

A PROPER PROCESS FOR MAKING CHANGES TO THE AUSTRALIAN CONSTITUTION

Abstract

Australia does not have a suitable system for making changes to the constitution on such controversial and complex matters as changing to a republic. Unless a suitable mechanism is set up the possibility of making such changes is very nearly zero.

This submission suggests a structure in which change can be discussed, the people involved and the reasons for change given in an unemotional and logical manner. Only a system such as is described, is likely to result in the change of the Australian Constitution which will make Australia a republic.

Difficulty in the Process of Change

The principal difficulty in proceeding towards a Republic in Australia is persuading the Australian people that the process of deciding on change has been fair, open and not influenced by vested political interests. Thus the process must be accessible and understood by all Australians. In the past politicians have been too influential in guiding or misguiding the outcome of referenda and now must be excluded from the process except in their role as ordinary citizens. The process must be conducted by impartial adjudicators whose interests are solely in gaining the outcome which is desired by the majority of the people within the constraints of achieving good governance of Australia.

It is a failing of our constitution that the process of change is difficult. This is because the process of change is conducted through the normal political system and so is strongly influenced by parliamentarians and the views of the two large political groupings. They have, in the past, exerted undue influence on the outcomes so that it is difficult to make changes on even fundamental issues. Parliamentarians have failed significantly over the century, to make even reasonable changes to the constitution and improve the basis of our democracy, enshrined in the constitution, by confusing the public on the issues which have been put to referendum. Over-long delay in accepting necessary, small and progressive changes can only result, in the end, in abrupt and disruptive changes. Politicians will nearly always put vested self-interest above that of the citizens who they seek to represent. Opponents of a particular change have often sought to confuse the debate even in the official cases for or against constitutional change.

The writers of the constitution could not have foreseen the emergence of a rigidly disciplined and disputative parliamentary system where any suggestion of change to the constitution commonly divides the parliament along political lines and senior members from each party exert considerable influence in the debate about the merits or otherwise of suggested amendments. The debate become mired in political point scoring, vested interests and suspicion that the changes will influence party representation in parliament rather than what is right and proper government and what conforms to the underlying principals which guide the governance of Australia. The political conflict makes the public suspicious of the process in which they have no part and so develop no trust in the outcome. The result is nearly always that change is refused because of the obfuscation of the intent of the proposed amendment.

So the process and guardianship of our constitution must be taken out of the political arena and the debate on the merits of changes conducted in a non-disputative and properly independent manner.

An Independent Constitutional Commission

I propose that this should be done by forming a Constitutional Commission which will have status similar to that of the High Court of Australia, in other words its independence must be recognised and sacrosanct. The Constitutional Commission should be charged with protecting the constitution and guiding the debate on changes which may be made to ensure that it reflects the best interests of the People of Australia.

The Commission should, ideally, come under the administrative control of the Governor General so that it is outside the control of political parties and parliamentary influence. The Governor General would, however, not have the ability to intervene in any of the matters under the consideration of the Commission. He would simply be the agent through which the Commission is administered. The Commission would be formed from leading constitutional lawyers, independent academics with expertise in law and some appointed members of the public with an interest in the operations of government. The Commission would comprise eight to ten persons. The role of this Commission will be to seek the opinion of the public, and other agencies as described below, on potential changes to the constitution, analyse the potential advantages and disadvantages of a particular constitutional change, inform the public of their opinion, formulate the question which is to put to the people on the proposed changes, and ensure that the constitutional changes are properly formulated. They would not have the power themselves to propose changes to the constitution but questions would be referred to them from a number of different sources. They would be appointed, one half by the parliament and one half by the Governor General, and would have tenure of up to ten years with options to be renewed.

They would consider the key questions which need to be decided as a result of each suggested amendment and issue impartial advice on the effects of the suggested change on the overall governance of Australia.

The Commission would also be responsible, with the assistance of the Electoral Commission, for the conduct of plebiscites to decide key questions to be resolved in the putting to the public of any constitutional amendments. They would ensure that the results of any plebiscite were incorporated into the formal changes required and would continually over-see the working of the constitution in association with the High Court of Australia and review any relevant ruling of that Court as they relate to the Constitution.

They would also consider the finding of Constitutional Conventions as described below and formulate the Convention's findings into questions to be put to plebiscites.

The People's Participation

The opinion of the public on key questions to the possible changes to the constitution should be obtained by two processes. The first of these would be through plebiscites conducted in conjunction with federal elections. These plebiscites should pose relatively simple but key questions about the direction of change and must be easily understood by the public. Should further questions on a particular issue need to be put they should be referred to the public in

subsequent plebiscites. Decisions made as a result of these plebiscites must, within a certain time period, be formulated into a constitutional amendment for submission to the people for a formal change.

The second method of seeking the opinion of the public should be through regular Constitutional Conventions. These conventions could be elected or appointed representatives similar to the one which was held before the previous referendum on the Republic. The outcome of the conventions should, however, be different from that of the recent convention as they will not have the power to suggest changes or agree to any changes but simply to debate issues related to changes and identify the key questions which needed be put to the public in plebiscites after they have been further considered by the Commission. These Constitutional Conventions could be held following every second Federal election, in other words about every six years. The holding of the conventions should come under the aegis of the Constitutional Commission.

Further questions about constitutional change could be referred to the Commission by any Federal or State Parliament, the High Court when there are conflicts of law or lack of clarity in the constitution, or from members of the public through petitions. After impartial analysis and advice the Commission would refer the proposed changes to the public through the mechanism of the plebiscites.

With the above process of debating the possible changes to the constitution the public would be fully taken into confidence and would themselves decide, prior to a formal process of amendment, just what the key questions were and what changes should be made. The result would be a low conflict and fully consultative process for making changes. This would take the matter out of the political arena both from the elected parliamentarians or elected representatives at the Constitutional Conventions.

It will be necessary to have a mechanism to challenge the actions of the Commission. Should any group or individual believe that the actions of the Commission, the wording of questions or of the formal amendments to the constitution did not reflect the wishes of the people as expressed in plebiscites, they could challenge the actions or wording in the High Court. The decision of the High Court would be made on matter of the process and the decision would be binding on the parties or the Commission. I would expect this process to be a very rare occurrence.

The mechanisms described above for changing the constitution will of necessity be slow, but that has been the history of proposed changes. At least this process will produce change and the changes will be those which the people have already given approval to through plebiscites. The formal process of amendment should then be a forgone conclusion as impartial opinions would already have been given on the changes, the matters fully debated and the questions not influenced by vested interests.

Safeguarding the Constitution

The Constitutional Commission would have no direct power but, in suggesting questions, drafting amendments and giving advice, should be guided by principles of governance which would be clearly stated and be such that all Australians could agree upon. These would be matters such as principles of equality, democracy, justice, fairness, inclusiveness of minorities and the right to representation.

With these guiding principles the Commission would have the role of safeguarding our constitution and seeing that the process of change was conducted in a fair and unbiased way. Ideally the commission would come under the administrative guidance of the Head of State, that is the President but there should be sufficient balances to make sure that that office did not influence the debate or the processes of recommending and agreeing on changes,

The most obvious thing which must be done now is to form the Commission firstly as a statutory body by Act of Parliament and give it, as one of its first tasks, the changing of the constitution to make itself a permanent body given constitutionally guaranteed status incorporated into the body politic of Australia. The only problem is that to make that first change, and give the governance of the Australian people to the people, it will require politicians to make that first step. At present only they have the power to approve such a change.

Without a process like this, substantial and necessary changes to the Australian Constitution will continue to fail.

Specific Questions

I now refer to the specific questions suggested in the discussion paper issued by the Senate Committee.

The responses to these questions are my own opinion and to get consensus many should be referred through the process suggested above and considered by the Constitutional Commission and put to the people through plebiscites and Conventions.

There are many models available which the Australian Constitution could imitate in the selection and role of the Head of State. I believe that the French system of direct election and where the responsibilities are shared by the President and the Prime Minister is worthy of consideration. I believe in a model where the President is responsible for areas such as foreign affairs but has little or no role in internal affairs. He is recognised as Head of State and, in meeting other heads of government, can give commitment on behalf of Australia to certain actions. If our Head of State does not have that role, it will diminish his influence and render the role as purely symbolic and ceremonial. This surely would be a waste of person who could and should play an important role in the governance and status of Australia

Question 1. Should Australia consider moving towards having a Head of State who is also Head of government?

The Head of State should have certain defined responsibilities such as for Foreign affairs and for protection of the Constitution. He should not adopt the role played by Presidents such as that of the United States. The responsibilities and influence exerted by the French President could be used as a model for the division of responsibility between the Head of State and the Head of government

Question 2. What powers should be conferred on the Head of State?

Apart from the powers which are currently held, the Head of State should be able to commit the government of Australia to certain action in foreign affairs. This person would represent

Australia at such forums as the Commonwealth Heads of Government and therefore must be able to say and do things which he must be able to back up by action in Australia.

Question 3. What powers (if any) should be codified beyond those currently specified in the Constitution.

When the roles of the Head of State are defined it will be evident what roles need to be codified and what ones left to reserve powers. The difficulty about codifying the role is that this could result in an administrative and legal nightmare where the interpretation of action would sometimes need to be tested in court.

Question 4. Should some form of campaign be available to nominees and if so, what assistance would be reasonable?

The campaign for a directly elected Head of State should be provided through the electoral commission. At the same time there should be little if any contribution made to campaigning by individuals or organisations. Again the model for the conduct of elections in France could be considered. There is a limit to TV and newspaper advertising and this is paid by the French government. All candidates have the same amount of TV time to present their cases. There are no how to vote card are last minute coercion of voters. The campaign is limited by a variety of decrees and the campaigning in fact is rarely necessary as the people who stand for election are often well known and have a consistent program behind them and are prominent in public life.

Question 5. Should/Can political parties be prevented from assisting or campaigning on behalf of nominees? If so How?

I want a politically knowledgeable person to be the Head of State and so political parties must necessarily participate. The limits on the campaign spending would make sure that only very good candidates were successful in an election and that the result would not be influenced unduly by money. To me a compelling reason to have a political knowledgeable person as Head of State is that the person would be able to exercise influence on the conduct of politics in Australia. It is also likely that a person who has aspiration to become Head of State through the political system would take a more statesmanlike stance in parliament and, if there were a few aspirants conducting themselves in such manner, would improve the conduct of parliament and of governance in general in Australia

Question 6. If assistance is to be given should this be administered by the Australian Electoral Commission or some other public body?

Yes, the spending on any campaign must be limited and supplied through a government agency. Any spending by private agencies which are viewed and being for the purpose of coercing the voters should be strictly limited, or controlled and possibly prohibited.

Question 7. If the Australian Head of State is to be directly elected, what method of voting should be used?

I favour the common approach in Europe of a direct election including all candidates, followed by a run off between the top two candidates

Question 8. If direct election is the preferred method for election of a head of a non-executive president, will this lead to a situation where the president becomes a rival centre of Government? If so is this acceptable or not? If not, can the office of Head of State be designed so that this situation does not arise?

Any direct election will provide the Head of State with some legitimacy. My preferred option is to give the Head of State some defined and significant responsibilities as outlined above, separate and distinct from those of the Head of Government. Foreign affairs is a necessary area for his activity as is protecting the Constitution.

Question 9. Who should be eligible to be put forward nominations for and appointed Head of State?

I do not favour an appointed Head of State however if we are to have one then the nomination process should include a strong component of public participation. This can be achieved by having nomination by petition. If a petition containing the required number of signatures is received the nomination of that candidate should be considered for appointment. A number of signatures in the 10s of thousands to 100 thousand should be required for the nomination to be valid.

Question 10. Should there be any barriers to nomination, such as nominations from political parties, or candidates being current or former members of parliament?

Any person eligible to vote in an Australian election should be eligible for nomination and appointment. Any other criterion would be considered discriminatory.

Question 11. Should there be a maximum and/or minimum number of candidates.

If the candidates are nominated by a method stated above the numbers of candidates would automatically be limited.

Question 12. Should there be a minimum number of nominators required for a nominee to become a candidate.

Yes, as above

Question 13. What should the Head of State be called, Governor General, President of the Commonwealth of Australia, or some other title?

The Head of State should be called the President. I could facetiously suggest that our heritage from the British republic would indicate that the Head of State should be called the Lord Protector.

Question 14. What should be the length of office for a Head of State?

I think that any term from four to eight years would be appropriate.

Question 15. Should a Head of State be eligible for re-appointment/re-election?

Yes the second term could be shorter than the first, say eight years first time and half of that for an extension.

Question 16. Should there be a limit on the number of terms an individual may serve as Head of State?

With the above formula there need be no limit to the number of terms which could be served.

Question 17. Who or what body should have the authority to remove the Head of State from office?

A joint meeting of the houses of parliament, perhaps including some representatives of the State Governments could have the authority to dismiss the Head of State.

Question 18. On what grounds should the removal from office of the Head of State be justified? Should those grounds be spelt out?

Ill health, incompetency, malversation or any criminal activity would suffice. The ground for dismissal should not include political differences with the government of the day.

Question 19. How should a casual vacancy be filled?

The senior Head of State of one of the states or the Chief Justice of the High Court of Australia could fill the role just as is the case now.

Question 20. What should the eligibility requirements be for the Head of State?

As stated above any eligible voter for the parliaments of Australia should be qualified. It would be good if the person actually knew what the role was and so a politically experienced person would be favoured. Any other restriction would be discriminatory.

Question 21. On what grounds should a person be disqualified from becoming Head of State?

The same restrictions which apply to prohibitions on political representatives should be used.

Question 22. Should the Head of State have power to appoint and remove federal judges?

This role should remain with the elected representatives of parliament.

Question 23. Should the Head of State have the prerogative of mercy?

No. This can be badly misused and would be interference in proper judicial process. In the United States the presidential clemency is a hang-over from the war of independence and the civil war where the judiciary in different states could take political stances on convictions. This is not the case in Australia and there is at present no cause for introducing such a right.

Question 24. Should the Head of State be free to seek constitutional advice from the judiciary and if so, under what circumstances?

The Head of State should work closely with the judiciary to ensure that the constitution is being observed, that the laws being passed by parliament are legal and that they reflect the objectives and principles of governance in Australia. This would be in his role as ultimate protector of the Constitution.

Question 25. What is the best way to deal with the position of the states in a federal Australian republic?

The Federal model of a republic should be adopted by all states with minor modifications to suit differences in demography and geography. I understand that each state has sovereign right under the constitution and some may not wish to become republics. They should be left as they are if they don't want to follow the path of the Federal republic. It would be only a matter of time before they all adopted some form of republican government. It would, undoubtedly, be better and more efficient if they all adopted compatible forms of republicanism and then all could elect their Head of State at the same time.