



CANBERRA LAW REVIEW

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Catherine van der Winden

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Canberra Law Review

FOREWORD

Welcome to the 2014 edition of the Canberra Law Review. First I should acknowledge the efforts of the student editors, Belinda Chapman and Catherine van der Winden, who assisted in the publication of this edition. Both have contributed commentaries to this edition, Belinda on the new information privacy legislation in the Australian Capital Territory and Catherine on potential future directions for sexual harassment legislation reform.

When we began planning of this edition in late 2013, the ACT government has just proposed its same sex marriage legislation. At that time we invited comments on the legislation and the legal issues associated with its implementation. Dr Scott Guy and Dr Peter McManus both responded promptly. Sadly (at least for the editors), the Federal Government and the High Court responded quicker than the editorial cycle could handle. It is now a matter of record that the High Court declared the *Marriage Equality (Same Sex) Act 2013* invalid on constitutional grounds in a 6-0 joint judgement*. The ACT government's failure has not deterred further potential bills, with both the Australian Labor Party and the Liberal Democrat senator David Leyonhjelm seeking to introduce private member bills into the federal parliament. The two papers in this edition were developed prior to the decision, however they address issues in relation to Federal/State legislation primacy and provide analysis on how future bills could be drafted and what practical issues such bills will need to address.

The Canberra Law Review is pleased to publish the results of Dr Bede Harris' survey into the Australian public's perceptions on constitutional reform. Covering a wide range of topics the survey explores what Dr Harris refers to as the Australian peoples' 'well-founded disillusionment with the political system and their ill-founded fear of constitutional change'.

Andrew Corney has submitted a case review on the use of social media in unfair dismissals. A matter of particular relevance in Canberra, where it seems that not a week went by in 2014 without a public servant or a professional rugby league player be dismissed on the basis of their social media comments. Additionally, Dr John Gilchrist completes his trilogy of papers on the prerogative rights of the Commonwealth under the Copyright Act 1968 and Dr Tony Meacham has commented on traditional constitutions and contemporary migration issues.

Finally we close with two book reviews. Bruce Arnold draws our attention to a fascinating period of Australian history in 'Superfluous People' and Dr Wendy Bonython reviews Richards and Louise's *Medical Law and Ethics* in 'Guiding the Gods in White Coats'.

Rob MacLean
Editor

* <http://www.austlii.edu.au/au/cases/cth/HCA/2013/55.html>

A SURVEY OF VOTER ATTITUDES TO CONSTITUTIONAL REFORM

BEDE HARRIS*

ABSTRACT

It is usually thought that, at best, the Australian public has little interest in constitutional reform or, at worst, is profoundly suspicious of it. A key reason for voter reluctance to countenance reform is the poor state of civics education in Australia, which has the consequence that voters are, understandably, fearful of changing what they do not understand. Previous opinion polls that have been conducted on constitutional reform have been of limited value in that they have focused on single issues and have not provided respondents with sufficient background information to enable them properly to evaluate what they are being asked. This article analyses the results of a representative survey of Australian voters in which respondents were given detailed background information explaining various constitutional reforms. The survey also differs from others in that it sought respondents' views on a wide range of reforms - relating to knowledge of the Constitution and experience of civics education, the electoral system, a Bill of Rights, the independence of the Speaker of the House of Representatives, ministerial accountability and an Australian republic. Its results indicate that, when fully informed, more voters are likely to support constitutional reform than has previously been thought. The article also discusses how best such reforms for which there is widespread support can be achieved.

I INTRODUCTION

It is usually thought that, at best, the Australian public has little interest in constitutional reform or, at worst, is profoundly suspicious of it. Of 44 constitutional reform referenda held since 1901, only eight have met with success. Yet no survey

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has been conducted to determine voter attitudes to comprehensive constitutional reform - that is, reform touching upon multiple issues. Such surveys as have been conducted have focussed on single issues. Furthermore, because of the poor state of civics education in Australia, voters are, understandably, fearful of changing what they do not understand, and this means that such surveys as have been conducted have almost inevitably produced results indicated negative public perceptions of constitutional reform. This article analyses the results of a survey which was different to others in that respondents were questioned in relation to a wide range of reforms and questions were prefaced by detailed background information.¹

Part II of this article explains the rationale for the survey and its methodology. Part III discusses responses to the issues canvassed in the survey. Part IV concludes with a discussion of how best those of the reforms which the survey indicates have broad public support could be achieved.

II RATIONALE AND METHODOLOGY

What do Australians think about constitutional reform? An answer which is all of flippant, accurate and depressing is 'Not much'. Indeed, a leading constitutional lawyer famously described Australia as a 'frozen continent' in so far as constitutional change is concerned.²

Yet to say that the failure of Australia to embark on constitutional reform is due solely to voter disinterest is to tell only part of the story. It is certainly true that, there is little that excites the passions of Australians in relation to systemic reform of our governmental institutions. However it would be a mistake to think that this disengagement is caused only - or even chiefly - by apathy. I would argue that the truth is far more disturbing - that there is in fact widespread underlying public dissatisfaction with how the political system works, but that apathy in relation to doing something about it stems from a profound lack of knowledge about how the Constitution operates, which in turn makes people fearful of changing it. Who would interfere in the operations of a machine which one knew performed an important function but which one did not understand the workings of, and which could cause catastrophic consequences if mishandled? In other words, what on the face of it appears to be apathy conceals a belief that because constitutional matters are so difficult to understand, and the consequences of an error potentially so egregious, there is no point in even contemplating change - and so no-one does.

¹ I wish to thank the Faculty of Business of Charles Sturt University for the Research Compact Grant which enabled me to commission the survey, and to Professor John Gammack of Zayed University for his advice on statistics and data analysis.

² Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, Melbourne, 1967) 208.

But worse even than this is the fact that politicians - and here principally one is talking of politicians from the two major blocs of the Coalition and Labor - deliberately exploit this fear of the unknown in order to maintain a *status quo* which serves their own interests. One does not need to be a promoter of conspiracy theories to come to this conclusion. The public record is full of instances in which politicians either misrepresent or simply lie about constitutional matters in order to discourage the public from entertaining changes which they (the politicians) do not want. Two examples serve to illustrate this:

The Howard government repeatedly stated that it would not offer an apology in Parliament to Indigenous Australians, because to do that would be to expose the Commonwealth to legal claims for compensation. This was nonsense – the law of parliamentary privilege, gives absolute legal immunity to anything said during the course of Parliamentary proceedings. An apology in Parliament simply could not have had the effect of making the government liable to pay compensation.

Similarly, when the Rudd government established a committee to hold public consultations on the question of whether Australia should have a Bill of Rights, the terms of reference included a restriction that options canvassed by the committee ‘should preserve the sovereignty of the Parliament’ – which in the language of constitutional law meant that the committee should not suggest options which gave the courts the power to invalidate laws or government actions which infringed a Bill of Rights. Anyone reading this clause without the benefit of knowing the Constitution would assume that the committee was being barred from proposing a model that would confer a new power on the courts. Yet the Commonwealth Parliament is not ‘sovereign’, in that sense, and never has been. From the moment the Constitution came into force the courts have had the power to invalidate laws passed by Parliament – including laws which infringe the four rights that the Constitution protects expressly, as well as others that it has subsequently been held to protect impliedly. The mandate given to the committee was misleading, because it suggested that the relationship between Parliament and the courts was different from what it actually is.

In light of the above, general public reluctance to engage in debate on constitutional reform ought to be recognised for what it is: wariness about becoming involved in matters that are seen to be arcane, coupled with fear that change will have adverse consequences which, in combination, result in a reflexive conservatism when presented with proposals for constitutional amendment.

But it would be wrong to think that lack of engagement in constitutional debate means that voters are satisfied with the way government functions in Australia. Indeed, quite the reverse is true. Public opinion polls and public commentary both reflect an

increasing dissatisfaction with the political process.³ Both the major political blocs are perceived as relentlessly negative - as stated by L'Estrange, former Secretary to the Department of Foreign Affairs and Trade,⁴

[Young Australians] see aspects of our political system as pandering to special interests, too much grandstanding, too focused on the lowest common denominator rather than on good decisions effectively implemented. They blame the process, and have little regard for the quality of people in it, for the governance in parliament.

Yet despite the undoubted disillusionment with our governmental institutions, people fail to appreciate that it is only by changing those institutions that government can be improved. As was stated by Stephen Sherlock, Director of the Centre for Democratic Institutions at the Australian National University⁵

People are very reluctant to engage in big ideas. We just want to make sure the trains run on time, and so on. There's a real absence of dialogue about the power and effectiveness of our institutions. We take them for granted.

This, then, is the critical problem - how to get voters to make the connection between their well-founded disillusionment with the political system and their ill-founded fear of constitutional change, because only by changing the rules of the game will we be able to change how it is played. The reason the political system operates with less efficiency, less justice and attracts a calibre of politician far lower than it could do is because of flaws in the system - it is not a question of bad luck. Therefore, only reform of the system will improve the results it delivers. It follows that education is key to achieving constitutional reform and also that only if voters are presented with information which disabuses them of the misconceptions they hold, can their true attitude to constitutional reform be gauged. This then was the rationale for the survey - to determine what the *fully informed* attitudes of Australians to constitutional reform are - in other words, what their attitudes are once the effect of proposed reforms have been explained. For this reason, many of the questions were prefaced by an explanation of what constitutional terms mean and what the implications of the proposed reforms.

The survey was conducted on the researcher's behalf by a research panel organisation, Online Research Unit (ORU) during the period December 2013 - January 2014. The survey consisted of 24 questions, designed to ascertain the views of respondents in six main topics: experience of civics education and knowledge of the Constitution, the electoral system, a Bill of Rights, independence of the Speaker of the House of

³ See Leonore Taylor, 'Voter enthusiasm now well and truly curbed', *The Sydney Morning Herald* (Sydney), 3 November 2012, 11; Leonore Taylor, 'Party leaders have eyes only for the polls', *The Sydney Morning Herald* (Sydney), 14 April 2012, 17; Paul Kelly 'Leaders lost in struggle over policy' *The Australian* (Sydney), 4 June 2011, 11 and Ross Peake 'Attitude adjustment: We're losing trust in government' *Canberra Times* (Canberra), 27 September 2011, 1.

⁴ Rowan Callick, 'Civic pride a lost cause', *The Australian* (Sydney), 24 June 2013, 9.

⁵ *Ibid.*

Representatives, parliamentary scrutiny of the executive and whether Australia should become a republic. Although self-selecting in the sense that their populations volunteer to participate in surveys, research panels have the advantage in that they avoid the biases inherent in telephone and internet surveys, which are restricted to respondents who have access to those modes of communication.⁶ Respondent selection by ORU was randomised from a panel conforming in age, gender and geographic location to the target population of enrolled voters. The results were based on 616 completed surveys which, as a sample relative to the overall voting population, delivers a 95 per cent confidence level with a 4 per cent margin of error.

III SURVEY RESULTS

A Knowledge of the Constitution and Experience of Civics Education

Before investigating public attitudes to constitutional reform, it was important to ascertain how much respondents knew about the Constitution, and what their experience of civics education had been. The first three questions in the survey focussed on this area. The results were as follows:

1. To your knowledge, does the Commonwealth of Australia have a written Constitution?

Yes	87%
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No	13%
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2. Australia does have a Constitution, called the Commonwealth of Australia Constitution Act. Were you taught about how Australia's Constitution works:

In primary school	11%
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In high School	20%
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⁶ See the discussion of the validity of research panels in Katherine Anderson, *The validity of online proprietary panels for social and marketing research* (Master of Business thesis, University of South Australia, 2012) 220 who concludes that empirical studies indicate that widely recruited panels with broad appeal give results which are sufficiently representative for use in social science research < http://ura.unisa.edu.au/R/?func=dbin-jump-full&object_id=61490 >.

In both primary and high school	18%
Never	51%

3. Do you think that school students should be taught more about our Constitution?

Yes	95%
No	5%

First, so far as knowledge that we have a Constitution is concerned, the survey presents a positive picture - that fact that 87 per cent of people were aware of the existence of the Commonwealth Constitution compares favourably with what previous surveys have revealed: that 54 per cent of respondents knew Australia had a Constitution in 1987 and 67 per cent did in 1992.⁷

However, knowledge of the bare fact of the existence of the Constitution does not mean that respondents knew about its contents - as we shall see later in the discussion of constitutional protection of human rights, 64 per cent of respondents were unaware that the Commonwealth Constitution contains provisions allowing the courts to invalidate legislation which unduly impairs certain rights.

This comes as no surprise when one considers the responses to the survey question about exposure to education about the Constitution - 51 per cent of respondents never having received such education at any level of schooling. Yet there is clearly an overwhelming desire for more education on the Constitution, with 95 per cent of respondents believing this to be necessary for school students.

The fact that over half of the respondents report not having received education about the Constitution is hardly surprising. Many respondents would not have had the benefit of civics education simply because the first concerted effort by the Commonwealth government to promote civics education occurred only in 1997 with the publication of a civics and citizenship curriculum, *Discovering Democracy*. Although *Discovering Democracy* was excellent in so far as it described how the Constitution worked, what it lacked was a critical approach - one which would encourage students to evaluate how our institutions work and to equip them with the

⁷ For a report of the results of these earlier surveys see Denis Muller 'Most want Constitution changed once they work out what it is', *Sydney Morning Herald* (Sydney), 3 July 1992, 6.

skills to enable them to debate how they might be improved. The Constitution was presented as representing the final culmination of an historical process, with a sub-text that it is the best that it could be.

The entire Australian school curriculum is currently in the process of being reformed.⁸ One hopes that the new national curriculum will contain an element of critical analysis, in the absence of which we risk producing a generation which will certainly be better informed than previous ones about how the Constitution works, but who will still be infected with an unwarranted belief that it is the best possible.

B *The Electoral System*

Just about the only occasion on which the ordinary person has an opportunity to participate in the political process is when they cast their vote at elections. Therefore the extent to which the electoral system accurately reflects the views of the electorate might be thought to be of paramount importance to its design. In reality, however, this is far from the case.

Because the electoral system for the House of Representatives is based on single-member electorates, election results are inevitably distorted, because whether a party wins seats in Parliament depends not simply on how many votes it obtains but, far more importantly, on how those votes are geographically distributed. This means that parties which have significant but widely distributed support from voters nationwide will not be able to obtain representation in Parliament. The fact that there is only one seat per electorate also means that politics becomes dominated by two parties. The overall effect is that there is no proportionality - indeed there is often gross disproportionality - between the number of first preference votes a party receives and the number of seats it wins. The unfair nature of the electoral system is illustrated by the following table which contains results from two federal elections in the recent past:

Year	Party	Nationwide % of first preference votes	% of House of Representatives seats
1990	Labor	39.4%	52.7%
	Coalition	43.4%	46.7%
1998	Labor	40.1%	45.2%
	Coalition	39.1%	54%

⁸ The project is being undertaken by the Australian Curriculum, Assessment and Reporting Authority (ACARA). The curriculum can be downloaded from the Australian curriculum site at Australian Curriculum, Assessment and Reporting Authority, *The Australian Curriculum*, < <http://www.australiancurriculum.edu.au/> > .

What is striking about these results is that clearly the ‘wrong’ party won both elections, in that the victor (that is, the party which obtained a majority in the House of Representatives) was less popular in terms of nationwide share of the vote than the vanquished. Furthermore, this is by no means a rare occurrence: Governments also came to power with fewer votes than were won by the opposition in 1954, 1961, 1969 and 1987.

The electoral system is particularly unfair to minor parties: In 1990 the 11.4 per cent of first preference votes (which indicate which party the voters truly wanted to represent them) won by the Australian Democrats yielded not one seat for the party – yet by contrast, the 8.4 per cent of first preference votes cast for the Nationals won them 9.5 per cent of the seats, and that was simply because of where those voters were located. In 2004 and 2007 the Greens won over 7 per cent of the vote but achieved no representation in the House, and when they won one seat in the House 2010, that was after winning 11.7 per cent of first preference votes nationwide. The result of this is that the major parties have won an astonishing 99.1 per cent of all House of Representatives seats held in the 26 elections since 1949.

Yet the disproportionate nature of our electoral system is not fully understood by voters, as the results of this next survey question indicate:

4. Under our current electoral system, when elections are held for the Commonwealth Parliament, do parties get seats in proportion to their percentage share of the national first preference vote?

Yes	33%
No	43%
Don't know	25%

The fact that 33 per cent of voters think that we have a proportional system perhaps reflects a belief that the electoral system could not be so unfair as to deny parties representation in proportion to their vote. The fact that an additional 25 per cent of respondents do not know whether the electoral system is proportionate or not and that only a minority of voters – 43 per cent - know that our system is not proportional, is indicative of the general lack of knowledge about the most fundamental aspects of our constitutional system.

What then is the attitude of voters to reform of the electoral system? Once made aware of the fact that the electoral system is *not* proportionate, a large majority of respondents were of the view that the system should ensure proportionality, as shown by the results of the second survey question on this issue:

5. Do you think that the electoral system *should* ensure that parties are allocated seats in Parliament in proportion to their percentage share of the votes they receive throughout Australia?

Yes	75%
No	25%

The results to this question indicate that an overwhelming majority of respondents were of the view that we should have an electoral system which ensures that voters' sentiments are accurately represented. The next question is, which electoral system would voters be likely to support? There several types of electoral systems, and a great many variants within each type, but broadly speaking electoral systems can be divided into four classes:

The first of these consists of single-member electorate systems - such as that currently used for the House of Representatives - where the country is divided into single-member electorates. As already demonstrated, such systems yield highly disproportionate results which do not accurately reflect the strength of parties among voters. As we have also seen they can also lead to a party winning a majority of seats with a minority of votes. However, they have the advantage that voters have an identifiable local representative.

The next type of system is known as the 'pure list' system, an example of which is provided by Israel. In this system there are no geographic electorates at all. Parties nominate lists of candidates in order of preference, and if a party obtains 20 per cent of the votes nationwide, the first 20 per cent of its candidates are elected. The advantage of such a system is that it is highly proportional. A disadvantage is that since there are no geographic electorates, voters have no identifiable MP who could be said to represent them. They also have the disadvantage that because of their control over the ordering of the lists, it is the parties rather than the voters, who control the identity of the MPs.

The third system, called Mixed Member Proportional, or MMP, examples of which operate in New Zealand and Germany, combines elements of the single-member electorate system and the pure list system. Under MMP half the seats in Parliament are elected from lists provided by parties and half from single-member electorates. The final composition of the legislature must, by law, reflect the proportion of the *list vote* that each party obtained. Therefore, once the results of the electorate seats are known, the seat allocations of each party are 'topped up' from their ordered lists (passing over any candidate who appeared on the list but who succeeded in gaining election in an electorate) so that their total number of seats reflects the percentage of the list vote they obtained. The system delivers a highly proportional result, and also provides voters with a local member. A drawback of the system is that the MPs who

are drawn from the party lists owe their place in Parliament to a decision by the party rather than the judgement of the voters.

The fourth type of electoral system is known as the Single Transferrable Vote (STV) system.⁹ It has an enormous number of variants, but a common feature of all of them is that the country is divided into multi-member electorates. STV is already used in Australia, in elections for the Tasmanian lower house and the ACT legislature (in the latter two jurisdictions it is often referred to as the ‘Hare-Clarke system’).¹⁰ STV is also used for elections for the upper houses of all State Parliaments (except for Tasmania). It is also used in many other countries - an example being in elections for the lower house of the Irish Parliament (Dail Eireann). Under STV, the country is divided into a number of large electorates, each returning more than one member (usually three to seven). Parties may nominate as many candidates for each electorate as there are seats to be filled. Voters receive a ballot paper on which all the parties’ candidates are listed. Voters indicate their preferences for individual candidates. The advantage of STV is that although it does not give as proportional a result as does MMP, the fact that it has multi-member electorates makes it far more representative than single-member electorate systems. Furthermore, the greater the number of seats in each electorate, the more proportionate the outcome so, for example, in a seven-member electorate, a party could win one of the seats with just over 12.5 per cent of the vote. Another advantage is that all members of the legislature are identifiable with a specific electorate, so voters have members who directly represent their locality. Furthermore, and uniquely among electoral systems, STV puts voters in the position where they can determine the fates of the various candidates put up by the *same party*, which puts voters in a far better position vis-à-vis party machines than either single-member electorate systems or systems involving party lists.

The survey sought to determine which electoral system respondents would be most willing to find support in a context where they could not be expected not know about the intricacies of various electoral systems. This it did by asking them to rank three objectives of a voting system in order of importance to them. The following were the results:

⁹ For an explanation of how STV works which is both amusing and very clear see the video at Tasmanian Electoral Commission, *Hare-Clark Explained* (2013), < <http://www.tec.tas.gov.au/StateElection/index.html> >.

¹⁰ The name combines those of Thomas Hare, who first devised the STV system in 1857, and Andrew Inglis Clark who persuaded Tasmania to adopt it in 1896.

6. Rank the following objectives of an electoral system *in order of importance* to you:

	1 st	2 nd	3 rd
Fairness in accurately representing which political party voters support	42%	41%	17%
Producing a government formed by only one party	12%	18%	70%
Giving voters a local representative to whom they can take their concerns	46%	41%	12%

This question was of particular significance because it required voters to weigh the importance of objectives which conflict with each other in the sense that different electoral systems serve these objectives to a greater or lesser extent. Therefore, the electoral system which would be most likely to find favour is that which best serves the two objectives which received the highest priority from respondents - giving voters an identifiable local representative, and ensuring fairness of representation.

As indicated by the discussion of electoral systems above, although the single-member electorate system produces identifiable local representatives, it performs very poorly in serving the objective of fair representation. Pure list systems give the reverse result: they are highly proportional, but none of the MPs represent any particular locality. The MMP system gives a proportional result, and half the MPs represent electorates, but half do not. Although, because it is based entirely on geographical electorates, STV provides a level of representation which is somewhat less than that provided by MMP, it is still far more representative than the single-member electorate system, and becomes increasingly representative as the number of members per electorate is increased. Furthermore, as STV has no list MPs it has the advantage over MMP that the identity of all MPs is subject to approval by the voters, who can even express differing preferences for candidates from the same party. In addition, voters have identifiable MPs representing their electorate to whom they can take their concerns. In light of this, it is reasonable to conclude that STV would be most likely to find favour with voters if a referendum was to be held on changing the electoral system.

As indicated above only 12 per cent of voters ranked the ability of an electoral system to produce single-party government as being of primary importance - indeed it was ranked 3rd in importance by the vast majority (70 per cent) of respondents. Nevertheless, one can anticipate that fear of governmental instability would be the major focus of those opposing electoral reform. The next two questions directly

confronted respondents with the issue of coalition government. The first was as follows:

7. Which of these statements most closely reflects your view of governments formed by coalitions between political parties:

They are always unstable	15%
They are sometimes unstable	56%
They are usually stable	27%
They are always stable	2%

In other words, 71 per cent of respondents thought that coalition governments were always or sometimes unstable, while 29 per cent thought they were usually or always stable. The next question was prefaced by information designed to focus the attention of respondents on the link between proportional representation and coalition government:

8. Under the current electoral system for the House of Representatives, MPs are elected in single-member electorates. A single party usually gets enough seats to form government, but parties do not get representation in proportion to their support nationwide. This can even lead to a government coming to power with fewer votes nationwide than were received by the opposition. By contrast, under a proportional representation system, parties always get seats in proportion to their share of the national vote. Governments are usually formed by a coalition of parties which, in combination, will always represent a majority of voters. In light of the above, which of these systems do you prefer:

The current electoral system	42%
Proportional representation	58%

What is to be made of all these results in combination? First, they show that an overwhelming majority of respondents support the concept of proportional representation - in answering question five, 75 per cent of respondents indicated that the number of seats a party wins in Parliament should be proportionate to its share of its nationwide vote. After then being asked in question seven to express their opinion of coalitions (which elicited concerns about governmental stability on the part of 71

per cent of respondents) and subsequently being asked in question eight to express a preference between the current electoral system and proportional representation, proportional representation gained the support of 58 per cent of respondents. In other words, even after confronting the issue of coalition government and the concerns about stability that it raises, a clear majority of respondents still favoured the adoption of proportional representation.

It is nevertheless significant that support for proportional representation dropped from 75 per cent (question five) to 58 per cent (question eight), as it reinforces the likelihood that is this that supporters of the *status quo* would focus on if change was mooted. It would therefore be of great importance to address fears of coalitions leading to governmental instability in the minds of voters before a referendum on electoral reform was held.

There is a wealth of research from other countries which indicates that there is no causative link between proportional representation and governmental instability. In the most comprehensive study, a tabulated ranking of countries listing their electoral systems and durability of governments indicated that whereas some countries (for example, the United Kingdom and Jamaica) using disproportionate single-member constituency systems produce long-lived governments, other countries using the same system (such as India and Papua-New Guinea) are afflicted with severe governmental instability. Conversely, while some countries using proportional representation (such as Italy and Israel) are prone to instability, others (such as Switzerland and Austria) have governments that are more stable and change less frequently than those in the United Kingdom.¹¹ Another telling statistic is that since its foundation in 1949, the Federal Republic of Germany, which uses proportional representation has had 18 elections, almost exactly the same number as the 17 elections held in the same period in the United Kingdom, which uses the non-proportional, single-member electorate system. In other words, the data emphatically indicates that there is no causative relationship between proportional electoral systems and governmental instability.

Our current electoral system is manifestly unfair, and in the absence of any electable alternatives serves the interest of the Labor-Coalition duopoly, rather than providing a true democracy. The results of the survey indicate that there is widespread support for a reform of the electoral system.

¹¹ David Farrell, *Electoral Systems – A Comparative Introduction* (Palgrave Macmillan, New York, 2001) 194-6.

C A Bill Of Rights

The first question relating to a Bill of Rights was designed to ascertain respondents' attitudes to the idea of 'rights' - that is, as fundamental freedoms which are superior to laws enacted by Parliament:

9. Which of these general statements of principle most closely accords with your views:

A Parliament elected by voters should have the power to enact laws that limit or remove any individual rights and freedoms	19%
--	-----

There are certain fundamental individual rights and freedoms which a Parliament elected by the voters should not be able to unreasonably limit or remove.	81%
---	-----

This result indicates very strong support for the essential concept underlying a Bill of Rights - that the individual has certain entitlements which ought to be respected, even in the face of the democratic will. The importance of the fact that an over whelming majority of respondents answered as they did cannot be overstated, because it constitutes a recognition of a belief that are (or should be) limits to democracy, which is a critical aspect of the argument that a Constitution should have a Bill of Rights. Respondents obviously recognise that individual rights cannot be left to the mercy of the government - even one that is democratically elected. As Geoffrey Robinson pithily states¹²

[democratic governance] has never meant that parliament can do anything it likes just because MPs happen to have been elected, or that governments can do anything because they are backed by a majority of elected MPs.

The next question asked respondents to identify which of among three remedies for a breach of rights they thought would be most effective in bringing the breach to an end.

¹² Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Random House, Sydney, 2009) 21.

10. If a person's rights are being infringed by the government, which of these courses of action do you think is most likely to quickly bring a halt to the infringement:

Lobbying Parliament or a candidate when the next general election occurs	14%
Seeking an order from the courts	66%
Petitioning the government	20%

These results indicate a recognition that, as Geoffrey Robertson states,¹³ the availability of judicial review as a mechanism for the vindication of rights

...means justice for people whose particular plight would ever be noticed by Parliament, or prove interesting enough to be raised by newspapers or a constituency MP. Far from undermining democracy by shifting power to unelected judges, it shifts power back to unelected citizens: democracy from its inception has relied on judges ('unelected' precisely so they can be independent of party politics) to protect the rights of citizens against governments that abuse power.

The next question was designed to discover what respondents knew of the current level of rights protection in the Commonwealth Constitution:

11. To your knowledge does the Commonwealth Constitution currently protect any fundamental human rights by empowering the courts to invalidate laws which unreasonably limit them?

Yes	36%
No	13%
Don't know	51%

Two things about these results are noteworthy: First, only 36 per cent of respondents were aware of the fact that we do have constitutionally-embedded rights, while a majority (64 per cent) either thought that the Constitution does not contain such rights or were unsure. This is perhaps unsurprising, given that, as we have seen in answer to the very first question in the survey, a majority of respondents said they had never been taught about the Constitution. However, the second and more significant

¹³ Ibid 8.

implication of the results is that the existence of that 64 per cent means that a large proportion of Australians think that the inclusion in our Constitution of a full Bill of Rights would mean the conferral of a new power on the judiciary whereas the courts have, since the coming into force of the Constitution, had the power to invalidate laws which infringed upon such rights as it protects.

The next question began by disclosing to respondents the fact that the Constitution protects some rights - in other words, revealed to those who were unaware of it that the courts already have the power to invalidate laws which infringe certain rights. Then, in light of that information, respondents were asked whether they thought that the Constitution should protect the full range of rights which Australia has agreed to uphold by signing international human rights documents:

12. Currently the Constitution gives express protection to five rights: freedom of religion, freedom of inter-State commerce and movement, fair compensation when property is acquired by the Commonwealth, jury trials under certain Commonwealth laws and non-discrimination on grounds of residence in a different State. The Constitution also already empowers the courts to invalidate legislation and government action which unreasonably limits these rights. Should the existing rights-protection by the Constitution be expanded so as to include a Bill of Rights which protects the full range of fundamental human rights that are protected by documents such as the Universal Declaration on Human Rights, which Australia has undertaken to uphold internationally?

Yes	59%
No	14%
Not sure	28%

The fact that 59 per cent of respondents supported the idea of comprehensive protection of rights is significant, in that it indicates a clear majority in favour of such a reform. However it is also noteworthy that this is significantly less than the 81 per cent of respondents who, in answer to question 1, agreed that there are certain rights that should be protected against derogation by Parliament. This difference is difficult to explain.

One explanation is that while the results to question nine indicate that respondents are supportive of the concept of constitutional rights in the abstract, the fact that the results to question 11 indicate that most respondents did not know that the Constitution protects certain rights by empowering the courts to invalidate legislation which infringes them could mean that they believe that the amendment of the Constitution to protect the full range of rights would confer a novel power on the

judiciary which is clearly not true. Yet this explanation is not very satisfactory, because question 12 was prefaced by a statement which explained that the Constitution already protects certain rights.

Another explanation might be that people consider that protection of the rather eclectic set of rights in the Constitution is all we need and that that is why only 59 per cent of respondents wanted to see an expansion of rights. Yet, as we shall see, when respondents were asked in the next question whether they wanted specific rights included, large majorities (often in excess of 90 per cent) supported the inclusion in the Constitution of many rights which are not currently protected. It is also encouraging that in answering question 10, 66 per cent of respondents agreed that seeking an order from a court is the most effective way of obtaining redress for an abuse of human rights, and this therefore gives grounds for confidence that a negative campaign focusing on this issue would be able to be countered.

The next question asked voters to consider what rights should be included if protection for the full range of rights was included in the Constitution. The rights listed in this question are those found in documents such as the *Universal Declaration of Human Rights* and in the *Canadian Charter of rights and Freedoms* and in the Bill of Rights contained in the South African Constitution, both of which closely follow the *Universal Declaration*.

13. If the Constitution had a full Bill of Rights, which of the following would you include (indicate Yes / No for each) the right

not to be subject to arbitrary arrest (arrest without reasonable suspicion of having committed a crime)	82%
not to be subject to arbitrary search	66%
to be informed of reasons for arrest	95%
to contact a lawyer upon arrest	94%
not to be discriminated against on grounds of race	94%
not to be discriminated against on grounds of gender	95%
not to be discriminated against on grounds of religion	91%

not to be discriminated against on grounds of sexual orientation	90%
not to be discriminated against on grounds of disability	94%
to a fair trial by an independent judiciary	98%
to life	90%
not to be subject to torture or to inhumane treatment	95%
to vote	92%
to stand for election to public office	87%
to privacy	93%
to fair compensation when property is compulsorily acquired	95%
to freedom of association	82%
to freedom of expression	93%
to freedom of religion	90%
to freedom of movement	91%

0

These results indicate that there is a general recognition that if a broader Bill of Rights was included in the Constitution, it should include the range of rights that have come to be accepted as universal in the post-World War II era. The results also indicate very high levels of support – in most cases from over 90 per cent of respondents - for most of those rights, although the lower levels of support for the rights not to be subject to arbitrary arrest or search is an odd anomaly given their importance.

Clearly there is still educative work to be done to explain to voters that effective vindication of rights depends upon the power of the courts to invalidate laws which infringe them, and also that such a power already exists in our Constitution, albeit in relation only to a handful of rights, and that therefore the inclusion of a full range of rights would increase the circumstances in which the courts could grant a remedy to complainants, but would not confer a new function on the courts.

D *An Independent Speaker*

One might think that question time, where MPs have the opportunity to ask questions of ministers relating to their areas of responsibility, would provide a means of holding the government to account. Debate in both houses of Parliament is conducted according to Standing Orders which are administered by the Speaker in the case of the House of Representatives. Unfortunately, there is no rule that *compels* ministers to answer questions, and Speakers do not compel them to do so either. Also unfortunately, and unlike in the United Kingdom, we do not have a truly independent Speaker. The Speaker is elected by a simple majority of the House – which therefore means, they are elected by the government of the day, and governments – both Coalition and Labor - have used their majorities in the House to elect control the office which is supposed to control them: During the 1996 election, John Howard promised he would ensure a ‘completely independent Speaker’, yet within two years of coming to power the government forced Speaker Halveston to step down after becoming frustrated at his impartiality in enforcing discipline on both Coalition and Labor MPs.¹⁴ Labor too has used the speakership as a political football: In 2011 the then government pressured Speaker Jenkins into resigning in order to gain an additional vote on the floor of the House, and installed Peter Slipper as Speaker. Matters did not improve after the Coalition government came to power in 2013, and Bronwyn Bishop was elected Speaker. Bishop’s continued to attend Liberal party room meetings – in contrast to the previous Speaker, Anna Burke. In 2014 Labor moved a motion of no confidence in the Speaker, pointing to the fact that all of the 98 members of the House whom she had ejected from the chamber were from the Opposition.¹⁵ The motion was defeated because the Speaker had the support of the government majority in the House, but the fact that the event occurred indicates the extent to which the office as it exists in Australia is a far cry from the UK, where a Speaker relinquishes ties to his or her party, does not sit as a member of his or her caucus, and is expected to be completely neutral in his or her treatment of MPs. It is therefore not surprising that ministers can evade questions posed to them at question time, because the Speaker, elected by their party, will certainly not force them to do so.

A solution to the issue was proposed by Kevin Rozzoli who served as Speaker of the New South Wales Legislative assembly for seven years.¹⁶ Although writing about reform of the New South Wales Parliament, his proposal would be equally applicable to the Commonwealth Parliament: He proposed that once chosen by a secret ballot of MPs, the Speaker would then become a ‘member at large’, serving a notional

¹⁴ Gerard Henderson, ‘PM’s backflip on Speaker reform’ (*The Courier Mail*, Brisbane), 9 March 1998.

¹⁵ Steven Scott, ‘Worst Speaker in history’ survives no-confidence vote by Opposition’, (*The Courier Mail*, Brisbane), 28 March 2014, 11.

¹⁶ Kevin Rozzoli, *Gavel to Gavel - An insider’s view of Parliament* (UNSW Press, 2006, Sydney, 2006) 194-201.

electorate until retirement, while his or her actual electorate seat would automatically be filled by a nominee of the party for which the Speaker had stood, who would then contest the seat in the usual way at the next election. This scheme would ensure that the Speaker was immediately elevated above party politics, without depriving his or her former constituents of political representation. The other critical aspect of Rozzoli's recommendation was that a Speaker should be able to be removed only by a two-thirds majority of Parliament - which in practical terms would mean only with the concurrence of both government and opposition.

The results of the survey questions relating to the lack of independence of the Speaker, and the fact that ministers cannot be compelled to answer questions raised important concerns in the minds of survey respondents:

14. Currently the Speaker of the House of Representatives, whose role it is to control debates and the behaviour MPs, is elected and dismissed by a simple majority of MPs. This means that the party which is in government effectively controls who will be Speaker. Requiring a larger majority would mean that support of more than one party was needed to appoint or dismiss the Speaker. Which of the following methods do you think should be used to elect and dismiss the Speaker:

The current system - by a simple majority of MPs.	40%
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We should have a new system which requires that a 2/3 majority of MPs should elect the Speaker.	60%
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15. Should Ministers be required to answer questions in Parliament?

Yes	96%
-----	-----

No	4%
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16. Should a refusal by a Minister to answer questions in Parliament be treated as an instance of misbehaviour by the Minister, and be subject to a penalty?

Yes	78%
-----	-----

No	22%
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The very substantial majorities believing that minister should be compelled to answers questions and should face sanctions if they do not no doubt reflect the general disenchantment felt by Australians in relation to the political process in general and the evasiveness of politicians in particular.

E Ministerial Accountability

The power of parliamentary committees to question ministers holds out – at least in theory – more promise as a mechanism for ensuring accountability of the government. However the usefulness of a committee being able to secure the attendance of witnesses (including ministers), to compel them to give answers to questions and to produce documents depends entirely on the committee having sanctions at its disposal when witnesses are recalcitrant. According to Harry Evans, who served as Clerk of the Senate for 21 years, the Senate has the power to issue a summons to compel witnesses to appear before its committees and to produce documents,¹⁷ although usual practice is for an invitation to be sent to the person to attend, and for them to attend voluntarily.¹⁸

Yet ministers not uncommonly refuse to attend committees, and also instruct public servants not to attend and / or not to answer particular questions.¹⁹ Perhaps the most striking recent example of this in 2014 was when Minister for Migration, Scott Morrison, refused to answer when asked by a Senate committee asked how many asylum-seeker boats had been intercepted in Australian territorial waters. The minister also refused to provide the committee with documents it requested. But this type of conduct is by no means rare: A number of examples from the past decade include John Howard's refusal to allow political advisors employed in his office and in that of the then defence minister Peter Reith, to appear at the inquiry into the Children Overboard affair,²⁰ the prohibition against a defence force officer appearing before the inquiry into what knowledge ADF personnel had of torture of Iraqi prisoners at Abu Ghreib,²¹ and the prohibition against public servants appearing before the inquiry into the AWB scandal.²²

¹⁷ Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 11th ed, Canberra, 2004) 30, 57 and 377.

¹⁸ *Ibid* 378.

¹⁹ *Ibid*.

²⁰ Tony Harris, 'The Buck Stops Over There', *Australian Financial Review* (Sydney), 19 March 2002, 62 and Patrick Walters, 'A fearless public servant', *The Australian* (Sydney), 17 August 2004, 4.

²¹ Alexandra Kirk, ABC Television, *The World Today*, 1 June 2004 (Tanya Nolan) <<http://www.abc.net.au/worldtoday/content/2004/s1120461.htm>>.

²² See Samantha Maiden, 'Gag in Senate illegal, clerk warns', *The Australian* (Sydney), 12 April 2006, 4; and Ross Peake, 'Cover-up claim as officials gagged', *Canberra Times* (Canberra), 14 February 2006, 2.

This is not how people expect the system to work. The results obtained to the next two survey questions on ministerial responsibility were as follows:

17. Parliamentary Committees scrutinise legislation, conduct public inquiries on matters referred to them by Parliament as a whole and hold the government to account by asking questions of Ministers and public servants. In your view, should Ministers and public servants be obliged to answer questions put to them by parliamentary committees?

Yes 96%

No 4%

18. Should Ministers who fail to answer questions put by parliamentary committees, or who instruct public servants not to do so, face penalties?

Yes 89%

No 11%

Clearly there is an enormous gap between how respondents want parliamentary government to work, and how it works in practice.

Although the question of whether a refusal to answer questions put by a parliamentary committee amounts to contempt has never been litigated in relation to the Commonwealth Parliament, it is very likely that a court would find that to be the case. The precedent for this is provided by a case which arose in relation to the Legislative Council of the New South Wales Parliament, which had suspended a government minister for refusing to provide documents requested by a parliamentary committee. In *Egan v Willis*,²³ the High Court held that under the common law, the Legislative Council enjoyed such privileges as were reasonably necessary to enable it to discharge its functions as a legislative chamber operating as part of a system of responsible government. These privileges included the power to compel a minister to produce documents requested by the chamber. The court therefore found that the Legislative Council had the power to demand that the Treasurer produce the documents, and to suspend him from the chamber when he refused to do so.

²³ (1998) 195 CLR 424.

So if, as seems very likely, a minister could be punished for contempt if he or she refused to answer questions put by a committee, why do ministers continue to engage in such conduct? It is here that legal and political considerations become intertwined. First one needs to note that although a minister who refused to answer questions put by a committee could colloquially be said to be ‘in contempt of the committee’, the correct legal position is that he or she would be in contempt of the house that established the committee, and it is only the house as a whole, not the committee (and still less any individual Senator whose question was not answered) who could bring contempt proceedings. The practical implication of this is that whether proceedings are brought depends upon whichever party controls the house voting to do that – and unfortunately, neither of the two major blocs, Labor and Coalition, see it as being in their long-term interests to punish each other’s ministers.

This was starkly revealed in 2002, when the Senate was holding an inquiry into the Children Overboard affair. Peter Reith, who had been Defence Minister at the time the events occurred, refused to give evidence before the Senate committee, and the cabinet also ordered that his staffers not comply with the committee’s requests to attend. At the time, the Coalition lacked a majority in the Senate, which meant that Labor, in conjunction with the minor parties, had sufficient numbers in the Senate to compel attendance, and could have used their majority in the Senate to initiate contempt proceedings if the committee met with recalcitrance. If the legality of that had been contested, the matter could have been tested in the courts and, based on the precedent of *Egan v Willis*, Reith would have been found to have been in contempt. The reason that this did not occur was that despite the fact that the Australian Democrats and Greens supported such a step, Labor refrained from using its Senate votes to exercise the contempt powers.²⁴ This demonstrates the political cynicism that afflicts what is the two-party system in Australia: As a party which might come to power in the future, Labor was unwilling to establish the precedent that ministers, advisors and public servants should be compellable witnesses before legislative committees.²⁵

There is clearly a need to enhance the power of parliamentary committees to hold governments to account. Any reform of the Constitution must put the power of committees to secure the attendance of witnesses and the imposition of penalties in

²⁴ See for example the failure of the Labor-controlled committee inquiring into the children overboard affair to summons political advisors who had been serving in the offices of the Prime Minister and the Minister of Defence – Megan Saunders, ‘Truth is out there, somewhere’, *The Australian* (Sydney), 25 October 2002, 12.

²⁵ For discussion of this political dimension of this issue see Laurie Oakes, ‘Hypocritical oath’, *The Bulletin* (Sydney), 13 March 2002, 17; Margo Kingston, ‘Labor backdown opens black hole of accountability’, *Sydney Morning Herald On-line* (Sydney), 1 August 2002, < <http://www.smh.com.au/articles/2002/07/31/1027926912621.html> >; Sarah Stephen, ‘Refugee drownings: Labor sabotages inquiry’, *Green Left Weekly*, 11 September 2002 < <https://www.greenleft.org.au/node/26737> > and Margo Kingston, ‘Labor’s latest travesty’, *Sydney Morning Herald On-line* (Sydney), 23 October 2002, < <http://www.smh.com.au/articles/2002/10/23/1034561546910.html> >.

cases of non-cooperation on a legal, rather than a political, foundation. The Constitution should explicitly mention parliamentary committees, should state that any member of a committee has the right to subpoena witnesses and require them to answer questions and present documents. It should provide that individual committee members should be able to initiate contempt proceedings against recalcitrant witnesses in the courts, which should have the power to impose penalties. This would reverse the power imbalance that exists between legislature and executive, and would make government truly responsible to the legislature.

Of course it may on occasion be true, that a question put to a minister or public servant by a parliamentary committee would, if answered, reveal information that should not be made public. One can think of any number of circumstances in which the revelation of military, intelligence, diplomatic or economic information could cause damage to the national interest. How should the legal system balance scrutiny of the government by Parliament against the need for the government to keep certain matters confidential?

The key issue is how to distinguish between public interest immunity claims which are genuine and those which are motivated simply out of a desire on the part of the government not to reveal information which it finds politically embarrassing. To take the example of Scott Morrison's refusal to provide information about refugee boat arrivals to the Senate, what objective basis was there for claiming that the number of boats that have arrived is something which it is not in the public interest to disclose? Certainly none was disclosed. This is because under current practice, when ministers claim public interest as the ground for refusing to provide information requested by parliamentary committees, the claim is accepted at face value - and there is no instance of a house of Parliament challenging such a claim.

Clearly some apolitical process is needed to determine whether claims of public interest immunity are well-founded. The current situation, which leaves the executive branch of government free to claim to public interest immunity without challenge, is unacceptable.

I would argue that this could satisfactorily be achieved by the application of the doctrine of public interest immunity, which is already acknowledged by the law of parliamentary privilege as a valid exception to the general principle that the executive must provide information requested by the legislature.²⁶ The doctrine was applied in *Egan v Chadwick*,²⁷ in which the New South Wales Court of Appeal held that the obligation of the executive arm of government to produce documents might, depending on the circumstances, be qualified by considerations of public interest immunity - in other words, that there were circumstances where the interest of cabinet

²⁶ Evans, above n 17, 464.

²⁷ (1999) 46 NSWLR 563.

confidentiality might outweigh Parliament's right to scrutinise the government. In determining what exceptions to the power of a chamber there might be, the court applied a test of what was reasonably necessary for a legislative chamber to discharge its role within a system of responsible government. Thus the court held that the operation of responsible government requires a balancing of interests: Although responsible government requires parliamentary scrutiny of the executive, the executive cannot discharge its role under the system without the freedom to deliberate on policy matters in private.

Why then has there never been a challenge by a house of the Commonwealth Parliament to a claim of immunity by the executive? Surely, given the precedent set in the context of a State Parliament in *Egan v Chadwick*, there would be a high probability that a court facing the same question arising at Commonwealth level would apply the same test? The reason for this is the same which applies where ministers refuse to answer questions – it is in the interest of neither of the major political blocs to go to court to challenge the misuse of the public interest defence, as both the Coalition and Labor in opposition know that they will find the claim useful once back in office.

As an example of a system where a legislature has power to subpoena members of the executive, and to seek the assistance of the courts in cases of non-compliance, we can turn to the United States where, despite not having a parliamentary government system such as we do, committees of Congress enjoy far greater oversight powers over cabinet ministers than does the Australian Parliament. In *United States v Nixon*²⁸ the Supreme Court held that the executive cannot be compelled to give information if the possibility that communications would be subject to disclosure would impair the confidentiality and candour of policy deliberations within the executive.²⁹ However, the court expressly affirmed that the executive's mere claim of privilege (the equivalent of public interest immunity in Australia) is not determinative – any case involving such a claim will be decided by the courts,³⁰ balancing the competing demands of the interest to be served by disclosing the information against the executive's claims to confidentiality.³¹ In *Nixon* the court held that claims of executive privilege will be particularly strong in relation to information relating to foreign affairs, diplomacy and national security,³² but even in a case where a claim of privilege is based on state secrets, the executive must satisfy the court that such an issue is involved, if necessary by providing evidence to the court *in camera*.³³ The

²⁸ 418 US 683 (1974).

²⁹ *Ibid* 705 and 708.

³⁰ *Ibid* 703.

³¹ *Ibid* 711-12. See also *Senate Select Committee on Presidential Campaign Activities v Nixon* 498 F.2d 725 (D.C. Cir 1974) and *United States v A T & T* 521 F.2d 384 (D.C. Cir 1976) and 567 F. 2d 121 (D.C. Cir 1977).

³² 418 US 683 (1974) 710-11.

³³ *United States v Nixon* 418 US 683 (1974) at 713-14. See also *United States v Burr* 25 Fed. Cas. 187 (1807) 190-92 and *United States v Jolliff* 584 F. Supp 229 (1981). The most recent instance

Supreme Court re-stated these rules on executive privilege in *Nixon v Administrator of General Services*,³⁴ in which it held that there was no general undifferentiated right to executive privilege,³⁵ and that a claim of privilege would succeed only where the executive could show that disclosure would significantly impair the executive branch's ability to achieve its constitutional function.³⁶ This line of cases thus demonstrates that the concept of executive privilege exists, but also that it is by no means a trump that will defeat any congressional request for information.

It should not however be thought that, because the courts have the ultimate role in deciding inter-branch disputes, contests between the legislature and the executive are frequently the subject of litigation in the United States. The legislature generally obtains the information it seeks, simply because the executive pays a political price of appearing to have something to hide in instances where it claims executive privilege.³⁷ In most cases, the two branches reach a political compromise,³⁸ and it is a quite normal feature of the political process in the United States for members of the executive, including members of the cabinet, to appear voluntarily before public hearings of congressional committees,³⁹ or for information to be provided in a confidential briefing to members of a committee.⁴⁰ Disputes are thus almost always settled by negotiation between Congress and the administration.⁴¹ The fact that the judicial branch is the ultimate determiner of the degree to which the executive is accountable has not led to the courts being confronted with policy questions that they are incapable of deciding without becoming involved in party-political disputes. It is a matter of supreme irony that the legislative branch in the United States has far greater power than is the case under the system of responsible government we have in Australia, which supposedly subjects the executive to legislative control.

of an *in camera* evaluation of the validity of a claim of executive privilege was in 1990, when Federal District Court Judge Greene privately viewed the personal diaries of former President Ronald Reagan, the release of which had been sought by former National Security Advisor, John Poindexter, when he was tried for offences committed as part of the Iran-Contra affair. Having reviewed the diaries, Judge Greene held that they added nothing of substance to evidence already before the court, and upheld the claim of executive privilege – see Mark Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* (Baltimore, Johns Hopkins Press, 1994) 127-30.

³⁴ 433 US 425 (1977).

³⁵ Ibid 446-47.

³⁶ Ibid 443.

³⁷ On the political ramifications of claims of executive privilege see Louis Fisher, 'Congressional Access to Information: Using Legislative Will and Leverage', 52 (2002) *Duke Law Journal* 323.

³⁸ Ibid 325.

³⁹ Ibid 394-401. Although an incumbent President has never been summonsed to appear before a congressional committee, President Ford agreed to do so voluntarily to answer questions relating to his pardoning of former President Nixon - see Rozell, above n 33, 90.

⁴⁰ Ibid 150.

⁴¹ William Marshall, *The Limits on Congress's Authority to Investigate the President*, (2004) *University of Illinois Law Review* 781, 806-08.

The idea of the courts determining such cases, rather than the executive being judge in its own cause, found favour with respondents to the survey, as demonstrated by the responses obtained to the final question relating to responsible government:

19. If a Minister says that they or public servants working for them should not answer questions put by a parliamentary committee because the answer might disclose matters which it is in the public interest to keep confidential (such as internal government deliberations or information relating to national security), then which of the following should happen:

The Minister's statement should be accepted without question	15%
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The courts should consider whether the Minister's claim is valid, in a closed (non-public) hearing if necessary.	85%
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The outcome of the balancing process undertaken by the courts would depend upon the facts of each case, however one would expect that cases involving foreign affairs and national security would be ones in which a high degree of deference would be shown to the executive once it proves its claim – perhaps at *in camera* proceedings before the parliamentary committee seeking information. Similarly, discussions between members of the cabinet, and documents which were genuinely related to cabinet proceedings,⁴² would also be likely to remain immune from legislative inquiry. A court adjudicating upon such issues might find that the leading of evidence or the production of documents is wholly covered by executive privilege, or it might allow a parliamentary committee to receive the evidence subject to conditions – for example that the evidence be presented *in camera*⁴³ and only before the members of the committee unassisted by parliamentary staff, with prohibitions on the recording of the evidence, as happens in the United States. The key point is that public interest

⁴² Confidentiality would thus not apply to a document merely because it had been physically present during a cabinet meeting – for an example of trolley-loads of documents being wheeled into cabinet meetings simply in order for it to be said that they were ‘cabinet documents’ see Greg Roberts, ‘To hell with the critics’ *The Australian* (Sydney), 26 August 2006, 23.

⁴³ A procedure which is already recognized as being available to committees – see Evans, above n 17, 379. A similar procedure (colloquially named the ‘crown jewels’ procedure) operates in the United Kingdom, where members of parliamentary committees are permitted to view documents which are of diplomatic, military or commercial sensitivity, subject to negotiated restrictions on publication. For a discussion of this see the First Report of the Liaison Committee of the House of Commons, HC 323, 1996-97, *The Work of Select Committees*, < <http://www.publications.parliament.uk/pa/cm199697/cmselect/cmliaisn/323i/lc0104.htm> >.

immunity should not be conceived of as a trump to be waved in the face of parliament or the courts and permitting the executive to avoid scrutiny. The fundamental principle which should underlie the doctrine of ministerial accountability to Parliament is that for the system to operate effectively, ministers cannot be the final arbiters of what information they should or should not disclose to the Parliament to which they are responsible.

F *An Australian Republic*

Despite being the least important change that could be made to the Constitution – in the sense that it would be of purely symbolic value, and would affect the operation of the Constitution neither for better nor for worse – the question of whether Australia should become a republic has gained more public attention than the other, far more significant, reforms which were the subject of this survey. Nevertheless, symbols have their own importance, and in that regard, a change to a republic would be significant.

Many countries in the international Commonwealth have become republics with scarcely a ripple of concern on the part of their inhabitants. This is unsurprising, because the substitution of a President as head of state in place of the monarch is easy to achieve and can be done in such a way as to have no practical effect on how the Constitution operates.

The reason why the issue has become so controversial in Australia is that lack of knowledge among voters about how the current Constitution works has resulted in a key impediment to reform in this area being the fear that a President might use his or her powers in breach of the conventions which currently control the exercise of powers by the Governor-General.

This raises the question of why we have conventions. Why operate a system where the law says one thing while a convention, which everyone regards as binding, says something completely different – indeed, can say something complete *opposite* to what the law says? Why not change the Constitution so that the law accords with reality – in other words, so that the unenforceable conventions are turned into enforceable law? Part of the problem is that many people have an almost mystical reverence for the conventions, believing that their content is uncertain, and that they are therefore incapable of being expressed as legal rules (or ‘codified’) in the Constitution. An alternative – and inconsistent argument – is if they were put into law they would ‘lose their flexibility’, and that the Governor-General would not be able to respond to constitutional crises. Neither of these arguments stands up to scrutiny: If the conventions are sufficiently certain to be capable of comprehension and operation, they are capable of being written down as law. If there are any that are uncertain then surely, given the importance of the Constitution, an effort should be

made to clarify them, so that they can be expressed with certainty? As to the argument relating to flexibility, if the conventions were codified, they would be no more prone to failing to address an unexpected situation than any other rule in a Constitution. That risk is present whenever statute law is drafted. It should not stand as a deterrent to converting these important constitutional practices into law.

Therefore, irrespective of whether we remain a monarchy, benefit would be derived from codification. Contrary to the views of those opposed to codification, it is by no means difficult, nor is it very unusual. Several Commonwealth countries, including some that have maintained the office of Governor-General,⁴⁴ and others that have become republics with a figurehead President exercising the powers formerly exercised by a Governor-General,⁴⁵ have codified the reserve powers.

Codification was one of the issues put to respondents to the survey, and the result was a significant majority in favour of codification:

- 20 The Governor-General represents the Queen in Australia and is appointed and dismissed by the Queen acting on the advice of the Prime Minister of the day. The Governor General's powers are stated very broadly in the Constitution, and most are left to informal rules, called 'conventions'. These rules are not enforceable by the courts - they rely wholly on the political consequences which would occur if they were breached. Do you think that these powers, and the conditions under which they are exercised, should be expressly included as legally enforceable rules in the Constitution?

Yes	64%
No	36%

Clearly the idea of codification, and the fact that it would make fundamental rules of the Constitution both certain and enforceable, found favour with respondents.

So far as a republic is concerned, opinion is evenly divided:

⁴⁴ See, for example, the *Constitution of Barbados* 1966, Arts 61, 65, and 66; the *Constitution of Bahamas* 1973, Arts 73, 74 and 66; the *Constitution of Grenada* 1973, Arts 52 and 58; and the *Constitution of Jamaica* 1962, Arts 64, 70 and 71.

⁴⁵ See, for example, the *Constitution of Dominica* 1978, Arts 59, 60 and 63; the *Constitution of Malta* 1964, Arts 76, 79, 80 and 81 and the *Constitution of Mauritius* 1968, Arts 57, 59 and 60.

21. Do you think Australia should become a republic - that is, with a President, - appointed or elected by Australians - exercising the powers which are currently exercised by the Governor-General on behalf of the Queen?

Yes	52%
No	48%

There is therefore certainly no great pressure for a move to a republic. Indeed, support for a republic has declined over the past decade. Possible causes for this shift in popular opinion are disinterest in the issue following the defeat of the republic referendum in 1999 and an increase in support for the monarchy following the marriage of Prince William and the birth of his heir. It would therefore be true to say that despite the fact that the republic issue has been the one most commonly discussed over the last 20 years, it is the one least likely to succeed at referendum.

More divisive among respondents was the question of how a President should be chosen, assuming Australia did indeed become a republic. The responses obtained to that question were as follows:

22. If Australia was to become a republic, which of these methods should be used to choose the President:

Election by the voters	73%
Appointment by the Prime Minister	5%
Election by Parliament	16%
Some other method	6%

These results are consistent with a number of surveys done over the past two decades, which have shown that voters would have an overwhelming preference for a popularly elected President were Australia to become a republic.⁴⁶

The key objection advanced by those who are opposed to direct election of a President is that because the holder of that office would have been directly elected, they might come to believe that they had a popular mandate equal to that of the Prime

⁴⁶ See John Warhurst 'The Trajectory of the Australian Republic Debate', *Papers on Parliament No. 51*, June 2009 < http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/pop51/warhurst > who cites opinion polls which show that 80% of respondents favoured a directly-elected President if Australia was to become a republic.

Minister, and that this in turn might tempt the President to misuse the powers of the office contrary to the conventions to which the Governor-General is subject. This was of concern to a majority of respondents to the survey:

23. Some people are concerned that if the voters directly elected a President, the President might be tempted to use the fact that they were elected by the people to use the powers of the office contrary to the non-legal rules (conventions) which apply to the office. Is that a concern for you?

Yes	56%
No	44%

However, this concern is groundless: If we had a directly elected President, the Constitution could have a provision put in it to the effect that the President is subject to the same conventions as was the Governor-General. If the concern still was that, because conventions are not laws and are therefore not enforceable by the courts, the president might break them, the obvious solution would be to codify the conventions. When this proposal was put to respondents, an overwhelming majority were of the view that codification would resolve the issue:

24. If you are concerned that a directly-elected President might use his or her powers contrary to convention, would your concerns be met if these conventions were changed into legally-enforceable provisions in the Constitution?

Yes	71%
No	29%

This result is consistent with that obtained to question 20 – indeed, the proportion of respondents in favour of codification rose from 64 per cent in Question 20 to 71 per cent in Question 24, which indicates that the benefits of codification become all the more apparent when considered in the light of having an elected President.

The results to this part of the survey indicate that respondents have more enthusiasm for codification of the conventions which regulate the powers of the Governor-General than they have for a change to a republic. This is gratifying, because codification is by far the more important reform. It is also notable that, as has been demonstrated by many surveys in the past, Australians are wedded to the idea of an elected presidency should we one day become a republic, and that codification is seen as a particularly beneficial in those circumstances.

IV ACHIEVING CONSTITUTIONAL REFORM

There is no doubt that the Commonwealth Constitution is in dire need of fundamental reform. The level of interest displayed by respondents to the various constitutional reform issues canvassed in the survey, and the key negative arguments that will need to be countered, are as follows:

Issue	Level of interest as revealed by survey	Benefits	Key issues to be overcome
Proportional representation	High	Fairness to voters. Labor / Coalition stranglehold over politics broken.	Apprehension about coalition government - rebuttable by referring to empirical data from other countries which use proportional representation.
Full Bill of Rights	High	Individual rights given constitutional protection. Congruence with international human rights conventions Australia has signed.	Apprehension about role of the courts - rebuttable by referring to the fact that the courts have had the power to invalidate legislation for breach of constitutional rights since inception of Constitution in 1901.
Speaker elected and dismissed by 2/3 majority of Parliament, and serves until retirement.	High	Independence of Speaker leading to fair treatment of MPs from all political parties.	None of significance - representation of voters in Speaker's electorate could be ensured by having the Speaker's seat filled by an MP from the same party, with subsequent elections carried on in the normal way.

<p>Ministers able to be compelled to answer questions by any member of a parliamentary committee and subject to sanction if they do not. Exemptions determined by the courts.</p>	<p>Very high</p>	<p>Responsible government would operate as it is supposed to.</p>	<p>None of significance - but major parties will oppose this measure because it would enormously enhance scrutiny of government.</p>
<p>An Australian republic.</p>	<p>Very low</p>	<p>Of purely symbolic importance.</p>	<p>Misrepresentation by monarchists of relationship between Queen and Governor-General - ie false argument that we already have an Australian 'head of state'.</p> <p>Fear that an elected President might interfere in government, contrary to convention.</p>
<p>Codification of conventions regulating powers of the Governor-General.</p>	<p>High</p>	<p>Clarification of role of Governor-General.</p> <p>Likely to increase support for a republic if voters were sure that an elected President would be bound to follow enforceable rules of law.</p>	<p>Argument that conventions give flexibility to the Constitution and / or are impossible to state precisely - rebuttable by referring to reforms in other Commonwealth countries.</p>

A critical lesson to be learned from the survey is that the Australian public is not as averse to constitutional reform as has commonly been assumed - provided that sufficient background information is given to respondents to enable them to understand what they are being asked. This means that any campaign by those seeking constitutional reform must start with a significant period of public education well before the calling of a referendum.

There is no doubt that there would be dogged opposition to putting a referendum to the public, particularly from the major parties, because it is they who have most to lose from the most important constitutional reforms discussed in this article - those which would make Parliament more representative, government more constrained by a Bill of Rights, and ministers more subject to parliamentary oversight. In light of the relative lack of interest of the public in constitutional matters, how best can the groundswell of support which will be needed to pressure Parliament to call a referendum be mustered? Or, to put it another way, in circumstances where the poor standard of civics education means that voters are not easily inspired to take an interest in the Constitution, what strategy is most likely to engender mass public support for reform?

In an ideal world, reform of the Constitution would take place in one fell swoop, and voters would be presented with a set of amendments addressing all aspects of the Constitution which need to be reformed. However, given that such an approach might prove too much for voters to digest all at once, an alternate avenue would be to identify a single reform that has the capacity pave the way for all the others. In my view, that reform would be the adoption of proportional representation. The stranglehold that two main blocs, Labor and Coalition, have over politics in Australia is the chief impediment to reform. Therefore anything that breaks that stranglehold and gives other parties representation in Parliament enhances the likelihood of further, comprehensive reform. Proportional representation would make Australian politics fluid, and would force the larger parties (or what is left of them after they break into their component parts) to make concessions to smaller parties in order to form government. Wider constitutional reform could be among those concessions.

A movement advocating change to proportional representation would have the advantage that its case could be based squarely on the concept of fairness, and an appeal to the Australian sense of a 'fair go'. Success in political campaigns relies as much upon emotional factors as it does on technical arguments, and in drawing public attention to the unfairness of the current electoral system, where the effect of a person's vote is almost wholly determined by where they live, opponents of change will be put on the defensive. This is the issue around which community action groups should coalesce and initiate a campaign for change. There is no doubt that the major political parties would bitterly oppose such a change - but that is perhaps the best demonstration to the community of how worthy it would be.

