

Deliberative assemblies to enhance the constitutional referendum process

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Abstract: This Article provides an overview of the referendum proposals advanced in Australia in recent decades, offering observations as to their democratic and political contexts, having regard to the work of the Senate Legal and Constitutional Affairs Committee's 2019 *Inquiry into Nationhood, National Identity and Democracy*. It considers one of the major recommendations made by the Committee, namely a need for a greater level of engagement and consultation through such devices as 'deliberative exercises' and explores the meaning of the term 'deliberative'. The Article then discusses how we might maximise the deliberative quality of any constitutional referendum process, before concluding with a proposal for change that would see constitutional referendums augmented with a system of deliberative assemblies to be held in each State and Territory.

INTRODUCTION

In July 2022, Prime Minister Anthony Albanese announced his intention to progress a constitutional referendum to enshrine an Indigenous 'voice to parliament' through his commitment to implement the 'Uluru Statement from the Heart' in full.² This is a significant commitment by the Prime Minister, especially considering the low success rate of constitutional referendums. Adding to its significant intrinsic commitment is the

¹ Disclosure: The author was a delegate to the second Nuclear Fuel Cycle Citizens Jury, which reported to the South Australian Premier in November 2016.

² Anthony Albanese, *Prime Minister's Address to Garma Festival*, delivered at East Arnhem Land, 30 July 2022. Accessed at: <<https://www.pm.gov.au/media/address-garma-festival?>>.

likelihood that the outcome of this current proposal will greatly impact the prospects for any future referendum on an Australian republic.³

The referendum requirement for a constitutional amendment places an admirably democratic mechanism at the heart of the process. In casting our eyes forward to these referendum proposals while bearing in mind their democratic context, this Article first considers the current state of health of Australian democracy, drawing on a recent examination by the Senate Legal and Constitutional Affairs Committee. It draws attention to one of the major recommendations of that inquiry's final report, namely a need for a greater level of engagement and consultation through such devices as 'deliberative exercises'. This Article considers what is meant by the term 'deliberative'. It then discusses how we might maximise the deliberative quality of any constitutional referendum process. This Article concludes with a proposal for change in augmenting constitutional referendums with a system of deliberative assemblies to be held in each State and Territory.

DEMOCRACY IN DECLINE?

A formal inquiry into the state of health of Australian democracy was established by the Commonwealth Senate in July 2019 and was referred to the Legal and Constitutional Affairs Reference Committee.⁴ The scope of the inquiry encompassed such matters as what might be meant by nationhood and citizenship, the rights and privileges of citizenship, and the meaning of the nation-state in the twenty-first century. Over two hundred submissions were received from a wide range of stakeholders. The Inquiry's report declared that:

*politics is broken, not democracy. Or, more specifically, something is broken in the way we are conducting politics.*⁵

³ George Williams, 'Let's decide on the voice, then get to the republic', *The Australian*, 13 September 2022, p. 11.

⁴ Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Inquiry into Nationhood, National Identity and Democracy*, 2021. Accessed at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Nationhood>.

⁵ Legal and Constitutional Affairs Committee, *Inquiry into Nationhood*, Report, p. 156.

The report continued:

*The way politics functions is alienating citizens; causing them to turn away from established political parties and mainstream political processes.*⁶

As a remedy, the report observed:

*[W]e must listen and respond. Whether through deliberative exercises, or other forms of consultation, governments must seek input from citizens, and meaningfully engage with that input.*⁷

The Senate Inquiry heard claims about allegedly declining levels of trust in government. One evidence source was data derived by the Australian Election Study (AES) comprising surveys associated with every Federal election since 1969.⁸ The AES data does indeed appear to show recent declines among its respondents in levels of satisfaction with Australian democracy. However, drawing on the same AES source, Dassonneville and McAllister⁹ have recently found no clear long-term trend towards a decline of political trust notwithstanding fluctuations from time to time. Their interpretation is that perceptions of trust are most affected by short-term factors: the degree of economic prosperity at any particular time impacts the level of expressed satisfaction with Australian democracy, as does perceptions of the performance of the incumbent government and the level of engagement with voters. These short-term factors, they argue, are not entrenched and are reversible.

The Senate Committee considered a submission from the Museum of Australian Democracy (MoAD) which is based in Old Parliament House, Canberra. As part of Democracy 2025's Public Trust Program, MoAD has conducted a national survey of opinion in public trust which augments the AES survey series. The MoAD study concludes that, while Australians generally seem happy with the structure of

⁶ Legal and Constitutional Affairs Committee, *Inquiry into Nationhood*, Report, p. 156.

⁷ Legal and Constitutional Affairs Committee, *Inquiry into Nationhood*, Report, p. 158.

⁸ I. McAllister, J. Sheppard, C. Bean, R. Gibson, T. Makkai, 'Australian Election Study 2019'. Accessed at: <<https://australianelectionstudy.org/>>.

⁹ Ruth Dassonneville and Ian McAllister, 'Explaining the decline of political trust in Australia', *Australian Journal of Political Science*, 56(3), 2021, pp. 280-297.

representative democracy, they seem less happy with the way that democracy works.¹⁰ The MoAD study suggests that Australia may have reached a worrying ‘tipping point’ due to an increasing gap between levels of trust and distrust.

While the Senate Committee itself was reluctant to claim any definitive long-term trend towards declining political trust, its final report in 2021 recommended that the Federal Government should work to improve the level of input from citizens and increase meaningful engagement to demonstrate that the government was listening and responding to the voting public. The Committee advised that this could be attempted through deliberative exercises or other forms of consultation and engagement.

It is in the spirit of the Senate Committee recommendations that this article proposes that deliberative democratic exercises should be incorporated within future constitutional referendum processes.

DELIBERATIVE PROCESSES

The term ‘deliberative’ can encompass a variety of meanings¹¹ and the understanding of the term among political theorists has evolved through several waves or generations of thinking. An early contributor was Cohen, for whom a deliberative democracy was as ‘an association whose affairs are governed by the public deliberation of its members’.¹² Later, Gutmann and Thompson proposed a more activist perspective: that, in deliberative democracy, citizens should not be seen as just passive actors but as people to whom reasons should be given to provide sufficient justification for the adoption of laws in terms that are both mutually understandable and agreeable.¹³ More recently, Dryzek and colleagues have proposed a more nuanced conception befitting a modern pluralist democracy and more attuned to the practical implications

¹⁰ Democracy 2025 Project, ‘Trust and Democracy in Australia: democratic decline and renewal’, December 2018. Accessed at: <<https://www.democracy2025.gov.au/documents/Democracy2025-report1.pdf>>.

¹¹ J. Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament*, Sydney: Cambridge University Press, 1998, p. 4.

¹² J. Cohen, ‘Deliberation and Democratic Legitimacy’, in James Bohman and William Rehg (eds) *Deliberative Democracy: Essays on Reason and Politics*, Cambridge: MIT Press, 1997, pp. 67-91.

¹³ A. Gutmann & D. Thompson, *Why Deliberative Democracy?* Princeton: Princeton University Press, 2004, p.3.

of how deliberative exercises can be structured in large complex societies to build ‘essential democratic capacity’.¹⁴

For Dryzek and colleagues, ‘deliberative’ means ‘mutual communication that involves weighing and reflecting on preferences and values, and interests regarding matters of common concern’.¹⁵ The role of deliberative exercises is to enable its participants to understand issues, their own personal interests, and the interests and perceptions of others in relation to a particular proposition. It seeks agreement where possible and, where agreement is not possible, it seeks to clarify any conflict in positions and intentions. This is definition provides a useful starting point for the following discussion.

REFERENDUMS AND DELIBERATION

Lawrence LeDuc has examined the relationship between referendums and deliberation, posing the question of what counts as good deliberation during a referendum campaign. Le Duc introduces a contrast between what he describes as the ‘voice’ and the ‘vote’ functions of referendums.¹⁶

By ‘voice’, LeDuc means the general conception of deliberation that allows for a process to consider various positions and to discuss issues that can enable the voting public to make an informed decision. By ‘vote’, he means the discrete final act of completing a written ballot at the end of the referendum campaign process.¹⁷ The distinction is intended to provide a normative framework to support the proposition that auxiliary deliberative elements are needed for a better referendum process.

LeDuc concedes that deliberation theory and referendums might not, at first sight, seem to have much in common:

¹⁴ A. Bächtiger, J. Dryzek, J. Mansbridge, and M. Warren, ‘Deliberative Democracy: An Introduction’, in A. Bächtiger, J. Dryzek, J. Mansbridge, and M. Warren (eds), *Oxford Handbook of Deliberative Democracy*, Oxford: Oxford University Press, 2018, p. 31.

¹⁵ A. Bächtiger, J. Dryzek, J. Mansbridge, and M. Warren, *Deliberative Democracy: An Introduction*, p. 18.

¹⁶ This has a certain resonance with the vocabulary of the ‘voice’ constitutional proposal by the Prime Minister.

¹⁷ L. LeDuc, ‘Referendums and deliberative democracy’, *Electoral Studies*, 38, 2015, p.139.

A deliberative model emphasizes the importance of voice whereas referendums by their very nature concentrate on votes.¹⁸

Referendum ballots require a formal decision to be made based upon available information in a possibly highly partisan environment, whereas deliberative theory requires a process of rational debate, respected opinions, and freedom from ‘coercion, deception or invective’.¹⁹ LeDuc argues, however, that the institutions and processes surrounding referendums do share common elements with deliberative democracy, such as the need to establish an environment conducive to discussing issues publicly and a ‘highly visible test’ of acceptability of a particular issue.²⁰

LeDuc identifies twelve influences which can affect the degree of good deliberation. Here I concentrate on just four of the more significant of these elements.

The first of these is ‘motive’. This recognizes that referendums are not necessarily called for purely deliberative reasons. The motive, whatever it is, can influence the resulting level of deliberation and the referendum outcome. In the Australian case, the decision to progress an amendment proposal through the Commonwealth Parliament is a conscious decision of the government of the day. In this sense, it is a political calculation. The complex path leading to the 2017 Australian Marriage Law Survey by the Australian Bureau of Statistics illustrates some of the political factors which can be in play.²¹

The 1967 Constitutional Referendum, after passing both Houses of Parliament, saw more government resources devoted to promoting the first question (proposing that the government be able to increase the number of House of Representative members without necessarily increasing the number of Senators) as opposed to the second question (proposing that the Commonwealth be empowered to make laws regarding

¹⁸ L. LeDuc, ‘Referendums and Deliberative Democracy’, Conference Paper at the International Political Science Association World Congress, Fukuoka, Japan, 9-13 July 2006, p. 2. Accessed at: <http://paperroom.ipsa.org/papers/paper_5268.pdf>.

¹⁹ LeDuc, *Referendums and Deliberative Democracy*, p. 1.

²⁰ L. LeDuc, ‘Voice vs. Votes: Adapting the Institutions and Processes of Direct Democracy to Improve Citizen Engagement and Participation’, *Lightning Policy Brief*, Canada Europe Transatlantic Dialogue, March 2016, p. 4. Accessed at: <<http://labs.carleton.ca/canadaeurope/we-content/uploads/sites/9/LeDuc-CETD-Brief-Final.pdf>>.

²¹ See e.g. Kildea, Paul Kildea, ‘Australia’s Same-sex Marriage Survey: Evaluating a Unique Popular Vote Process’, *Monash Law Review*, 46(2), 2020, pp. 107-40.

Aboriginal Australians and for their inclusion in the census). The overall campaign by the Holt Government has been described as rather 'lackluster'.²² As it happened, the first referendum question failed (with only NSW voting 'Yes' and a national 'Yes' vote of just 40.25%) while the second question passed with all six States voting 'Yes' and a national 'Yes' vote of 90.77%.

A second, and related, element of LeDuc's framework considers the role of the government of the day. If the motive to propose a referendum question is based upon political decisions or assessments, then it can be inferred that governments are not neutral when it comes to their role in prosecuting a referendum campaign. If a government decides to put a referendum question forward, it usually does so with the expectation of winning. Referendums are not usually initiated to see them fail. However, sometimes the government may instead be seeking just to neutralize an issue. The 1999 Republic referendum could be such a case, with Prime Minister John Howard acknowledging his own opposition to the amendment proposal.²³ In that referendum, the first question regarding becoming a republic was lost with no States voting 'Yes' and a national 'Yes' vote of only 45.13%. The second question regarding a new Preamble was also lost, with no States recording a 'Yes' vote and a national vote of 39.34%.

A third of the LeDuc elements is that an informed process needs the referendum question to be clear and concise. LeDuc acknowledges that clarity is not an easy attribute to define or achieve.²⁴ The impact of poor clarity, however, may be that the available time to deliberate or publicly engage over a particular referendum question is taken up with arguments over the wording of the question as opposed to the substantive issues at stake. This problem is lessened if there is only one referendum question put to the voting public. Where there are multiple questions, LeDuc suggests that a lower quality debate or deliberation may result.

²² B. Attwood and A. Markus, *The 1967 Referendum, or When the Aboriginals Didn't Get the Right to Vote*. Canberra: Aboriginal Studies Press, 1997, p. 37.

²³ Howard's opposition to change can be seen in his formal statement in support of the 'NO' case'. See Australian Politics, 'John Howard's Statement Against a Republic'. Accessed at: <<http://australianpolitics.com/1999/10/25/john-howard-statement-against-a-republic.html>>.

²⁴ LeDuc, *Referendums and Deliberative Democracy*, p. 12

A fourth element derived from LeDuc relates to whether a referendum proposal involves a 'multiplicity of issues'.²⁵ The 1999 Republic referendum is an example of a referendum raising complex constitutional and political issues beyond the actual question itself. An inability to separate out such complex issues could affect the outcome of the ballot. For LeDuc, deliberation can be strengthened if the public discussion can focus on one single issue. Australian constitutional referendums have included several where multiple questions have been put. For example, the 1944 Referendum included a proposal to insert a new Clause 60A into the Constitution encompassing fourteen new legislative powers related to post-war reconstruction.²⁶ This referendum passed in just SA and WA, and achieved a national 'Yes' vote of just 45.99%.

What is a 'successful' referendum? 'Success' could be simply understood as the approval of the referendum proposal. Alternatively, it might, from an initiating government's point of view, mean a 'No' result which is welcome because it puts aside a troubling but previously unresolved issue. From a procedural perspective, 'success' might mean a referendum process that is conducted well irrespective of the 'Yes' or 'No' outcome. This is the perspective adopted for the purposes of this article: a 'successful' referendum involves a high-quality deliberative process (or 'voice') leading to an informed 'vote' irrespective of the 'Yes' or 'No' outcome.

A PROPOSAL

Having reflected on these experiences and perspectives, I contend that the time is right to consider a fresh proposal to enhance the constitutional referendum process in Australia.

My proposal is both practical and moderate. It incorporates additional deliberative democratic elements into the Australian constitutional referendum process. The proposal is consistent with the role of our existing representative institutions. It can

²⁵ LeDuc, *Referendums and Deliberative Democracy*, p. 16.

²⁶ C. Fox, 'The fourteen powers referendum of 1944 and the federalization of Aboriginal affairs'. *Aboriginal History*, 32, 2008, pp. 27-48.

be implemented without itself needing to be ratified by a formal constitutional amendment.

I acknowledge that this is not the first proposal for tweaking the referendum process in a deliberative direction. In the aftermath of the 1999 Republic constitutional referendum, John Uhr put forward several ideas for a more deliberative style of constitutional amendment process.²⁷ Uhr envisaged three main elements. These were constitutional conventions constituted on an elected basis, an all-party parliamentary Select Committee on matters relating to referendums, and the establishment of a new statutory authority (a 'Referendum Commission') to regulate referendum information and to provide for a 'fair and balanced' referendum process.²⁸

My proposal is more incremental and moderate. It simply proposes to establish a series of deliberative assemblies to consider any proposed constitutional amendment after it has been endorsed by the Commonwealth Parliament. These deliberative assemblies would be conducted in the capital city of each State and Territory. Each deliberative assembly would comprise at least one hundred eligible electors, selected to be broadly representative via a statistical method and convened over a series of weekends.

I am wary of proposing too numerous an assembly. The larger the number who are meeting, the more likely it seems that factions may form which weaken the deliberative integrity of the process. That may be the lesson of the South Australian 2016 Nuclear Fuel Cycle citizen jury where the assembly participants for the final sessions numbered 328.²⁹

An opportunity to deepen the 'voice' of deliberation, with elements such as deliberative assemblies, can create a catalyst for broader discussion and public opinion formation regarding the proposed constitutional change. Deliberative assemblies incorporated, as proposed here, as an auxiliary mechanism in considering proposals for a constitutional amendment would be consistent with maintaining the legitimacy of the parliamentary process to initiate constitutional referendums and with recognizing the authority of the final national and State-by-State vote in determining the outcome.

²⁷ J. Uhr, 'Rewriting the Referendum Rules' in J. Warhurst and M. MacKerras (eds) *Constitutional Politics: The Republic Referendum and the Future*, St Lucia: University of Queensland Press, 2002, pp. 177-200

²⁸ J. Uhr, *Rewriting the Referendum Rules*, p. 197.

²⁹ L. Carson, 'Learnings from South Australia's Nuclear Fuel Cycle Jury', 4 September 2017. Accessed at: <<https://www.newdemocracy.com.au/2017/09/03/learnings-nuclear-jury/>>.

The notion of deliberative democracy puts respectful community engagement at the centre of democracy. As stated by Dryzek and colleagues, this is where:

*people come together, on the basis of equal status and mutual respect, to discuss the political issues they face and, on the basis of those discussions, decide on the policies that will then affect their lives.*³⁰

It is time to broaden and deepen the engagement process of constitutional referendums in this way.

³⁰ Bächtiger, Dryzek, Mansbridge, and Warren, *Deliberative Democracy: An Introduction*, p.18.