



THE LAW SOCIETY  
OF NEW SOUTH WALES

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18 August 2021

Mr Michael Tidball  
Chief Executive Officer  
Law Council of Australia  
DX 5719 Canberra

By email: [nathan.macdonald@lawcouncil.asn.au](mailto:nathan.macdonald@lawcouncil.asn.au)

Dear Mr Tidball,

### **Inquiry into constitutional reform and referendums**

Thank you for the opportunity to provide comments to the Law Council on this issue. We understand that the Law Council intends to provide a submission to the House Standing Committee on Social Policy and Legal Affairs in respect of its inquiry into constitutional reform and referendums. The Law Society's submission is informed by its Public Law Committee. We provide comment in respect of terms of reference 1 to 3 as follows.

#### **1. Opportunities to improve public awareness and education about the Australian Constitution**

The Constitution is a necessarily technical and complex document, which does not lend itself well to broad understanding, or general awareness. In our view, one of the lessons learned from the 1999 referendum campaign is to not overestimate the level of public understanding about the Constitution.

Improved public awareness of the Constitution is critical to ensuring that the debate on the Constitution, and proposed changes to it, can be accessible to all Australians. This will ensure stronger co-ownership over any changes (of particular importance with respect to recent proposals of constitutional recognition of Aboriginal and Torres Strait Islander Australians and local government), as well as address the risk of misinformation campaigns de-railing constitutional reform.

Efforts to improve public awareness of the Constitution should be focused on specific messages targeted broadly, as well as at specific cohorts within the community, and with a clear sense of the level of awareness we are aiming for (i.e. success measures). Any efforts to uplift understanding should not only focus on the operation of specific parts of the Constitution but the very value of it to our system of government and our nation as a whole.

We understand that educational efforts in the past include education of school-aged children and young people, through methods such as dedicated curriculum items; bodies such as the Constitution Education Fund Australia providing focused attention to lifting awareness; and Government funding to trips to Canberra to learn more about our system of government (including a trip to the Australian Constitution Centre in the High Court).

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney  
ACN 000 000 699 ABN 98 696 304 966

[lawsociety.com.au](http://lawsociety.com.au)

T +61 2 9926 0333 F +61 2 9231 5809  
E [lawsociety@lawsociety.com.au](mailto:lawsociety@lawsociety.com.au)



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However, it is unclear whether these measures have resulted in any increased understanding of the Constitution, or an ability to apply generalised awareness of the Constitution to specific questions about whether or not change to parts of it to respond to emerging issues. Of particular interest to the Law Society, and an issue for consideration by the Committee, is whether this knowledge and understanding, if developed during school, has been maintained as students leave school and enter the broader community.

Public understanding will not change if the same methods are employed, particularly without evaluation. In our view, there needs to be a re-examination to understand what lessons can be learned from successful public information campaigns, such as the recent campaigns on COVID-19, to apply to a very important issue that unfortunately does not strike many in the community to be of immediate relevance, and therefore of interest.

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

In our view, a key element to lifting engagement in constitutional reform is to make the process both less ad hoc, and less political.

The constitutional reform process in Australia continues to be an ad hoc one. This approach limits the opportunity to engage the public in regular awareness raising and educational efforts, not just on the issue for reform at hand, but on the prerequisite knowledge about the Constitution, and the reform processes.

While the movement to recognise Aboriginal and Torres Strait Islander Australians in the Constitution has rightly garnered significant community interest, there is a risk that the community's unfamiliarity with the Constitution will create misunderstandings that could undermine legitimate debate on the merits of the amendment.

Further, the impact of fear of the unknown or unfamiliar on the likely success of constitutional reform should not be dismissed. With only 8 successful referenda out of 44, it is clear that a "No" campaign that capitalises on these insecurities will often be successful.

To address this, in our view, it is useful, if not necessary, to ensure that the process of constitutional reform, as well as the amendment proposals, should be co-designed and co-owned by the public. Popular ownership requires:

- Extended national debate and consultation on a proposal
- Debate and consultation occurring across a wide variety of forums
- A process that is open and responsive
- A process that makes full use of available media
- A commitment that public engagement will permeate and drive the whole process

For example, establishing a standing Constitutional Convention (with a preference for community rather than political representatives) to meet on an annual basis to discuss issues relating to the Constitution would allow a forum where the community is engaged in regular debate about the Constitution. It could offset the concern that reforms are decided by a small segment of the population by allowing broad representation in a regular discussion. Investing the Convention with the authority to decide the form of final proposals would ensure that the public is truly owning the final process.

**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 amendment**

Some suggestions to assist with improving the conduct of referenda include:

1. Abolish restrictions on expenditure by the Commonwealth Government, including money to a dedicated neutral campaign to lift understanding of process and providing Commonwealth funding to a dedicated Yes and No committee. In many cases equal funding makes sense, but unequal funding makes sense if there is not widespread support for No. However, we suggest that parliamentary support for unequal funding should be required in order to allocate funding unequally.
2. We suggest that section 11 be modernised to allow the use of digital platforms to disseminate information on the Yes/No campaigns, rather than restricting the dissemination of information to voters via Yes/No pamphlets. The rationale for maintaining the current section 11 is unclear, as there is no clear basis to suggest that disseminating information only via pamphlets (vs including digital information dissemination) is more likely to increase understanding and interest in the process.
3. It may be prudent to consider the value of attaching voting on a referendum to an election to reduce costs that could be redistributed to campaigns to lift awareness. While there are risks that this could politicise the campaign, or draw attention away from it, if the other proposals are adopted to de-politicise and normalise constitutional reform, these issues may not impact the overall outcome as significantly.

Thank you for the opportunity to provide these comments. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au) or 02 9926 0354.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'JRW', followed by a horizontal line extending to the right.

Juliana Warner  
**President**