

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

# **Inquiry into constitutional reform and referendums**

House of Representatives Standing Committee on  
Social Policy and Legal Affairs

December 2021  
CANBERRA

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# Membership of the Committee

## *Chair*

Mr Andrew Wallace MP (to 24 November 2021)

## *Deputy Chair*

Ms Sharon Claydon MP

## *Members*

Ms Angie Bell MP (from 17 December 2021)

Dr Mike Freeland MP

Mr Andrew Laming MP

Ms Peta Murphy MP

Mr Rowan Ramsey MP

Mr Julian Simmonds MP

Dr Anne Webster MP



# Terms of reference

The House of Representatives Standing Committee on Social Policy and Legal Affairs will examine the 2019-20 annual report of the Attorney-General's Department. In doing so, the Committee will inquire into and report on constitutional reform and referendums, having particular regard to:

- 1 opportunities to improve public awareness and education about the Australian Constitution;
- 2 suggestions for mechanisms to review the Australian Constitution and for community consultation on any proposed amendments before they are put to a referendum;
- 3 the effectiveness of the arrangements for the conduct of referendums set out in the *Referendum (Machinery Provisions) Act 1984* and the need for any amendments; and
- 4 any other related matters.





# List of recommendations

## Recommendation 1

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2.75 The Committee recommends that the Australian Government fund and support an expansion of the National Schools Constitutional Convention (NSCC) program with the objective of including more students every school year.

In expanding the NSCC, the Department of Education, Skills and Employment should work with the states and territories to ensure the broadest possible participation, including by:

- rotating the location of conventions to ensure that students in rural, regional and metropolitan areas can equally participate, or supporting students who face barriers to travel (geographical, financial) to attend Canberra
- assisting schools to hold their own convention, to encourage wider participation
- expanding the conventions or increasing their frequency to accommodate more students from years 9 to 12
- ensuring that students from disadvantaged and diverse backgrounds are appropriately represented.

## **Recommendation 2**

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- 2.82 The Committee recommends that the Attorney-General's Department commission a study on the Australian people's awareness of the Constitution, referendums and constitutional matters.

Outcomes from this study should inform consideration of future initiatives to increase public literacy about Australia's Constitution.

## **Recommendation 3**

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- 2.83 The Committee recommends that the Australian Government develop and implement a public awareness and education program on the Constitution, constitutional framework and Australia's democratic system.

Such a program may include an ongoing education campaign, and promotion online and on social media. It should draw on and seek to increase public engagement with existing resources already available to the public, such as those of the Australian Constitution Centre, Australian Electoral Commission and Parliamentary Education Office.

Such a program should be designed and operated independently from the timeframe and context of any particular referendum, while being able to capitalise on opportunities for public education presented by referendum periods or other constitutional events when they arise.

Any program should ensure it appropriately communicates with First Nations and CALD communities.

An ongoing education campaign should complement and feed into other processes considered by this Committee, including conventions, which are intended to increase citizen involvement in proposals and campaigns for constitutional reform.

## **Recommendation 4**

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- 3.90 The Committee recommends that both Houses of the Australian Parliament establish a Joint Standing Committee on Constitutional Matters to operate from the commencement of the 47th Parliament.

The Joint Standing Committee should be:

- given a broad mandate to review the Constitution and consider constitutional matters, including receiving and inquiring into proposals for change
- able to self-refer constitutional matters for inquiry as well as receive references from either House of Parliament or a relevant Minister
- required to consider and make recommendations to Parliament relating to the establishment of, agenda for, and resulting report from, ongoing or one-off constitutional conventions that may be warranted generally or to consider specific reform proposals
- mandated to exercise functions relating to the referendum process once a referendum proposal is taken forward by Government and/or Parliament, as recommended below at Recommendation 9.

## **Recommendation 5**

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3.91 The Committee recommends that the Australian Government use the opportunity of any constitutional convention established on the recommendation of the Joint Standing Committee recommended at Recommendation 4 to conduct a program of public engagement, including through media and social media campaigns, to ensure broad public awareness of the convention and help increase public understanding of the Constitution.

This should form part of the enhanced public education effort recommended at Recommendation 3.

## **Recommendation 6**

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4.153 The Committee recommends that Section 11 of the *Referendum (Machinery Provisions) Act 1984* be amended to enable the Electoral Commissioner to distribute the yes/no pamphlet to all electors using any additional methods that the Electoral Commissioner considers appropriate.

## **Recommendation 7**

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4.156 The Committee recommends that Section 11(4) of the *Referendum (Machinery Provisions) Act 1984* be amended to provide for the Australian

Government to fund referendum education and promotion of the arguments for and against the referendum proposal.

## **Recommendation 8**

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4.158 The Committee recommends that the *Referendum (Machinery Provisions) Act 1984* be amended, consistent with relevant provisions in Part XX of the *Commonwealth Electoral Act 1918*, to:

- prohibit referendum campaign organisations from receiving gifts or donations of \$100 or more from foreign donors
- require referendum campaign organisations to disclose gifts or donations above a certain threshold.

## **Recommendation 9**

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4.163 The Committee recommends that an Independent Expert Panel be established to provide advice to the Joint Parliamentary Committee recommended at Recommendation 4 in the lead up to each referendum on aspects of the referendum process, including but not limited to:

- the form of the wording of the referendum question
- the inclusion of neutral information in the yes/no pamphlet
- other neutral information and education activities
- establishment of yes/no committees.

The Joint Parliamentary Committee would consider the advice of the Panel before providing that advice to the Parliament, along with the considered views of the Committee.

The Committee recommends that the Panel be appointed by the Prime Minister in consultation with other parliamentary party leaders, and should include experts in constitutional law, public communication, representatives from the Australian Electoral Commission and/or other relevant government entities, and community representatives.

This process should be reflected through amendments to the *Referendum (Machinery Provisions) Act 1984* where appropriate.

## **Recommendation 10**

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4.166 The Committee recommends that the Australian Government ensure that the *Referendum (Machinery Provisions) Act 1984* and the referendum process more generally is modernised well in advance of any referendum on the question of constitutional recognition of Indigenous Australians, which is expected to occur in the next term of Parliament, or any other future referendum.



# 1. Introduction

## Conduct of the inquiry

- 1.1 On 22 June 2021, the Committee resolved to examine the 2019-20 annual report of the Attorney-General's Department, in order to inquire into constitutional reform and referendums.
- 1.2 The Committee opened the inquiry for public submissions, inviting written submissions of less than 4000 words, with a deadline of 6 August 2021.
- 1.3 In total, the Committee received 21 submissions and seven supplementary submissions to the inquiry. The submissions received are published on the Committee's website and listed at Appendix A. Four scholarly articles were also provided to the Committee and accepted as exhibits; these are listed at Appendix B.
- 1.4 The Committee held four public hearings between September and November 2021. Due to the Covid-19 pandemic the public hearings were all conducted from Canberra, with witnesses (and most Committee members) participating via videoconference and teleconference. Details of the public hearings held are at Appendix C.
- 1.5 The Committee thanks all those who contributed to the inquiry.

## Scope of the inquiry

- 1.6 This inquiry focused on the processes for constitutional reform and the conduct of referendums, rather than substantive proposals for constitutional amendment on particular issues. Launching the inquiry, the Committee Chair made clear that:

The inquiry is not about specific changes to the Constitution, but about ensuring that as a nation we can have informed discussion and debate about any proposals for constitutional change, and a fit-for-purpose referendum process to decide on them.<sup>1</sup>

- 1.7 The full terms of reference for the inquiry are included in the front pages of this report.

## Changing Australia's Constitution

- 1.8 The process for amending Australia's Constitution is set out in its section 128. In short, section 128 requires that a law to alter the Constitution must first be passed by an absolute majority of both Houses of Parliament,<sup>2</sup> then within two and six months, put to the people at a referendum.
- 1.9 At that referendum, the change must be approved by a 'double majority' – a majority of the total number of voters across the nation, and also, a majority of voters in a majority of the States (meaning at least four of Australia's six states).<sup>3</sup> Only if the double majority is achieved is the referendum passed and put to the Governor-General for final assent, bringing the constitutional change into law.
- 1.10 Section 128 provides that 'the vote shall be taken in such manner as the Parliament prescribes'. The procedures determined by Parliament are set out in the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) and associated regulations.
- 1.11 The matters regulated by the Referendum Act, and proposals for their reform, are discussed further in Chapter 4 of this report.

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<sup>1</sup> Parliament of Australia, 'New inquiry into constitutional change in the modern age', *Media Release*, 24 June 2021.

<sup>2</sup> Section 128 includes a 'deadlock' provision for resolving disagreement between the Houses on a referendum proposal, with a question approved by either House on two separate occasions ultimately able to be put to the people by the Governor-General, if the Houses are repeatedly unable to agree.

<sup>3</sup> Certain referendums may attract a further majority requirement under Section 128, which provides that any referendum reducing the proportional representation of a State in Parliament, or otherwise 'affecting the provisions of the Constitution in relation to' a particular State, can only pass with majority approval in that State.



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## History of Australian referendums

- 1.12 Since the Constitution came into effect in 1901, 44 amendments have been put to the people at 19 referendum events. More than half of these occurred prior to 1950. The proposed changes have ranged from formal 'technical' amendments to substantive issues of national reform.
- 1.13 Only 8 of the 44 changes proposed since Federation have been approved. The most recent successful referendum was held in 1977, in which three of four proposals put to the people were carried: relating to filling casual vacancies in the Senate, a retirement age for judges, and allowing Territory electors to vote in referendums. (The unsuccessful fourth proposal would have required House of Representatives and Senate elections to always be held on the same day.)
- 1.14 In the more than 40 years since then, eight referendum questions have been put to the Australian people, in three referendum events held in 1984, 1988 and 1999. All were defeated.
- 1.15 The most recent referendums in 1999 proposed two changes: to establish an Australian republic, and to insert a preamble into the Constitution. Neither of the 1999 questions was approved by a majority of electors in any state, or a majority overall.
- 1.16 A referendum was proposed in 2013 relating to local governments, a matter that had been put to referendum unsuccessfully twice before. While the requisite legislation was passed by both Houses of Parliament, and preparations made for the referendum to be held in September 2013, it was first delayed, then abandoned following a change of government in October that year.

## Previous parliamentary inquiries

- 1.17 The Committee's inquiry took note of previous consideration of constitutional reform and referendums undertaken by this and other committees in recent years. Two of this Committee's previous undertakings were particularly germane to the present inquiry.

## Inquiry into the Machinery of Referendums, 2009

- 1.18 In 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs (a predecessor to this Committee) conducted an inquiry into the machinery of referendums. The Committee was tasked to examine 'the effectiveness of the *Referendum (Machinery Provisions) Act 1984*

in providing an appropriate framework for the conduct of referendums', with a particular focus on the Yes and No cases and financial provisions, and to recommend any amendments to the Act that may be required.<sup>4</sup>

1.19 The Committee's report, *A Time for Change: Yes/No?* made 17 recommendations. These mostly related to four key areas:

- amendments to the provisions of the Act and parliamentary procedures relating to the Yes/No arguments and pamphlets<sup>5</sup>
- changes to rules and processes relating to the funding of referendums, including removal of the limitation on Commonwealth Government funding<sup>6</sup>
- development of a national civics education program to enhance public understanding of, and engagement with, the Constitution<sup>7</sup>
- establishment of an independent Referendum Panel for each referendum, which would promote the referendum, educate voters about the referendum arguments, and exercise oversight functions relating to the Yes/No pamphlet and Government funding.<sup>8</sup>

1.20 In the Government's response to the report, presented in 2012, three of the 17 recommendations were supported, two were 'supported in principle', eight were 'noted', and four were not supported. The Government did not agree to the proposed amendments to funding provisions or to the establishment of a Referendum Panel, preferring that these be considered by

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<sup>4</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, p. xii (Terms of Reference).

<sup>5</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendations 2, 3, 4, 5.

<sup>6</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendations 11, 12.

<sup>7</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendation 6.

<sup>8</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendations 7, 8, 9, 10, 13, 14, 15.

governments for particular referendums on an ‘as needed’ or ‘case by case’ basis.<sup>9</sup>

- 1.21 The recommendations of the 2009 inquiry are further discussed in Chapter 4 of this report, where relevant to matters considered in the present inquiry.

## **Constitutional Roundtable on fixed four-year parliamentary terms, 2019**

- 1.22 In November 2019, this Committee convened a ‘Constitutional Roundtable’, reviving a past practice of some of its predecessor committees, of convening one-off public discussions with experts (and sometimes other invited guests) on topical constitutional issues. The subject of the 2019 Roundtable was fixed four-year terms for the Australian Parliament.<sup>10</sup>
- 1.23 While the session focused on that issue, the Committee’s half-day discussion with a panel of four constitutional experts expanded into broader aspects of the constitutional framework in Australia—in particular, this country’s recent history with regard to engaging decision-makers and the public in substantive consideration of constitutional issues, and the need to update Australia’s laws and processes governing the conduct of referendums.
- 1.24 The Roundtable was a key catalyst for further consideration of such matters within the Committee, which led to its decision to launch this inquiry. Evidence obtained during the Roundtable has been taken into consideration in this inquiry and is cited in this report where relevant.

## **Structure of this report**

- 1.25 This report consists of four chapters. Following introduction and background in the present chapter:
- Chapter 2 discusses the state of awareness about the Constitution in Australia, and evidence received in relation to strengthening constitutional education for both school students and the public

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<sup>9</sup> Australian Government, *Australian Government response to the House of Representatives Standing Committee on Legal and Constitutional Affairs report: A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, October 2012.

<sup>10</sup> See: [www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/Fixedparlterms](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Fixedparlterms)

- Chapter 3 discusses mechanisms to review the Constitution, particularly processes for public engagement and consultation on constitutional issues and reform
- Chapter 4 examines the legislative framework and arrangements for the conduct of referendums in Australia, and evidence received about the areas in which this may need review or change.

1.26 Chapters 2, 3 and 4 each conclude with the Committee's comments and recommendations on the issues raised in the chapter.

## 2. Public awareness and education about the Constitution

- 2.1 This chapter considers the level of awareness and understanding of the Constitution and constitutional framework among school students and the general public.
- 2.2 The chapter also examines current programs aimed at enhancing awareness and education on constitutional issues, and considers evidence received on suggestions and opportunities to improve and strengthen constitutional education for both school students and the public.
- 2.3 The Committee notes that some of these issues were considered in the Joint Standing Committee on Electoral Matters' 2007 report *Civics and Electoral Education*—noting that that inquiry considered civics education broadly rather than constitutional matters in particular, and it was also held before the civics and citizenship curriculum was made compulsory for students in years 3 to 8.<sup>1</sup>

### Awareness of the Constitution

- 2.4 The Committee sought information about the current state of awareness of the Constitution to assist it in understanding where there are opportunities to improve and strengthen education amongst school students and the general public.

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<sup>1</sup> Joint Standing Committee on Electoral Matters, *Civics and Electoral Education*, May 2007.

## Students

- 2.5 The Committee received limited evidence on schools students' awareness and understanding of constitutional issues. The evidence it was given suggested that education and understanding is low, which was raised as an important matter for consideration during the inquiry.
- 2.6 The primary source of data cited in evidence was the National Assessment Program (NAP) sample assessments, which assesses groups of students in years 6 and 10 on a three-yearly basis on subjects including civics and citizenship. The *NAP Civics and Citizenship 2019 National Report* states that the civics and citizenship sample assessment:
- ... assesses students' skills, knowledge and understandings of Australian democracy and its system of government, the rights and legal obligations of Australian citizens and the shared values which underpin Australia's diverse multicultural and multi-faith society.<sup>2</sup>
- 2.7 Data was provided on 5,611 year 6 students and 4,510 year 10 students. Figures from the report showed that 53 per cent of year 6 students met or exceeded the proficient standard nationally, while 38 per cent of year 10 students met or exceeded the proficient standard.<sup>3</sup> Table 2.1 provides the percentages of students at the year 6 and year 10 level across each state and territory, and nationally, attaining the proficient levels.

**Table 2.1 Percentages of year 6 and year 10 students at or above the proficient standard for the civics and citizenship curriculum by state and territory and nationally in 2019**

State/territory	Year 6	Year 10
NSW	54	40
Vic.	53	39
Qld.	54	35
WA	53	45

<sup>2</sup> Australian Curriculum, Assessment and Reporting Authority, *NAP Civics and Citizenship 2019 National Report*, p. 16.

<sup>3</sup> Australian Curriculum, Assessment and Reporting Authority, *NAP Civics and Citizenship 2019 National Report*, pages 23-24.

SA	43	29
Tas.	47	26
ACT	66	51
NT	24	28
<b>Australia</b>	<b>53</b>	<b>38</b>

Source: *Australian Curriculum, Assessment and Reporting Authority, NAP Civics and Citizenship 2019 National Report*, p. 5.

- 2.8 The Department of Education, Skills and Employment (DESE) advised that the proficient standard:
- ... represents a challenging but reasonable expectation of student achievement at a year level, with students needing to demonstrate more than elementary skills which might be expected at that level.<sup>4</sup>
- 2.9 Further, DESE explained that while the national curriculum sets out the content that is taught in the civics and citizenship curriculum from years 3 to 10, it is the responsibility of the states and territories to give effect to that content.<sup>5</sup>
- 2.10 The Attorney-General's Department stated that 'schools determine pedagogical and other delivery considerations that account for students' needs, interests and the school and community context'.<sup>6</sup>
- 2.11 Professor George Williams was one of a number of witnesses who expressed concern about civics education in schools.<sup>7</sup> He told the Committee that the problem can be seen at universities where there are 'really smart uni students who disclaim knowledge of even some of the most basic aspects of our government, let alone the Constitution'.<sup>8</sup>

<sup>4</sup> Dr Ros Baxter, Deputy Secretary, Schools and Youth Group, Department of Education, Skills and Employment, *Committee Hansard*, Canberra, 7 October 2021, p. 2.

<sup>5</sup> Dr Ros Baxter, Deputy Secretary, Schools and Youth Group, Department of Education, Skills and Employment, *Committee Hansard*, Canberra, 7 October 2021, p. 3.

<sup>6</sup> Attorney-General's Department, *Submission 12*, p. [5].

<sup>7</sup> See, for example: Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 3. See also: Dr Bede Harris, *Submission 2*, p. 1; Benjamin Cronshaw, *Submission 3*, p. 1; Australian Republic Movement, *Submission 9*, p. 1.

<sup>8</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 3.

- 2.12 Benjamin Cronshaw submitted that young people and students ‘could benefit most from learning more about the Australian Constitution and the political system, particularly as they come to vote for the first time in elections or potential referendums.’<sup>9</sup>

## General public

- 2.13 Data on the general public’s awareness and literacy about the Constitution, constitutional matters and referendums was also limited.

- 2.14 In 2021, a survey conducted by the Griffith University Centre for Governance and Public Policy, the *Australian Constitutional Values Survey 2021*, found that 82.7 per cent of those surveyed had heard of the Constitution before.<sup>10</sup>

- 2.15 While this shows that most Australians have an awareness of the Constitution, participants in the inquiry drew the Committee’s attention to what they perceived to be a large deficiency in knowledge of what is actually contained in it, including knowledge about referendums, amongst the Australian population.

- 2.16 Professor Williams told the Committee about two polls which emphasised this problem:

... one poll taken ... asked Australians, 'Do we have a written Constitution?' Around one in two said no. You can guess the answer to that—yes or no—so heaven knows what the actual result was. There was a poll that came out just a couple of months ago, asking Australians, 'Do we have some sort of bill of rights in our Constitution?' Over 50 per cent said yes. So we're dealing with a very large problem ...<sup>11</sup>

- 2.17 In addition, the Australian Republic Movement (ARM) stated that its own research has ‘highlighted the general lack of awareness about the nature and role of the office of Governor-General, their important constitutional functions and the separation of powers outlined in the Constitution’.<sup>12</sup>

- 2.18 The Australian Electoral Commission (AEC) submitted that it had recently conducted developmental research on referendums and found that ‘there is

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<sup>9</sup> Benjamin Cronshaw, *Submission 3*, pages 1-2.

<sup>10</sup> Griffith University Centre for Governance and Public Policy, *Australian Constitutional Values Survey 2021*, March 2021, viewed 4 November 2021.

<sup>11</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 3.

<sup>12</sup> Australian Republic Movement, *Submission 9*, p. 2.



little or no knowledge of referendums and their purpose within the Australian voting public'.<sup>13</sup>

- 2.19 A number of submitters considered that this lack of awareness feeds into distrust and disengagement with Australia's democratic system. ARM believed that 'voters will continue to feel alienated from the decisions made by elected leaders unless they are equipped with a working knowledge of government institutions in Australia'.<sup>14</sup>
- 2.20 Professor Williams stated that the lack of awareness is 'undermining the ability of citizens to be effective participants in government and to hold governments to account'. He added that Australians are feeling frustrated that they are being 'left out of deliberative processes that determine how this nation is governed' which then feeds into distrust and apathy.<sup>15</sup>
- 2.21 Similarly, Dr Bede Harris stated that 'public disenchantment with the political system as a whole' leads to difficulty in persuading voters 'of the need for constitutional reform'.<sup>16</sup>
- 2.22 Mr Glenn Barnes from Citizens for Democratic Renewal told the Committee that the lack of trust in Australia's political processes means that it is 'highly unlikely that the electorate would pass any referendum proposal framed solely by politicians today'.<sup>17</sup>

## Civics education at school

- 2.23 The Committee heard about the Australian curriculum and the range of initiatives in place to educate school students about the constitutional framework. Nevertheless, evidence to the inquiry emphasised the importance of more participatory and hands-on education.

## National curriculum and programs in place

- 2.24 The civics and citizenship curriculum, as part of the Australian Curriculum, comprises three key focus areas at each year level—government and

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<sup>13</sup> Australian Electoral Commission, *Submission 20*, answers to questions on notice, p. 2.

<sup>14</sup> Australian Republic Movement, *Submission 9*, p. 2.

<sup>15</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, pages 3 and 7.

<sup>16</sup> Dr Bede Harris, *Submission 2*, p. 1.

<sup>17</sup> Mr Glenn Barnes, Joint Chair, Citizens for Democratic Renewal, *Committee Hansard*, Canberra, 20 September 2021, p. 11.

democracy; laws and citizens; and citizenship, diversity and identity.<sup>18</sup> The Attorney-General's Department submitted that the focus areas include learning about:

... the key features of government under the Australian Constitution with a focus on the separation of powers, the roles of the Executive, the houses of parliament and the division of powers.<sup>19</sup>

- 2.25 The civics and citizenship curriculum is compulsory for students in years 3 to 8, and in years 9 and 10 it is offered as an elective. Students in years 11 to 12 are not taught the curriculum at all. DESE submitted that students in years 3 to 10 are taught the curriculum 'approximately 20 hours per year' and that it has no data on how many students are enrolled in the learning area when it is offered as an elective in years 9 to 10.<sup>20</sup>
- 2.26 To support the curriculum, the Australian Government runs programs that aim to improve students' understanding of the Constitution and Australian democracy. In their submissions and answers to questions on notice, the Attorney-General's Department and DESE provided an overview of the programs in the area of civics and citizenship currently in place.<sup>21</sup> Table 2.2 lists the programs with brief descriptions.

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<sup>18</sup> Australian Curriculum, *Civics and Citizenship: Structure*, <https://www.australiancurriculum.edu.au/f-10-curriculum/humanities-and-social-sciences/civics-and-citizenship/structure/>, viewed 10 November 2021.

<sup>19</sup> Attorney-General's Department, *Submission 12*, p. [5].

<sup>20</sup> Department of Education, Skills and Employment, *Submission 19*, answers to questions on notice, p. [2].

<sup>21</sup> Department of Education, Skills and Employment, *Submission 19*, answers to questions on notice pages [7]-[10]; Attorney-General's Department, *Submission 12*, pages [5]-[6].

**Table 2.2 Civics and citizenship education programs**

<b>Program</b>	<b>Brief description</b>
Australian Constitution Centre (ACC)	Opened at the High Court in 2018, the ACC supports aspects of the civics and citizenship curriculum for students in years 5 to 10 on topics including the Constitution, the six foundational constitutional principles, Australian democracy and the High Court. <sup>22</sup>
Museum of Australian Democracy (MOAD)	MOAD is a living museum of social and political history located at Old Parliament House. It offers learning experiences relating to civics and citizenships for school groups. <sup>23</sup>
National Electoral Education Centre (NEEC)	Located at Old Parliament House, the NEEC offers programs on Australian democracy, the Houses of Parliament and elections and referendums. <sup>24</sup>
National Schools Constitutional Convention (NSCC)	Designed for year 11 and 12 students, the NSCC promotes learning about the Australian Constitution, including how it shapes our democracy, and an understanding of our democratic heritage and tradition. Up to 120 students participate in the program each year. <sup>25</sup> The communiqué is usually presented to the President of the Senate and other senior Senate office-holders. <sup>26</sup>

<sup>22</sup> Australian Constitution Centre, *About the educational Australian Constitution Centre*, <http://www.australianconstitutioncentre.org.au/about-us.html>, viewed 5 November 2021.

<sup>23</sup> Museum of Australian Democracy, *School programs*, <https://www.moadoph.gov.au/learning/teachers/school-programs/>, viewed 5 November 2021.

<sup>24</sup> Australian Electoral Commission, *Visit us*, <https://education.aec.gov.au/visit-us/>, viewed 5 November 2021.

<sup>25</sup> Attorney-General's Department, *Submission 12*, p. [6]; Department of Education, Skills and Employment, *Submission 19*, answers to questions on notice, p. [9].

<sup>26</sup> Women for an Australian Republic, *Submission 17.1*, p. 3.

Parliament and Civics Education Rebate (PACER)	The PACER program provides a subsidy to schools to support students travelling to Canberra to visit national institutions including Parliament House, the Australian War Memorial, MOAD and the NEEC. <sup>27</sup>
Parliamentary Education Office (PEO)	The PEO delivers learning programs to primary and secondary students at Parliament House, and offers print and digital teaching resources. <sup>28</sup>

2.27 The AEC told the Committee that it places a ‘high priority’ on digitising its material to provide access to students in remote areas. It also highlighted its Democracy Rules program, which it said was a ‘flagship online education resource for schools’:

That is a program to enable teachers to deliver democracy education within schools. It’s a 150-page program. It includes a dedicated five-minute animated video on changing the Constitution and seven separate classroom based activities on constitutional reform and referendums, how we change the Constitution, how the Constitution influences our lives and how referendums work.<sup>29</sup>

2.28 Similarly, DESE submitted to the inquiry that many of its PACER institutions also facilitate digital programs and resources such as:

- a free video conferencing program for students in years 5 to 12, connected with parliamentary experts from the PEO
- ‘digital excursions’ to MOAD for primary and secondary students
- live and interactive virtual excursions to the Australian War Memorial.<sup>30</sup>

2.29 DESE advised that some civics and citizenship education programs were further pivoted ‘from face-to-face delivery to online’ due to the COVID-19 pandemic. The NSCC was held as a virtual event in October 2020 and March

<sup>27</sup> Attorney-General’s Department, *Submission 12*, p. [6].

<sup>28</sup> Parliamentary Education Office, *Get to know the PEO*, <https://peo.gov.au/connect-with-the-peo/get-to-know-the-peo/>, viewed 8 November 2021.

<sup>29</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 5; Mr Jeff Pope APM, Deputy Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 4.

<sup>30</sup> Department of Education, Skills and Employment, *Submission 19*, answers to questions on notice, pages [11]-[12].

2021, with a total of 46 students and 107 students participating in each respectively.<sup>31</sup>

- 2.30 DESE submitted that the PACER institutions have anecdotally reported that ‘interest from schools in their digital programs has grown over the past two years and that schools are opting to utilise the programs’ in classrooms.<sup>32</sup>

## Suggestions to improve education

- 2.31 A strong theme in evidence to the inquiry was that the civics and citizenship curriculum would benefit from a stronger focus on students participating in practical, hands-on civics education.

- 2.32 Professor Williams explained that ‘you don't get very far with just relating information in this area. It is really dry and often pretty dull’ and that hands-on, practical activities are the key to reinforcing education. He went on to say that the ‘best thing’ he had seen that works in actively engaging students are the school-based constitutional conventions:

Instead of just relating information, there would be an engaging exercise that they're all involved in. The key is, as part of that, to choose a good topic. It might be, for example, ‘Should the constitution be amended to provide that 16-year-olds should vote?’<sup>33</sup>

- 2.33 Dr Paul Kildea agreed that ‘relevance is a real key here’ and explained that students would be more knowledgeable about the Constitution if they were enabled to ‘participate in a meaningful way in national debates’.<sup>34</sup>

- 2.34 Similarly, Dr Carolyn Holbrook submitted to the inquiry that ‘only when young people feel that the Constitution is relevant to them and their concerns, will they become genuinely engaged’.<sup>35</sup>

- 2.35 The AEC told the Committee it ‘would like to be involved’ in school based constitutional conventions ‘to an extent’.<sup>36</sup>

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<sup>31</sup> Department of Education, Skills and Employment, *Submission 19*, answers to questions on notice, pages [9]-[10], [13]-[15].

<sup>32</sup> Department of Education, Skills and Employment, *Submission 19*, answers to questions on notice, p. [10].

<sup>33</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, pages 3, 5.

<sup>34</sup> Dr Paul Kildea, *Committee Hansard*, Canberra, 20 September 2021, pages 4-5.

<sup>35</sup> Dr Carolyn Holbrook, *Submission 21*, p. 4.

<sup>36</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 5.

- 2.36 When asked how to broaden participation in conventions beyond students who ‘self-select’ themselves for each event, Professor Williams proposed that every school should hold a constitutional convention to ensure that ‘every kid would get involved at that point, not just the select few’.<sup>37</sup>
- 2.37 Dr Kildea suggested that the ‘random selection’ of students avoids the self-selecting group from participating every time. He stated that the random selection approach is ‘used for deliberative forums, like citizens’ assemblies’:
- The benefit of it means that you would get people of all levels of ability and different life circumstances, and the evidence shows that it makes for a really enriching debate ... there’s potential for everyone there—the people who are at the top of the class and in the middle and at the bottom—to learn, to get excited about constitutional change.<sup>38</sup>
- 2.38 Similarly, Women for an Australian Republic submitted that ‘all students, including female students’ should have equal opportunity to participate in the conventions. It suggested that ‘more funds’ could be provided:
- ... for additional online conventions and practice parliaments in order to enable students outside capital cities, from a wider range of schools and from a wider range of feeder subjects to participate. These online events should be held more frequently and also be extended to students in Years 7 to 10 at appropriate levels of participation/activity.<sup>39</sup>
- 2.39 DESE submitted to the Committee that the relevant jurisdictions manage regional and state constitutional conventions and there is no involvement by the Department. In terms of selection of students, DESE said that:
- ... states and territories are allocated student places at the national convention based on the size of the jurisdiction and jurisdictions manage selection ... the jurisdictions do consider gender balance, school sector, location and socio-economic mix.<sup>40</sup>
- 2.40 DESE went on to say that in the 2021-22 Budget, \$2.2 million was announced for a Youth Engagement Package which included a one-year pilot in 2022 to

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<sup>37</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 5.

<sup>38</sup> Dr Paul Kildea, *Committee Hansard*, Canberra, 20 September 2021, p. 6.

<sup>39</sup> Women for an Australian Republic, *Submission 17.1*, pages 3-4.

<sup>40</sup> Department of Education, Skills and Employment, *Submission 19*, answers to questions on notice, p. [7].

expand the NSCC to students in years 9 and 10. DESE told the Committee that it is 'currently in the final stages of the related tender process'.<sup>41</sup>

- 2.41 In its 2007 report, the Joint Standing Committee on Electoral Matters recommended that the PEO and the AEC be given more support to access additional space to host a greater number of students and schools in their relevant civics programs.<sup>42</sup>
- 2.42 In its response, the Government said that while the programs at the AEC and PEO are 'an effective way to deliver civics and electoral education', 'class room education is often a more efficient way to reach a large number of students'.<sup>43</sup>
- 2.43 The 2019 *NAP Civics and Citizenship National Report* found that students with greater participation in school governance activities or extracurricular civics and citizenship activities were more likely to have higher levels of achievement in the NAP.<sup>44</sup> However, the number of year 11 and 12 students that attend the NSCC each year is low when compared with the total number of students enrolled across Australia. For example, in 2019, almost 507,000 students were enrolled in years 11 and 12,<sup>45</sup> while 'up to 120' students attend the NSCC every year.<sup>46</sup>
- 2.44 The Committee also received evidence that the curriculum had shortcomings in teaching students an ethical and philosophical framework against which to evaluate the Constitution. Dr Harris told the Committee that low levels of civic knowledge and understanding arise from the lack of 'any critique of the Constitution or how it might be improved' in curriculum content.<sup>47</sup>

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<sup>41</sup> Department of Education, Skills and Employment, *Submission 19*, answers to questions on notice, p. [7].

<sup>42</sup> Joint Standing Committee on Electoral Matters, *Civics and Electoral Education*, May 2007, p. 83.

<sup>43</sup> Australian Government, *Government response to the Report of the Joint Standing Committee on Electoral Matters Civics and Electoral Education*, August 2011, p. 5.

<sup>44</sup> Australian Curriculum, Assessment and Reporting Authority, *NAP Civics and Citizenship 2019 National Report*, p. 27.

<sup>45</sup> Australian Curriculum, Assessment and Reporting Authority, *Number and proportion of all students enrolled in schools by school level and school sector, Australia 2019*.

<sup>46</sup> Department of Education, Skills and Employment, *Submission 19*, answers to questions on notice, p. [9].

<sup>47</sup> Dr Bede Harris, *Submission 2*, p. 2.

- 2.45 Dr Harris explained that while ‘the civics and citizenship module is very good from a mechanical point of view, in that it explains how the Constitution as it is written operates’, the curriculum fails to ‘develop an ethical framework against which to evaluate institutions’:

Although in Year 7 students study a module on ‘How values, including freedom, respect, inclusion, civility, responsibility, compassion, equality and a ‘fair go’, can promote cohesion within Australian society,’ the curriculum provides no coverage of philosophy, without a knowledge of which it [is] surely impossible to understand and evaluate the values underlying a constitution.<sup>48</sup>

- 2.46 Other suggestions received in evidence to strengthen the civics and citizenship school curriculum included more opportunities for academics to visit schools to talk to students about civics, a ‘greater emphasis on civics education in Australian schools’, and that the curriculum should be compulsory for students beyond Year 10.<sup>49</sup>

## **General public education and awareness**

- 2.47 In relation to education and awareness of the Constitution among the general public, participants in the inquiry raised issues including the lack of education initiatives currently in place and the need for adults to experience a more practical and hands-on approach to learning about the Constitution.

### **Current education initiatives in place**

- 2.48 Evidence to the inquiry highlighted that education campaigns and initiatives aimed at adults on the Constitution and constitutional framework are limited. The AEC told the Committee that the Australian public’s awareness ‘about elections and anything to do with the constitution is actually sparked by an electoral event’:

It may be dormant in between those periods, but, when an election gets closer, citizens seem to be very interested in those sorts of issues, and we think our

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<sup>48</sup> Dr Bede Harris, *Committee Hansard*, Canberra, 20 September 2021, p. 4; Dr Bede Harris, *Submission 2*, p. 2.

<sup>49</sup> Dr Bede Harris, *Committee Hansard*, Canberra, 20 September 2021, p. 6; Australian Republic Movement, *Submission 9*, p. 2; Dr Bede Harris, *Submission 2*, p. 2.



education campaigns and awareness campaigns are far more effective when they're proximate to an electoral event.<sup>50</sup>

2.49 The AEC explained that it hadn't 'spent a huge amount of time talking about the Constitution' in its education campaigns 'because that is probably the role of other forms of civics education rather than the AEC's'.<sup>51</sup>

2.50 In addition to programs for students, the AEC provides general information on referendums on its website, however its role during a referendum is to 'educate the public about the referendum itself, not the topic areas':

The goal of an AEC referendum campaign would be to inform voters of their right and responsibility in relation to participation in a referendum; and of the electoral services to facilitate enrolment, voter turnout and formal voting. A significant part of the campaign is the management and delivery of the legislated referendum booklet to all addresses on the electoral roll.<sup>52</sup>

2.51 As discussed earlier in this chapter, the AEC found in its market research that 'there is little or no knowledge of referendums and their purpose within the Australian voting public'.<sup>53</sup> The AEC advised that as a result of these findings, it would introduce an early educative campaign phase ahead of a future referendum period 'to educate the community on the purpose and process of referendums'.<sup>54</sup>

2.52 Evidence on information and education about a referendum question once a referendum process begins is discussed in detail in Chapter 4.

2.53 When the Committee asked if DESE delivered programs that sought to engage the general public in relation to constitutional matters, the Department stated that the programs at the High Court 'certainly aren't purely focused on children' and that the programs, such as the Australian Constitution Centre, exists 'as resources that can be accessed by the general community':

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<sup>50</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 6.

<sup>51</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 6.

<sup>52</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 3; Australian Electoral Commission, *Submission 20*, answers to questions on notice, p. 1.

<sup>53</sup> Australian Electoral Commission, *Submission 20*, answers to questions on notice, p. 2.

<sup>54</sup> Australian Electoral Commission, *Submission 20*, answers to questions on notice, p. 2.

It is focused on young Australians, but it doesn't prevent others in the community from accessing and using that resource as well.<sup>55</sup>

- 2.54 DESE explained that the 'Discovering Democracy pieces and some short, animated videos on civics and citizenship education' can also be accessed by parents and other members of the community.<sup>56</sup> DESE submitted however that the resources are not translated into multiple languages as they are developed with an aim to support educators of students, rather than the general public.<sup>57</sup>
- 2.55 The Attorney-General's Department submitted that it 'does not have programs that provide information to the general public or seek to engage them in relation to constitutional matters'.<sup>58</sup>

### **Suggestions to improve awareness and knowledge**

- 2.56 As some submitters advocated for students to experience a more practical and hands-on approach to learning about the Constitution, some advocated for a similar approach to strengthen adults' knowledge and awareness.
- 2.57 Women for an Australian Republic argued that the general population requires a 'practical application' of civics education and that voter awareness 'will only improve if it becomes a regular habit'.<sup>59</sup>
- 2.58 Professor Gabrielle Appleby supported practical approaches to education such as 'more regular citizens' deliberative processes'.<sup>60</sup>
- 2.59 Professor Williams told the Committee that education campaigns are lacking 'a hook or some regular activity that draws our conversation towards constitutional change'.<sup>61</sup>

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<sup>55</sup> Dr Ros Baxter, Deputy Secretary, Schools and Youth Group, Department of Education, Skills and Employment, *Committee Hansard*, Canberra, 7 October 2021, p 6.

<sup>56</sup> Dr Ros Baxter, Deputy Secretary, Schools and Youth Group, Department of Education, Skills and Employment, *Committee Hansard*, Canberra, 7 October 2021, p 6.

<sup>57</sup> Department of Education, Skills and Employment, *Submission 19*, answers to questions on notice, p. [16].

<sup>58</sup> Attorney-General's Department, *Submission 12.1*, answers to questions on notice, p. [2].

<sup>59</sup> Women for an Australian Republic, *Submission 17*, p. 6.

<sup>60</sup> Professor Gabrielle Appleby, *Committee Hansard*, Canberra, 20 September 2021, p. 22.

<sup>61</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 4.

- 2.60 Several submitters advocated for the introduction of a constitutional convention as a means of regular community engagement and education in constitutional reform.
- 2.61 Women for an Australian Republic stated that the ‘topical 1998 Constitutional Convention, which was televised, gripped the country for two weeks because it put both sides of the case under the normal rules of debate, providing knowledge and information as well as an appreciation of other points of view’.<sup>62</sup>
- 2.62 Professor Appleby also reflected positively and told the Committee that a regular convention would:
- ... regularise language around constitutional reform, regularise the idea of constitutional reform, regularise the idea that we may be able to achieve constitutional reform, and people will start to be engaging with the substance rather than just thinking, as we’ve seen with a number of referendum proposals, ‘don’t know—just vote no’.<sup>63</sup>
- 2.63 Professor Williams explained that constitutional conventions ‘tend to capture enormous attention across the community’ and described the convention at Old Parliament House in 1998 as a ‘focal point of very powerful community engagement and education’.<sup>64</sup>
- 2.64 The Attorney-General’s Department stated that while the extent to which constitutional conventions enhance public awareness is difficult to assess, ‘previous conventions have provided opportunities for public engagement through community representations, calls for public submissions, and public forums’.<sup>65</sup>
- 2.65 The Department commented that the ‘extent to which a convention or similar event is able to engage with the public and raise awareness about the Constitution will be at least in part dependent on funding’.<sup>66</sup>
- 2.66 Constitutional conventions as a mechanism to review the Constitution are discussed in further detail in Chapter 3.

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<sup>62</sup> Women for an Australian Republic, *Submission 17: Attachment 1*, p. 6.

<sup>63</sup> Professor Gabrielle Appleby, *Committee Hansard*, Canberra, 20 September 2021, p. 22.

<sup>64</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 6.

<sup>65</sup> Attorney-General’s Department, *Submission 12.1*, answers to questions on notice, p. [3].

<sup>66</sup> Attorney-General’s Department, *Submission 12.1*, answers to questions on notice, p. [3].

- 2.67 Women for an Australian Republic among others suggested a range of practical methods to improve education and awareness, including sponsoring trips to Canberra for adults similar to the PACER program, holding more regular referendums, holding frequent plebiscites and polls to stimulate interest and engagement, and introducing programs similar to school curriculums for the wider public.<sup>67</sup>
- 2.68 Dr Kildea told the Committee that Australians need to ‘get into the practice of voting in referendums’.<sup>68</sup> Similarly, Women for an Australian Republic submitted that:
- There is no point investing in civics education with no practical application or result. Frequent plebiscites and polls, often at the touch of a button, and referendums becoming an expected feature of regular visits to the ballot box, whether online or in person, would provide that practical application.<sup>69</sup>
- 2.69 Women for an Australian Republic explained that the deliberative polls held in the lead up to the 1999 referendum were ‘highly successful in providing information about the choices’.<sup>70</sup>
- 2.70 Mr Sandy Biar from the Australian Republic Movement also argued that public awareness and educational campaigns should not be left to the period immediately before a referendum as this limits their impact. He explained that ‘civics education should be an ongoing process to lift the overall level of participation and political awareness in the decision-making process’.<sup>71</sup>
- 2.71 The Law Council of Australia also saw value in improved public awareness stating it would ‘address the risk of misinformation campaigns de-railing potential reforms.’ It proposed that a review should be conducted ‘to understand what lessons can be learned from successful public information campaigns’.<sup>72</sup>

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<sup>67</sup> For example, see: Women for an Australian Republic, *Submission 17*, pages 3-6; Benjamin Cronshaw, *Submission 3*, p. 2; Dr Paul Kildea, *Committee Hansard*, Canberra, 20 September 2021, p. 8; Dr Bede Harris, *Submission 2*, p. 4.

<sup>68</sup> Dr Paul Kildea, *Committee Hansard*, Canberra, 20 September 2021, p. 8.

<sup>69</sup> Women for an Australian Republic, *Submission 17*, p. 6.

<sup>70</sup> Women for an Australian Republic, *Submission 17: Attachment 1*, p. 6.

<sup>71</sup> Mr Sandy Biar, National Director and Chief Executive Officer, Australian Republic Movement, *Committee Hansard*, Canberra, 20 September 2021, p. 18.

<sup>72</sup> Law Council of Australia, *Submission 16*, pages 1-2.

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## Committee comment

- 2.72 The Committee is concerned about the apparent low levels of understanding of the Constitution and constitutional framework in school students, as evidenced by the low 'proficient' levels across year 6 and 10 students in the 2019 civics and citizenship assessment.
- 2.73 The Committee notes evidence received indicating that participation in extracurricular civics and citizenship activities increases students' level of achievement in the curriculum. As such, it is the Committee's strong view that the school curriculum requires a stronger focus on students participating in more practical, hands-on civics education, such as more regular and expansive school constitutional conventions.
- 2.74 The Committee notes that the number of year 11 and 12 students that attend the NSCC annually is extremely low when compared with the number of students enrolled across Australia. The Committee acknowledges that the program is being piloted for year 9 and 10 students; however a much wider expansion of the program is needed. The Committee notes that there are a number of academics and stakeholders who are keen to be involved and lend their expertise to student constitutional conventions.

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## Recommendation 1

- 2.75 The Committee recommends that the Australian Government fund and support an expansion of the National Schools Constitutional Convention (NSCC) program with the objective of including more students every school year.**

**In expanding the NSCC, the Department of Education, Skills and Employment should work with the states and territories to ensure the broadest possible participation, including by:**

- **rotating the location of conventions to ensure that students in rural, regional and metropolitan areas can equally participate, or supporting students who face barriers to travel (geographical, financial) to attend Canberra**
- **assisting schools to hold their own convention, to encourage wider participation**

- **expanding the conventions or increasing their frequency to accommodate more students from years 9 to 12**
- **ensuring that students from disadvantaged and diverse backgrounds are appropriately represented.**

- 2.76 From evidence to the inquiry, it is clear to the Committee that education campaigns and initiatives aimed at the wider population on the Constitution and framework are limited and inadequate, contributing to low levels of awareness and knowledge of, and engagement with, Australia's democratic system.
- 2.77 Based on their own experiences and communications with constituents, Committee members have observed that there is a concerning number of Australians who don't know about the Constitution or are misinformed about what is actually contained in it.
- 2.78 The Committee appreciates the challenges of engaging the public on such issues outside of a referendum campaign period. However, the Committee is concerned to see greater efforts made towards improving Australian's literacy on the constitutional framework and system of government.
- 2.79 The Committee notes that while the programs at the High Court and relevant resources published by other bodies such as the AEC are accessible by all members of the general community, not only school students, these are not necessarily widely advertised to adults.
- 2.80 As such, the Committee considers that the Government should introduce new initiatives for adult education about the Constitution, including campaigns run during constitutional conventions and referendum periods in order to capitalise on these opportunities.
- 2.81 The Committee also considers that a better understanding of Australians' current knowledge of the constitutional framework would assist in the design and delivery of any new education and information programs.

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## Recommendation 2

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- 2.82 The Committee recommends that the Attorney-General's Department commission a study on the Australian people's awareness of the Constitution, referendums and constitutional matters.

Outcomes from this study should inform consideration of future initiatives to increase public literacy about Australia's Constitution.

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## Recommendation 3

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- 2.83 The Committee recommends that the Australian Government develop and implement a public awareness and education program on the Constitution, constitutional framework and Australia's democratic system.

Such a program may include an ongoing education campaign, and promotion online and on social media. It should draw on and seek to increase public engagement with existing resources already available to the public, such as those of the Australian Constitution Centre, Australian Electoral Commission and Parliamentary Education Office.

Such a program should be designed and operated independently from the timeframe and context of any particular referendum, while being able to capitalise on opportunities for public education presented by referendum periods or other constitutional events when they arise.

Any program should ensure it appropriately communicates with First Nations and CALD communities.

An ongoing education campaign should complement and feed into other processes considered by this Committee, including conventions, which are intended to increase citizen involvement in proposals and campaigns for constitutional reform.

- 2.84 The Committee notes that almost a third of Australia's population are migrants and considers that there is also a need to reach out to this population to ensure that there is a widespread understanding of Australia's Constitution and democratic system. While the Joint Standing Committee on Electoral Matters recommended in its 2007 report that the AEC review the languages it translates its materials into, and that the then Department of Immigration and Citizenship develop a program of electoral education,

these recommendations relate more to the electoral system, than the Constitution.

- 2.85 The Committee suggests that reaching out to the migrant population through the Adult Migrant English Program on civics could be an effective way of disseminating education and information about the Constitution and the constitutional framework, and encourages the Government to consider strengthening this aspect of the program.



# 3. Mechanisms to review the Constitution

- 3.1 The inquiry’s terms of reference included examining ‘mechanisms to review the Australian Constitution and for community consultation on any proposed amendments before they are put to a referendum’. Many participants in the inquiry offered views and suggestions on how constitutional review could be strengthened in Australia, and how the people could be more effectively consulted on proposed reforms.

## The history of constitutional review in Australia

- 3.2 In the lead-up to Federation in 1901, and in the 12 decades since, Australia’s colonial, Federal, state and territory governments have conducted various processes to consider constitutional change—both specific proposals and more general review.
- 3.3 Nevertheless, the Committee was told that constitutional reform in Australia—at least at the national level—has to date been approached in an *ad hoc* manner, usually in connection with an immediate reform issue for consideration, and the political circumstances of the moment.<sup>1</sup>
- 3.4 Australia has convened a number of national processes of constitutional review since the 1890s. Several mechanisms with broad or general mandates were established, at irregular intervals, up to the 1980s.
- Three Constitutional Conventions held in 1891, 1897 and 1898 were the mechanism by which the Constitution was drafted, considered and eventually agreed upon, prior to Federation. While members of the 1891

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<sup>1</sup> Professor George Williams AO, *Submission 1*, p. 1.

Convention were nominated by the parliaments of each of the colonies (including New Zealand), the 1897-98 delegates were popularly elected.

- A Royal Commission on the Constitution was held from 1927-29, but did not result directly in any matters going forward to referendum, partly due to a change of government soon after its report was presented.<sup>2</sup>
- In 1942, a Convention comprising 24 appointed members (including the premiers and opposition leaders of the states) considered proposals for the expansion of various Commonwealth powers in the Constitution, some of which were eventually put to referendum in 1944, but not approved.
- A Joint Standing Committee on Constitutional Review operated within the Commonwealth Parliament between 1956 and 1959, comprising eight members of the House of Representatives and four Senators. It presented two reports to Parliament, in 1958 and 1959, covering a range of constitutional reform issues. The Government never formally responded to the committee's reports, although its deliberations could be seen as laying some of the groundwork for the two referendums held in 1967, and later reviews.<sup>3</sup>
- The Australian Constitutional Convention (ACC) was established in 1973 and met six times between 1973 and 1985 in various cities across Australia. Its delegates were appointed by the federal and state parliaments, and comprised representatives of federal, state and local governments and legislatures, including non-government representatives who were involved as equal partners. Over the 12 active years of the ACC, five of its recommendations were put to referendum, three of which were approved.<sup>4</sup>
- A Constitutional Commission comprising five prominent Australians (supported by several appointed advisory committees) was established in 1985 and reported to the Government in 1988. This led to the 1988

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<sup>2</sup> See Professor Cheryl Saunders, *The Parliament as Partner: A Century of Constitutional Review*, Parliamentary Library Research Paper No. 3 2000-01, August 2000, pages 15-16.

<sup>3</sup> See Professor Cheryl Saunders, *The Parliament as Partner: A Century of Constitutional Review*, Parliamentary Library Research Paper No. 3 2000-01, August 2000, pages 19-21. Professor Saunders also notes (at p. 20) that the Joint Committee met with a backlash from some states, who protested their lack of involvement in the constitutional discussions.

<sup>4</sup> Professor Cheryl Saunders, *The Parliament as Partner: A Century of Constitutional Review*, Parliamentary Library Research Paper No. 3 2000-01, August 2000, p. 22.

referendum event in which four proposals for change were put to the people, but none approved.<sup>5</sup>

- 3.5 The most recent full Constitutional Convention was convened in Canberra in February 1998, to discuss whether Australia should become a republic, which model for a republic should be put to the public via referendum, and under what circumstances and timeframe.<sup>6</sup> The Convention was composed of 152 members, half appointed by the federal Government and half elected via a voluntary postal vote. The appointed members included 40 members of state, territory and federal parliaments including all leaders and opposition leaders, and a number of ministers.<sup>7</sup>
- 3.6 The 1999 Convention differed from previous constitutional review processes in Australia in that it focused on one specific proposal for reform. It was a key part of the preparations for the referendum on the republic held in 1999, which was not approved.
- 3.7 In 2010 an Expert Panel on Constitutional Recognition of Indigenous Australians was appointed, with a membership comprising Australians from Indigenous and non-Indigenous communities and organisations, business, community leaders, academics, and members of Parliament.<sup>8</sup> This was part of a process of consideration of that issue which has continued—including through the 2016-17 First Nations Regional Dialogues and National Constitutional Convention (known as the ‘Uluru dialogues’) and current consultation processes, which are discussed later in this chapter.
- 3.8 In 2011 an Expert Panel on Constitutional Recognition of Local Government was convened, with an appointed membership comprising Commonwealth members of Parliament, local councillors and ‘other prominent Australians’.<sup>9</sup> This was part of preparations for the referendum on that topic which was proposed and legislated in 2013, but did not take place.

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<sup>5</sup> Attorney-General’s Department, *Submission 12*, p. [10].

<sup>6</sup> Attorney-General’s Department, *Submission 12*, p. [6].

<sup>7</sup> Attorney-General’s Department, *Submission 12*, p. [7]. The Department notes that a public consultation process was also held in 1999 on the resulting draft bill (exposure draft) proposing the amendments to the Constitution which were to be put to referendum.

<sup>8</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012.

<sup>9</sup> Attorney-General’s Department, *Submission 12*, p. [8].

## Proposals for constitutional review and consultation

- 3.9 Many participants in the inquiry emphasised the need for more regular or systematic mechanisms for constitutional review, and for discussion of constitutional issues with the Australian people. The newDemocracy Foundation submitted that:

...the Committee should explore new approaches that specifically address weaknesses in traditional approaches to referendums by seeking 'shared ownership' of the referendum process rather than something owned by MPs and sold to a sceptical citizenry.<sup>10</sup>

- 3.10 Benjamin Cronshaw noted the lack of any formal constitutional consideration in more than 20 years, and believed that 'there is merit to continuously reviewing the Constitution and see what can be changed or amended to meet the needs and interests of contemporary Australians'.<sup>11</sup>

- 3.11 Stuart McRae, while unconvinced that the Constitution was in need of reform, nevertheless agreed that 'the government might usefully establish a respected non-partisan body to review, endorse or oppose any proposal before it is put before Parliament or to the people',<sup>12</sup> and that any proposal for change 'should be subject to extensive dialogue over many years'.<sup>13</sup>

- 3.12 Dr Bede Harris believed that an inquiry into matters needing constitutional reform could be referred to an existing or special parliamentary committee, the Australian Law Reform Commission, or a special commission established for the purpose—stating that the mechanism used was less important than ensuring it allowed for 'the broadest possible consultation with the public'.<sup>14</sup>

- 3.13 Dr Paul Kildea endorsed the value of deliberative processes used both in Australia and overseas in recent years for public engagement and consultation on constitutional reform:

...many countries are making more use of citizens' assemblies and other deliberative forums to advance debate about constitutional change... These

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<sup>10</sup> The NewDemocracy Foundation, *Submission 4*, p. 1.

<sup>11</sup> Mr Benjamin Cronshaw, *Submission 3*, p. 2.

<sup>12</sup> Mr Stuart McRae, *Submission 5*, p. 1.

<sup>13</sup> Mr Stuart McRae, *Submission 5*, p. 6.

<sup>14</sup> Dr Bede Harris, *Submission 2*, pages 4-5.

forums bring together ordinary citizens to learn about and debate important issues and make recommendations to government.

When these assemblies are run well they expand constitutional debate beyond the usual suspects and they help facilitate really meaningful public engagement with constitutional issues.<sup>15</sup>

- 3.14 Professor Gabrielle Appleby also recorded her support for ‘more regular citizens’ deliberative processes, whether that be through the form of a constitutional convention or otherwise’.<sup>16</sup>
- 3.15 Mr Glenn Barnes from Citizens for Democratic Renewal advocated that ‘to bring a really consolidated approach to how we handle [constitutional reform], we need a mechanism that draws the broader population into the discussion and has wide publicity of the considerations’, noting also that there were various Australian and international models that could be drawn upon to craft such a mechanism.<sup>17</sup>
- 3.16 The Attorney-General’s Department (AGD) told the Committee that the Government was ‘supportive of discussion of constitutional issues’ while noting that experience had shown ‘different processes won’t necessarily lead to a yes vote’.<sup>18</sup> The Department also noted that the ability to support consultation events ‘will be at least in part dependent on funding, which is always a question for the Government’.<sup>19</sup>
- 3.17 Various possible mechanisms for constitutional review and consultation were raised and discussed during the inquiry, as set out below.

## **A permanent Constitutional Commission/Council**

- 3.18 Professor George Williams proposed that:

Australia should establish a small, ongoing Constitutional Commission charged with reviewing the Constitution, generating proposals for

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<sup>15</sup> Dr Paul Kildea, *Committee Hansard*, Canberra, 20 September 2021, pages 2-3.

<sup>16</sup> Professor Gabrielle Appleby, *Committee Hansard*, Canberra, 20 September 2021, p. 22.

<sup>17</sup> Mr Glenn Barnes, Joint Chair, Citizens for Democratic Renewal, *Committee Hansard*, Canberra, 20 September 2021, p. 12.

<sup>18</sup> Mr David Lewis, General Counsel (Constitutional), Office of Constitutional Law, Attorney General’s Department, *Committee Hansard*, Canberra, 20 September 2021, p. 29.

<sup>19</sup> Attorney-General’s Department, *Submission 12.1*, p. [3].

constitutional reform, consulting with the public on draft proposals and, after consultation, recommending them to Parliament.<sup>20</sup>

- 3.19 The Commission proposed by Professor Williams would receive proposals put forward by any Australian government, parliament or parliamentary committee and any members of the public. It would also be empowered to consider matters raised in other constitutional discussions, and to explore proposals on its own volition. The Commission would decide which proposals to prioritise and take forward.<sup>21</sup>
- 3.20 While supporting the conduct of regular constitutional conventions (discussed below), Professor Williams saw a permanent Commission as having a valuable role in generating reform proposals and maintaining momentum between those events: 'I think that's a pretty cheap way of making sure that the right proposals are generated, that there's education and the like in between the conventions and that there's broad political engagement'.<sup>22</sup>
- 3.21 Citizens for Democratic Renewal (CDR) similarly suggested the establishment of 'a permanent Constitutional Council of esteemed community leaders to consider the constitution in the light of contemporary society and advocate appropriate change'. CDR proposed that the Council be responsible for drafting any referendum questions and presenting them to Parliament for action.<sup>23</sup>
- 3.22 Mr Glenn Barnes from CDR elaborated, telling the Committee that:
- Rather than just having ad hoc bodies start the process for a referendum, I believe that we should have a referendum council whose role would be studies of the Constitution, aiming to keep it contemporary to our society and, where a desired change is suggested, taking the process on... their role would be to seek out ways and means of engaging the public in the discussion and to be the arbiters of whether we've reached sufficient commonality of view in the public to actually move to a referendum.<sup>24</sup>

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<sup>20</sup> Professor George Williams AO, *Submission 1*, p. 1.

<sup>21</sup> Professor George Williams AO, *Submission 1*, pages 1-2.

<sup>22</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 10.

<sup>23</sup> Citizens for Democratic Renewal, *Submission 8*, p. [1].

<sup>24</sup> Mr Glenn Barnes, Joint Chair, Citizens for Democratic Renewal, *Committee Hansard*, Canberra, 20 September 2021, p. 15.

- 3.23 Dr Bede Harris agreed that ‘it would be a very good idea to have a standing commission to receive and consider proposals for reform’.<sup>25</sup>
- 3.24 CDR was conscious that the nomination process and selection of members for such a body would ‘need to be carefully thought through to ensure public confidence in the capability and independence of the council’.<sup>26</sup> It suggested that members could include constitutional experts and ‘long-retired, experienced and respected politicians’ as well as representatives of the public.<sup>27</sup>
- 3.25 Under Professor Williams’ model, the Commission would have a broad and inclusive membership including former parliamentarians, representatives of local government, constitutional experts and members of the broader community, appointed in a multipartisan way to ensure it could generate ‘broad political and community support for whatever proposals it puts forward’.<sup>28</sup>

## Constitutional Conventions

- 3.26 As noted above, Australia’s Constitution was brought into being via a series of Constitutional Conventions, and further conventions have been convened on an *ad hoc* basis in the decades since Federation.
- 3.27 Professor Williams was one of several submitters advocating a ‘regular, popular Constitutional Convention’. Professor Williams proposed that such an event be held every ten years, and draw upon recommendations from the proposed Constitutional Commission, Parliament, a majority of states or a ‘petition of a large number of Australians’. The Convention would debate proposals for constitutional reform and make recommendations to Parliament for submission to a referendum. Professor Williams’ view was that a Constitutional Convention should be broadly representative of the community, while also ‘small enough to allow for real debate’.<sup>29</sup>
- 3.28 With regard to the proposed ten-year frequency, which he described as every ‘half-generation’, Professor Williams expressed the view that:

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<sup>25</sup> Dr Bede Harris, *Committee Hansard*, Canberra, 20 September 2021, p. 2.

<sup>26</sup> Citizens for Democratic Renewal, *Submission 8*, p. [2].

<sup>27</sup> Mr Glenn Barnes, Joint Chair, Citizens for Democratic Renewal, *Committee Hansard*, Canberra, 20 September 2021, p. 15.

<sup>28</sup> Professor George Williams AO, *Submission 1*, p. 2.

<sup>29</sup> Professor George Williams AO, *Submission 1*, p. 2.

It shouldn't be too often, because the Constitution rightly shouldn't be changing all the time. It should have some consistency—a sense of permanence about it—but we do need regular engagement. At the moment what we're lacking is a hook or some regular activity that draws our conversation towards constitutional change...<sup>30</sup>

- 3.29 Australians for Constitutional Monarchy (ACM) also advocated convening a constitutional convention to comprehensively review the Constitution, proposing that it draw on the model of the 'Corowa Plan' Conventions that drafted the Constitution in 1897-98. ACM explained that '[w]hat the Corowa plan involves is that, when a convention comes to a conclusion and then consults with all of the parliaments, the idea is that the final draft from the convention goes straight to the people'.<sup>31</sup>
- 3.30 ACM submitted that such a convention should be held every ten years: while 'it would be unwise to do this too often', broad reviews should be undertaken periodically and be 'special events in the life of the nation'.<sup>32</sup> Speaking with the Committee, Professor Flint from ACM went further, suggesting that 'I wouldn't hold it more often than, say, every 20 years'.<sup>33</sup>
- 3.31 Dr Kildea was another who saw value in a 'once-in-a-decade' constitutional convention, adding that such processes should be run openly and in a 'bottom-up, grassroots way' to motivate people to get involved.<sup>34</sup>
- 3.32 Women for an Australian Republic supported the institution of regular constitutional conventions, with elected and nominated participants assisted by legal and other experts, assembled by the Australian Government and/or state governments.<sup>35</sup> It believed that conventions should be held more frequently than every ten years, proposing that they take place every three to five years, to maintain momentum amid a 'constantly evolving diet of

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<sup>30</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 4.

<sup>31</sup> Professor David Flint, National Convenor, Australians for Constitutional Monarchy, *Committee Hansard*, Canberra, 20 September 2021, p. 21.

<sup>32</sup> Australians for Constitutional Monarchy, *Submission 14.1*, p. [1].

<sup>33</sup> Professor David Flint, National Convenor, Australians for Constitutional Monarchy, *Committee Hansard*, Canberra, 20 September 2021, p. 24.

<sup>34</sup> Dr Paul Kildea, *Committee Hansard*, Canberra, 20 September 2021, p. 5.

<sup>35</sup> Women for an Australian Republic, *Submission 17*, p. 4.



public topics to engage [public] attention'.<sup>36</sup> The Australian Republic Movement agreed.<sup>37</sup>

- 3.33 Professor Appleby similarly suggested that every five years might be an appropriate timeframe for broad constitutional conventions, with the possibility of more flexible timing for 'specific deliberative processes' on topical issues.<sup>38</sup>
- 3.34 The Law Council of Australia (LCA) submitted that constitutional reform would be assisted by ensuring that 'the process of constitutional reform, as well as the amendment proposals, are co-designed and co-owned by the public', through a comprehensive, open and meaningful process of national debate and consultation, such as an annual constitutional convention.<sup>39</sup>
- 3.35 There was some discussion as to whether one-off, issue specific conventions were preferable to, or should supplement, periodic comprehensive ones. Dr Kildea suggested that some constitutional issues would engage and be relevant to the public more than others, and there may be value in one-off conventions or assemblies to consider particular issues, in addition to more comprehensive ten-year review events. This would also allow flexibility to 'design a process that matches the issue'.<sup>40</sup>
- 3.36 Professor Williams acknowledged that it may from time to time be appropriate to hold a convention to consider a specific reform proposal, but advocated that these should be 'the exception, and only ever in addition to the systematic deliberation proposed by the regular Convention model'.<sup>41</sup>
- 3.37 As discussed in Chapter 2, inquiry participants were in broad agreement about the potential value of constitutional conventions not just as a mechanism for constitutional reform, but also to inspire community engagement and strengthen public awareness about the Constitution. To that end, many emphasised the importance of getting the model right for

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<sup>36</sup> Ms Sarah Brasch, National Convenor, Women for an Australian Republic, *Committee Hansard*, Canberra, 20 September 2021, p. 22. See also Mr Andrew Oliver, who proposed a 'fully elected constitutional convention to prepare an entirely new draft republican constitution': Mr Andrew Oliver, *Submission 13*, pages [7, 10].

<sup>37</sup> Mr Sandy Biar, National Director and Chief Executive Officer, Australian Republic Movement, *Committee Hansard*, Canberra, 20 September 2021, p. 24.

<sup>38</sup> Professor Gabrielle Appleby, *Committee Hansard*, Canberra, 20 September 2021, pages 22-23.

<sup>39</sup> Law Council of Australia, *Submission 16*, p. 2.

<sup>40</sup> Dr Paul Kildea, *Committee Hansard*, Canberra, 20 September 2021, p. 8.

<sup>41</sup> Professor George Williams AO, *Submission 1*, p. 2.

such a convention, and particularly ensuring that it allowed for broad and genuinely representative involvement across the Australian community.

- 3.38 Dr Kildea noted that there were a range of options to structure the process, and examples that had been successfully used both in Australia and overseas that could be drawn upon.<sup>42</sup>

### *The Irish model – the Constitutional Convention and Citizens’ Assemblies*

- 3.39 During the inquiry, the Irish experience with constitutional reform over the last ten years was raised a number of times in discussion with the Committee as an example worth considering, or even emulating.
- 3.40 The newDemocracy Foundation specifically recommended that Australia establish a Constitutional Convention based on the model used in Ireland in 2013-14, describing the Irish Convention and subsequent Citizens’ Assemblies as ‘pioneering events in deliberative democracy’.<sup>43</sup>
- 3.41 The Committee held a hearing via videoconference with three Irish officials who had been directly involved with the Constitutional Convention and the most recent Citizens’ Assembly, to explore the Irish model and what might be drawn from it for possible consideration in Australia.
- 3.42 The Irish representatives were positive about the success of the Convention and Assemblies; advising that while the process remained ‘an experiment’, the deliberations had generated productive discussion and ultimately resulted in referendums and votes for change, including on sensitive issues such as abortion and marriage equality.<sup>44</sup>
- 3.43 Mr Art O’Leary, former Secretary to the Constitutional Convention, noted that the unique nature and apparent success of the Irish model had generated a high level of international attention:

There is worldwide interest in the Irish experience, because it does appear as if Ireland’s success in conducting these forums, which provide a safe and respectful environment in which people can have a conversation about sometimes divisive issues, has been interesting to other countries who are in a similar position.<sup>45</sup>

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<sup>42</sup> Dr Paul Kildea, *Committee Hansard*, Canberra, 20 September 2021, p. 7.

<sup>43</sup> The newDemocracy Foundation, *Submission 4*, p. 1.

<sup>44</sup> See *Committee Hansard*, Canberra, 2 November 2021, pages 3, 10.

<sup>45</sup> Mr Art O’Leary, Former Secretary, Constitutional Convention of Ireland, *Committee Hansard*, Canberra, 2 November 2021, p. 1.

- 3.44 Mr O’Leary explained that the Irish Convention on the Constitution held 12 weekend-long meetings over a 14-month period between January 2013 and February 2014, to consider ten issues referred to it by a resolution of both Houses of the Irish Oireachtas (Parliament). The Convention comprised 100 members - 66 randomly-selected citizens, 33 parliamentarians (nominated by political parties in proportion to their representation in parliament) and an independent Chair.<sup>46</sup>
- 3.45 The Convention made 38 recommendations, 18 of which would require the Irish electorate to decide by referendums. To date three referendums have been held on matters proposed by the Convention, two of which resulted in constitutional change. Other matters remain under consideration.<sup>47</sup>
- 3.46 Dr Catherine Day, Chair of the 2019-21 Citizens’ Assembly on Gender Equality, and its Secretary Dr Mary-Clare O’Sullivan, spoke about the subsequent Citizens’ Assemblies that emerged from the Convention. Pursuant to a further resolution of both Houses of Parliament in July 2016, the Irish Government established the first Assembly which was held from 2016-18 and considered five issues. That Assembly has so far led to one constitutional referendum, in which change was again approved by the Irish people. The second Citizens’ Assembly, on the topic of Gender Equality, was convened in 2019, again upon a resolution of both Houses of Parliament. Its report was presented in July 2021 and remains under consideration by the Government and Parliament.<sup>48</sup>
- 3.47 While operating in a similar way to the Constitutional Convention, the Citizens’ Assemblies were notably distinct in that there were no parliamentary members: all 99 members of each Assembly were randomly-selected members of the public, presided over by an appointed Chair.<sup>49</sup>
- 3.48 Dr Day advised the Committee that proposals for four future citizens’ assemblies are currently ‘in the pipeline’ in Ireland.<sup>50</sup>

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<sup>46</sup> Mr Art O’Leary, Former Secretary, Constitutional Convention of Ireland, *Committee Hansard*, Canberra, 2 November 2021, p. 1; see also [www.constitutionalconvention.ie](http://www.constitutionalconvention.ie).

<sup>47</sup> [www.constitutionalconvention.ie](http://www.constitutionalconvention.ie); see also Mr Art O’Leary, Former Secretary, Constitutional Convention of Ireland, *Committee Hansard*, Canberra, 2 November 2021, p. 6.

<sup>48</sup> See *Committee Hansard*, Canberra, 2 November 2021, pages 2-3, 6-7.

<sup>49</sup> See [www.citizensassembly.ie](http://www.citizensassembly.ie).

<sup>50</sup> Dr Catherine Day, Former Chair, Citizens’ Assembly on Gender Equality, *Committee Hansard*, Canberra, 2 November 2021, p. 7.

- 3.49 While the recommendations of the Convention and Assemblies are not binding on parliament or government, they are obliged to consider and respond to the reports and recommendations of the processes, and Dr Day commented that ‘in a way, the parliament is cutting a stick to beat its own back. It’s not bound by any of the recommendations, but it would be very difficult now to put them all in the bin’.<sup>51</sup>
- 3.50 The structure of the sessions, and use of facilitators, advisors and advocates, were highlighted as important and carefully-designed elements of the processes. Mr O’Leary commented on the need to bridge the ‘gap in knowledge’ between parliamentarians and public representatives at the Convention, particularly on more technical issues such as reform of the electoral system.<sup>52</sup> Independent facilitators and note-takers were engaged to assist and record the small-group discussions, and to help ensure that all voices were heard.<sup>53</sup>
- 3.51 Another point made was that identifying and articulating the issues for discussion was crucial. Both Dr Day and Mr O’Leary believed that citizens’ deliberation processes should be triggered by issues needing consideration, rather than scheduled at regular intervals. Mr O’Leary commented that ‘[t]he issue is everything...The setting up of a citizens’ assembly should always be driven by the issue which needs to be considered’.<sup>54</sup>
- 3.52 Dr Day believed that a regular convention or assembly could ‘become too routine’:

As I said, I think the choice of topic is very important. There may not be a topic on which it's appropriate to get the citizens involved on a regular basis. That's my own feeling. I think there is a danger in Ireland of it becoming a device... 'Let's have a citizens' assembly.' But I think that would devalue the currency. For me, it should really be an important issue on which the citizens

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<sup>51</sup> Dr Catherine Day, Former Chair, Citizens’ Assembly on Gender Equality, *Committee Hansard*, Canberra, 2 November 2021, p. 6.

<sup>52</sup> Mr Art O’Leary, Former Secretary, Constitutional Convention of Ireland, *Committee Hansard*, Canberra, 2 November 2021, pages 2, 9.

<sup>53</sup> See *Committee Hansard*, Canberra, 2 November 2021, p. 5.

<sup>54</sup> Mr Art O’Leary, Former Secretary, Constitutional Convention of Ireland, *Committee Hansard*, Canberra, 2 November 2021, p. 10.

want to be engaged and need to have a channel. So I would say the regularity would probably kill it or reduce it to something much more mundane.<sup>55</sup>

3.53 Dr O’Sullivan agreed and stated that:

I think that, in some way as well, the participants need to feel special on some level. If they feel as if they’re a conveyer belt going through a very routine process, it may become less attractive to participate.<sup>56</sup>

3.54 While strongly endorsing the Irish model, the newDemocracy Foundation proposed additional elements that should be adopted in Australia, including convening citizens’ assemblies at the state level, and feeding them up into a national conversation, in recognition of the ‘unique federal nature of Australia’s constitutional amendment process’.<sup>57</sup>

### *The Uluru model*

3.55 Professor Megan Davis told the Committee that the ‘Uluru dialogues’ process, culminating in a constitutional convention held at Uluru in 2017, was ‘probably the most recent Australian process on constitutional reform’ and demonstrated the success of a different model, operating within smaller communities and excluding political and other ‘elite’ representatives.<sup>58</sup>

3.56 The process consisted of a series of 12 regional dialogues in communities around Australia. Each dialogue involved an average of 100 Aboriginal and Torres Strait Islander delegates, including representatives of traditional owner groups and community organisations. The delegates were asked to consider, assess and prioritise reform proposals according to the views of their region. The outcomes of the dialogues were then brought together at a National Constitutional Convention at Uluru in order to achieve a consensus position on the form that the constitutional recognition of Indigenous Australians should take.<sup>59</sup>

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<sup>55</sup> Dr Catherine Day, Former Chair, Citizens’ Assembly on Gender Equality, *Committee Hansard*, Canberra, 2 November 2021, p. 10.

<sup>56</sup> Dr Mary-Clare O’Sullivan, Former Secretary, Citizens’ Assembly on Gender Equality, *Committee Hansard*, Canberra, 2 November 2021, p. 10.

<sup>57</sup> The newDemocracy Foundation, *Submission 4*, p. 3.

<sup>58</sup> Professor Megan Davis, *Committee Hansard*, Canberra, 20 September 2021, pages 25-26.

<sup>59</sup> Referendum Council, *Final Report of the Referendum Council*, June 2017, pages 10-11.

3.57 Professor Davis described the consultations:

Our experience was we ran a deliberative dialogue process at a national constitutional convention for First Nations people that came off the back, as you know, of about seven years of commitment to constitutional recognition. We ran it in a way that we excluded all what you would call, in a sociological sense, elites from the room... no politicians were allowed in. There were no national congress, no rep bodies. No people who work for Aboriginal medical services or health services who are on huge salaries could attend the dialogue; it had to be voiceless people. It was deliberately crafted in a way that it was not elites; it was the people who never get to have a say...

I think the Uluru dialogues are an example of very good democratic innovation in Australia. We ran this convention that came up with consensus at the end... I wanted to make the point that it's not rocket science in that if you know your community, you can talk to your community... we did exclude the bureaucrats from the meeting so people would feel safe, that they could say things and not worry about the implications for their funding et cetera, and we provided a safe space. We then drew upon all of the experience that does exist in Australia...<sup>60</sup>

3.58 In contrast to the Irish model, Professor Davis regarded it as important that external facilitators not be involved:

I think one of the things we did really well... was that we didn't allow facilitators, so all of the people who led the conversations were local people who knew everybody by name. They knew where they worked and lived; they knew who their families were. It was done in a fashion where people felt safe to roll up their sleeves and engage in something... 'Right. Let's imagine what the future of Australia could look like, and we'll go through this process'.<sup>61</sup>

3.59 Others also saw the example of the Uluru process as a good one to inform future constitutional conventions in Australia.<sup>62</sup> Professor Williams, for example, said that:

I think that the Uluru process is a really good example of... a very successful ground-up process leading to a national convention. It also met my

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<sup>60</sup> Professor Megan Davis, *Committee Hansard*, Canberra, 20 September 2021, p. 25.

<sup>61</sup> Professor Megan Davis, *Committee Hansard*, Canberra, 20 September 2021, pages 25-26.

<sup>62</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 7; Mr Glenn Barnes, Joint Chair, Citizens for Democratic Renewal, *Committee Hansard*, Canberra, 20 September 2021, p. 12; Ms Sarah Brasch, National Convenor, Women for an Australian Republic, *Committee Hansard*, Canberra, 20 September 2021, p. 21.

experience: often you go out into communities and they are extremely articulate, extremely interested and often really frustrated nobody has listened to them about this issue, and they want that opportunity. If we were to have the half-generation convention, I actually think it would follow a similar process. You wouldn't just have the one set piece; you'd work it up. You might work it up from school conventions. You'd also have community conventions, maybe based on local government areas, and that would generate enormous grassroots energy and momentum towards a national process.<sup>63</sup>

- 3.60 In its submission, AGD drew attention to the ongoing Government-led process established following the Uluru dialogues. AGD described its work with the National Indigenous Australians Agency (NIAA) to design an Indigenous Voice to Parliament through 'high quality and respectful engagement processes' with Aboriginal and Torres Strait Islander people.<sup>64</sup>

Since late 2019, 3 co-design groups, with 52 members and majority Aboriginal and Torres Strait Islander membership, have engaged in a robust, deliberative and consultative process, to develop proposals for a National Voice and Local and Regional Voices. Through this process, Aboriginal and Torres Strait Islander people have continued to drive decision making about the Indigenous Voice.<sup>65</sup>

- 3.61 NIAA advised that the process was one of 'place-based engagement' adapted to each community's needs and aspirations, rather than a 'one size fits all' model, and stressed the importance of respectful partnerships, building rapport and cultural safety to empower communities and ensure meaningful engagement and participation.<sup>66</sup>

## **A parliamentary committee**

- 3.62 During the Committee's Constitutional Roundtable in November 2019, consideration of one particular proposal for change (fixed four-year parliamentary terms) led into more general discussion about whether a joint parliamentary committee would be a useful vehicle to consider constitutional reform issues, and to inquire into and report to Parliament on proposals for amendment.

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<sup>63</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 7.

<sup>64</sup> Attorney-General's Department, *Submission 12*, p. [4].

<sup>65</sup> Attorney-General's Department, *Submission 12*, p. [5].

<sup>66</sup> Attorney-General's Department, *Submission 12*, p. [5].

- 3.63 As noted above, a Joint Standing Committee on Constitutional Review existed in the Australian Parliament from 1956-1959.<sup>67</sup> In 1999, a Joint Select Committee on the Republic Referendum was established, specifically to examine and report on the bills before Parliament to facilitate the republic referendum that year.<sup>68</sup> In more recent years, select or standing parliamentary committees have been used from time to time to examine specific constitutional matters.<sup>69</sup>
- 3.64 There has, however, been limited consideration of constitutional reform by the existing House and Senate committees with coverage of constitutional affairs, and there is presently no joint committee dedicated to considering constitutional review or related matters, despite the relevance of both Houses in any process of constitutional change.
- 3.65 During this Committee's 2019 Roundtable, Professor Williams spoke about the possible role for a joint parliamentary committee in more systematic constitutional review:

I think things are at a very low ebb, in terms of the [constitutional] conversation generally, and we need to break out of that. One obvious way would be the joint select committee, as this parliament did in 1959, which looked at these issues more holistically, but again with very high levels of community input. It's either that or we need a separate inquiry process...

...you could have a joint standing committee. I do see the merit in a standing committee, because these are obviously ongoing issues that need to be

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<sup>67</sup> It is also noted that the 1927-29 Royal Commission on the Constitution was established after the parties were unable to agree on the composition of a joint parliamentary committee to undertake that work. See Professor Cheryl Saunders, *The Parliament as Partner: A Century of Constitutional Review*, Parliamentary Library Research Paper No. 3 2000-01, August 2000, p. 15.

<sup>68</sup> Joint Select Committee on the Republic Referendum, *Advisory Report on: Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999*, August 1999, p. x (terms of reference).

<sup>69</sup> See, for example: Joint Select Committee on Constitutional Recognition of Local Government, *Final report on the majority finding of the Expert Panel on Constitutional Recognition of Local Government: the case for financial recognition, the likelihood of success and lessons from the history of constitutional referenda*, March 2013; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 2015, *Final Report*, June 2015; Joint Standing Committee on Electoral Matters, *Excluded: the impact of section 44 on Australian democracy*, May 2018; Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Final Report*, November 2018.



resolved and one of the problems is that there is no regular way of engaging with these matters.<sup>70</sup>

3.66 In the same discussion, Professor Cheryl Saunders was conditionally supportive of the idea:

So, if you were to think of an institutional mechanism—of course a joint standing committee of the parliament on the Constitution is probably a good idea in its own right—it needs to be one that can actually engage with people and not just be talking heads talking down to them, trying to persuade them to vote for things that you want to vote for at the Commonwealth level.<sup>71</sup>

3.67 Professor Saunders has previously endorsed the idea of a joint standing committee ‘charged with making an annual or, at least, regular, report on the Constitution in accordance with agreed terms of reference’.<sup>72</sup>

3.68 In the present inquiry, Women for an Australian Republic supported the use of a parliamentary committee to receive and consider constitutional change proposals from states, territories, organisations, businesses and individuals on an ongoing basis, and similarly suggested the committee should report annually to Parliament on them.<sup>73</sup>

3.69 In his submission that state parliaments should be empowered to propose amendments to the Constitution, Associate Professor Luke Beck proposed the use of a new or existing federal parliamentary committee to receive such proposals from the state parliaments, inquire into them, and report to the federal Parliament.<sup>74</sup>

3.70 The Committee also noted advice that the resolutions establishing each of the Irish Citizens’ Assemblies required subsequent examination of their recommendations by a joint parliamentary committee, as the first step in parliamentary consideration towards ultimate referendums or other legislative or policy changes. Dr O’Sullivan commented that:

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<sup>70</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 7 November 2019, p. 23.

<sup>71</sup> Professor Cheryl Saunders, *Committee Hansard*, Canberra, 7 November 2019, p. 23.

<sup>72</sup> Professor Cheryl Saunders, *The Parliament as Partner: A Century of Constitutional Review*, Parliamentary Library Research Paper No. 3 2000-01, August 2000, p. iii.

<sup>73</sup> Women for an Australian Republic, *Submission 17*, p. 4; Ms Sarah Brasch, National Convenor, Women for an Australian Republic, *Committee Hansard*, Canberra, 20 September 2021, p. 22.

<sup>74</sup> Associate Professor Luke Beck, *Submission 7*, p. [1].

...a key thing is that it stops the recommendations sitting on the shelf if...there's a clear pathway for when the parliament or the politicians will get a chance to feed in and consider the recommendations.<sup>75</sup>

3.71 In addition to a mechanism for review including receiving proposals for constitutional reform and engaging the public in inquiries into them, it was suggested by contributors to the inquiry that such a committee could have other roles once a referendum process is in train. This is further discussed in Chapter 4.

## **Other forms of deliberative democracy**

3.72 Some participants in the inquiry also mentioned citizen initiated referenda, citizens' juries or related direct democracy models used overseas, including in certain US states and in Switzerland. While not necessarily (or only) related to constitutional change, such models were seen by some as contributing to greater public engagement and empowerment in Australia's democratic process.<sup>76</sup>

3.73 While overseas examples were often cited in this regard, it was also brought to the Committee's attention that direct consultation with the people on constitutional or other public policy issues is not unknown in Australia. In its submission, the newDemocracy Foundation cited research documenting more than 48 examples of 'deliberative engagement practice' in Australia at the local, state and federal levels. The Foundation submitted that '[t]his suggests a national capacity to learn from experience and institutionalise these processes'.<sup>77</sup>

3.74 Professor Flint from ACM advocated for a Swiss-style provision for citizens to initiate regular referendums, telling the Committee that:

If there's a people in the world who are closely involved in constitutional matters, it's the Swiss. Voting is voluntary in Switzerland, but every three

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<sup>75</sup> Dr Mary-Clare O'Sullivan, Secretary, Citizens' Assembly on Gender Equality, *Committee Hansard*, Canberra, 2 November 2021, p. 4.

<sup>76</sup> Citizens for Democratic Renewal, *Submission 8, Attachment 1*, p. [4]; Australians for Constitutional Monarchy, *Submission 14*, p. [13] and *Submission 14.1*; Women for an Australian Republic, *Submission 17*, p. 4; Mr Iain Walker, Executive Director, newDemocracy Foundation, *Committee Hansard*, Canberra, 20 September 2021, p. 12; Professor David Flint, National Convenor, Australians for Constitutional Monarchy, *Committee Hansard*, Canberra, 20 September 2021, p. 21; Professor Gabrielle Appleby, *Committee Hansard*, Canberra, 20 September 2021, p. 23.

<sup>77</sup> The newDemocracy Foundation, *Submission 4*, p. 3.

months they have to consider a series of referendum proposals both at the federal and the state level but also often at the local level. So they're quite attuned to this. That is because the Swiss constitution provides for a significant degree of direct democracy... I think that that habit of allowing people, by petition, to initiate referendums is very important, and it makes the system very much accountable to the people.<sup>78</sup>

- 3.75 It was noted that these initiatives sometimes had unforeseen consequences: Mr Walker from the newDemocracy Foundation said that the implementation of citizen initiated referenda in certain US states had 'turned into a disaster'.<sup>79</sup>
- 3.76 Women for an Australian Republic drew attention to the strong public response to the (voluntary) plebiscite on marriage equality in 2017, submitting that both referendums and plebiscites should occur more regularly to ascertain the people's views on important issues, as well as increasing voters' comfort with voting for change.<sup>80</sup> It proposed introducing a law and voter incentives to facilitate the increased use of plebiscites, as well as 'deliberative polls' which could be conducted electronically.<sup>81</sup>
- 3.77 On the other hand, the Samuel Griffith Society urged caution about the reach and use of citizen-led and informal processes, submitting that '[o]ther methods of community consultation, such as Citizen Juries and Deliberative Polling, are no substitute for a referendum', in which an equal vote is afforded to each eligible citizen.<sup>82</sup>
- 3.78 ACM did not support plebiscites in areas relating to constitutional change, advocating that on such matters 'the parliament should proceed directly to a referendum and not go through preceding plebiscites'.<sup>83</sup>

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<sup>78</sup> Professor David Flint, National Convenor, Australians for Constitutional Monarchy, *Committee Hansard*, Canberra, 20 September 2021, p. 24.

<sup>79</sup> Mr Iain Walker, Executive Director, newDemocracy Foundation, *Committee Hansard*, Canberra, 20 September 2021, p. 12.

<sup>80</sup> Women for an Australian Republic, *Submission 17*, p. 3.

<sup>81</sup> Women for an Australian Republic, *Submission 17*, pages 4-5 and *Submission 17: Attachment 1*, p. 5.

<sup>82</sup> The Samuel Griffith Society Inc., *Submission 11*, p. [3].

<sup>83</sup> Professor David Flint, National Convenor, Australians for Constitutional Monarchy, *Committee Hansard*, Canberra, 20 September 2021, p. 20.

## Committee comment

- 3.79 At its Constitutional Roundtable held in 2019, and again during this inquiry, the Committee was struck by the constitutional review *not* taking place in Australia currently, or in recent years. It was clear from the Committee's queries that there is no established process for review, and no department or agency of the Australian Government are mandated to proactively consider or coordinate any general processes of constitutional review or consultation.
- 3.80 Indeed, the Committee understands that essentially no work is presently done on these issues unless and until a particular proposal for change reaches the point of planning for a referendum. The Committee observes that such an approach allows neither the time nor the environment for more broad, calm and considered review of necessary or desirable constitutional changes.
- 3.81 In response to the evidence from the Attorney-General's Department that different constitutional processes 'won't necessarily lead to a yes vote' (see paragraph 3.16), the Committee notes that obtaining a yes vote is not necessarily the object of many of the recommendations made to this inquiry, which are instead focussed on ensuring Australia has a more informed and engaged citizenry.
- 3.82 The history of constitutional review in Australia is *ad hoc* and, it could be argued, has met with very limited success to date. The Constitution is the foundation document of Australia's Federation and nationhood. The Committee considers that it is important enough to warrant a process for ongoing review of whether the Constitution remains fit for purpose and, where relevant, consulting the public on possible change. This should occur independently from 'live' consideration of one particular issue or proposed referendum.
- 3.83 While the Committee considers that it is important to start the momentum on constitutional review and consultation, it is also concerned that any mechanism established for the purpose of constitutional review be meaningful, manageable and sustainable. In this regard, the Committee's view is that major constitutional consultations, such as conventions, should be important national events, not so regular or routine that they result in public fatigue or complacency.
- 3.84 The Committee instead sees merit in establishing a parliamentary joint standing committee with a broad mandate to review the Constitution and receive and examine proposals for constitutional change. This averts the

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possible expense and bureaucracy of a new mechanism; instead using a system that is established and proven, and allows parliamentarians to 'buy-in', engage and have confidence in the constitutional reform process on an ongoing basis.

- 3.85 The Committee considers that in addition to ongoing review and inquiry, an important function of a joint committee would be to consider and make recommendations in relation to any future constitutional convention in Australia, and then to examine the proposals arising from any convention.
- 3.86 In considering any future constitutional convention, the Committee suggests that there are valuable lessons that could be learned from both the Irish constitutional reform process and the Uluru dialogues. In relation to the latter, the Committee notes the importance of comprehensive consultations with First Nations communities specifically on any proposed constitutional changes relating to them.
- 3.87 The Committee also notes that any convention would serve dual purposes: not only substantive review of constitutional issues, but as a valuable opportunity to strengthen public awareness and engagement on the Constitution.
- 3.88 To ensure access to expertise and advice that may assist in performing its duties, the Committee suggests that the joint standing committee could appoint an independent constitutional expert (or a panel of such persons) to advise it and assist in its deliberations, as required. The Committee notes that similar independent adviser roles are presently employed by, for example, the Senate's legislative scrutiny committees.
- 3.89 The Committee is cognisant of the possibility that a referendum on Indigenous recognition in the near future may overlap with any broader work on constitutional review. The Committee recognises that this (or any other) 'live' referendum would take priority, and may need to be taken into consideration, particularly in relation to the planning and scheduling of any constitutional convention. At the same time the Committee is strongly of the view that the possibility of a specific referendum should not prevent or unnecessarily delay the implementation of a broader, systematic process of constitutional review, as recommended here.

## **Recommendation 4**

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**3.90 The Committee recommends that both Houses of the Australian Parliament establish a Joint Standing Committee on Constitutional Matters to operate from the commencement of the 47th Parliament.**

**The Joint Standing Committee should be:**

- **given a broad mandate to review the Constitution and consider constitutional matters, including receiving and inquiring into proposals for change**
- **able to self-refer constitutional matters for inquiry as well as receive references from either House of Parliament or a relevant Minister**
- **required to consider and make recommendations to Parliament relating to the establishment of, agenda for, and resulting report from, ongoing or one-off constitutional conventions that may be warranted generally or to consider specific reform proposals**
- **mandated to exercise functions relating to the referendum process once a referendum proposal is taken forward by Government and/or Parliament, as recommended below at Recommendation 9.**

## **Recommendation 5**

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**3.91 The Committee recommends that the Australian Government use the opportunity of any constitutional convention established on the recommendation of the Joint Standing Committee recommended at Recommendation 4 to conduct a program of public engagement, including through media and social media campaigns, to ensure broad public awareness of the convention and help increase public understanding of the Constitution.**

**This should form part of the enhanced public education effort recommended at Recommendation 3.**

## 4. Arrangements for the conduct of referendums

- 4.1 This chapter considers the arrangements for the conduct of referendums, which are set out in the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act). The chapter also considers evidence relating to the need for bodies or mechanisms to oversee certain aspects of the referendum process.
- 4.2 The chapter concludes with a brief discussion of evidence on section 128 of the Australian Constitution, which sets out the manner in which the Constitution itself may be altered.
- 4.3 While the chapter examines evidence received in the present inquiry, the Committee also notes that some of these issues were considered in detail in the House of Representatives Standing Committee on Legal and Constitutional Affairs' 2009 report, *A Time for Change: Yes/No?*—particularly provisions relating to the yes/no pamphlet and rules relating to the funding of referendum campaigns.<sup>1</sup> That Committee's recommendations and the Australian Government's responses are noted where relevant throughout the chapter.

### **The *Referendum (Machinery Provisions) Act 1984***

- 4.4 As noted in Chapter 1, section 128 of the Constitution sets out the manner in which the Constitution itself may be altered. It provides that a bill to amend the Constitution must be passed by an absolute majority of each House of

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<sup>1</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009.

the Parliament (or, in certain circumstances, one House of the Parliament on two separate occasions) before it is submitted to electors at a referendum. A majority of electors in a majority of states *and* a majority of all electors must then approve the proposed amendment. Evidence on these aspects of section 128 is discussed later in this chapter.

- 4.5 Section 128 also provides that the Parliament prescribe the procedures for the conduct of a referendum. Specifically, it states:

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes.

- 4.6 The Referendum Act provides the framework for the conduct of referendums. It sets out a range of mechanical matters, including the issuing of a writ for a referendum, voting procedures (including pre-poll and postal voting), and scrutiny of the results. It also sets out a process for informing electors about a referendum proposal.
- 4.7 Responsibility for the administration of the Referendum Act (together with electoral matters more generally) sits within the Finance portfolio. The Australian Electoral Commission, an independent statutory authority within the Finance portfolio, is the agency that conducts referendums.<sup>2</sup>
- 4.8 A representative of the Department of the Finance told the Committee that the Referendum Act is ‘fit for purpose’ in the sense that ‘the act exists and [a] referendum could be conducted’.<sup>3</sup> The Committee heard that the practice of successive governments has been to consider the Referendum Act in the context of a given referendum and pursue any appropriate amendments to the Act as required at the time; and that there was no proposal to change the Act at the present time.<sup>4</sup>
- 4.9 Mr Tom Rogers, the Electoral Commissioner, stated that the Australian Electoral Commission (AEC) would consider whether there are any legislative or other barriers to the proper conduct of a referendum, and

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<sup>2</sup> Department of Finance, *Submission 18*, p. 1; Attorney-General’s Department, *Submission 12*, p. [2].

<sup>3</sup> Mr Nathan Williamson, Deputy Secretary, Governance and Resource Management, Department of Finance, *Committee Hansard*, Canberra, 7 October 2021, p. 7.

<sup>4</sup> Mr Nathan Williamson, Deputy Secretary, Governance and Resource Management, Department of Finance, *Committee Hansard*, Canberra, 7 October 2021, pages 7-8. As an example, the Attorney-General’s Department (*Submission 12*, p. [7]) noted that the *Referendum Legislation Amendment Act 1999* amended the Referendum Act to remove limitations on Australian Government expenditure on public information activities during the 1999 referendum.



provide advice to the Government, when it appeared that a referendum was likely to proceed.<sup>5</sup>

- 4.10 The Department of Finance also advised that changes made to the *Commonwealth Electoral Act 1918* (Electoral Act) to modernise electoral processes are, where possible, mirrored in the Referendum Act.<sup>6</sup>
- 4.11 However, a strong theme in evidence to the inquiry was that aspects of the Referendum Act are outdated and should be modernised to support referendums in contemporary Australia. This view was articulated by Professor George Williams, who characterised the Referendum Act as being ‘in very poor shape’.<sup>7</sup>
- 4.12 Professor Williams explained that the framework for the conduct of referendums was adopted in 1912 and ‘has changed little since then’:
- It was designed at a time when voting was not compulsory, Australia’s population was far smaller and far less diverse, and the print media and public speeches were the dominant modes of communication. The system is showing its age and is not suited to contemporary Australia.<sup>8</sup>
- 4.13 Similarly, Dr Paul Kildea said there is ‘a clear need’ to update the Referendum Act ahead of any future referendum:
- Some features have not been revisited in over a century; others, for many decades.<sup>9</sup>
- 4.14 Dr Kildea argued it is ‘critical’ that changes to the Referendum Act be considered in advance of a referendum, ‘to ensure that they are careful, considered and made for principled rather than strategic reasons’.<sup>10</sup> Dr Kildea told the Committee that:
- Often we only wait until a referendum is right around the corner before we start thinking about constitutional review, processes and the rules that govern

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<sup>5</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 4.

<sup>6</sup> Department of Finance, *Submission 18*, p. 1; Mr Nathan Williamson, Deputy Secretary, Governance and Resource Management, Department of Finance, *Committee Hansard*, Canberra, 7 October 2021, p. 6.

<sup>7</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 10.

<sup>8</sup> Professor George Williams AO, *Submission 1*, p. 3.

<sup>9</sup> Dr Paul Kildea, *Submission 15*, p. 1.

<sup>10</sup> Dr Paul Kildea, *Submission 15*, p. 1.

referendums and how we vote in them... If we wait until a referendum is held, it's just too late.<sup>11</sup>

- 4.15 Professor Williams elaborated on this point, arguing that updating the Referendum Act should not be done 'on the eve of a campaign':

... as soon as you get to the campaign it's politicised and it's too difficult. You've got to do it before you've got a particular proposal being considered. This is why the local government referendum fell over in 2013. We had bipartisan support, but we left the referendum machinery changes to the eleventh hour, and bipartisanship broke down over amendments to the Referendum (Machinery Provisions) Act...<sup>12</sup>

- 4.16 Mr Rogers, the Electoral Commissioner, told the Committee that any changes to the Referendum Act should be enacted 'fairly early' ahead of a referendum.<sup>13</sup>

- 4.17 In making the case for specific changes to the Referendum Act, Professor Gabrielle Appleby argued that 'the rule book for conducting referendums must be in a fit and modern state'. She proposed two criteria against which the framework for the conduct of referendums should be assessed: 'that it meet the government's responsibility to provide citizens with objective and fair information on any proposed referendum' and 'that the Australian people are able to communicate freely and transparently with each other about that referendum proposal'.<sup>14</sup>

- 4.18 The remainder of this section examines evidence received on specific aspects of the Referendum Act.

## Setting a referendum question

- 4.19 A number of submitters considered the formulation of the question presented to voters at a referendum.

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<sup>11</sup> Dr Paul Kildea, *Committee Hansard*, Canberra, 20 September 2021, p. 2. See also: Ms Sarah Brasch, National Convenor, Women for an Australian Republic, *Committee Hansard*, Canberra, 20 September 2021, p. 27.

<sup>12</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 10.

<sup>13</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 1.

<sup>14</sup> Professor Gabrielle Appleby, *Committee Hansard*, Canberra, 20 September 2021, p. 19. See also: Indigenous Law Centre, University of New South Wales, *Submission 10*, pages 1-2.

- 4.20 Section 128 of the Constitution requires that for a constitutional amendment to be enacted, electors must first ‘approve the proposed law’. The Referendum Act achieves this in practice by requiring that the ballot paper at a referendum include the (long) title of the proposed law, which is determined by the Parliament, followed by the question: ‘Do you approve this proposed alteration?’<sup>15</sup>
- 4.21 Australians for Constitutional Monarchy (ACM) submitted that the referendum question should continue to ‘refer to the long title’ of the proposed law passed by the Parliament, which it said was consistent with section 128 of the Constitution.<sup>16</sup>
- 4.22 The Indigenous Law Centre (ILC) at the University of New South Wales submitted that:
- It is imperative that the question that is put on the ballot paper is easily understood, and captures the essential nature of the reform. It must be clear, simple and neutral.<sup>17</sup>
- 4.23 In the context of a possible referendum on the constitutional recognition of Indigenous Australians, the ILC noted that for some voters the referendum question will be the first time that they engage with the issue ‘at the level of decision-making seriousness’.<sup>18</sup>
- 4.24 Dr Kildea submitted that under the current arrangements, questions ‘tend to be technical and wordy, and can be confusing to voters’. Furthermore, he said, the use of the long title ‘encourages members of parliament to draft emotive or misleading Bill titles in the hope of swaying voters’:
- In 1988, for example, voters were asked to approve a proposed law ‘[t]o alter the Constitution to provide for fair and democratic parliamentary elections throughout Australia’, notwithstanding the fact that the actual proposal was aimed at achieving the relatively narrow objective of ‘one vote, one value’.<sup>19</sup>
- 4.25 The ILC recommended that the Referendum Act be amended to allow the referendum question to be put in the following form: ‘Are you in favour

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<sup>15</sup> *Referendum (Machinery Provisions) Act 1984*, s. 25; Schedule 1.

<sup>16</sup> Australians for Constitutional Monarchy, *Submission 14.1*, p. [1].

<sup>17</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 2.

<sup>18</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 2.

<sup>19</sup> Dr Paul Kildea, *Submission 15*, p. 2.

of [short description of proposed reform], as provided in the [short title of Act]?’ The short description of the proposed reform would be developed by a joint parliamentary committee, assisted by an independent panel, which would advise the committee on the ‘clarity and neutrality’ of proposed descriptions.<sup>20</sup>

- 4.26 Dr Kildea echoed this recommendation, but also suggested that a ‘short, factual description’ of the proposed constitutional amendment be included on the ballot paper. Like the ILC, Dr Kildea recommended that there be independent scrutiny of the referendum question and any other text on the ballot paper, while leaving the final say to the Parliament.<sup>21</sup>
- 4.27 Citizens for Democratic Renewal and Women for an Australian Republic both suggested that bodies other than Parliament be responsible for drafting referendum questions.<sup>22</sup> Evidence on the possibility of other bodies overseeing certain aspects of the referendum process is discussed later in this chapter.
- 4.28 In addition to the wording of the referendum question, some submitters considered the issue of which bodies should be able to initiate a referendum. This evidence is also discussed later in this chapter.

### **Information and education about a referendum question**

- 4.29 The primary way in which the Government must inform voters about a referendum question is through the production and distribution of a pamphlet containing arguments in favour of and against the proposed constitutional amendment, along with a statement showing the text of the proposed amendment (the ‘yes/no pamphlet’).<sup>23</sup>
- 4.30 Evidence on the yes/no pamphlet and other issues relating to public information and education is examined in this section.

#### ***Yes/no pamphlet***

- 4.31 The Referendum Act requires that the arguments in favour of and against the proposed constitutional amendment to be included in the yes/no

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<sup>20</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 3.

<sup>21</sup> Dr Paul Kildea, *Submission 15*, p. 2.

<sup>22</sup> Citizens for Democratic Renewal, *Submission 8*, p. 1; Women for an Australian Republic, *Submission 17.1*, p. 2.

<sup>23</sup> *Referendum (Machinery Provisions) Act 1984*, s. 11.

pamphlet be authorised by the majority of those members of the Parliament who voted for and against the amendment respectively. Each argument must consist of no more than 2,000 words and must be provided to the Electoral Commissioner within four weeks of the passage of the proposed law through the Parliament.<sup>24</sup>

- 4.32 The Electoral Commissioner must then post a printed copy of the yes/no pamphlet to each address on the electoral roll no later than 14 days before the voting day for the referendum.<sup>25</sup>
- 4.33 The Commissioner may also post the pamphlet to any other addresses that they consider appropriate, send the information contained in the pamphlet to any email addresses they consider appropriate, publish the information on the internet, and arrange for it to be translated into other languages or forms suitable for the visually impaired.<sup>26</sup>
- 4.34 In evidence to the inquiry, stakeholders examined issues including the structure and content of the pamphlet, oversight of information contained in the pamphlet, and distribution of the pamphlet.

#### *Structure, content and oversight*

- 4.35 Several submitters raised concerns about the educational and informational value of the pamphlet in its current form. For example, Professor Williams argued that the structure of the yes/no pamphlet encourages Australians to ‘divide into two camps – to be either for or against a proposal’:

This has value – it can force people to really think about an issue. But adversarial rhetoric should not be the only information the Commonwealth Government provides in the official pamphlet.<sup>27</sup>

- 4.36 Similarly, Dr Kildea submitted that, in its current form, the yes/no pamphlet is ‘a poor mechanism for educating voters’:

The arguments presented are often exaggerated and/or misleading. The maximum length of 2000 words is unnecessarily long and likely exceeds the attention span of many voters. Further, the law does not provide for the preparation of a statement setting out basic facts about the referendum

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<sup>24</sup> *Referendum (Machinery Provisions) Act 1984*, s. 11. When there are referendums on more than one proposed law on the same day, the arguments in relation to the proposed law shall be printed in one pamphlet and must consist of no more than 2,000 words on average.

<sup>25</sup> *Referendum (Machinery Provisions) Act 1984*, s. 11.

<sup>26</sup> *Referendum (Machinery Provisions) Act 1984*, s. 11.

<sup>27</sup> Professor George Williams AO, *Submission 1*, p. 4.

proposal. Overall, a fair-minded voter motivated to learn more about the referendum will find little of value in the official pamphlet.<sup>28</sup>

4.37 The ILC also argued that the current specifications ‘encourage a pamphlet that is unnecessarily long... and devoid of potentially useful explanatory material such as images’.<sup>29</sup>

4.38 Professor Williams recommended that the yes/no arguments be preceded by ‘neutral material’ including ‘a clear explanation of the proposal and a clear explanation of its context, including where it fits into the constitutional structure’.<sup>30</sup>

4.39 Along similar lines, several submitters recommended the inclusion of a neutral explanation of the parts of the Constitution affected by the proposed amendment, and the anticipated effect of the amendment.<sup>31</sup>

4.40 The ILC recommended that the pamphlet include an ‘objective summary of the arguments that have been made for and against the proposal’ of no more than 1,000 words, which could be supplemented with images.<sup>32</sup> The ILC also recommended the inclusion of a ‘citizens’ statement’ developed through a deliberative process, stating that:

This section allows the voters to hear about the reform from ‘ordinary people’, which can increase understanding as well as trust in the information provided.<sup>33</sup>

4.41 Women for an Australian Republic among others recommended that the yes/no pamphlet include a list of the members of the Parliament who voted for and against the proposed amendment.<sup>34</sup> It also suggested relaxing the requirement to include the text of the proposed amendment to allow for

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<sup>28</sup> Dr Paul Kildea, *Submission 15*, pages 5-6.

<sup>29</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, pages 4-5.

<sup>30</sup> Professor George Williams AO, *Submission 1*, p. 4.

<sup>31</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 5; Dr Paul Kildea, *Submission 15*, pages 6-7; Women for an Australian Republic, *Submission 17: Attachment 1*, pages 2-3.

<sup>32</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, pages 4-5.

<sup>33</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 5. See also: Professor George Williams AO, *Submission 1*, p. 4; Dr Paul Kildea, *Submission 15*, pages 6-7.

<sup>34</sup> Women for an Australian Republic, *Submission 17: Attachment 1*, p. 3; Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 6; Dr Paul Kildea, *Submission 15*, p. 7.

consequential amendments to be summarised rather than listed in their entirety.<sup>35</sup>

- 4.42 Some submitters contemplated whether oversight of some or all of the content contained in the yes/no pamphlet should be taken out of the hands of parliamentarians.<sup>36</sup> For example, Dr Kildea suggested that giving responsibility for drafting the yes/no arguments to other individuals or bodies ‘promises to foster more accuracy and balance’.<sup>37</sup> On the other hand, ACM submitted that the yes/no arguments should continue to be authorised by the parliamentarians for and against the proposed constitutional amendment, arguing that ‘it would be wrong on principle to hand this task to some unelected body’.<sup>38</sup>
- 4.43 Evidence on the possible roles for different bodies in the referendum process is discussed later in this chapter.
- 4.44 In its 2009 report, the House Standing Committee on Legal and Constitutional Affairs recommended that the Referendum Act be amended to remove the word limit for the yes/no arguments and to require all members of Parliament to authorise both yes and no arguments in the circumstance where a proposed constitutional amendment is passed unanimously.<sup>39</sup> However, the Government did not support these recommendations.<sup>40</sup>
- 4.45 The committee also recommended retaining the requirement that the yes/no arguments be authorised by parliamentarians<sup>41</sup>, noting that the involvement of other bodies or persons is not precluded.<sup>42</sup>

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<sup>35</sup> Women for an Australian Republic, *Submission 17: Attachment 1*, p. 3.

<sup>36</sup> For example, see: Professor George Williams AO, *Submission 1*, p. 4; Australian Republic Movement, *Submission 9*, p. 3; Indigenous Law Centre, University of New South Wales, *Submission 10*, pages 4-5; Women for an Australian Republic, *Submission 17: Attachment 1*, pages 2-3.

<sup>37</sup> Dr Paul Kildea, *Submission 15*, p. 6.

<sup>38</sup> Australians for Constitutional Monarchy, *Submission 14.1*, p. [1].

<sup>39</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendations 2, 5.

<sup>40</sup> Australian Government, *Australian Government response to the House of Representatives Standing Committee on Legal and Constitutional Affairs report: A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, October 2012, pages 1-2.

<sup>41</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendation 4.

## *Distribution*

4.46 As outlined above, the Referendum Act requires that the yes/no pamphlet be posted to households, and it also allows for the pamphlet to be sent via email. However, a common theme in evidence to the inquiry was that the information contained in the pamphlet should be required to be distributed in other ways, such as on the internet and via social media, and be made more accessible.

4.47 Evidence on the use of social media during a referendum campaign more generally is discussed in the following section.

4.48 Professor Williams argued the pamphlet needs to ‘move on’ from being a print-based publication:

Today, few Australians would expect to receive information on a referendum only in print form. Presenting information only in this form risks not engaging with a large segment of the population that now expects to receive information about public affairs online.<sup>43</sup>

4.49 Professor Williams recommended that the yes/no pamphlet and other information about a referendum be able to be distributed using ‘all available methods’, including radio, television, email and the internet:

The available methods of delivery should not be specified and narrowed. Just as communication technologies have changed over the last century, so may we expect them to continue to change in the future.<sup>44</sup>

4.50 The Law Council of Australia (LCA) said the rationale for maintaining the current arrangements was unclear, ‘as there is no basis to suggest that disseminating information only via printed material (as opposed to digital information dissemination) is more likely to increase understanding and interest in the process’.<sup>45</sup>

4.51 Similarly, Dr Kildea recommended that the pamphlet’s contents be disseminated via print and broadcast media and the internet. He suggested one approach, which would be consistent with the referendum procedures

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<sup>42</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, pages 57-58.

<sup>43</sup> Professor George Williams AO, *Submission 1*, pages 4-5. See also: Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 10.

<sup>44</sup> Professor George Williams AO, *Submission 1*, p. 5.

<sup>45</sup> Law Council of Australia, *Submission 16*, p. 3.



in Western Australia and Tasmania, was to 'authorise the Electoral Commissioner to bring the arguments to the notice of voters, thus leaving the choice of media to the Commissioner'.<sup>46</sup>

- 4.52 Dr Kildea also suggested allowing the pamphlet to be posted to households further in advance of the referendum, 'to give voters more time to consider the information and arguments'.<sup>47</sup> Professor Williams made a similar recommendation, stating that:

If referendums are to be successful, information, deliberation and citizen engagement need to be at the core of the referendum process from the beginning of the campaign.<sup>48</sup>

- 4.53 In addition to distribution of the pamphlet on the internet and in other media, the ILC recommended making it a requirement that the pamphlet be translated into 'key voter languages' and made available in a form suitable for the visually impaired.<sup>49</sup>
- 4.54 When asked about the case for re-examining how the yes/no pamphlet is distributed, Mr Rogers, the Electoral Commissioner, noted the cost involved and suggested that there could be scope for making information available in other formats. However, he also explained that the AEC's research indicated that the guide posted to households at every election was used by large numbers of Australians to inform them about the electoral process.<sup>50</sup>
- 4.55 In its 2009 report, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that the Referendum Act be amended to require that the pamphlet be delivered to every household,

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<sup>46</sup> Dr Paul Kildea, *Submission 15*, p. 7.

<sup>47</sup> Dr Paul Kildea, *Submission 15*, p. 7. See also: Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 5.

<sup>48</sup> Professor George Williams AO, *Submission 1*, p. 5.

<sup>49</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 5. See also: Women for an Australian Republic, *Submission 17: Attachment 1*, p. 3.

<sup>50</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 7.

rather than every elector.<sup>51</sup> This recommendation was supported by the Government and implemented in 2013.<sup>52</sup>

4.56 In a submission to the present inquiry, ACM argued that this change should be reversed. It stated that:

Material addressed to 'the householder' or some similar vague addressee is likely to be thrown out unopened, especially in shared households.<sup>53</sup>

4.57 Professor David Flint, National Convenor of ACM, said that while the default position should be that the pamphlet is mailed to every elector, electors should be able to opt instead to receive it via email or to access it themselves.<sup>54</sup>

### *A neutral education campaign*

4.58 As outlined in the previous section, a number of submitters suggested the inclusion of neutral information about a proposed constitutional amendment in the yes/no pamphlet. In addition to this, some submitters advocated for a neutral public education campaign in a referendum.

4.59 The Committee notes that the Referendum Act currently restricts the Government from spending money on activities including a neutral public education campaign. Evidence on this point is discussed later in this chapter.

4.60 The Attorney-General's Department explained that the 1999 referendum involved a broad public education program to provide information about the referendum.<sup>55</sup> Speaking at the time, the then Attorney-General, the Hon. Daryl Williams MP, stated that:

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<sup>51</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendation 3.

<sup>52</sup> Australian Government, *Australian Government response to the House of Representatives Standing Committee on Legal and Constitutional Affairs report: A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, October 2012, p. 1; *Referendum (Machinery Provisions) Amendment Act 2013*.

<sup>53</sup> Australians for Constitutional Monarchy, *Submission 14*, p. [3].

<sup>54</sup> Professor David Flint, National Convenor, Australians for Constitutional Monarchy, *Committee Hansard*, Canberra, 20 September 2021, p. 20.

<sup>55</sup> Attorney-General's Department, *Submission 12*, p. [7].

In order to make an informed decision, the Australian people must have access to relevant information about our system of government and the proposal for change.<sup>56</sup>

4.61 He went on to say that the aim of the education program would, in part:

... ensure that balanced, factual information is made widely available to assist electors to understand the issues before they vote in the referendum.<sup>57</sup>

4.62 In a submission to the present inquiry, Dr Kildea characterised neutral education campaigns as ‘another useful tool for fostering informed voting’. Dr Kildea said that the experience of the campaign in 1999 was ‘generally a positive one’ and that:

Looking ahead, the priority for any neutral educational initiative should be to produce and circulate information that is balanced, accurate and, as much as is possible, coordinated with other official sources of information.<sup>58</sup>

4.63 Similarly, Professor Williams argued for the development and distribution of ‘neutral information about the referendum in a way that promotes community participation and enables Australians to cast an informed vote’.<sup>59</sup>

4.64 The newDemocracy Foundation referred favourably to a citizen-produced voter information kit used in Oregon and Switzerland, which it suggested could ‘help improve trust and the quality of information in the wider public conversation’ on the referendum issue.<sup>60</sup>

4.65 In its 2009 report, the House Standing Committee on Legal and Constitutional Affairs expressed its view that the yes/no pamphlets alone are ‘insufficient to adequately prepare voters to exercise their democratic right and responsibility’ in referendums.<sup>61</sup>

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<sup>56</sup> The Hon. Daryl Williams MP, Attorney-General, Referendum Legislation Amendment Bill 1999, Second Reading, *Hansard*, 11 March 1999, p. 3761.

<sup>57</sup> The Hon. Daryl Williams MP, Attorney-General, Referendum Legislation Amendment Bill 1999, Second Reading, *Hansard*, 11 March 1999, p. 3761.

<sup>58</sup> Dr Paul Kildea, *Submission 15*, p. 8.

<sup>59</sup> Professor George Williams AO, *Submission 1*, p. 3.

<sup>60</sup> newDemocracy Foundation, *Submission 4*, p. 3.

<sup>61</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, p. 59.

4.66 In addition to a national civics education program, the Committee recommended that the Referendum Act be amended to allow for spending on referendum education<sup>62</sup>, which could include ‘background and contextual material to aid in understanding the nature of the proposed changes and the effect of its success or defeat’.<sup>63</sup> The Government noted this recommendation, stating that it would consider any amendments to the Referendum Act ‘on a case by case basis’.<sup>64</sup>

### *Social media and misinformation*

4.67 As noted above, some submitters recommended amending the Referendum Act to facilitate information about a referendum question being distributed more widely on the internet and social media. Evidence to the inquiry also considered broader issues relating to social media and misinformation in the context of a referendum campaign.

4.68 Mr Rogers, the Electoral Commissioner, said that social media was something that the AEC was ‘dealing with and learning to deal with’. He went on to say that social media ‘will certainly be an issue at the next event and we’ll have to be alert to that’.<sup>65</sup>

4.69 Professor Williams told the Committee that:

I really fear that ... we are heading to the nation’s first social media referendum, yet we have legislation that does not mention a word about how to deal with the quite significant challenges that emerge from that. As I say, it was drafted pre radio, and the focus is upon this written pamphlet that goes out a week or so before the referendum. Really, that’s a pretty hopeless way of dealing with these issues sensibly.<sup>66</sup>

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<sup>62</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendations 6, 11.

<sup>63</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, p. 61.

<sup>64</sup> Australian Government, *Australian Government response to the House of Representatives Standing Committee on Legal and Constitutional Affairs report: A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, October 2012, p. 3.

<sup>65</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 3.

<sup>66</sup> Professor George Williams AO, *Committee Hansard*, Canberra, 20 September 2021, p. 10.

- 4.70 Professor Williams suggested that an independent panel (discussed later in this chapter) could have responsibility for ‘reviewing and reporting on the accuracy of factual claims’ made during a referendum.<sup>67</sup>
- 4.71 Women for an Australian Republic suggested the introduction of penalties for ‘misleading information or claims’ contained in arguments for and against constitutional changes, ‘including those spread through the media including social media’. It said that the platforms or publishers concerned should be required to remove such material and recommended the establishment of an independent complaints mechanism for this purpose.<sup>68</sup>
- 4.72 Dr Kildea suggested there should be consideration of the merits of introducing measures to ‘regulate the dissemination of misinformation’ in a referendum:

The law currently makes it unlawful to mislead voters as to the manner in which they cast their referendum ballot. However, it applies only to statements that might mislead a voter about the process of casting their vote. The question is whether some sanction should be introduced to penalise those who disseminate statements that misrepresent the substance of a referendum proposal.<sup>69</sup>

- 4.73 Dr Kildea suggested two possible approaches:

One possible approach would be to introduce a measure like section 113 of the *Electoral Act 1985* (SA). Under that provision, it is an offence to authorise, cause or permit the publication of an election advertisement by any means (including on radio or television) that ‘contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent’. The state’s Electoral Commissioner may request that such an advertisement be withdrawn and/or that a retraction be issued, and can seek a court order to support that request. Individuals (including opposition campaigners) can also request a withdrawal and/or retraction, provided that they can demonstrate standing.

... An alternative approach is taken in New Zealand. The law regulates the making of misleading statements during election campaigns, but only for the

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<sup>67</sup> Professor George Williams AO, *Submission 1*, p. 3.

<sup>68</sup> Women for an Australian Republic, *Submission 17*, p. 5; Women for an Australian Republic, *Submission 17.1*, p. 1.

<sup>69</sup> Dr Paul Kildea, *Submission 15*, p. 9.

two days preceding polling day. It is an offence within that period to make 'a statement of fact that the person knows is false in a material particular'.<sup>70</sup>

- 4.74 Mr Sean Burke, a member of ACM, supported using a range of platforms to reach people 'through their preferred means of communication', but said that information should be monitored for accuracy.<sup>71</sup>
- 4.75 More generally, the LCA argued that improved public awareness of the Constitution would address the risk of misinformation in relation to proposed constitutional changes.<sup>72</sup> A related point was made by Mr Sandy Biar, National Director and Chief Executive Officer of the Australian Republic Movement (ARM), who told the Committee that low levels of civic awareness 'increase the susceptibility of Australians to foreign disinformation campaigns'.<sup>73</sup>
- 4.76 Evidence on public awareness about the Constitution is discussed in detail in Chapter 2.
- 4.77 Mr Andrew Johnson, Chief Legal Officer at the AEC, explained that changes were made in 2018 to require that communications about referendum matter are authorised, consistent with the requirement in the Electoral Act:
- That's any matter which is likely to influence or any matter about the referendum. That would have to have an authorisation on it. The requirements, then, apply to social media, as well as all traditional forms of communications.<sup>74</sup>
- 4.78 Mr Johnson added that the authorisation requirement applies to paid advertising and communication by 'political entities, parties, candidates and other people who are spending money', but not to people 'just voicing an opinion on social media'.<sup>75</sup>

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<sup>70</sup> Dr Paul Kildea, *Submission 15*, p. 9.

<sup>71</sup> Mr Sean Burke, Member, Australians for Constitutional Monarchy, *Committee Hansard*, Canberra, 20 September 2021, p. 27.

<sup>72</sup> Law Council of Australia, *Submission 16*, p. 1.

<sup>73</sup> Mr Sandy Biar, National Director and Chief Executive Officer, Australian Republic Movement, *Committee Hansard*, Canberra, 20 September 2021, p. 19.

<sup>74</sup> Mr Andrew Johnson, Chief Legal Officer, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 2.

<sup>75</sup> Mr Andrew Johnson, Chief Legal Officer, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 2.

## Expenditure and donations in a referendum campaign

4.79 This section examines evidence received on public and private expenditure in referendum campaigns, as well as issues relating to donations to campaign organisations.

### *Public expenditure*

4.80 As noted above, section 11(4) of the Referendum Act limits the Government from spending money ‘in respect of the presentation of the argument in favour of, or the argument against, a proposed law’ to amend the Constitution, except in relation to certain activities. These include the preparation and distribution of the yes/no pamphlet and the provision by the AEC of other information about the proposed amendment and its effect.<sup>76</sup>

4.81 Following the 1988 decision of the High Court in *Reith v Morling*, the limitation contained in section 11(4) is understood to be quite broad.<sup>77</sup> The operation of section 11(4) was subsequently suspended for the 1999 referendum to allow for public education and the funding of the yes and no campaigns, and again for the proposed 2013 referendum on the recognition of local government, which ultimately did not proceed.<sup>78</sup>

4.82 Dr Kildea explained that the restriction was introduced in 1984 ‘to ensure neutrality in public expenditure’. However, Dr Kildea outlined what he saw as three shortcomings of the current arrangements:

First, they prevent the Commonwealth from spending money to promote referendum arguments via mass media outlets such as television, radio and newspapers, or through social media, even if it wishes to do so in an even-handed manner. They also preclude the federal government from funding Yes and No committees to undertake their own campaigns.

Second, section 11(4) impedes Commonwealth spending on genuine education campaigns. ... Third, the existing rule is selective in its application. Equivalent

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<sup>76</sup> *Referendum (Machinery Provisions) Act 1984*, s. 11(4).

<sup>77</sup> *Reith v Morling* (1988) 83 ALR 667. See also: House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, pages 15-20.

<sup>78</sup> *Referendum Legislation Amendment Act 1999*, s. 4; *Referendum (Machinery Provisions) Amendment Act 2013*, s. 4.

restrictions do not apply to expenditure by State and Territory governments, political parties, interest groups or individuals.<sup>79</sup>

4.83 Professor Williams was concerned about the implications of the bar:

Australia's history of referendums shows that this restriction can allow the public debate to be monopolised by groups that have an interest in opposing reform or, even, in confusing voters.<sup>80</sup>

4.84 Both Dr Kildea and Professor Williams recommended lifting the restriction on government expenditure. However, both also recommended that, if the Government spends money to support the yes and no campaigns at a referendum, it be required to spend equal amounts on each campaign.<sup>81</sup>

4.85 ACM noted that the Government provided equal funding for the yes and no campaigns in the 1999 referendum, and recommended that this arrangement be retained at a future referendum.<sup>82</sup>

4.86 The LCA also recommended abolishing the restriction on government expenditure. However, it argued that providing unequal amounts to the yes and no campaigns may be appropriate in some circumstances—it suggested that this should require parliamentary approval.<sup>83</sup>

4.87 Women for an Australian Republic suggested that the fact that section 11(4) of the Referendum Act was suspended for the 1999 referendum indicates that the provision does not meet contemporary requirements. It suggested leaving only general provisions relating to expenditure in the Referendum Act and providing for specific expenditure in legislation on a case-by-case basis for each referendum.<sup>84</sup>

4.88 Mr Rogers, the Electoral Commissioner, also said that the limitation on government spending was 'something that the parliament might care to look at':

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<sup>79</sup> Dr Paul Kildea, *Submission 15*, p. 3.

<sup>80</sup> Professor George Williams AO, *Submission 1*, p. 4.

<sup>81</sup> Dr Paul Kildea, *Submission 15*, p. 4; Professor George Williams AO, *Submission 1*, p. 4.

<sup>82</sup> Australians for Constitutional Monarchy, *Submission 14*, pages [7-9].

<sup>83</sup> Law Council of Australia, *Submission 16*, p. 3.

<sup>84</sup> Women for an Australian Republic, *Submission 17: Attachment 1*, p 4.



If that's going to be a permanent suspension of that part of the legislation it'll be useful to do that rather than just in the enabling legislation [for each referendum]. Time has certainly moved on.<sup>85</sup>

- 4.89 As noted above, in 2009 the House Standing Committee on Legal and Constitutional Affairs recommended amendments to remove the restriction on government expenditure, but this recommendation was not adopted.

### *Private expenditure*

- 4.90 The question of private expenditure in referendum campaigns was also considered in evidence to the inquiry.

- 4.91 Dr Kildea explained that currently there are 'no limits on the amount of money that individuals, campaign groups and political parties can spend on referendum campaigns'. While he said that past referendum campaigns had not seen significant amounts of private spending, he cautioned that this may not be the case in future campaigns:

The Australian Marriage Postal Survey ... demonstrates that in hard fought campaigns on salient issues, some individuals and groups are prepared to spend significant amounts on advertising. Such spending is of particular concern where it is one-sided, as this enables one side of the issue to flood the airwaves and drown out opposing arguments.<sup>86</sup>

- 4.92 Dr Kildea recommended that the Referendum Act be amended to 'impose spending limits on individuals, campaign groups and political parties', which he said would 'help to foster a level campaign playing field'. However, he also highlighted the importance of setting any spending limit at an appropriate level:

... if set too low, it can prevent a group from getting their message across in today's media environment; if set too high, the risk of excessive and one-sided spending remains.<sup>87</sup>

- 4.93 On the other hand, the ILC recommended against any limits on private expenditure in a referendum campaign:

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<sup>85</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, pages 2-3.

<sup>86</sup> Dr Paul Kildea, *Submission 15*, p. 4.

<sup>87</sup> Dr Paul Kildea, *Submission 15*, p. 4.

The exercise of popular sovereignty involved in a referendum depends on the free flow of communication by and to citizens in the run up to a referendum vote at the ballot box.<sup>88</sup>

4.94 The ILC continued:

The [referendum] process involves a much less predictable dynamic than conventional elections, with much greater scope for horizontal alliances between citizens, civil society organisations, faith groups, businesses, professional associations, sporting organisations and so on. The risk of spending caps is that they will impede or discourage this protean capacity for a referendum proposal to galvanise civic engagement and unite diverse groups within the Australian community.<sup>89</sup>

4.95 While the ILC argued that individuals and organisations should not be limited in their ability to campaign during a referendum, it also called for the disclosure of significant donations to campaign organisations.<sup>90</sup> This issue is discussed below.

### *Donations and campaign transparency*

4.96 A number of submitters considered the regulation of donations, including foreign donations, to referendum campaigns.

4.97 The Committee heard that there is currently no requirement for referendum campaigns to disclose information about donations, nor is there any limitation on foreign donations to referendum campaigns.<sup>91</sup>

4.98 As noted above, the ILC recommended the introduction of a disclosure regime for significant donations to campaign organisations, arguing that public transparency was important in a referendum. The ILC nominated a threshold of \$1,000, consistent with electoral laws in New South Wales and Queensland. The source and amount of any donations above this threshold would be required to be declared to the AEC within seven days of receipt, and this information would be published on the AEC's website in real time. Furthermore, the ILC suggested that:

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<sup>88</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 6.

<sup>89</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, pages 6-7.

<sup>90</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, pages 7-8.

<sup>91</sup> For example, see: Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 8; Dr Paul Kildea, *Submission 15*, p. 4.

Once the referendum campaign officially commences, any organisations undertaking referendum campaigning could also be required to disclose donations they have received within the preceding two years for the purpose of campaigning.<sup>92</sup>

4.99 Similarly, Dr Kildea recommended an obligation on campaign organisations to report in real time on the source and amount of their donations, saying that the current arrangements shield campaigners from scrutiny.<sup>93</sup>

4.100 Women for an Australian Republic said it did not oppose a requirement for campaign organisations to disclose donations during a defined campaign period, but raised concerns about a requirement to disclose donations received prior to the campaign, as was suggested by the ILC.<sup>94</sup>

4.101 Mr Iain Walker, Executive Director of the newDemocracy Foundation, expressed some scepticism about the effectiveness of regulating donations:

You're trying to catch a bucket of water with a sieve, trying to limit the influence of money on these campaigns. People will set up grassroots organisations or door-knocking organisations. It becomes, in our view, an almost impossible task.<sup>95</sup>

4.102 The ARM suggested that consideration could be given to the introduction of a register of political campaigners consistent with sections 287F and 287H of the Electoral Act.<sup>96</sup> Mr Biar from the ARM said that this measure would 'ensure there is transparency of who is attempting to influence the outcome of Australian referenda'.<sup>97</sup>

4.103 The ARM also addressed the question of foreign donations, recommending the introduction of a ban on foreign donations to entities campaigning for constitutional change, consistent with the restrictions introduced in the Electoral Act in 2019. The ARM submitted that:

Foreign influence campaigns should not be allowed to undermine Australian democracy or subversively attempt to amend Australia's

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<sup>92</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, pages 7-8.

<sup>93</sup> Dr Paul Kildea, *Submission 15*, p. 4.

<sup>94</sup> Women for an Australian Republic, *Submission 17.1*, p. 2.

<sup>95</sup> Mr Iain Walker, Executive Director, newDemocracy Foundation, *Committee Hansard*, Canberra, 20 September 2021, pages 16-17.

<sup>96</sup> Australian Republic Movement, *Submission 9*, p. 2.

<sup>97</sup> Mr Sandy Biar, National Director and Chief Executive Officer, Australian Republic Movement, *Committee Hansard*, Canberra, 20 September 2021, p. 19.

Constitution. Australians should have the confidence that those seeking to inform them about constitutional change represent Australians' interests, not those of a foreign nation.<sup>98</sup>

- 4.104 In response to this evidence from the ARM, ACM submitted that there was 'in fact only one instance of foreign intervention in the 1999 referendum' and that, accordingly, the cost and burden of a register of political campaigners would not be justified.<sup>99</sup>
- 4.105 Dr Kildea said that foreign donations to referendum campaigns should be banned, both to address the risk of foreign interference and to bring referendum and election laws into alignment.<sup>100</sup>
- 4.106 Mr Rogers, the Electoral Commissioner, highlighted the absence of a prohibition on the receipt of foreign donations in the Referendum Act as an obvious point of difference with the Electoral Act.<sup>101</sup> Mr Rogers said he was not aware of the reason for the discrepancy between the two acts:

I can't quite understand it myself. That would certainly be something, if we wished to, particularly in the modern era, to make the two acts more closely aligned. That would be an area for examination.<sup>102</sup>

## Arrangements for voting at a referendum

- 4.107 The Committee received some evidence on the current arrangements for voting at a referendum.
- 4.108 The ARM argued for the introduction of 'no excuse' eligibility criteria for postal voting (effectively enabling any voter to choose to vote by postal ballot), and for consideration to be given to the use of electronic voting in order to:

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<sup>98</sup> Australian Republic Movement, *Submission 9*, p. 2. See also: Mr Sandy Biar, National Director and Chief Executive Officer, Australian Republic Movement, *Committee Hansard*, Canberra, 20 September 2021, p. 19.

<sup>99</sup> Australians for Constitutional Monarchy, *Submission 14.2*, pages [1-2].

<sup>100</sup> Dr Paul Kildea, *Submission 15*, p. 4.

<sup>101</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 1.

<sup>102</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 8.

... increase participation, reduce the cost of referenda to taxpayers and decrease the time required to determine a result, so long as this can be done securely and maintain the integrity of the ballot process.<sup>103</sup>

4.109 Mr Biar from the ARM told the Committee:

... we believe every Australian should have the opportunity to participate in elections and referenda, and we should remove the barriers to that participation.<sup>104</sup>

4.110 Professor Graeme Orr argued that voting at a referendum should be voluntary, noting that there were 13 referendums between 1906 and 1919 before compulsory voting was introduced at the national level in the 1920s. Professor Orr outlined a number of arguments against compulsory voting at referendums, including that:

- the Constitution mainly concerns procedural issues about government institutions rather than fundamental social values
- compulsion invites ‘if in doubt, throw it out’ campaigns and/or purely partisan campaigns
- voluntary plebiscites have had high turnout by international standards, suggesting that where people understand the issue and its salience, they will vote in numbers to legitimate the outcome.<sup>105</sup>

4.111 Professor Orr suggested that requiring referendums to not coincide with elections (where compulsory voting would remain) could ‘help separate party-voting from the referendum issue and enhance focus on the yes/no cases’. He suggested that a combination of postal and electronic voting could be used to reduce cost.<sup>106</sup>

4.112 However, the LCA suggested that it may be ‘prudent’ to attach referendums to elections, and that cost savings could be redirected to awareness campaigns.<sup>107</sup>

4.113 On this issue, Mr Rogers, the Electoral Commissioner, told the Committee:

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<sup>103</sup> Australian Republic Movement, *Submission 9*, p. 2.

<sup>104</sup> Mr Sandy Biar, National Director and Chief Executive Officer, Australian Republic Movement, *Committee Hansard*, Canberra, 20 September 2021, pages 18-19.

<sup>105</sup> Professor Graeme Orr, *Submission 6*, pages 1-2.

<sup>106</sup> Professor Graeme Orr, *Submission 6*, p. 2.

<sup>107</sup> Law Council of Australia, *Submission 16*, p. 3. See also: Women for an Australian Republic, *Submission 17*, p. 3.

Certainly, if we run a referendum at the same time as an election, there'll absolutely be economies of scale, but it will still cost money. It will require extra people, staff training, a public awareness campaign and all of those sorts of issues, which end up costing money.<sup>108</sup>

- 4.114 ACM raised concerns with the AEC's practice of not including informal votes when counting the total number of electors voting. It argued that a clear reading of section 128 of the Constitution would require that both formal and informal votes are counted.<sup>109</sup>

## **Bodies to oversee aspects of the referendum process**

- 4.115 As noted above, the AEC is the agency responsible for conducting referendums. However, the Committee heard evidence about the possibility of other bodies overseeing certain aspects of the referendum process.

### **Referendum panel**

- 4.116 A number of submitters recommended the establishment of an independent referendum panel in the lead-up to each referendum.

- 4.117 Dr Kildea suggested the roles and responsibilities of the referendum panel could include:

... scrutiny of question setting, preparation of a neutral statement on the meaning and implications of the proposed reform, preparation of arguments for and against that reform, and oversight of Yes and No committees.<sup>110</sup>

- 4.118 Similar suggestions for the panel's roles and responsibilities were made by Professor Williams and the ILC.<sup>111</sup>

- 4.119 There was a common view that the referendum panel should be appointed by the Prime Minister in consultation with other parliamentary party leaders, and should include experts in constitutional law, public

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<sup>108</sup> Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 26 October 2021, p. 1.

<sup>109</sup> Australians for Constitutional Monarchy, *Submission 14*, pages [9-11].

<sup>110</sup> Dr Paul Kildea, *Submission 15*, p. 5.

<sup>111</sup> Professor George Williams AO, *Submission 1*, p. 3; Indigenous Law Centre, University of New South Wales, *Submission 10*, pages 3-4.

communication, a representative from the AEC, and community representatives.<sup>112</sup>

- 4.120 Professor Williams added that the states should be consulted on the panel's membership, and suggested the panel should include members who are 'widely respected and known to be impartial on the issues being debated in the referendum'.<sup>113</sup> Similarly, Dr Kildea said that the panel's composition 'should be carefully considered to ensure that it is trusted by political parties, campaigners and the general public'.<sup>114</sup>
- 4.121 It was noted in evidence that a referendum panel of this kind has been widely recommended. In particular, in the 2009 report of the House Standing Committee on Legal and Constitutional Affairs, the Committee recommended that amendments to the Referendum Act provide for the establishment of an independent, bipartisan referendum panel, appointed for each referendum.<sup>115</sup>
- 4.122 The Committee recommended the panel be comprised of no more than eight persons, including a representative of the AEC, and would have responsibility for:
- determining an appropriate and relevant information and communications strategy for the referendum, including identifying what education material should be distributed and the methods of distribution
  - determining the maximum word length for the yes/no arguments
  - making recommendations to the Government concerning the budget to be provided for a referendum campaign
  - determining the budget available to the yes/no campaigns, which should be funded equally.<sup>116</sup>
- 4.123 The Committee recommended that the Government determine the budget available to the referendum panel for education and campaign activities, and

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<sup>112</sup> Professor George Williams AO, *Submission 1*, p. 3; Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 3; Dr Paul Kildea, *Submission 15*, p. 5.

<sup>113</sup> Professor George Williams AO, *Submission 1*, p. 3.

<sup>114</sup> Dr Paul Kildea, *Submission 15*, p. 5.

<sup>115</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendation 7.

<sup>116</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendations 8-10, 13-14.

that the panel provide a report to the Parliament on its activities and expenditure at the conclusion of the referendum.<sup>117</sup>

- 4.124 In its response to that Committee's report, the Government noted the recommendation for the establishment of a referendum panel, and noted or otherwise did not support the recommendations relating to the proposed panel's membership and functions. It stated:

The Government notes there may be benefits in establishing a Referendum Panel for the purposes of promoting a particular referendum and educating voters on the referendum arguments but notes that this can be achieved on an as needed basis without the need to legislate for the general establishment of a panel.<sup>118</sup>

- 4.125 The Committee notes that a panel of experts was convened for the 1999 referendum to provide advice on the public education program. The panel was chaired by Sir Ninian Stephen and included Professor Geoffrey Blainey, Dr Colin Howard QC, Professor Cheryl Saunders and Dr John Hirst.<sup>119</sup>

### **Joint parliamentary committee**

- 4.126 The ILC recommended that a joint parliamentary committee be responsible for developing a short description of the proposed constitutional amendment to be included in the referendum question. Under this model, the committee would recommend the proposed wording for approval by the Parliament.<sup>120</sup>
- 4.127 The ILC suggested the committee should be assisted in its work by the referendum panel, which would advise the committee on the 'clarity and neutrality of proposed descriptions'.<sup>121</sup>

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<sup>117</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, December 2009, Recommendations 12, 15.

<sup>118</sup> Australian Government, *Australian Government response to the House of Representatives Standing Committee on Legal and Constitutional Affairs report: A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, October 2012, pages 2-3.

<sup>119</sup> Professor John Warhurst, 'From Constitutional Convention to Republic Referendum: A Guide to the Processes, the Issues and the Participants', *Research Paper 25 1998-99*, Parliament of Australia, Parliamentary Library, 29 June 1999.

<sup>120</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 3.

<sup>121</sup> Indigenous Law Centre, University of New South Wales, *Submission 10*, p. 3.



- 4.128 Evidence on the possible role for a joint parliamentary committee in the constitutional reform process more broadly is discussed in Chapter 3.

## Yes and no committees

- 4.129 A number of submitters referred to the yes and no campaign committees established in the 1999 republic referendum. The committees were drawn from delegates to the 1998 Constitutional Convention, and were each allocated \$7.5 million to make the respective arguments for and against the proposed constitutional amendment.<sup>122</sup>
- 4.130 Professor Williams recommended that the Referendum Act be amended to allow for such committees in future referendums. However, he also recommended that information and advocacy produced by the yes and no committees be subject to the oversight of the referendum panel, to ensure that statements of fact are not inaccurate.<sup>123</sup>
- 4.131 Women for an Australian Republic commented that the way in which the yes and no committees were constituted 'only served to intensify the adversarial nature' of the referendum process.<sup>124</sup>
- 4.132 The ARM argued that the Referendum Act should be amended to formalise the status of the yes/no committees, where these are established. In particular, it recommended that the yes/no committees be given access to electoral roll data and the list of postal vote applicants; be given the same status as registered political parties with regard to the appointment of scrutineers; and be responsible for authorising the material included in the yes/no pamphlet.<sup>125</sup>

## Section 128

- 4.133 In addition to evidence on arrangements for the conduct of referendums as set out in the Referendum Act, the Committee received some evidence on section 128 of the Constitution, which sets out the manner in which the Constitution may be altered.

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<sup>122</sup> Australian Electoral Commission, 'Public Information Campaign', [https://www.aec.gov.au/elections/referendums/1999\\_referendum\\_reports\\_statistics/Public\\_Information\\_Campaign.htm](https://www.aec.gov.au/elections/referendums/1999_referendum_reports_statistics/Public_Information_Campaign.htm).

<sup>123</sup> Professor George Williams AO, *Submission 1*, p. 5.

<sup>124</sup> Women for an Australian Republic, *Submission 17: Attachment 1*, p. 4.

<sup>125</sup> Australian Republic Movement, *Submission 9*, p. 3.

- 4.134 The Committee acknowledges that the extent of evidence on section 128 may have been limited as it did not call for evidence on specific proposals for constitutional change, including changes to section 128. Nevertheless, the Committee considers this evidence to be relevant to the overall theme of the inquiry, which concerns the processes for constitutional change.
- 4.135 Aspects of section 128 examined in evidence included the provisions that:
- a bill to amend the Constitution must be passed by an absolute majority of each House of the Parliament (although, in certain circumstances, a proposed amendment can proceed to a referendum if it is passed on two separate occasions by only one House of the Parliament)
  - a majority of electors in a majority of states *and* a majority of all electors (in electors in the territories) must approve the proposed amendment at a referendum – this requirement is sometimes referred to as a ‘double majority’.
- 4.136 Some submitters suggested that the ability to initiate a referendum should not be limited to the Australian Parliament. For example, Mr Stuart McRae referred to a paper published by the Constitutional Commission in 1987, which considered proposals for referendums to be initiated by states, a constitutional convention, or directly by electors. Reflecting on these alternative means of amending the Constitution, Mr McRae stated:
- ... it would improve our Constitution if the ability to initiate proposals for change were not limited to the Commonwealth. The Commonwealth is unlikely to initiate a proposal that, for instance, reduced its power in some fashion even if such a change is objectively a good idea.<sup>126</sup>
- 4.137 Similarly, ACM argued that the power to initiate referendums should be extended, proposing that a referendum be ‘initiated by a petition approved by 10 per cent of electors nationally and five percent in a majority of states’. Under their proposal, signatures on the petition could be obtained over the period of one year, and, in the event that the proposed amendment was not supported at a referendum, ‘no question in identical or substantively similar terms could be put again until ten years had elapsed’.<sup>127</sup>

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<sup>126</sup> Mr Stuart McRae, *Submission 5*, p. 2.

<sup>127</sup> Australians for Constitutional Monarchy, *Submission 14*, p. [13].

- 4.138 ACM also proposed that a referendum be initiated by any four houses of any state parliaments adopting identical resolutions over the period of one year.<sup>128</sup>
- 4.139 In making the case for these changes, Professor Flint from ACM told the Committee that power to initiate referendums should not be a monopoly of the federal Parliament and that referendums should be ‘widespread’.<sup>129</sup>
- 4.140 Associate Professor Luke Beck outlined a mechanism whereby a committee of the Australian Parliament would be required to inquire into a report on alterations to the Constitution resolved upon by any house of a state parliament. Associate Professor Beck said the present arrangements ‘give insufficient respect to the States as constituent components of the Federation’.<sup>130</sup>
- 4.141 Other submitters addressed the requirement for a ‘double majority’ at a referendum. For example, Women for an Australian Republic stated that section 128 ‘makes the Constitution almost impossible to change and brings with it consistent failure’.<sup>131</sup> It argued that the requirement for a majority of votes in a majority of states should be removed, stating that:
- ... things have moved on since Federation when retention of States’ rights and roles was paramount, jealously and zealously guarded... We now have more than a [century’s] experience with the operation of the Senate as its members represent the interests of the States and Territories although this emphasis is now much diminished as the interests and cohesion of the nation have changed over time.<sup>132</sup>
- 4.142 The Attorney-General’s Department advised that the Joint Standing Committee on Constitutional Review noted the high benchmark required to achieve constitutional change in a 1958 report. In its report, the Committee recommended that the requirement for a majority of votes in a majority of states be lowered to a majority of votes in *at least half* of the states.<sup>133</sup>

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<sup>128</sup> Australians for Constitutional Monarchy, *Submission 14*, p. [13].

<sup>129</sup> Professor David Flint, National Convenor, Australians for Constitutional Monarchy, *Committee Hansard*, Canberra, 20 September 2021, p. 21.

<sup>130</sup> Associate Professor Luke Beck, *Submission 7*, p. 1.

<sup>131</sup> Women for an Australian Republic, *Submission 17*, p. 3.

<sup>132</sup> Women for an Australian Republic, *Submission 17*, p. 3.

<sup>133</sup> Attorney-General’s Department, *Submission 12*, p. [9].

4.143 Women for an Australian Republic also raised the possibility of section 128 being amended to allow for multiple propositions to be considered at referendums rather than simply the acceptance or rejection of single propositions.<sup>134</sup>

4.144 On the other hand, reflecting on the historical difficulty of constitutional change in Australia, Mr McRae argued that section 128 ‘has protected us from measures that may not have improved our Constitution’. Further, he said:

... section 128 works fairly well and the focus that should occupy the minds of those who want to change the Constitution should be on the real merit of any proposed change. If there is a meritorious proposal then a good argument to adopt it can be mounted.<sup>135</sup>

4.145 The Samuel Griffith Society argued that the stability of Australia’s constitutional framework has contributed to its ongoing prosperity, and that the process for constitutional amendment set out in section 128 is ‘both an effective means of altering the Constitution when appropriate, and an effective safeguard of the Constitution and its virtues’:

The framers of the Constitution conceived of the referendum process as a means by which the Australian people could be empowered to exercise a ‘veto’ over any proposed reform. Critically, the Constitution was deliberately designed to be relatively difficult to alter in order to afford maximum protection to the states.<sup>136</sup>

## Committee comment

4.146 From evidence to the inquiry, it is clear to the Committee that certain provisions in the Referendum Act are outdated and not suitable for a referendum in contemporary Australia. This conclusion is consistent with the findings of the House of Representatives Standing Committee on Legal and Constitutional Affairs in 2009, indicating that these are longstanding issues which have gone unresolved by successive governments.

4.147 The Committee acknowledges and accepts the need for some flexibility to make special arrangements for the conduct of particular referendums,

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<sup>134</sup> Women for an Australian Republic, *Submission 17: Attachment 1*, p. 6.

<sup>135</sup> Mr Stuart McRae, *Submission 5*, pages 2-4.

<sup>136</sup> Samuel Griffith Society, *Submission 11*, p. [2].

having regard to the timing of the referendum, the nature of the proposed constitutional amendment, and any other relevant matters.

- 4.148 However, the Committee's view is that the arrangements set out in the Referendum Act should, in so far as possible, reflect modern expectations for how a referendum should be conducted, and should be consistent with relevant Commonwealth electoral laws. They should also facilitate, rather than restrict, the fully informed participation of voters to the highest extent possible.
- 4.149 Furthermore, the Committee's strong view is that it is desirable to consider any changes to the Referendum Act outside of the context of an imminent referendum. This is important to minimise the risk that otherwise routine amendments to the Act will be politicised in the debate about the referendum question, and to assist in setting clear expectations about the conduct of the referendum.
- 4.150 As such, the Committee is concerned to see that the Referendum Act and the referendum process more generally is modernised well in advance of any referendum on the question of constitutional recognition of Indigenous Australians, which is expected to occur in the next term of Parliament, or indeed any other future referendum.
- 4.151 To this end, the Committee has identified three specific changes needed to the Referendum Act, outlined below.
- 4.152 First, given the central role of the yes/no pamphlet in the referendum process, the Committee supports reinstating the requirement that the printed yes/no pamphlet is sent to all electors, rather than to all households. However, the Committee also recognises that people's preferences for how they receive information continue to evolve. The Referendum Act should therefore not unnecessarily constrain the Electoral Commissioner from using whatever additional methods they consider will be most effective to distribute the pamphlet.

## **Recommendation 6**

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- 4.153 The Committee recommends that Section 11 of the *Referendum (Machinery Provisions) Act 1984* be amended to enable the Electoral Commissioner to distribute the yes/no pamphlet to all electors using any additional methods that the Electoral Commissioner considers appropriate.**

- 4.154 Second, the limitation on Australian government expenditure in a referendum campaign should be relaxed. The Committee considers that there are legitimate reasons for the Government to spend money in a referendum campaign outside the scope of what is currently permitted under section 11(4) of the Referendum Act, including to conduct a neutral education campaign and to support the arguments for and against the proposed constitutional amendment. These activities are consistent with modern expectations for how governments seek to inform the community about issues of public importance.
- 4.155 The Committee also notes that section 11(4) of the Referendum Act was suspended for the referendum in 1999 and the proposed referendum in 2013, indicating the view of successive governments that the limitation is too restrictive.

## **Recommendation 7**

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- 4.156 The Committee recommends that Section 11(4) of the *Referendum (Machinery Provisions) Act 1984* be amended to provide for the Australian Government to fund referendum education and promotion of the arguments for and against the referendum proposal.**
- 4.157 Third, there should be greater transparency in relation to donations in a referendum campaign, and a restriction on foreign donations. In this regard, the Committee considers that provisions for the regulation of donations in the Referendum Act should in so far as possible mirror those contained in the Commonwealth Electoral Act.

## **Recommendation 8**

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- 4.158 The Committee recommends that the *Referendum (Machinery Provisions) Act 1984* be amended, consistent with relevant provisions in Part XX of the *Commonwealth Electoral Act 1918*, to:**
- **prohibit referendum campaign organisations from receiving gifts or donations of \$100 or more from foreign donors**
  - **require referendum campaign organisations to disclose gifts or donations above a certain threshold.**
- 4.159 The Committee considers that these are relatively modest and straightforward amendments that would result in an improved set of

arrangements for the conduct of any future referendum. The Committee's view therefore is that the Government should seek to make these changes within the first six months of the next term of Parliament.

- 4.160 Further to these changes, the Committee has identified other aspects of the referendum process with scope for improvement. These include the form of the wording of the referendum question; the inclusion of neutral information in the yes/no pamphlet; the development and rollout of other neutral information and education activities; and the establishment of yes/no campaign committees. The Committee's view is that, while it is reasonable for these issues to be determined on a case-by-case basis at each referendum, there should be a clear and consistent process for doing so.
- 4.161 The Committee acknowledges the view among some submitters that an independent referendum panel should oversee some aspects of the referendum process. This is consistent with the 2009 recommendations of the House Standing Committee on Legal and Constitutional Affairs.
- 4.162 The Committee's view, however, is that a joint parliamentary committee is a more appropriate body to examine these issues and provide advice to the Parliament. In particular, it is the Committee's expectation that the joint standing committee of the kind recommended at Recommendation 4 would have a strong understanding of the development of the referendum proposal and the specific issues to be considered when determining the arrangements for the referendum. This committee could be assisted by expert advisors and representatives of the AEC as required.

## **Recommendation 9**

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- 4.163 The Committee recommends that an Independent Expert Panel be established to provide advice to the Joint Parliamentary Committee recommended at Recommendation 4 in the lead up to each referendum on aspects of the referendum process, including but not limited to:**
- **the form of the wording of the referendum question**
  - **the inclusion of neutral information in the yes/no pamphlet**
  - **other neutral information and education activities**
  - **establishment of yes/no committees.**

**The Joint Parliamentary Committee would consider the advice of the Panel before providing that advice to the Parliament, along with the considered views of the Committee.**

**The Committee recommends that the Panel be appointed by the Prime Minister in consultation with other parliamentary party leaders, and should include experts in constitutional law, public communication, representatives from the Australian Electoral Commission and/or other relevant government entities, and community representatives.**

**This process should be reflected through amendments to the *Referendum (Machinery Provisions) Act 1984* where appropriate.**

- 4.164 While the Committee has sought to make recommendations to modernise the Referendum Act, it also acknowledges that some aspects of the Act were not examined in detail in evidence to the inquiry. Recognising the fact that the Referendum Act has been updated in a piecemeal, *ad hoc* fashion, the Committee therefore suggests there would be benefit in a more comprehensive review to identify any further areas where the Act should be modernised and brought into line with Commonwealth electoral laws, in addition to those outlined above. One area the Committee suggests for consideration as part of any review is the need for stronger regulation of misinformation in referendum campaigns, including on social media.
- 4.165 The Committee emphasises, however, that any review of the Referendum Act should not delay the implementation of the recommendations included in this chapter, and that the Government should seek to modernise the referendum process as soon as practicable and well in advance of any future referendum.

## **Recommendation 10**

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- 4.166 **The Committee recommends that the Australian Government ensure that the *Referendum (Machinery Provisions) Act 1984* and the referendum process more generally is modernised well in advance of any referendum on the question of constitutional recognition of Indigenous Australians, which is expected to occur in the next term of Parliament, or any other future referendum.**
- 4.167 Lastly, the Committee received some evidence on section 128 of the Constitution, but notes that this issue was not considered in detail in the inquiry. The Committee is not convinced that there is an urgent need to



pursue changes to section 128. Instead, the Committee is more concerned to see greater awareness of and engagement with constitutional issues within the existing framework for constitutional change, as articulated in the recommendations contained throughout this report.

**Ms Sharon Claydon MP**  
**Acting Chair**  
**20 December 2021**



# Additional comments – Labor members

- 1.1 Awareness and understanding of our Constitution, referendums and constitutional matters is disturbingly low amongst Australian citizens – both school students and the public alike.
- 1.2 Labor welcomes recommendations in this report that are aimed to increase public literacy about Australia’s Constitution, our constitutional framework and Australia’s democratic system.
- 1.3 But this increase in awareness should be met with increased public engagement.
- 1.4 Labor Members note that the evidence the Committee received strongly supports the contention that holding regular Constitutional Conventions or other deliberative processes with citizen involvement, contributes to a better understanding of Australia’s constitutional framework.
- 1.5 This evidence is mapped out clearly in Chapter 3 of this report.
- 1.6 Labor Members are disappointed with the lack of recommendations to reflect this weight of evidence for increased public engagement.
- 1.7 Labor Members wish to put on record our preference for an additional recommendation that would see the Australian Government establish a process for regular Constitutional Conventions.
- 1.8 We note that in designing the Constitutional Convention process, the Government should have consideration of the Irish constitutional reform process and Australia’s First Nations Regional Dialogues and National Constitutional Convention (known as the ‘Uluru dialogues’).

- 1.9 Sadly, this additional recommendation for regular engagement with the Australian people on constitutional matters was rejected by Government Members of the Committee.
- 1.10 Regardless, Labor Members concur with the weight of evidence received by the Committee in support of regular Constitutional conventions.
- 1.11 Australia's Constitution was brought into being via a series of Constitutional Conventions, but the history of constitutional review in Australia is *ad hoc* and has met with very limited success to date. It is not unreasonable to suggest that Australia is seriously out-of-practice when it comes to Constitutional review.
- 1.12 As detailed in Chapters 2 and 3 of this report, 'inquiry participants were in broad agreement about the potential value of Constitutional Conventions not just as a mechanism for constitutional reform, but also to inspire community engagement and strengthen public awareness about the Constitution' (see paragraph 3.37, p. 35).
- 1.13 It is the view of Labor Members that we need to inspire Australians to engage with our Constitution – to understand its significance as the founding document, to seek reforms to ensure its relevance to contemporary Australia, and to debate how it might better shape our nation going forward. Moreover, this engagement should be on a regular basis – to help strengthen public knowledge and participation in all matters relating to our Constitution.
- 1.14 The Constitution is indeed our national birth certificate, but it is not a static historic document, set in stone. As John Quick and Robert Garran observed in their authoritative text on the Australian Constitution – a constitution which does not contain 'provision for its amendment with the development, growth, and expansion of the community which it is intended to govern, would be a most inadequate and imperfect deed of partnership'.
- 1.15 The Australian Constitution is necessarily a living document, that can be adapted to meet the needs of Australians now and in the future. That's what the original framers intended and that's the evolving nature of nationhood.

**Ms Sharon Claydon MP**  
**Deputy Chair**

**Ms Peta Murphy MP**  
**Member**

**Dr Mike Freeland MP**  
**Member**



# A. List of submissions

- 1 Professor George Williams AO
- 2 Dr Bede Harris
- 3 Mr Benjamin Cronshaw
- 4 The newDemocracy Foundation
- 5 Mr Stuart McRae
- 6 Professor Graeme Orr
- 7 Associate Professor Luke Beck
- 8 Citizens for Democratic Renewal
  - 8.1 Supplementary
- 9 Australian Republic Movement
- 10 Indigenous Law Centre, University of New South Wales
- 11 The Samuel Griffith Society Inc.
- 12 Attorney-General's Department
  - 12.1 Supplementary
- 13 Mr Andrew Oliver
- 14 Australians for Constitutional Monarchy
  - 14.1 Supplementary
  - 14.2 Supplementary
- 15 Dr Paul Kildea
- 16 Law Council of Australia
- 17 Women for an Australian Republic

- 17.1 Supplementary
- 18** Department of Finance
  - 18.1 Supplementary
- 19** Department of Education, Skills and Employment
- 20** Australian Electoral Commission
  - 20.1 Supplementary
- 21** Dr Carolyn Holbrook



## B. List of exhibits

- 1 David M. Farrell, Jane Suiter, and Clodagh Harris, '*Systematizing constitutional deliberation: the 2016–18 citizens' assembly in Ireland*', *Irish Political Studies*, 34:1, 113-123 (2019)
- 2 David M. Farrell *et al.*, *The Effects of Mixed Membership in a Deliberative Forum: The Irish Constitutional Convention of 2012–2014*, *Political Studies*, 68:1, 54-73 (2019)
- 3 Paul Kildea and Rodney Smith, *The Challenge of Informed Voting at Constitutional Referendums*, *UNSW Law Journal*, 39(1), 368-400 (2016)
- 4 Paul Kildea, *A Little More Conversation? Assessing the Capacity of Citizens to Deliberate About Constitutional Reform in Australia*, *Griffith Law Review* 22:2, 291-314 (2013)



# C. List of public hearings

## Monday, 20 September 2021 - Canberra

*Professor George Williams, Private capacity*

*Dr Bede Harris, Private capacity*

*Dr Paul Kildea, Private capacity*

*The newDemocracy Foundation*

- Mr Iain Walker, Executive Director

*Citizens for Democratic Renewal*

- Mr Glenn Barnes, Joint Chair

*Professor Gabrielle Appleby, Private capacity*

*Professor Megan Davis, Private capacity*

*Australian Republic Movement*

- Mr Sandy Biar, National Director and Chief Executive Officer

*Australians for Constitutional Monarchy*

- Professor David Flint, National Convenor
- Mr Sean Jacobs, Youth Ambassador
- Mr Daniel Lahood, Youth Ambassador
- Mr Sean Burke, Member

*Women for an Australian Republic*

- Ms Sarah Brasch, National Convenor

*Attorney-General's Department*

- Mr David Lewis, General Counsel (Constitutional), Office of Constitutional Law
- Mr Christopher Malone, Senior Legal Officer, Office of Constitutional Law

**Thursday, 7 October 2021 - Canberra***Department of Finance*

- Mr Nathan Williamson, Deputy Secretary, Governance and Resource Management
- Mr Scott Dilley, First Assistant Secretary, Governance, Governance and Resource Management
- Mr Sebastian Powney, Acting Assistant Secretary, Governance and Resource Management

*Department of Education, Skills and Employment*

- Dr Ros Baxter, Deputy Secretary, Schools and Youth Group
- Ms Shane Samuelson, Assistant Secretary, Youth and Student Learning Branch

**Tuesday, 26 October 2021 - Canberra***Australian Electoral Commission*

- Mr Tom Rogers, Electoral Commissioner
- Mr Jeff Pope APM, Deputy Electoral Commissioner
- Dr Kath Gleeson, Acting First Assistant Commissioner, Service Delivery Division
- Mr Andrew Johnson, Chief Legal Officer

**Tuesday, 2 November 2021 - Canberra***Irish Constitutional Convention and Citizens' Assemblies*

- Dr Catherine Day, Chair, Citizens' Assembly on Gender Equality
- Dr Mary-Clare O'Sullivan, Secretary, Citizens' Assembly on Gender Equality

- Mr Art O'Leary, Former Secretary, Constitutional Convention of Ireland