original state will have less than five seats.

It should be self-evident that, while the deterioration of trust in our political system may not be solely due to the nexus, acquiescing to the whittling of constituents' power while ignoring the impact of a bloating electorate on MPs is damaging our democracy.[1]

Breaking the nexus is essential, but complicated. While it would enable the size of electorates to return to a workable scale, unless some special provision was made it would also change the balance of power between the Senate and the House of Representatives during a joint sitting of both Houses. That raises the question of whether a formula could be found to overcome this problem.

As the law now stands, Parliament has the options of again increasing the number of senators, again asking the people to amend section 24 of the Constitution, or pretending the problem does not exist. If it pretends the problem does not exist electorates will bloat to the point that our representative democracy loses its meaning. If the number of senators per state is increased to allow expansion of the lower house, the quota for a person to be elected to the Senate will be significantly lower – and the problem of bloating will be kicked down the road for future generations to deal with. So changing section 24 of the Constitution would seem to be the best option.

Almost Guaranteed to Fail

Forty-two years have passed since the last successful referendum. The failure rate of referendums is itself a deterrent to seeking change. Parliament's *Infosheet 13* calls the Constitution 'Australia's supreme law' yet that supreme law now includes 16 redundant sections and about 30 sections which are either part redundant, archaic, irrelevant, silly or worthy of review.

Reasons given for the failure of referendums include the perception that constitutional questions are so technical and complex that only politicians and lawyers can properly understand them. Some argue that constitutional questions in Australia are inherently party political in nature, type-casting those who engage in public discussion of them as being themselves politically aligned. There is a sad general distrust of politics and politicians. The fact that Australia's election cycles are so short means the time for mounting a reform campaign is limited. Once Parliament decides to hold a referendum it must take place no later than six months after the bill is passed, adding further to the time pressure and leaving only a small window of opportunity for public understanding of a reform proposal.

And then there is that quaint 19th century gentlemen's debating club rule that a proposal reform to a section of the Constitution must be accompanied by an equally firm case as to why it should fail. The 'yes' and 'no' approach has developed over the last 100 years but it is not a Constitutional requirement. Indeed the Constitution says clearly that: 'When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes.' Of the 44 referendums held since Federation, five have not had a 'no' case put, the last being at the 1967 referendum on the Aboriginal question.

[1] *The Conversation* February 25, 2019

When an issue is judged to be of such importance that a national referendum is required, the proponents cast their message to the nation as a whole. Opponents mount a formally approved case against it but informal campaigns can be mounted based on the perceived concerns of individual states or other sectional interests. The report of a round table sponsored by the *House of Representatives Legal and Constitutional Affairs Committee* on 1 May, 2007 explored this question in more detail. At that meeting Professor Leslie Zines observed: " 'yes' and 'no' cases have sometimes been 'an absolute disgrace…If you look back into the past, particularly the 'no' but also the 'yes' cases have often been pretty scurrilous political tracts".

The round table covered five points necessary for a successful referendum – bi-partisanship, adequate popular education, a level of popular ownership of the proposal, that the proposal must be one of substance and that the states need to co-operate. There is also a view that politicians should be kept as far away from the process as practicable. All of these factors, when added to the deliberate crafting by the Founding Fathers to make change as difficult as possible, would seem to make reform of section 24 to preserve a meaningful Parliamentary representative democracy virtually impossible.[2]

A Suggestion – a Different Approach to Reform?

Reform of the Constitution has always been looked at through the prism of Parliament, politics and constitutional lawyers. Is there scope to look at reform through a different prism - to deal with it initially as a change-management proposition? Governments and major corporations facing difficult and complex issues commonly establish a task force, a commission or some other senior dedicated expert body to guide them through to a solution to intractable problems. Would it be feasible for the Parliament to establish what might be called something like the *Constitutional Reform Implementation Commission*, with '<u>implementation</u>**'** being the operative word? Such a body would need to be appointed by and be responsible to Parliament, not the executive, and would need to be able to operate over several terms of the Parliament to overcome time restraints. Parliament, perhaps through an appropriate committee, would need to have formal oversight of the Commission's work but would not be able to interfere with its operations.

Parliamentary Commissions

The concept of a Parliamentary commission is not new to the Westminster system. The Office of the Conflict of Interest and Ethics Commissioner of Canada is an entity of the Parliament of Canada that seeks to prevent conflicts between the public duties and private interests of elected and appointed officials. The New Zealand Parliamentary Commissioner for the Environment is appointed by the Governor-General on the recommendation of the House of Representatives. In the UK an officer is appointed by Parliament to investigate complaints against officials accused of not acting in a proper administrative way.

[2] Professor Anne Twomey *The Conversation*, July 16, 2019

Other Parliamentary commissions investigate corruption, such as ICAC in NSW. Similar parliamentary commissions in Queensland and WA have dealt with allegations of misbehavior.

The fact that a Westminster-style Parliament establishing a constitutional reform implementation commission is unprecedented should not, of itself, rule the proposition out of consideration.

Working within the Constitutional Framework

This is clearly a hypothetical proposition and in no way is it intended to be prescriptive. The purpose is stimulate exploration of alternative means of achieving Constitutional reform. The reform process might go something like this:

- Parliament establishes a Parliamentary Commission. It is given a ten year operating life, with option for renewal if the then Parliament sees fit. Its overall objective is to manage the implementation of reform of the Constitution.

- The executive nominates, and the Parliament endorses, the appointment of high status Commissioner/s for a period of five years with options for renewal. If three commissioners were appointed, one of the commissioners could have professional knowledge of Constitutional law, another might be from a major corporation with significant change management and negotiation experience and a third might be a communications specialist.

- The Reform Implementation Commission would first review the Constitution and identify sections which must, should and might be amended. It would suggest priorities and seek approval from the Parliament (or Parliamentary Committee) to commence the reform process. The Parliament might add new proposals such as, say, appropriate constitutional recognition of the Aboriginal and Torres Strait people.

- The Commission would then go through the process of identifying stake-holders. It would encourage submissions from those in favour of a proposition and those likely to be against. It may amend the proposition or adjust questions according to those who would otherwise argue ‘yes’ and those who would otherwise argue ‘no’. It would negotiate with states and where there was resistance, seek to accommodate concerns. It may discuss with political parties their philosophical or policy perspectives. It would be free to expose flawed argument or hyperbole.

- When the Commission was satisfied that it had met all reasonable requirements and had dealt with all rational arguments it would advise Parliament it was ready to proceed. It would advise that the people had been informed and/ or recommend a program to inform the public about the issues. There would be no formal ‘no’ case because those with legitimate arguments would have already had their views incorporated into the process. Parliament would then pass the legislation setting the referendum process in motion as determined by the Constitution.

Conclusion

This submission has explored a different approach to modernising Australia's Constitution because so much of it is irrelevant or archaic. This should not divert attention from the most pressing need – the need to amend section 24 of the Constitution so the bloating of electorates can be reversed. Because the bloating is so incremental there is a danger of Parliament deferring consideration of the problem. However, inaction will lead to a continuing deterioration in status and effectiveness of our parliamentarians, it will add to the stress on our representative democracy and will expand the distance between the people and those we elect to represent our interests to the detriment of all.

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ATTACHMENT 1

SAMPLE OF FEDERAL SEATS IMPACTED BT POPULATION GROWTH

Electorate	1984		2019		2066	
	Voters	**Constituents**	**Voters**	**Constituents**	**Voters**	**Constituents**
Bradfield NSW	68,593	**92,000**	107,361	**140,000**	222,150	**338,500**
Eden Monaro NSW	69,721	**93,000**	114,140	**150,000**	222,150	**338,500**
Jagajaga Vic	63,984	**92,000**	107,571	**140,000**	218,280	**338,400**
Gippsland Vic	64,679	**91,000**	110,578	**146,000**	218,280	**338,400**
Oxley Qld	61,861	**92,000**	104,200	**140,000**	214,800	**321,800**
Longman Qld	65,500	**92,000**	114,696	**150,000**	214,800	**321,800**
Cowan WA	60,842	**90,000**	98,670	**135,000**	202,710	**326,700**
Forrest WA	66,535	**92,000**	105,417	**140,000**	202,710	**326,700**
Barker SA	69,860	**93,000**	118,400	**150,000**	214,800	**321,800**
Sturt SA	69,931	**93,000**	123,830	**170,000**	214,800	**321,800**
Bass Tas	58,661	**85,000**	76,530	**100,000**	152,600	**207,400**
Canberra ACT	78,620	**100,000**	95,384	**130,000**	214.000	**320,000**
Lingiari NT	64,939.	**95,000**	118,819	**160,000**	214,000	**320,000**

Note: The figures showing the number of electors in 1984 and 2019 are provided by AEC and published by Wikipedia <*https/en/Wikipedia.org/wiki/Electoral_Results_for_the_Division_of_(name of electorate)*>.

The figure is the actual number of voters adjusted to take into account those who were entitled to vote but did not (i.e. the turnout).

The number of constituents is an estimate. Based on analysis of several electorates, the number of voters is approximately two-thirds the number of constituents.

The figures for 2066 are based on projections by the *Australian Bureau of Statistics (3222.0 - Population Projections, Australia, 2017 (base) – 2066*). It assumes that population growth will be even across states. It is more likely that the eastern states will grow faster. Consequently South Australia, Western Australia and the Northern Territory will most likely lose seats if section 24 is not amended.