

## CONSTITUTIONAL LAW

### Where to now?

#### GEORGE WILLIAMS gives a critical appraisal of the recent Republic Referendum.

The republic debate has exposed the underbelly of Australian democracy. It has revealed deep, entrenched, problems in our system of government, and the need for significant structural reform. Such reform would go beyond a change to our national symbols and head of state. It would seek to rebuild the connection between Australians and their government.

#### The defining features of the 'debate'

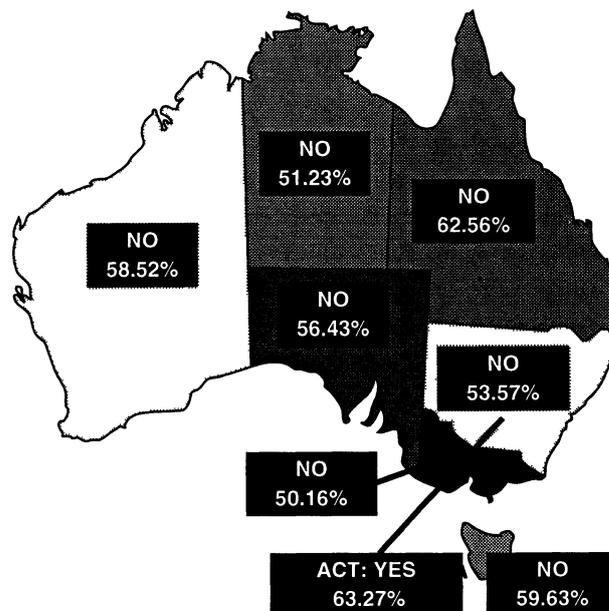
Two main weaknesses in the democratic system have been brought to light by the recent referendum. First, the lack of knowledge of the current system in the community; and, second, Australians' lack of engagement with the political process.

#### Lack of knowledge of the current system

The prospect of an Australian republic has been one of the political issues of the 1990s. The possibility was raised by Paul Keating in the early 1990s, before being examined in detail by the Republic Advisory Committee, which held public hearings around Australia and delivered a two volume report.<sup>1</sup> The issue was also debated over two weeks at the 1998 Constitutional Convention,<sup>2</sup> whose 152 members were half elected and half appointed. Finally, a model for a republic was put to the people in the referendum held on 6 November 1999, which was accompanied by a \$24.5m government-funded advertising campaign,<sup>3</sup> a 71-page 'Yes' and 'No' case booklet sent to every voter, and saturation coverage in parts of the media.

Despite this, most Australians have little or no idea of what a republic would mean, let alone how the proposed model would have worked. The referendum 'debate' instead generated considerable confusion, as well as strongly differing opinions on issues ranging from the mechanism for the dismissal of the President to who is currently our head of state. Such disagreement took place at a high level, and even produced a clash between former Chief Justices of the High Court.

This high level disagreement obscured the fact that the proposed model remained impenetrable to many Australians. The central reason was that Australians have little understanding of how the current system of government works. The evidence bears this out. A 1987 survey conducted for the Constitutional Commission found that 47% of Australians were unaware that Australia has a written Constitution.<sup>4</sup> Similarly, the 1994 report of the Civics Expert Group<sup>5</sup> found that only 18% of Australians have some understanding of what their Constitution contains. Significantly, only one in three people felt reasonably well



Figures extracted from Australian Electoral Commission's web site <http://referendum.aec.gov.au/>  
Results as at 30 November 1999, 95% votes counted.

informed about their rights and responsibilities as Australian citizens.

These figures show why republicans faced an uphill battle. They had the task not only of informing Australians about the merit of the proposed changes, but also of providing enough information about the current system to allow the changes to be evaluated. This proved an impossible task in the heated and partisan atmosphere of the campaign. As a result, rather than being an example of informed deliberation, the debate was more an exercise of each side seeking to gain the support of celebrities and other notable figures.

#### Lack of engagement with the political process

Many Australians have become alienated from the political process and from the people who represent them in parliament. In a context of uncertainty and insecurity brought about by rapid social and economic change, it is not surprising that they distrust our political leaders and the system of representative government that has produced them. It is not easy to feel part of a system that is not understood, and in which there are very few opportunities for participation.

This has led to problems such as a lack of confidence in the political system. The symptoms of this can be seen in the drop in support for the major parties (and thus in the number of 'hung' parliaments at the State level) and in the rise of protest parties such as Pauline Hanson's One Nation Party. There has also been an increase in proposals for schemes that would give Australians a greater say in government, such as citizens' initiated referenda<sup>6</sup> or the idea that a President should be directly elected by the people.

#### Our deeper problems

The central arguments of the 'No' case were 'Vote No to the Politician's Republic' and 'Don't Know - Vote No'. Australians' lack of engagement with the political process, combined

with their lack of knowledge, demonstrate why they were so effective. This is not to say that Australians cast their votes stupidly. The most rational choice when faced with a change to a system that seems to work at least tolerably well, but of which little or nothing is known, is to reject that change. It also does not mean that Australians are as a rule apathetic about how they are governed. Rather, it suggests the need to provide an entry point into such debates.

Over the weekend of 23 and 24 October 1999, a 'Deliberative Poll'<sup>7</sup> was held at Old Parliament House in Canberra on the republic issue. The Poll allowed 347 Australians, randomly chosen from all walks of life and from many regions, to listen to and question experts and the supporters of each side. It created dialogue and deliberation amongst attendees so as to allow them to assess the proposed changes. The results were dramatic. As a result of the Poll, over 50% of participants went from knowing little or nothing about issues such as the proposed dismissal mechanism and the powers of the Governor-General to having a good level of understanding. Support for the 'Yes' case jumped from 53% to 73%, while support for a direct election model as a first preference dropped from 50% to 19%. The Poll showed how the republic could, and should, be a topic of serious and considered debate at a community level.

The Poll showed that disinterest and confusion need not be the hallmark of our political life. Australians were willing and capable of being directly and fully engaged in the debate. The Poll demonstrated that the onus lies on our policy makers and parliaments to do more to involve the Australian people in government.

### Where to now?

In the wake of the referendum, we should take the opportunity to analyse the process for constitutional change and whether the focus on the republic has obscured the need for other reform. The wider problems in our political system exposed by this debate show that we have focused too narrowly on reform of our head of state. The campaign revealed an obvious need for continuing reform of our education system. However, the teaching of civics will not in itself be enough. More must be done to engage the community in the political process.

Over the longer term, Australia needs a process of constitutional renewal. Our Constitution was not written as a people's Constitution. It does not expressly embody the fundamental rights or aspirations of the Australian people, nor any spirit of reconciliation with Australia's Indigenous inhabitants. It has a chapter on Finance and Trade but only a few scattered provisions dealing with human rights.<sup>8</sup> It also fails to explain how the current system works. The text does not mention the Prime Minister, and suggests that all power is vested in the Queen, and her representative the Governor-General.

The Constitution also has negative aspects. The Commonwealth races power in s.51(xxvi) permits the federal parliament to pass laws on the topic of 'the people of any race for whom it is deemed necessary to make special laws'. According to Edmund Barton (later Australia's first Prime Minister and one of the first members of the High Court), speaking at the 1898 Melbourne Convention that drafted the Constitution, this power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.<sup>9</sup> The obviously racist underpinnings of this power were

arguably extended to Indigenous peoples as a result of the 1967 referendum. Whether this actually occurred was not resolved in 1998 in the *Hindmarsh Island* case,<sup>10</sup> leaving Indigenous peoples in constitutional limbo.

In the shorter term, we should focus on pragmatic options to re-engage people with the political system. In *A Bill of Rights for Australia* (UNSW Press, 1999), I argue for the drafting of a statutory Bill of Rights, at the Federal or State level. There is strong community support for a Bill of Rights, with one survey showing 72% for, 7% against and 21% undecided.<sup>11</sup>

A Bill of Rights enacted by parliament would engage the community in a reform process without the need for a referendum. It would produce a document that set out the place of Australians within the political system, without transferring the power to solve our pressing social, moral and political concerns from parliament to the courts. Rather than merely establishing legal rules, the aim would be to foster a culture of liberty, including tolerance and respect of difference.

The process for creating such a document might focus on a draft prepared and put to a parliamentary committee, which would take submissions from the community and hold hearings around the country. The end result would be a statute that would recognise and protect the core rights of the Australian people, while being subject to repeal or amendment by parliament. This would produce an ongoing dialogue between parliament, the courts and the people.

### Conclusion

The recent republic debate had a narrow focus on our head of state. It exposed more fundamental problems with our democratic system. This suggests that other reforms should be undertaken now, such as the enactment of a statutory Bill of Rights. After all, a republic will be of little value unless it takes root within a system of government, known to and understood by the people, that fosters their participation.

*George Williams teaches law at the Australian National University. He also practises as a barrister.*

### References

1. Republic Advisory Committee, *An Australian Republic: The Options*, AGPS, 1993, 2 vols. For the Prime Minister's response, see Prime Minister Paul Keating, *An Australian Republic: The Way Forward*, AGPS, 7 June 1995.
2. Report of the Constitutional Convention, 4 vols, Commonwealth of Australia, 1998. See Williams, G., 'The Peoples' Convention?' (1998) 23 *Alternative Law Journal* 2.
3. This included \$9.5m spent on 'neutral' advertising, with the remaining \$15m being divided equally between the Committees organising the 'Yes' and 'No' campaigns.
4. Constitutional Commission, *Bulletin*, September 1987, No 5.
5. Civics Expert Group, *Whereas the People: Civics and Citizenship Education*, AGPS, 1994.
6. Williams, G. and Chin, G., 'Australian Experiments with Community Initiated Referendum: CIR for the ACT?' (1998) 7 *Griffith Law Review* 274.
7. See Fishkin, J.S., *The Voice of the People: Public Opinion and Democracy*, Yale University Press, 1997.
8. Williams, G., *Human Rights under the Australian Constitution*, Oxford University Press, 1999, Ch 3.
9. *Official Record of the Debates of the Australasian Federal Convention, 1891-1898*, reprinted Legal Books 1986, vol 4, Melbourne 1898, pp.228-9.
10. *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
11. Galligan B. and McAllister, I., 'Citizen and Elite Attitudes Towards an Australian Bill of Rights' in B. Galligan and C. Sampford (eds), *Rethinking Human Rights* Federation Press, 1997, p.149.