15 May 2019
Australian Law Reform Commission

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 However, the Constitution cannot be amended or repealed by Parliament in the same way as ordinary statutes.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)

---

1 Australian Law Reform Commission, *Where next for law reform?* (9 May 2019).

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.

referendum on amendment of the Australian Constitution took place 20 years ago, in 1999.[4] George Williams and David Hume have described this recent state of affairs as the 'self-fulfilling constitutional drought'.[5] This reflects the reality that constitutional reform is often pre-emptively removed from the agenda because it is assumed to be unfeasible.

The absence of governmental proposals for constitutional reform in recent years does not, however, reflect an absence of contemporary debate on constitutional issues.

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,[6] to the complicated dual citizenship prohibition under s 44 that has plagued federal parliament in recent years.[7] 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.[8] 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'.[9] 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.[10] 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.[11] 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.[12]

---

4 The 1999 referendum asked whether Australia should become a republic.

5 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 230.

6 Max Spry, 'Executive and High Court Appointments' (Parliament of Australia Research paper 7 2000-01, 2000) www.aph.gov.au.

7 See generally HK Colebatch, 'Enough is enough on section 44: it's time for reform' (The Conversation, 10 September 2018) theconversation.com; Ian Holland, 'Section 44 of the Constitution' (Parliament of Australia E-Brief, March 2004) www.aph.gov.au.

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.

10 Williams and Reynolds (2017) 59; Debeljak (2013) 39–41.

11 *International Covenant on Civil and Political Rights ('ICCPR')*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights ('ICESCR')*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). Australia ratified the ICCPR

Indigenous Recognition

Indigenous advocates have called for a number of amendments to the Constitution.[13] 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.[14] Critics have called for removal of the race power and constitutional entrenchment of the right to freedom from discrimination.[15] 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.[16] 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.[17]

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

---

in 1980 and the ICESCR in 1975, but neither instrument has been fully implemented in domestic law: Debeljak (2013) 42; Australian Human Rights Commission, 'Human rights at your fingertips', www.humanrights.gov.au.

12 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.

13 See *Uluru Statement from the Heart* (Resolution of the Referendum Council First Nations National Constitutional Convention, 2017) www.referendumcouncil.org.au/resource.html; Referendum Council, *Final Report of the Referendum Council* (2017) www.referendumcouncil.org.au/final-report.html; Daniel McKay, 'Uluru Statement: a quick guide' (Australian Parliament, Law and Bills Digest Section, 19 June 2017) www.aph.gov.au.

14 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.

15 See generally Dan Conifer, 'Constitutional recognition: Australia's founding document should not embody 'racist past', Pat Dodson says' (ABC News, 23 June 2017) www.abc.net.au/news; Frank Brennan, 'Frank Brennan: the case for modest constitutional change' (The Conversation, 21 May 2015) theconversation.com; Lorena Allam, 'Constitution's power to 'enable' race discrimination should be removed, MPs told' (The Guardian, 19 October 2018) www.theguardian.com/australia-news.

16 See generally Dominic O'Sullivan, 'Indigenous recognition in our Constitution matters – and will need greater political will to achieve' (The Conversation, 18 January 2018) theconversation.com; Joint Select Committee on Constitutional Recognition, *Final Report* (Australian Parliament, 2018); Australian Human Rights Commission, 'About Constitutional Recognition', www.humanrights.gov.au; Daniel McKay, 'Uluru Statement: a quick guide' (Australian Parliament, Law and Bills Digest Section, 19 June 2017) www.aph.gov.au.

17 *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* (High Court of Australia, B43/2018 and B64/2018, commenced 8 May 2018). See Brooke Fryer, 'High Court will decide if Indigenous people without citizenship can be deported' (SBS News, 8 May 2019) www.sbs.com.au.

uses the surplus to provide grants to State governments.[18] 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.[19] 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.[20]

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.[21] 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.[22] 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.[23] After a controversial and unsuccessful campaign, however, the referendum was abandoned, and the uncertainty remains.[24] In 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.[25]

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

---

18 See National Commission of Audit, *Towards Responsible Government* (Final Report, 2014) App. Vol. 1 [8.3]; Therese Burton, Brian Dollery, Joe Wallis, 'A Century of Vertical Fiscal Imbalance in Australian Federalism' (2016) 36(1) *History of Economics Review* 26, 27.

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.

20 Galligan (2014); National Commission of Audit (2014) App. Vol. 1 [8.3].

21 See John McMillan, 'Constitutional Reform in Australia' (Australian Parliament Papers, No. 13, 1991) www.aph.gov.au.

22 *Williams v Commonwealth of Australia* [2012] HCA 23. See also ABC News, 'Commonwealth funding of school chaplaincy program struck down in High Court' (20 June 2014) www.abc.net.au/news.

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.

24 David Spooner and Kirsty Magarey, 'Constitutional Reform—Indigenous peoples and local government' (Australian Parliament, Law and Bills Digest) www.aph.gov.au.

25 See Anne Davies, 'Push for referendum on federal takeover of Murray-Darling river system' (The Guardian, 6 May 2019) www.theguardian.com/australia-news; Lee Godden, Jacqueline Peel, Lisa Caripis, 'Commonwealth should keep final say on environment protection' (The Conversation, 5 December 2012) theconversation.com; cf. Adam Webster, 'A referendum won't save the Murray-Darling Basin' (The Conversation, 13 May 2019) theconversation.com.

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]

---

[26] See below in relation to fundamental rights and freedoms: ALRC, *Equality Before the Law: Part 2: Women's Equality* (Report 69, 1994).

[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 Federal Civil Justice System* (Report 89, 2000) [1.4]; ALRC, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report 92, 2001) [1.12].

[28] See, e.g. ALRC, *Service and Execution of Process* (Report 40, 1987) [30], [612], [615]; ALRC, *Grouped Proceedings in Federal Court* (Report 46, 1988) [76]; ALRC, *Designs* (Report 74, 1995) [12.13]; ALRC, *Costs Shifting – Who Pays for Litigation* (Report 75, 1995), [9.3]–[9.7]; ALRC, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, 2018) 68, 97 fn 30.

[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].

[30] See, e.g. ALRC, *Unfair Publication: Defamation and Privacy* (Report 11, 1979) [303]; ALRC, *Debt Recovery and Insolvency* (Report 36, 1987) [16], [149]; ALRC, *Spent Convictions* (Report 37, 1987) [69].

[31] ALRC, *Family Law for the Future – An Inquiry into the Family Law System* (Report 135, 2019) ch 4.

[32] *NSW v Commonwealth* (1915) 20 CLR 54 ('*Wheat case*'); *Waterside Workers' Federation v J W Alexander* (1918) 25 CLR 434; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. These issues have arisen in various ALRC reports, including: ALRC, *Insolvency: The Regular Payment of Debts* (Report 6, 1977) 39; ALRC, *Same*

In the ALRC's 1986 report on Indigenous customary law, for example, this principle limited consideration of alternative Aboriginal court models.[33] Other potential reforms in ALRC reports have been hampered by the inability of Chapter III courts to discharge powers other than judicial powers.[34] This limits, for example, the use of sentencing guidelines or guideline judgements which would require Ch III courts to make impermissible 'advisory opinions'.[35] 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.[36]

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.[37] 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.[38] Other reports have noted the inconsistency inherent in the practice of identifying some rights as 'constitutionally implied' while designating others as common law rights.[39]

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.[40] 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'.[41] 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.[42] 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

---

Crime, Same Time: Sentencing of Federal Offenders (Report 103, 2006) 413, 533; ALRC, *Secrecy Laws and Open Government in Australia* (Report 112, 2010) 455.

33 ALRC, *Recognition of Aboriginal Customary Laws* (Report 31, 1986) [808], [1021].

34 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, [270] ('*Boilermakers Case*'). See ALRC, *Insolvency: The Regular Payment of Debts* (Report 6, 1977) 39; ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, 2006) 413, 533.

35 *Huddard, Parker & Co Pty Ltd v Moorehead* (1909) 9 CLR 330, 357; *Wong v The Queen* (2001) 207 CLR 584. See, e.g. ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, 2006) 413, 533; ALRC and NSWLRC, *Family Violence: A National Legal Response* (Report 114, 2010) 602; ALRC, *Principled Regulation: Federal and Civil Administrative Penalties in Australia* (Report 95, 2003) 883–5, 889.

36 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

37 ALRC, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws* (Report 129, 2016) 16, 19, 22, 34–5.

38 ALRC, *Equality Before the Law: Part 2: Women's Equality* (Report 69, 1994) [4.16], rec 4.2.

39 See, e.g. ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report 98, 2004) 382.

40 ALRC, *Criminal Investigation* (Report 2, 1975) [20]; ALRC, *Evidence* (Interim Report 26, 1985) 2; ALRC, *Evidence* (Final Report 38, 1987) 20–21; ALRC, *Sentencing of Federal Offenders* (Interim Report 15, 1980) [5]–[7], [10], [68]–[74], [144], [153]; ALRC, *Sentencing* (Report 44, 1988) [3]; ALRC, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report 92, 2001) [2.85]–[2.91]; ALRC, *Uniform Evidence Law* (Report 102, 2006) [1.15]–[1.16].

41 Sharon Scully, 'Does the Commonwealth have constitutional power to take over the administration of public hospitals?' (Australian Parliament Research Paper no. 36 2008–09, 2009) www.aph.gov.au.

42 ALRC, *For Your Information: Australian Privacy Law and Practice* (Report 108, 2008) 615.

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.[43] 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.'[44]

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.

---

[43] See, e.g. ALRC, *Debt Recovery and Insolvency* (Report 36, 1987) [16]–[17], [149]; ALRC, *Recognition of Aboriginal Customary Laws* (Report 31, 1986) [1026]–[1028]; ALRC, *Criminal Admiralty Jurisdiction and Prize* (Report 48, 1990) [23].

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