

Submission – Inquiry into constitutional reform and referendums

We thank the House of Representatives Standing Committee on Social Policy and Legal Affairs for this opportunity to contribute to the inquiry into constitutional reforms and referendums.

Our submission is focused on the second item in the Terms of Reference –

2. Suggestions for mechanisms to review the Australian Constitution and for community consultation on any proposed amendments before they are put to a referendum.

We recommend that Australia establish a *Convention on the Constitution*, like that held in Ireland between 2012 and 2014.

The Irish Parliament was able to advance significant constitutional reforms in controversial areas by using a new approach from which there are clear lessons for Australia.

Deliberative processes such as the Irish Constitutional Convention build public trust in decision-making by substantively and visibly involving everyday people in processes that tackle difficult trade-offs in a way that addresses polarisation and misinformation.

The wider public's distrust of politicians is a well-known phenomenon. It will reduce the likelihood that bi-partisan support is sufficient for a successful referendum. For this reason, 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.

Section A. Background: Constitutional reform and referendums in Ireland

In 2012, Ireland established a Convention on the Constitution by [resolution of both Houses of the Oireachtas](#). Its task was to consider several possible changes to the Constitution and make recommendations. The Resolution committed the Government to respond to each recommendation made by the Convention. It was comprised of 99 members, 66 of which were everyday Irish citizens chosen by democratic lottery, and 33 of which were Members of Parliament.

The Convention met over 18 months between 2012 and 2014. It discussed 10 issues in all. Several of its recommendations resulted in amendments to the Constitution made through referenda.

The Constitutional Convention used the model of deliberative democracy, in which citizens participate meaningfully in decision-making. This involves:

- A democratic lottery of ordinary citizens, who are provided with a range of information
- Expert presentations from speakers, some nominated by citizens themselves
- Facilitated small-group discussions to avoid groupthink and grandstanding
- Plenty of time to consider all the perspectives on an issue
- An emphasis on working to find common ground positions with people different to your 'bubble' rather than it being an individualised activity
- Recommendations fed into the political process that are written entirely by citizens

We ask the Committee to especially note that the Convention considered the provision for same-sex marriage which required amending the Constitution by referendum. The Convention recommended such an amendment and the subsequent referendum on this proposal passed on 22 May 2015 and the [Thirty-fourth Amendment of the Constitution \(Marriage Equality\) Act 2015](#) was signed into law on 29 August 2015. **This made Ireland the first country in the world to legislate for same-sex marriage in a traditionally socially conservative country through a process that required constitutional amendment by referendum.**

| Note: We have no policy view on any issue – these examples are used to demonstrate their clear political difficulty.

Arguably, the provision for same-sex marriage would not have been put to the Irish people during the socially conservative Fine Gael government's tenure if not for the clear recommendation of the Convention. Including representatives of all the parties in the deliberations (its 33 political members came from all the parties) ensured a high degree of cross-party consensus in favour of the process — both in favour of the referendum and in favour of the Convention.

In 2016, following the success of the Convention on the Constitution, both Houses of the Oireachtas established what is known as [The Citizens' Assembly](#). The Resolution asked the Citizens' Assembly to consider several matters including the Eighth Amendment of the Constitution which prohibited abortion.

The Assembly was composed of a chairperson, appointed by the government, and 99 ordinary citizens '[randomly selected so as to be broadly representative of Irish society](#)' in terms of age, gender, social class, and regional spread.

The assembly deliberated on the Eighth Amendment throughout five sessions from November 2016 until April 2017. Members were given information on the topic, heard from 25 experts and received 12,000 submissions from members of the public and interest groups.

The Assembly members overwhelmingly agreed that the constitutional provision on abortion was unfit for purpose and that its article should not be retained in full ([87% of members](#) agreed). The Assembly members also made a [series of recommendations](#) about what the legislation should cover and about the term limits that should apply.

As per its terms of reference, the Assembly submitted its recommendations and [final report](#) to the Oireachtas in June 2017. The Assembly's findings were reviewed by the Joint Committee of both Houses of the Oireachtas, which agreed with the need to remove the article, but advocated a [simple repeal](#) (without inserting a new provision in the Constitution). The [final Referendum Bill](#), however, accorded with the 'repeal and replace' recommendations made by the Assembly.

The Citizens' Assembly results initially faced criticism. Some commentators felt that they didn't represent the views of the public. [Opinion polls](#) at the time certainly showed a different picture. An Irish Times/Ipsos MRBI poll in May 2017 found just 23% of the public in favour of legalising abortion in all circumstances. However, once the public had had a chance to consider the matter more deeply during the referendum campaign, the results were strikingly similar to that of the Assembly. In the Assembly 64% voted in favour of "terminations without restrictions". In the referendum, 66.4% voted in favour of repealing the eighth amendment, effectively legalising abortion in Ireland.

That the referendum result so closely reflects that of the Citizens' Assembly shows that the Assembly was more aligned with the national consciousness than some had thought.

Section B. What has been learned since the Convention on the Constitution and Citizens' Assemblies

The Convention and Assemblies were pioneering events in deliberative democracy. They showcased the capacity for everyday citizens to work together on complex and controversial subjects and find common

ground. The deliberative process ensured that a representative mix of people would publicly endorse and own a set of recommendations that they'd worked hard to develop. The fact they foreshadowed future support for proposals in the face of off-the-cuff commentary to the contrary is testament to their quality.

Since the Citizens' Assemblies on the Eighth Amendment and recently on Gender Equality, the field of deliberation has progressed quickly. There are additional elements that would feature for any future best practice pre-referendum deliberation in Australia. These include:

- The citizen production of a voter information kit, like that produced by citizens' for [Oregon's Citizens' Initiative Review](#) and for frequent referenda in [Switzerland](#). This would help improve trust and the quality of information in the wider public conversation on the issue.
- Consideration of the unique federal nature of Australia's constitutional amendment process would see separate Citizens' Assemblies feeding into a national conversation.

Section C. Why Consider Citizens' assemblies and Deliberative Democracy?

Across the globe, public authorities are increasingly using these representative deliberative processes to involve citizens more directly in solving some of the most pressing policy challenges. These processes give ideal amounts of time and information to a group of randomly selected everyday people and facilitate their deliberation on an issue that leads to finding common ground on a set of recommendations.

Australia has been a pioneering, global leader in the development of this practice. OECD research¹ documents more than 48 examples of deliberative engagement practice here in Australia matched only by Germany. This suggests a national capacity to learn from experience and institutionalise these processes. The Victorian Government recently included mandatory deliberative engagement practice for local councils in its [Local Government Act 2020](#) (s55, g). The Western Australian Government's Local Government Act Review Panel also recommended in its [final report](#) the "mandate [of] deliberative community engagement in the preparation of both Community Strategies and Council Plans." (s37, d, iv).

[Evidence collected by the OECD](#)² and existing research in the field of deliberative democracy points to five key reasons why representative deliberative processes can help lead to better public decisions and enhance trust:

1. **Better policy outcomes because deliberation results in considered public judgements rather than off-the-cuff public opinions.** Most public participation exercises are *not* designed to be representative or collaborative. Consequently, they can be adversarial – a chance to air grievances rather than find solutions or common ground. Deliberative processes create the spaces for learning, deliberation and the development of informed recommendations, which are of greater use to policy and decision-makers.
2. **Greater legitimacy to make hard choices.** These processes help policymakers to better understand public priorities, and the values and reasons behind them, and to identify where consensus is and is not feasible. Evidence suggests that they are particularly useful in situations where there is a need to overcome political deadlock or make difficult trade-off decisions.

¹ OECD (2020), *Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave*, OECD Publishing, Paris, <https://doi.org/10.1787/339306da-en>.

² Ibid.

3. **Enhance public trust in government and democratic institutions by giving citizens an effective role in public decision making.** People are more likely to trust a decision that has been influenced by the considered judgement of everyday people than one made solely by elected MPs.
4. **Make governance more inclusive by opening the door to a much more diverse group of people.** Deliberative processes, with their use of democratic lotteries and stratified sampling, bring in people proportionally to their presence in society, making the group visibly representative in terms of age, gender, disability, education and job type.
5. **Help counteract polarisation and disinformation.** Empirical research has shown that echo chambers that focus on culture, identity reaffirmation, and polarisation do not survive in deliberative conditions, even in groups of like-minded people.

Section D. Key Principles for Engagement

It is difficult for large groups of people to find agreement on complex decisions. The OECD recommends a set of *principles* that make group decision-making easier. These principles improve the deliberative quality of group work by creating the environment for the consideration of the broadest range of sources while giving participants time, an equal share of voice and authority.

These seven principles underpin the growing wave of deliberative processes around the globe:

1. **A clear remit:** A clear, plain-language challenge or question should be asked of the group. It should be a neutrally phrased question that explains the task, shares the problem and provides a strong platform for discussion about priorities and trade-offs. The question will determine the scope of the process, setting the boundaries for what the group is considering.
2. **Diverse information:** Participants should have access to a wide range of transparently sourced, relevant, and accessible evidence and expertise, and can request additional information. Citizens should spend extensive time asking questions and identifying sources **they** trust for the information they need.
3. **Democratic lottery:** A stratified random sample of the community should be recruited through a democratic lottery. Simple demographic filters (age, gender, education, location) can be used to help stratify this sample to reflect the entire population. Most engagement by government does not enable a representative cross-section of the community to be heard, instead, incentives to participate are often geared to those with the most acute interest. The combination of random selection and a meaningful opportunity to influence a decision attracts people from all walks of life.
4. **Adequate time:** These processes develop participants' thinking on a complex issue by giving them multiple opportunities to question experts, learn from one another and find agreement on trusted sources of information. As deliberation requires adequate time for participants to learn, weigh evidence, and develop collective recommendations, the more time they are provided, the more thorough their consideration of the issue.
5. **Influence:** It is important to be clear what impact the work of everyday citizens will have. The convening authority should publicly commit to responding to or acting on recommendations promptly. A meaningful opportunity to influence a decision must be demonstrated to participants before they commit their time.

6. **Dialogue and deliberation, not debate:** Group deliberation entails finding common ground; this requires careful and active listening, weighing and considering multiple perspectives, every participant having an opportunity to speak, a mix of formats, and *skilled facilitation*. The task for the group is to find common ground on answers to the question, this emphasises the avoidance of simple majorities and challenges them with finding where they can agree.
7. **A free response:** A group should not be asked merely to (critically) review a government or parliamentary reform proposal. Instead, group members should be given a 'blank page' to provide their own set of recommendations with a rationale and supporting evidence that emerges from their shared learning.

Section E. Recommendation: An Australian Convention on the Constitution

Australia should establish its own Convention on the Constitution and make use of deliberative democracy processes that ensure public trust and shared ownership of potential referendums.

Picture a year-long process held in every state and territory, leading to 150 everyday citizens chosen by democratic lottery and representative of all parts of Australia coming together in Canberra monthly for 18 months to find common ground about recommendations for constitutional reform. They would consider issues proposed to them by Parliament and hear from a wide range of expert speakers, some of which they would nominate themselves. Their work would provide recommendations they write alongside an information pack they compose for their fellow citizens to use when considering an issue up for referendum. It would be the considered voice of people from all walks of life exploring the pros and cons of constitutional changes.

In 2018, as Chair of the Joint Standing Committee on Electoral Matters, **Senator Linda Reynolds endorsed this approach in a public hearing into the Conduct of the 2016 federal election and matters related thereto:**

“In fact, we had a discussion on (citizens’ assemblies) yesterday—not in relation to this inquiry but in relation to the section 44 inquiry—because in the mind of the committee it’s becoming very clear that to deal with the section 44 issue will require constitutional amendment. And it is a very hard challenge for a group of politicians to prosecute the argument when people see that it’s just fixing our own paperwork. But we found that there are some very serious implications now for our democratic processes and elections. So, regarding the approach you’re talking about, we’re actually discussing how we could achieve public support for a referendum on this issue.” (Feb 2, 2018)
([Source](#))

There are many issues suited to public consideration by a Citizens’ Assembly on constitutional reform, including section 44 as suggested by Senator Reynolds, the Indigenous voice to Parliament, and the matter of independence and the Republic.

As Senator Reynolds identified, it’s a difficult challenge for politicians to advocate for changes to the constitution in the face of declining trust in politics and the political process. New and modern approaches will be required if Australia is to reform and renew its constitution.

These approaches will need to include everyday Australians throughout, to ensure the wider community can see people like them involved meaningfully in decisions that will impact generations to come. This will build trust in the process, but it will also tap into the latent knowledge and innovation within the Australian

population, ensuring that whatever reforms that do emerge are firmly Australian in their origin and suitability.

Having operated over 25 demonstration projects and with a two-year contract with the United Nations Democracy Fund to deliver demonstration projects in this field, newDemocracy is well placed to design, operate and oversee any trials the Committees wish to pursue.

We are happy to respond to questions and appreciate your time considering this paper.

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