The Constitution of Australia: Revisiting Reform

The Australian Constitution was one of the potential topics for reform highlighted by the Australian Law Reform Commission (ALRC) as part of the launch of Where next for law reform? — a national conversation about what the priorities for law reform should be over the next three to five years.¹ This conversation will inform a proposed three to five year programme of law reform projects that the ALRC will submit to the Attorney-General of Australia for consideration in mid to late 2019. The purpose of this paper is to lay the foundations for public discussion of the Constitution as a potential reform priority by introducing some contemporary constitutional debates and highlighting constitutional issues that have been encountered by the ALRC in the course of previous inquiries.

1. Introduction

The Australian Constitution constitutes the ‘invisible architecture’ of government in Australia. Its provisions govern the structure, functions, and powers of the three arms of government (the legislature, executive and judiciary), as well as the interaction between the States and Territories and the Commonwealth.

Law reform in Australia is subject to constitutional limits on, for example, the types of functions that may be performed by different bodies and the scope of Commonwealth legislative power. The ALRC must consider these constitutional limits when developing its recommendations for reform of different areas of law. Recommending reforms that exceed existing constitutional limits necessarily entails recommending amendment of the Constitution to make that reform possible.

It is generally recognised that the Constitution should not be viewed as a timeless document whose terms ought to be preserved exactly as they were drafted in the 1890s. A document drafted more than a century ago cannot be expected to adequately provide for changes in the circumstances of Australian society since that time. However, the Constitution cannot be amended or repealed by Parliament in the same way as ordinary statutes.

The special procedure that must be followed to amend the Constitution is contained in s 128. This section requires that a proposed constitutional amendment is first passed by an absolute majority of both houses of Parliament,² and is then put to eligible voters in a referendum. Successful constitutional amendment requires the amendment to be approved by a ‘double majority’ — that is, not only by a majority of voters within Australia, but also by a majority of voters within a majority of states.³

Achieving constitutional reform has been historically difficult. Only eight of the 44 referendum proposals that have been put to the Australian public since 1901 have been successful. The most recent (unsuccessful)

² An alternative pathway is also provided for where the amending law is passed by an absolute majority in one house, but not the other. If the amendment is passed by an absolute majority of the same house three months later, the amendment may progress to the referendum stage.
³ Amendments that would affect a particular state in specified ways must also be approved by a majority of voters in the affected state.
2. Contemporary Constitutional Issues

The Australian Constitution has consistently been the subject of prolific public debate. Constitutional issues underpin a broad range of public concerns, from the opaque process of judicial appointments, to the complicated dual citizenship prohibition under s 44 that has plagued federal parliament in recent years. Here we briefly canvass some examples of prominent constitutional debates currently underway in Australian society, to highlight the breadth of issues impacted by the limits of the Constitution, and the potential appetite for reform in Australian society. These are just a sample of the types of constitutional issues that may warrant further enquiry and reform.

Human Rights

Only a handful of rights are expressly guaranteed by the Constitution, including the right to vote, the right to trial by jury, and freedom of religion. The High Court has also ‘implied’ some rights into the constitution, on the basis that they are necessary prerequisites for the functioning of a ‘Constitution for a free society’. Examples of implied rights include the right to political communication, the right to a fair trial, and the right to not be detained other than by judicial order. Apart from this limited coverage, the Constitution makes no mention of many fundamental human rights guaranteed by international conventions such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, both of which Australia has ratified. While rights may also be set out in statute, some have argued that only constitutional reform can ensure that rights are adequately protected in Australia.

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4 The 1999 referendum asked whether Australia should become a republic.
8 Even these rights have limited application. For example, the right to vote is functionally redundant, in that it only applies to persons who acquired the right to vote before 1902 – that is, persons born before 1881. Others have been limited by the High Court, such as the right to trial by jury, which the High Court has held to only apply to indictable offences: see R v Archall & Roskruge [1928] 41 CLR 128, 22–23, and subsequent cases. See also George Williams and Daniel Reynolds, A Charter of Rights for Australia (UNSW Press, 2017) 50; Julie Debeljak, ‘Does Australia Need a Bill of Rights?’ in Paula Gerber and Melissa Castan (eds), Contemporary Perspectives on Human Rights Law in Australia (Thomson Reuters Lawbook Co, 2013) 39.
9 The Hon Lionel Murphy, former Attorney-General of the Whitlam Government and Justice of the High Court, quoted in Williams and Reynolds (2017) 60.
**Indigenous Recognition**

Indigenous advocates have called for a number of amendments to the Constitution. Indigenous peoples are not mentioned in the Constitution, but racial discrimination is still expressly permitted under s 51(xxvi) (the ‘race power’). The use of this power is inconsistent with the prohibitions contained in the *Racial Discrimination Act 1975* (Cth), the operation of which has at times been suspended by the Australian Government in order to use the race power. Critics have called for removal of the race power and constitutional entrenchment of the right to freedom from discrimination. Others have also called for constitutional reforms to recognise Indigenous peoples as the First Australians, and establish a Makarrata Commission and Indigenous Voice to Parliament. These amendments could ensure Indigenous consultation on legislation that affects Indigenous communities, and Indigenous supervision of a process of ‘agreement making’ and ‘truth telling’ between Aboriginal and Torres Strait Islander peoples and government. Finally, the High Court is currently considering a challenge to the Commonwealth Government’s position that an Aboriginal or Torres Strait Islander person without Australian citizenship is an ‘alien’ under the Constitution, for the purposes of mandatory deportation laws.

**Taxation**

The constitutional powers granted to the Commonwealth, together with evolving Commonwealth practice has led to vertical fiscal imbalance between the Commonwealth and State governments. While the States retain primary responsibility for service delivery, they are unable to raise sufficient revenue to provide services and instead rely on tied and untied grants from the Commonwealth. The Commonwealth Government raises more revenue than is necessary to service Commonwealth spending responsibilities and

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14 See generally Diana Perche, ‘Ten years on, it’s time we learned the lessons from the failed Northern Territory Intervention’ (The Conversation, 26 June 2017) theconversation.com.


16 In a current example, the race power was used by the Howard Government to implement the Northern Territory National Emergency Response (or NT Intervention), a package of changes to welfare, law enforcement, and land tenure rules, among others, affecting 73 indigenous communities. The enacting legislation suspended the operation of the *Racial Discrimination Act 1975* (Cth) in order to facilitate the policy. See generally Diana Perche, ‘Ten years on, it’s time we learned the lessons from the failed Northern Territory Intervention’ (The Conversation, 26 June 2017) theconversation.com; Sara Everingham, ‘Northern Territory Emergency Response: Views on ‘intervention’ differ 10 years on’ (ABC News, 21 June 2017) www.abc.net.au/news; Australian Human Rights Commission, ‘About Constitutional Recognition’, www.humanrights.gov.au.


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uses the surplus to provide grants to State governments. In 2014–15, transfers between the Commonwealth Government and State Governments amounted to roughly one quarter of Commonwealth spending, and up to 60 percent of States’ revenue. The Commonwealth’s policy agenda has grown significantly since federation. Through the operation of tied grants to the States, that growth has extended into areas where the Commonwealth otherwise has no constitutional power. Education and health are examples where this has led to claims of duplication, policy dissonance, blame-shifting, and a general lack of accountability between state and federal governments.

**Federalism**

The federal structure has also created other problems. Commentators have called for clarification of the Commonwealth’s legislative power with regard to issues including communications, environmental regulation, social welfare, industrial relations, intellectual property, and family law. As an example of the uncertainty created by the federal structure, the Constitution makes no provision for local government or its funding. This has cast uncertainty over the constitutional validity of Commonwealth funding for local government programs, such as the school chaplaincy scheme, which the High Court rejected in 2012. In 2013, federal parliament passed a constitutional amendment bill, which (if it succeeded in a referendum) would have made specific provision for Commonwealth financial assistance to local government bodies. After a controversial and unsuccessful campaign, however, the referendum was abandoned, and the uncertainty remains.

A more recent example, the environmental crisis in the Murray Darling Basin has raised questions regarding the proper division of Commonwealth and State regulatory power over rivers that flow through multiple states.

3. Constitutional Issues Encountered in Previous ALRC Inquiries

Since its establishment in 1975, the ALRC has produced 91 reports on various areas of Australian Commonwealth law. Of these, we identified 56 reports (61%) in which the Constitution presented one or more obstacles to the effective operation of the law in Australia. Broadly, these obstacles fall into two categories: those where the legal arrangements in need of reform were dictated or underpinned by constitutional requirements; and those where the Constitution itself limited the availability or scope of possible reforms. Despite the prevalence of constitutional issues in previous ALRC inquiries, constitutional

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19 In 2014–15, for example, Victoria received 47 percent of its total revenue from the Commonwealth, while South Australia received 51 percent and Tasmania 61 percent: Brian Galligan, ‘Renewing Federalism: what are the solutions to Vertical Fiscal Imbalance?’ (The Conversation, 16 September 2014), theconversation.com.


23 The Constitution Alteration (Local Government) 2013 was passed and came into effect in 2013, but did not proceed to a referendum: www.legislation.gov.au.


reform has only once been recommended by the ALRC.\(^{26}\) When constitutional issues have arisen, they have typically been beyond the scope of the inquiry.\(^{27}\) Even when the ALRC has attempted to grapple with the constitutional issues that arise, it is often impeded by uncertainty as to the scope of constitutional provisions, which undermines efforts to recommend appropriate and effective reforms.\(^{28}\)

**Heads of Power**

One of the most common issues stems from constitutional limits on the scope of Commonwealth legislative power. The Commonwealth only has the power to make laws with respect to certain subject matters or ‘heads of power’ set out in s 51 of the Constitution. In several ALRC inquiries, it was unclear which of the available heads of power would be most appropriate to support the proposed legislative reforms, highlighting the limited capacity of the Constitution to meet the evolving legal needs of contemporary Australian society.\(^{29}\)

In others, the ALRC favoured a uniform legislative approach, but was forced to concede that such reform would either require State governments to enact uniform legislation, or necessarily result in functionally incomplete Commonwealth legislation.\(^{30}\) This shortfall has had serious consequences for the welfare of Australians: the ALRC’s most recent report, *Family Law for the Future*, noted that constitutional limitations prevent the federal family courts from hearing some aspects of matters relating to family violence. This has led to the development of a bifurcated legislative regime covering family law issues, in which parenting and property proceedings are heard in federal family courts, while child protection and family violence matters are dealt with in state courts. As a result, some children and victims of domestic violence have been put at risk because the federal judicial officers adjudicating parenting orders have not been made aware of serious violence risks.\(^{31}\)

**Separation of Powers**

The constitutionally enshrined ‘separation of powers’ doctrine limits the types of power that may be exercised by the different branches of Commonwealth government. Notwithstanding the importance of the separation of powers in Australia, this arrangement presents challenges for law reform. The strict separation of powers principles that have emerged from High Court jurisprudence impact on the ability of law reform bodies to think creatively about the most appropriate forums for resolving disputes. Consideration of the use of administrative tribunals and alternative decision-making forums is limited by the principle that federal judicial power may only be exercised by courts which are constituted in accordance with Ch III of the Constitution.\(^{32}\)

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\(^{27}\) See, e.g. ALRC, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report 126, 2015) [1.71]–[1.72]. The ALRC has also at times been instructed not to consider reforms that would require constitutional amendment: ALRC, *Managing Justice: A Review of the Judiciary Act 1903 and Related Legislation* (Report 92, 2001) [1.12].


\(^{29}\) For example, issues such as privacy and superannuation do not fit neatly into any of the available heads of power: ALRC, *Privacy* (Report 22, 1983) [7]; ALRC, *Collective Investments* (Report 59, 1992) [7.19].


In the ALRC’s 1986 report on Indigenous customary law, for example, this principle limited consideration of alternative Aboriginal court models. Other potential reforms in ALRC reports have been hampered by the inability of Chapter III courts to discharge powers other than judicial powers. This limits, for example, the use of sentencing guidelines or guideline judgements which would require Ch III courts to make impermissible ‘advisory opinions’. Separation of powers considerations also impact reform proposals by state law reform bodies, albeit to a lesser extent, as the vesting of non-judicial powers in State courts is limited by their role as prospective vessels of federal jurisdiction.

Human Rights
In 2016 the ALRC reported that fundamental rights are inadequately protected in the Constitution, and that inconsistent development of rights through case law has led to uncertainty in relation to the application of rights and the proper balancing of conflicting rights. In 1994 the ALRC recommended the constitutional entrenchment of a proposed Equality Act as the most effective pathway to ensuring equality in Australia. Recognising the challenges of constitutional reform, however, the ALRC conceded that a statutory regime would be more feasible in the near term. Other reports have noted the inconsistency inherent in the practice of identifying some rights as ‘constitutionally implied’ while designating others as common law rights.

Federalism
Several previous inquiries have contended with the confusion, uncertainty, and inconsistencies created by the federal structure, including the inconsistent exercise of federal jurisdiction or federal functions by state courts or other agencies. In some areas, the lack of constitutional clarity as to whether regulatory responsibility lies with the Commonwealth or the States has led to decades of ‘blame shifting and buck passing’. For example, it was difficult for the ALRC to make recommendations to reform privacy protections in Australia, because it is unclear under the Constitution whether responsibility for the regulation of personal data lies with the Commonwealth or State governments. This issue also manifests in areas of law that are governed by a complex and confusing patchwork of laws and regulations that sometimes encompass all three levels of

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33 ALRC, Recognition of Aboriginal Customary Laws (Report 31, 1986) [808], [1021].
36 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51.
government. Apart from the inefficiencies inherent in this approach to governance, it also generates particular challenges where the Commonwealth seeks to override relevant inconsistent state laws, which the Constitution permits under s 109. The ALRC’s 1986 report on Indigenous customary law, for example, noted that many of the law reform options considered sat within the existing administrative scope of the States and Territories, and that ‘Commonwealth involvement in these areas would undoubtedly raise sensitivities.’

4. Starting the Conversation on Constitutional Reform

Twenty years have elapsed since the public was last asked to vote on amending the Australian Constitution. The ‘constitutional drought’ of the 21st century does not, however, reflect the satisfactoriness of current constitutional arrangements. As outlined above, there are a range of ongoing debates which raise questions about the need for constitutional amendment. The challenges of current constitutional arrangements have also been apparent in the work of the ALRC over the past 40 years.

The law reform process inevitably occurs in the shadow of the historical difficulty of pursuing constitutional amendment. Reform options that would require constitutional amendment are liable to be discounted without full consideration of their merits because it is assumed that constitutional amendment is unfeasible, or at the very least would be beyond the scope of the inquiry in question.

It is on this basis that the ALRC puts forward the Constitution itself as a potential topic for law reform. A law reform inquiry may reinvigorate the conversation on constitutional reform in the 21st century and provide an impetus for government to engage with the amendment process. The ALRC anticipates such an inquiry would represent a particularly valuable opportunity to review some of the technical and structural aspects of the Constitution that have not attracted public debate, but may have significant impacts on law reform – recognising that the Constitution governs much more than ‘the vibe’.

The ALRC welcomes your comments on the Constitution as a potential reform priority. You can contribute to the conversation by participating in our online survey (closing 30 June 2019) or by attending one of our upcoming public seminars. This is also an opportunity to comment on other potential areas of reform identified by the ALRC in Where next for law reform?, or to suggest further topics. Please visit our website for more details on how to get involved. Further seminar dates and locations will be added in the coming months.


44 ALRC, Recognition of Aboriginal Customary Laws (Report 31, 1986) [1022].