

The Voice Referendum Needs to Enter the Deliberative Zone

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Abstract: This Article considers the Aboriginal and Torres Strait Islander Voice constitutional referendum proposal in the light of two previous referendums, namely the 1967 and 1999 referendums. Introducing the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill (Cth) into parliament sets the scene for an engaged referendum campaign and final ballot expected in late October or early November 2023. The referendums in 1967 and 1999 have essential lessons for the present referendum proposal and highlight serious challenges. To maximise referendum success, I argue that the ensuing referendum campaign must exhibit the highest degree of deliberative democratic expression and provide eligible voters with clear intent and explanation, readily available information, and inclusive engagement. The stakes are high that this referendum campaign does not divide the Australian community but is a vehicle for greater understanding and relationship between Australia's Indigenous and non-Indigenous communities.

INTRODUCTION

Referendums are a critical democratic exchange between the Commonwealth Parliament and the people of Australia. The prescribed method of changing the Commonwealth Constitution is established in section 128. This section requires alteration legislation to be passed by both Houses of the Commonwealth Parliament or passed by one House but rejected by the other House twice within three months. If this is achieved, the Governor-General is required to submit the bill to the eligible voters of Australia in a referendum ballot. As a result of the double-majority hurdle

that referendums must overcome, Quick and Garran have described the people of the Commonwealth of Australia as the 'delegated sovereigns' of the Constitution.¹

With the official launch of the grassroots 'Yes' campaign on 27 February 2023,² and now the introduction of the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill into the Commonwealth Parliament on 30 March 2023, the race has begun to the expected finish line of a national referendum vote on a 'Voice to Parliament' towards the end of 2023. While the Prime Minister has emphasised the importance of bipartisanship in the success of constitutional referendums,³ this article aims to delve deeper into other significant influences on the progress of referendum campaigns, focussing on the level of deliberation encountered in the national debate. To maximise the success of the upcoming referendum, this article argues that the Voice to Parliament referendum campaign will need to enter the 'Deliberative Zone'.

REFERENDUMS AND DELIBERATION

Since Federation in 1901, only eight out of forty-four referendums have been successful. In reflecting on the defeat of the 1951 referendum on abolishing the Communist Party of Australia, Menzies commented that getting an affirmative vote in a referendum is likened to one of the Labours of Hercules.⁴ When looking at international comparisons, though, Williams and Hume consider that Australia has not done 'too badly' in implementing constitutional change.⁵

¹ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth [1901]*, Sydney: Legal Books, 1976, p. 993. 'It is an undoubted recognition of the qualified electors as the custodians of the delegated sovereignty of the Commonwealth'.

² Dean Parkin, Australians for Indigenous Constitutional Recognition, 'In the Media'. Accessed at: <https://yes23.com.au/in-the-media>.

³ Maeve Bannister, The New Daily, 'PM gets party room ready for referendum challenge'. Accessed at: <https://thenewdaily.com.au/news/politics/australian-politics/2023/03/21/pm-gets-party-room-ready-referendum-challenge/>.

⁴ George Williams and David Hume, *People Power: the history and future of the referendum in Australia*, Sydney: University of New South Wales Press, 2010, p. 199.

⁵ Williams and Hume, *People Power: the history and future of the referendum in Australia*, p. 200.

The term ‘deliberative’ can encompass various meanings,⁶ and the understanding among political theorists has evolved through several waves or generations of thinking. Dryzek and colleagues have proposed a contemporary conception befitting a modern pluralist democracy and more attuned to the practical implications of how deliberative exercises can be structured in large complex societies to build ‘essential democratic capacity’.⁷

For Dryzek and colleagues, ‘deliberative’ means ‘mutual communication that involves weighing and reflecting on preferences and values, and interests regarding matters of common concern’.⁸ The role of deliberative exercises is to enable participants to understand issues, their interests, and the interests of others concerning a particular proposition. It seeks agreement where possible and, where not possible, to clarify any conflict in positions and intentions. This definition provides a valid starting point for the following discussion.

Referendums have been an active field of study in both theory and practice in Australia and internationally. Butler and Ranney provide a wide comparative study of the form and functions of referendums.⁹ Setälä explores the tension inbuilt within referendums between majoritarian decision-making and the perceived threat to minorities when examining referendums and democratic government.¹⁰

Galligan analysed Australia’s constitutional landscape after the large defeat of the 1988 referendum proposals. Galligan asserted that while the defeat of the 1988 referendum would cause constitutional change to be unlikely for some time, Australia’s constitution

⁶ John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament*. Sydney: Cambridge University Press, 1998, p. 4.

⁷ Andre Bächtiger, John Dryzek, Jane Mansbridge, and Mark Warren, ‘Deliberative Democracy: An Introduction’, in Andre Bächtiger, John Dryzek, Jane Mansbridge, and Mark Warren (eds), *Oxford Handbook of Deliberative Democracy*, Oxford: Oxford University Press, 2018, p. 31.

⁸ Bächtiger, Dryzek, Mansbridge, and Warren, *Deliberative Democracy: An Introduction*, p. 18.

⁹ David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory*, David Butler and Austin Ranney (eds), Washington: American Enterprise Institute, 1978. See also David Butler and Austin Ranney, *Referendums around the World*, David Butler and Austin Ranney (eds), Washington: American Enterprise Institute, 1994.

¹⁰ Maija Setälä, *Referendums and Democratic Government: Normative Theory and the Analysis of Institutions*, London: MacMillan Press, 1999.

should not be considered frozen or static.¹¹ Galligan considered that partisanship, lack of knowledge and apathy, as well as a 'pro-State sentiment' were factors in the referendum defeat.¹²

When reviewing the aftermath of the defeated 1999 referendum, Uhr considered that while apathy and cynicism played a part, the referendum process does little to prevent widespread misrepresentation of issues and little to encourage open and respectful debate where alternative views are respectfully considered.¹³

Williams and Hume reviewed eight referendums in Australia between 1906 and 1999 and described similar factors at play when looking at why referendums fail. They consider that the record of referendum success highlights crucial elements such as popular ownership of the referendum process, deliberation and education, consultation and compromise.¹⁴

In arguing that referendums must enter the Deliberative Zone, LeDuc provides a valuable intersection between referendums and deliberative democratic theory by proposing several factors that improve the level of deliberation found in a referendum campaign. Le Duc contrasts what he describes as the 'voice' and the 'vote' functions of a referendum.

By 'voice', LeDuc means the general conception of deliberation that allows for a process to incorporate various positions and discuss issues that 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.¹⁵ The distinction is intended to provide a normative framework to support the proposition that additional deliberative elements are needed for a better direct democratic referendum process.

¹¹ Brian Galligan, *The Constitutional Commission and the 1988 Referendums*, Brian Galligan & John Nethercote (eds), Canberra: Australian National University, 1989, p. X.

¹² Brian Galligan, *The Constitutional Commission and the 1988 Referendums*, p. 130.

¹³ John Uhr, 'Rewriting the Referendum Rules', in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future*, St Lucia: University of Queensland Press, 2002, pp. 188-199.

¹⁴ George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia*, pp. 236-237.

¹⁵ Lawrence LeDuc, 'Referendums and deliberative democracy', *Electoral Studies*, Vol 38, 2015, p.139.

LeDuc concedes that deliberative theory and referendums might not, at first sight, seem to have much in common.¹⁶ Referendum ballots require a formal decision based on available information in a highly partisan environment. In contrast, deliberative theory involves a process of rational debate, respected opinions, and freedom from coercion or deception. 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 enabling a well-informed decision to be made.¹⁷

LeDuc identifies twelve influences that can affect or influence the level of deliberation. Here I concentrate on four of the more significant of these elements.¹⁸ The first element is motive, which recognises that referendums are not necessarily initiated by the government of the day for purely deliberative reasons. The second element is the 'role of government' in a referendum, as they are the most prominent political player able to communicate the justification for the referendum. The third of Le Duc's elements is that a referendum question must be clear and concise to support an informed referendum debate. Yet, as DeLuc highlights, clarity is not an easy attribute to define or achieve. The last element to consider is whether a referendum campaign involves a range of complex issues that need to be processed and understood by the voting public. Is it sufficient to accept the 'vibe' for good deliberation?

TWO REFERENDUMS

Two referendums considered here provide a valuable perspective for the present debate over the proposed referendum on an Indigenous 'Voice to Parliament'. The first referendum to look at is the 1967 referendum consisting of two proposals regarding the number of Members of Parliament and matters related to Aboriginal affairs. The second referendum to consider is the 1999 referendum regarding the issue of an Australian republic and a proposed new preamble to the Constitution. These two

¹⁶ Lawrence LeDuc, 'Referendums and Deliberative Democracy', 2006. Accessed at: http://paperroom.iprsa.org/papers/paper_5268.pdf.

¹⁷ Lawrence LeDuc, 'Voice vs. Votes: Adapting the Institutions and Processes of Direct Democracy to Improve Citizen Engagement and Participation', 2016. Accessed at: <http://labs.carleton.ca/canadaeurope/web-content/uploads/sites/9/LeDuc-CETD-Brief-Final.pdf>.

¹⁸ LeDuc, *Referendums and Deliberative Democracy*, 2006, p. 7.

referendums provide a helpful illustration of the impact of the selected influences above.

1967 REFERENDUM

The 1967 referendum is particularly interesting to review, not only for the social impact of the outcome but also for the nature of the subject matter itself. The context of the 1967 Referendum was that it was a momentous time for civil rights and social change, especially when considering the events taking place in other countries worldwide, especially in America.

The first question on the referendum ballot related to what is called the 'nexus' between the House of Representatives and the Senate, in that the number of Members in the House of Representatives is constrained to be, as near as practicable, twice the number of Senators (amendment to section 24). The second question related to removing impediments to the Commonwealth Parliament in making laws for Aboriginal people (amendment to section 51(xxvi)) and ensuring that Aboriginal people were counted in the formal Commonwealth Census to determine the population of the Commonwealth, which would consequentially impact the determination of the number Members within Parliament (repeal of section 127).

At the time of Federation in 1901, the Commonwealth Parliament did not hold the direct power to make laws over Aboriginal people as it was not considered necessary by the framers of the Commonwealth Constitution.¹⁹ It was felt that the newly established states were best placed or positioned to manage the affairs of the Aboriginal population within their jurisdiction as they had done as separate colonies. Attwood and Markus highlight that:

¹⁹ Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution*, Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007, p. 1. See also *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, Canberra: Commonwealth of Australia, 2012, p.14.

*Aboriginal people were barely mentioned during the debates of the federal conventions which determined the terms of the nation's foundational document.*²⁰

George Williams characterises the framing of the Constitution as being premised upon the notion of 'exclusion and discrimination'.²¹ There was also the assumption that the protection of rights was best left to Parliament and not to be defined within the Constitution.²² This view was further reinforced in the 1929 Royal Commission into the Australian Constitution, which declined to make any recommendations regarding Aboriginal matters, especially any proposals regarding section 51(xxvi) of the Constitution, thereby leaving legislative powers regarding Aboriginal people in the hands of the respective States.²³

Regarding the proposal regarding the repeal of section 127 of the Constitution, it was clear that the administration of the census from 1901 excluded the counting of all full-blood Aboriginal people in the reported population tables for each State. While Griffiths concedes this to be the product of the political environment of the time²⁴, the Commonwealth Chief Statistician did encourage the informal counting of all Aboriginal people in an annual census from 1924 onwards.²⁵

Motive

When considering the element of *motive*, the focus is whether the reason to submit a referendum proposal to a national vote has contributed to good deliberation. In looking at the 1967 referendum, the motive of the Holt Liberal/Coalition Government had less to do with the cause or aspiration of Aboriginal progress than it did with the

²⁰ Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution*, p. 1.

²¹ George Williams, 'The Races Power and the 1967 Referendum', *Australian Indigenous Law Review*, 11 2007, pp. 8-11.

²² Larissa Behrendt, 'The 1967 Referendum: 40 Years On', *Australian Indigenous Law Review*, 11 2007, pp. 12-16.

²³ John Summers, 'The Parliament of the Commonwealth of Australia and Indigenous Peoples 1901-1967', in *Parliament: The Vision in Hindsight*, Geoffrey Lindell and Robert Bennet (eds), Leichardt: The Federation Press, 2001, pp. 149-209.

²⁴ Max Griffiths, *Aboriginal Affairs: A Short History*, Sydney: Kangaroo Press, 1995, p. 46.

²⁵ Statistician's Report, *Census of the Commonwealth of Australia 30 June 1933*, Canberra: Commonwealth Government Printer, p. 117.

political calculation that the popularity of the proposal to repeal section 127 of the Constitution could draw sufficient support of the other question on the ballot paper. That question was the proposal to break the 'nexus' or link between the number of members of the two Houses of Parliament and allow an increase in the number of members of the House of Representatives without increasing the number of Senators. This was the main political game of the Government.²⁶

There was also a significant element of support for the ability of the Commonwealth to legislate on Aboriginal matters and to include Aboriginal people within the numerical population census of the Australian Commonwealth. The pressure for changing the Constitution commenced soon after Federation in 1901, with petitioning campaigns from 1910 onwards, moving through to the 1930s with proposals for dedicated parliamentary seats for Aboriginal representatives within the Commonwealth Parliament. These campaigns were organised through the advocacy of the likes of William Cooper and the Australian Aboriginals League,²⁷ and the Federal Council for Aboriginal Advancement of the 1950s/60s.²⁸

The primary motive for initiating the 1967 referendum was establishing a government advantage in the House of Representatives and taking advantage of a civil rights movement's influence to achieve political gains within the Commonwealth Parliament.

Role of Government

The role of the Government during a referendum campaign is the second influence highlighted by LeDuc. This is relevant within an Australian context as constitutional changes can only be initiated in Parliament through the prime agency of the government of the day. Since Federation in 1901, there have been 79 constitution alteration bills out of a total of 115 bills introduced to Parliament that have either lapsed for lack of support or were withdrawn by the Government before the actual

²⁶ Zachary Gorman and Greg Melleuish, 'The nexus clause: A peculiarly Australian obstacle', *Cogent Arts & Humanities*, 5 (1) 2018, pp. 11-16.

²⁷ Bain Attwood and Andrew Markus, *Thinking Black*, Canberra: Aboriginal Studies Press, 2014, p. 9. William Cooper petitioned King George V in 1933 to advance the proposal to introduce dedicated parliamentary seats within the Commonwealth Parliament for Aboriginal representatives.

²⁸ Bain Attwood and Andrew Markus, *The 1967 Referendum, or When the Aboriginals Didn't Get the Right to Vote*, Canberra: Aboriginal Studies Press, 1997, p.21.

issue of referendum writs. The role of government in managing the passage of a referendum bill through Parliament to be submitted to a national vote is crucial.

The decision of the Holt Government to proceed with the 1967 referendum was made early that year, with a referendum scheduled for 27 May. The passage of this alteration bill commenced with the Menzies Government in 1965 and was primarily focused on the issue of breaking the 'nexus' or link between the number of the House of Representatives and the Senate. Cabinet papers at the time indicate that the decision to add the questions regarding Aboriginal matters was made in the hope that it would create a positive influence on the question regarding parliamentary members.²⁹ The Holt Government prosecuted the case for change primarily in terms of the 'nexus' question and effectively left the referendum campaigning in the hands of various non-government advocacy groups such as the Federal Council for the Advancement of Aboriginals (FCAA), later renamed the Federal Council for the Advancement of Aboriginal and Torres Strait Islanders (FCAATSI), involving especially women activists such as Faith Bandler.³⁰ There was a distinct sense that the Government was only interested in the political advantage of breaking the link between the Senate and the House of Representatives and had exhibited a decided lack of concern for Aboriginal affairs.

While the actual referendum vote on the Aboriginal question was passed with the largest margin of all referendum questions, the Holt Government should have moved straight away to take advantage of the extent of public support for change. The Holt Government only recognised considerations of the condition of Aboriginal communities at least three months after the referendum result. Holt eventually told the Commonwealth Parliament, via a Ministerial Statement on the 7th of September 1967, that he would be simply maintaining the status quo in Aboriginal affairs and expected the States to continue to hold prime responsibility for Aboriginal affairs.³¹

²⁹ Bain Attwood and Andrew Markus, 'Representation Matters: The 1967 Referendum and Citizenship', in *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*, Nicolas Peterson & Will Sanders (eds), Cambridge: Cambridge University Press, 1998, pp. 121-124.

³⁰ Kate Laing and Lucy Davies, 'The Leadership of Women in the 1967 Referendum', *Agora*, 56(1) 2021, pp 13-18.

³¹ Harold Holt, *Commonwealth Parliamentary Debates*, House of Representatives, 7 September 1967, pp. 972-975.

Clarity

The third element of our framework is that of clarity, which relates to the extent to which the actual framing of the question itself can contribute to good deliberation. The nature of this element is whether a referendum question is sufficiently clear to support good engagement and debate, especially accepting that good deliberation should enable participants to understand issues, seek agreement where possible and clarify any conflict in positions and intentions.

In looking at the first question regarding the 'nexus' clause of the number of members in both Houses of Parliament, the wording of the referendum question on the ballot paper was concise and clear, being to 'to alter the Constitution so that the number of members of the House of Representatives may be increased without necessarily increasing the number of Senators. While the ballot question was straightforward, the explanation of the change in the official Yes/No pamphlet comprised most of the written pages.

In looking at the second referendum question, the wording on the ballot paper was general. It was 'to alter the Constitution to omit certain words relating to the people of the Aboriginal race in any State and so that Aboriginals are to be counted in reckoning the population'. With the question requiring reference to different material, the assumption was that voters would have explored and understood the proposed changes and were aware of its contents and consequences.

This assumption had been off the mark, as opinion polls at the time of the referendum indicated that many Australians believed the effect of the referendum would be to deliver equal rights for Aboriginals or that it would provide the right to vote. A Morgan Gallop Poll on 19 May 1967, one week before the referendum, indicated that 22% of the Australian public believed the referendum would deliver equal rights for Aboriginals.³² A further 14% thought the referendum would benefit Aboriginals, especially 'better opportunities' and 'improved conditions'.³³ Neither of these beliefs was correct. The right to vote had already been established at the Commonwealth level

³² Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, power and the Australian Constitution*, p. 49.

³³ Murray Groot and Terrance Beed, 'The referenda: Pollsters and predictions', *Australian Journal of Political Science*, Vol 12 1977, pp. 86-95.

in 1962, with the last State to legislate the right to vote for Aboriginals was Queensland in 1965.³⁴

In explaining the second ballot question in the Yes/No pamphlet, there was only a short one-and-a-half-page formal 'Yes' case detailed, with no proper 'No' case included. It was left, therefore, to the various advocacy groups to promote the cause for change with their resources.³⁵

As highlighted by LeDuc, clarity is an important influence on the level of deliberation in a referendum campaign. It is an interesting irony that the Government devoted the most resources to justify the first referendum question but failed to obtain a successful result. The second question was more precise but was provided with the least amount of supporting material, but succeeded. The issue of clarity was recognised by Linda Burney in her commentary on the 1967 Referendum and reconciliation efforts. Burney's view is that success in any future proposals will be contingent on a clarity of vision and clarity of purpose.³⁶ This is a significant factor for the upcoming Voice to Parliament referendum proposal currently before the Commonwealth Parliament.

Complexity

The fourth element of Le Duc's framework is that of complexity. That is, whether there is a multiplicity of institutional structural issues and potential consequences embedded in a referendum question that complicates good deliberation through this level of complexity.

While the first ballot question on breaking the nexus between the House of Representatives and the Senate was clear, it did include complex issues related to the perceived balance of power between the two Houses of Parliament, especially in an environment where Senate numbers could provide obstacles to Government legislation, especially budget or money bills. Meanwhile, while simpler but most

³⁴ John Gardiner-Garden, 'The 1967 Referendum—history and myths', *Research Brief No 11*, Canberra: Commonwealth of Australia, 2007, pp 15-19.

³⁵ Attwood and Markus, *The 1967 Referendum, or When the Aboriginals Didn't Get the Right to Vote*, p.37.

³⁶ Linda Burney, 'Reconciliation and Referendum: 1967 to present', *Australian Journal of Public Administration*, 76 (4) 2017, pp 409.

misunderstood, the second question succeeded by the most significant margin of all referendums held since Federation in 1901.

One of the misunderstandings of the referendum campaign was that a successful 'Yes' vote would somehow resolve the past deficiencies in Aboriginal rights and their status as citizens. This assumption overstated the proposed and implemented changes due to the referendum. The referendum result was expected to improve welfare programs and opportunities for Aboriginals.³⁷

*In my view, the best single explanation for the success of the original referendums between 1898 and 1900, which adopted the Constitution, was the idealism and inspiration which built up around the goal of federation. This, too, may explain the unprecedented success of the 1967 referendum on Commonwealth powers to make special laws for the Aboriginal people. The fact that the actual Constitutional changes involved were widely misunderstood, both at the time and since, only reinforces this interpretation.*³⁸

The first question could not achieve a majority 'Yes' vote at a national level, with only 40.25% voting 'Yes' and only one State, New South Wales, gaining a greater than 50% approval. The second question was passed with a national average vote of 90.77% in favour and a positive 'Yes' result in every State.

1999 REFERENDUM

The second selected referendum to consider is the 1999 referendum on the issue of an Australian republic. The Howard Liberal/Coalition Government initiated this referendum in 1998 due to previous electoral commitments leading up to the 1996 Federal election. The broader context of the 1999 referendum was the establishment of the Constitutional Centenary Foundation in 1991 to promote understanding and discussion about the Australian Constitution and Australia's system of government during the lead-up to the Centenary of Federation in 2001. A consequence of establishing this non-partisan body was the subsequent establishment of two opposing

³⁷ Attwood and Markus, *The 1967 Referendum, or When the Aboriginals Didn't Get the Right to Vote*, p. 39

³⁸ Helen Irving, 'The Republic Referendum of 6 November 1999', *Australian Journal of Political Science*, 35(1) 2000, p. 115.

parties, the Australian Republican Movement in July 1991 and the Australians for a Constitutional Monarchy in June 1992.

Motive

Looking at motive as an influence on deliberation, we need to consider the political drivers that led to the referendum proposal being put to a national vote and how motive can contribute to the level of deliberation encountered.

The broader context of the 1999 referendum was the establishment of the Constitutional Centenary Foundation in 1991 for the purpose of promoting understanding and discussion about the Australian Constitution and Australia's system of government during the lead-up to the centenary of Federation in 2001. On 28 April 1993, the then Keating Labor Government initiated the Republican Advisory Committee with the primary task of examining the options to advance the minimal changes necessary to establish an Australian Head of State. This Committee, headed by Malcolm Turnbull, reported back to the Commonwealth Parliament in October 1993, resulting in the Keating Labor Government committing to holding a referendum on the issue of an Australian Republic by the centenary of Federation in 2001. The Liberal/National Coalition opposition matched this proposal and that, if elected, they would establish a 'People's Convention' on the issue and, if practical options were developed, a Liberal/National Coalition Government would progress this option to the Australian people in the form of a constitutional referendum.

After the Liberal/National Coalition won the March 1996 Federal election, it would have been easy to allow the previous government's referendum proposal to fade into the background of unfulfilled electoral promises. The calculation by then Prime Minister John Howard, in progressing this proposal, was that he could present the referendum to the people of Australia to decide, but at the same time demonstrate his opposition to the referendum proposal hoping to neutralize the issue.³⁹

³⁹ John Uhr, 'Testing Deliberative Democracy: The 1999 Australian Republic Referendum', *Government & Opposition*, 35(2) 2014, p. 207.

Role of the Government.

How the government of the day conducts itself during a referendum campaign can influence the level of deliberation over a particular referendum proposal. The Howard Government announced, on 10 October 1999, that the Government would not fund any 'Yes and No' cases for the first referendum question relating to the Preamble. Therefore, this funding restriction could have impacted the ability to inform the voting public of the details of the first proposal.⁴⁰ The higher 'No' vote that registered for the Preamble question, compared to the second question on the issue of a republic, potentially reflects the lower profile the proposed new preamble received during the referendum campaign and the lack of engagement with the voting public.

On the issue of the second question on the referendum ballot regarding a proposed Australian Republic, the Howard Government established a separate 'people's convention' to debate the case of a republican head of state. The convention aimed to publicise the debate and significantly influence the referendum's outcome. While the convention significantly contributed to an increased level of debate and public accessibility of information regarding the referendum, other factors have been proposed for the failure of the referendum.⁴¹

Clarity

The third element LeDuc considers when analysing contributions or obstacles to the level of deliberation found within referendum campaigns is that of clarity. The more precise the referendum question, the greater the likelihood that voters will understand the purpose of the referendum and will not be subject to different interpretations or deliberate misinterpretations. While the Australian Electoral Commission produced a 38-page 'Yes-No-Pamphlet', this document still did not detail the actual alteration bills and required more investigation on the part of the individual voter.

Ian McAllister has highlighted the difficulty in people understanding what they were being asked to vote for, combined with an electoral system of compulsory voting in

⁴⁰ Mark McKenna, 'First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991-99', *Research Paper No. 16*, Canberra: Commonwealth of Australia, 2000, p. 16

⁴¹ George Williams, 'The 1998 Constitutional Convention-First Impressions', *Current Issues Brief No 11*, Canberra: Commonwealth of Australia, 1998, p.5.

requiring attendance at a polling booth to vote, provided a major cause of the referendum defeat.⁴² This is an important lesson to remember for the current referendum campaign.

Complexity

The last of the four elements of analysis is that of complexity. LeDuc highlights that a multiplicity of issues or excessive complexity can contribute to difficulties in deliberation. As the problems or level of impacts embedded within a referendum question increase, the greater likelihood that people will find it challenging to engage in reasoned debate. The more issues built into a referendum question, the greater the potential for failure.

One aspect of the complexity of the 1999 republican referendum was the overlapping referendum questions included on the ballot paper. The first question related to the Preamble, the second referencing a Bill to amend the constitution to abolish the Monarchy and establish a President as replacement Head of State. While both questions related to different components of the Commonwealth Constitution, the two referendum questions were distinct and separate elements and not explicitly connected. Would there have been a more successful outcome if there had been only one proposed element of change? Higley and McAllister have pondered that the 'ability of voters to understand complex political changes has long been a problem with referendums, and with the potential for direct democracy more generally'.⁴³

Regarding the first ballot question, the preamble lives outside the standard legal clauses of the Constitution. The preamble is contained within the covering clauses of the British Imperial Act that established the formal Constitution. A significant issue raised with this ballot question was the confidence level in whether a referendum under section 128 of the Constitution could amend the covering clauses of the Imperial Act. The complex issues built within the preamble question certainly detracted from its

⁴² Ian McAllister, 'Elections Without Cues: The 1999 Republican Referendum', *Australian Journal of Political Science*, 36(2) 2001, p. 247.

⁴³ John Higley and Ian McAllister, 'Elite division and voter confusion: Australia's Republic referendum in 1999', *European Journal of Political Research*, 41 2002, p. 859.

potential success. As stated by Les Murray after the referendum, 'the thing had been crippled by compromise, whereat the people in their mercy took it out and shot it'.⁴⁴

In referencing an amending act to abolish the Monarchy and establish a President, the second referendum question suffered a similar fate regarding the complicated structural and institutional issues involved within the ballot question. The impact of linking the two questions, as difficult as they were, with divided advocates of alternative republican models, with a perceived lack of voter knowledge, combined with compulsory voting, led to a 'depressed' vote for change and, therefore, a contribution to its failure.⁴⁵ LeDuc considered the 1999 Referendum in his work and calculated that including these complex issues of removing the Monarchy and electing a President may have been significant factors in why the referendum question failed.⁴⁶

In assessing the aftermath of the 1999 referendum, John Uhr gave thought to two essential lessons coming out of the referendum, namely, what future republican options could be considered that may have better success, and secondly, that the referendum procedures 'failed to give Australia a constitutional change process that measures up to the best standards of a "deliberative democracy", defined as a democracy striving to maximise reasoned public deliberation and to minimise partisan deception'.⁴⁷ The complex institutional structures in the referendum question made simple arguments difficult. The extent to which the Voice to Parliament referendum is impacted similarly will be fascinating to see unfold.

The current wording of the referendum, as detailed in the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023 (Cth), goes beyond what was described in the Final Report of the Referendum Council, where a constitutionally entrenched Voice simply to the Federal Parliament was the most endorsed by Dialogue participants as the most preferred option for constitutional alteration.⁴⁸

⁴⁴ Les Murray, 'Mates Lost and Saved: Drafting the Constitutional Preamble', in *Constitutional Politics: The Republic Referendum and the Future*, John Warhurst and Malcolm Mackerras (eds), St. Lucia: University of Queensland Press, 2002, p. 86.

⁴⁵ Ian McAllister, *Elections Without Cues: The 1999 Republican Referendum*, p. 247.

⁴⁶ LeDuc, *Referendums and Deliberative Democracy*, 2006, p. 14.

⁴⁷ John Uhr, 'After the Referendum: The Future of Constitutional Change', *Public Law Review*, Vol 11 March 2000, p. 7.

⁴⁸ Referendum Council, *Final Report*. Canberra: Commonwealth of Australia, 2017, pp. 14-15.

CONCLUSION

In arguing that referendum campaigns must exhibit the highest degree of deliberative democratic expression and enter the Deliberative Zone, national referendum campaigns must provide eligible voters with clear intent and explanation of an alteration proposal, provide readily available information and inclusive public engagement, to overcome the double-majority affirmative vote requirement of Section 128 of the Constitution.

The usefulness of the analytical framework provided by LeDuc is that it gives insight into the influences at play when looking at referendums as an exercise of direct democracy and public engagement. In comparing the 1967 and 1999 referendums, Mark McKenna sees that this coming referendum is not a repeat of 1967 but has more in common with the 1999 referendum. The dynamics will be quite different as the proposed change is broad, there will be a 'No' case mounted, and the impact of social media will be large.⁴⁹

Having regard to the work of LeDuc and the influences he has identified regarding deliberation and referendums, what happens from now is that the recently established Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum will examine and receive submissions from the public on the proposed alteration and allow representations to be made to the Committee as part of its public examination of the referendum bill. It will be of critical importance how the Albanese Government responds to the Committee's Final Report, due to be tabled in May. There should also be a series of deliberative assemblies established in each State and Territory to be a catalyst for a broader discussion and public opinion formation regarding the proposed constitutional change. These deliberative assemblies would work as an auxiliary mechanism to the Parliament, adding a deliberative layer to the ensuing referendum campaign. With an expected referendum ballot to be held in late October or early November 2023, there is time to ramp up the level of deliberative engagement.

Ideally, the public discourse from now until the referendum vote will be considered, respectful and will enable the public to understand the issues related to the proposed Voice to Parliament and its impact on Parliament and the Executive Government. The race to the referendum finish line has begun. The Aboriginal and Torres Strait Islander

⁴⁹ Mark McKenna, 'Australia in Four Referendums', *Meanjin Quarterly*, 81(4) 2022, pp. 75-78.

Voice to Parliament referendum must enter the Deliberative Zone to maximise its success in this referendum race.