

# COMMUNIQUE

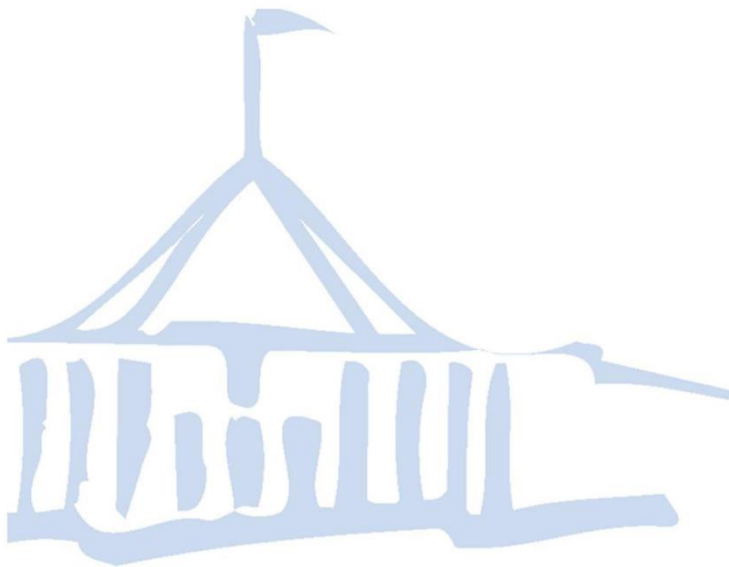
## TOPIC -

**Constitutional Reform: Is section 128 still a necessary requirement to change such an important document as the Australian Constitution?**

**The Museum of Australian Democracy  
at Old Parliament House, Canberra**

**21 to 23 March 2023**

**28TH NATIONAL SCHOOLS  
CONSTITUTIONAL CONVENTION**



## 1. Introduction

The 28th National Schools Convention (NSCC) was held at the Museum of Australian Democracy at Old Parliament House from 21 - 23 March 2023.

115 students attended from Government, Independent and Catholic schools from across Australia, covering metropolitan and country areas.

The Convention topic delegates were asked to investigate, discuss and come to a conclusion about was, ***Is Section 128 still a necessary requirement to change such an important document as the Australian constitution?***

## 2. Convention process

Through a program of pre-reading, working groups, keynote speakers and soap box sessions, delegates considered a wide range of issues before providing their opinion about the role of Section 128 of the Constitution.

The convention was facilitated by Emeritus Professor John Warhurst AO.

### **Convention opening remarks:**

- The delegates were officially welcomed to the convention by Senator the Honourable Anthony Chisholm, Assistant Minister for Education. Senator Chisholm began by congratulating students for their election as delegates to the convention and reminded delegates of the importance of civics education, citing the decline in the National statistics of year 10 proficiency with civics institutions and structures. He also referred to the upcoming referendum on the Voice and how relevant it is to the democratic process and the issue of updating the Constitution.
- Eliza Luhrs from Wavell State High School thanked the Senator on behalf of all the NSCC delegates.

### **Convention speakers were:**

#### **Keynote 1**

Professor Kim Rubenstein, University of Canberra - *Australia's Constitutional Referendum Law and the History of Australia's Referendums*. The address underlined how the Constitution is foundational to everything that happens in relation to power in Australian society.

Four main elements / themes were presented during this keynote:

1. History
2. The degree of change in Australian society
3. The changing nature of the Federal system
4. Key changes to be considered

Key facts and points for thoughts provided in Professor Rubenstein's presentation include:

- The Constitution was originally drafted by a narrow range of Australians. Culturally and linguistically diverse and Indigenous Australians were not eligible to attend conventions forming the foundation document. Only women in South Australia and Western Australia were eligible to run for election at a convention.

- In 1901 Federalism - the agreement to become a nation - was not to be delivered with a surrender of state power. The constitution reflects this tension. The question posted to delegates was – “are there still special state issues requiring the double majority safeguards or is a more national view required especially that universal suffrage has been achieved”?
- In a referendum and double majority, section 128 gives more power to the States. Delegates were asked “Is this true to the principle of Federation or does it challenge the principle of representative democracy?”

**Questions raised and discussed by the delegates focused on:**

- o What are safeguards to the dominance of the Eastern Australian, more populous states?
- o Is the Voice more powerful than an inclusion of a preamble? Symbolism of recognition versus more positive and active citizenship.
- o Should the Voice be inclusive and recognise multiple nations within the Voice.
- o Should States have the power to veto the Commonwealth if they have vested interests in an issue?
- o Would including territories make it more difficult to pass referenda?
- o How important is education in the role of the Constitution?
- o What is the difference between the Voice and current advisory bodies to Government?
- o How does s.128 contextualise in modern Australia?
- o If the Constitution is a living document does the language make it inaccessible and struggle with modernity?
- o Should there be recognition of the UK as a foreign power by the High Court. Does this mean we are already moving beyond the original Constitution with reference to the Crown?
- o How realistic is it to see any amendment to s.128 if it means minority states surrender power?
- o Are there other reasons, beyond population, that precludes territories from s.128 of Constitution?
- o If s.128 was changed to remove double majority and use only on a single majority what are special state issues that might be included?
- o If a double majority was replaced by a super majority (e.g. two thirds majority) would this be a safeguard against the dominance of more populous states?

**Keynote 2**

Fr Frank Brennan SJ (AO) Adjunct Professor, Newman College, Melbourne University - *Section 128 in current practice. Is this still fair go for all?* The address focused on discussing Section 128 and its fairness.

Key facts and points for thoughts provided in Father Brennan’s presentation include:

- The Constitution was essentially formed by the vote of the people, not the decree of Parliament and so meets the standard of democratic fairness. So, if we wish to amend the Constitution, it is fitting as it is the will of the people not legislators?
- When discussing s.128, what is the role of Governor-General? Usually, the role is limited until the referendum is passed by both Houses – but if the House of Representative proposes a referendum change, but it is blocked in the Senate, should the Governor-General still be compelled to take this to the people?
- Is voting at referendum fair? Looking at double majority – considering fairness, territories are now included in majority vote but not majority of states. A check on States’ rights – a referendum can’t diminish a single state, without achieving a majority in that particular state.
- Is it fair that only the Federal Government can initiate a referendum? Should referendums be initiated by State Parliaments? In reference to Constitutional Commission 1985 to 1988 - is it fairer that only three of the states are included but representing the majority of voters? Is it fairer to allow a citizen to initiate a change to referendum?

**Keynote 3**

Professor Peter Anderson, Walpiri and Murinpatha Nations, Northern Territory, Queensland University of Technology - *What do first nations think of Section 128 and referendums generally?* The address started by posing some questions for the delegates to consider: In approaching the referendum on the Voice, how do we come to a position? What is expertise and opinion?

Key facts and points for thoughts provided in Professor Anderson's presentation include:

- There is plenty of opinion to be found, but there is a need to take time to uncover the expertise.
- Intellectual terra nullius - education - what we know – is it opinion or is it expertise? Is the information we have about Indigenous perspectives informed or is it biased?
- Indigenous knowledges vs western knowledge - is our world view determined by a narrow understanding of what can be known?
- How do we come to know about Indigenous issues? Where can I go for relevant information?
- Who is privileged to speak in our society? What value set is more privileged in our society?
- The challenge approaching the Voice is that often the focus is on issues with Indigenous communities. Do we ever ask the question about systemic change required to accommodate Indigenous perspective?
- 'Picking at the scab of a racist system' - one of the few countries not to have a treaty and sovereignty is so important to this proposed change.
- Elements of an indigenous perspective:
  - o Empathy for Indigenous matters - people are equal and should thus be treated equally.
  - o Understanding that Indigenous people suffer from disadvantages and injustices.
  - o Current dominant model of the Government fails to adequately recognize rights of Indigenous people = oppressive.
  - o Passionate and profound commitment for change.

**Questions raised and discussed by the delegates focused on:**

- o Why are Indigenous people arguing against the Voice and the role of sovereignty?
- o As a first nations man, what are Professor Anderson's views on how will the Voice impact first nations people?

**Keynote 4**

Dr Andrew Banfield, Parliamentary Library, Canberra - *How constitutional reform occurs in Canada and New Zealand?* Dr Banfield's address also started with some questions:

- o What is the purpose of the constitution?
- o How are constitutions changed?
- o How do Canada and NZ change their constitutions, and do they use referendums?

Key facts and points for thoughts provided in Dr Banfield's presentation include:

- Does a constitution entrench equality, justice, rights, national traditions? The Constitution "creates the preconditions for well-functioning democratic order, one in which citizens are genuinely able to govern themselves" (quote from Cass Sunstein).
- We must differentiate the rules of the game: Law can be enforced by courts; Conventions are rules and norms: ministerial responsibility, Rule of Law, responsible government – the code of conduct enforced by the players.
- Consider the scales of Constitutional change: Macro - Formal amendments – Referendums vs Micro - litigation and judicial rulings (e.g. Commonwealth - State agreements in the Murray Darling basin for example)

- Examining Canada's case, they have used a formulaic approach:
  - o *Unanimous formula:*
    - Both Houses of Parliament and all provincial Legislatures
    - Use of both French and English
    - Amending formula
  - o *7/50:* Both houses of Parliament + 7/10 provinces representing 50% of the population
    - Change in proportional representation
    - Change in number of senators
    - Addition of new provinces
- New Zealand have a 'flexible Constitution' and works from a range of codified arrangements
  - o Amendments are based on Statute change
  - o New Zealand Referendums - no legal obligation to ask questions. Determined by majority vote.
- The key lesson is - Constitutions are supposed to be hard to change. We should set the rules of the game, but when rules become unworkable, change them.
- Simplicity does matter - easy questions are more successful.
- Staying power of the policy status quo - People are risk averse, hence people are likely to stick with what they know.

#### Questions raised and discussed by the delegates focused on:

- o What has been your career pathway?
- o What is the New Zealand amendment process?
- o What are the worst things about the Australian system for constitutional reform?
- o How impactful is education on successful reform?
- o Do less populated provinces in Canada result in an unfair voting system?
- o In Australia there is 2 to 6 months to understand a referendum question. Is this the case in Canada?
- o Simplicity is important - should the language of constitutions also be simpler?
- o Which amendment process do you consider to be the best?
- o Is the politicisation of constitution change hindering the process of change?
- o Should territories be included to better reflect the people in constitutional reform?
- o Are there any parallels between the indigenous rights/voice between Canada and Australia?
- o Should Australia adopt other processes found in Canada and NZ (like the treaty) before we go to referendum on the Voice?
- o If the Voice referendum is passed, do you think we will have more amendments to the Constitution?
- o If the Voice fails how will this impact Australia's reputation internationally?
- o Should we include a Bill of Rights in the constitution especially to protect indigenous rights?
- o What are your objections to codifying constitutional conventions?

#### Presentation by Deputy President of the Senate

In addition to the 4 keynote speakers, Senator Andrew McLachlan CSC, Deputy President of the Senate also attended the Convention and addressed the delegates. The addressed pointed out that referenda are a way for a society to make a decision and is a rival to a Parliament in a civil society. It is embedded in politics - nor is it pure process – but citizens need to be informed. It is not just the vote but also the processes around it that are crucial to referendum itself.

Points for thoughts provided in Senator McLachlan presentation include:

- Politics: Government initiate referendums and do not do so to lose, so they shape the outcome. Success historically is linked to a bipartisan approach.

- **Clarity:** There should be information and education that is available to allow people to come to a decision.
- **Money:** How do you finance a campaign? Should there be community forums to build consensus prior to a referendum?
- Raised a challenge as technology may allow for electronic voting in the future - will referendums become more popular?
- Is direct voting a pure form of democracy or will there be an increased load on electors to become informed on the issue?

**Questions raised and discussed by the delegates focused on:**

- How essential is the wording of the question to be successful in a referendum?
- By providing a pamphlet does this politicise a referendum?
- Is a move to electronic voting a negative?
- If voting is important for decision making, how do you account for ill-informed voting?
- Do you think the public being informed about the details of the referendum is important?
- If the Voice is passed, what type of measures will be put in place to ensure the Voice is not disregarded?
- When can we expect the Liberal Party to take a position on the Voice?
- Do you believe electronic voting will result in more referenda being voted on?

### 3. Delegate deliberations

**Workshops**

Three Working Group sessions were designed to generate arguments and ideas to be shared with other groups based on the discussion during the keynotes and guiding questions.

**Working Group Session 1:** *Can we take any learning from previous referendums? Do First Nations people have enough say in the current model? Are there any implications for the Constitution with the proposal of a Voice Referendum.*

What is Section 128? What does it mean and how does it work in practice? How is what The Prime Minister the Hon Anthony Albanese MP proposing in the Voice Referendum different to the current Constitution? After considering these questions and the content presented by the first keynote speaker, delegates discussed:

- s.128 and double majority is problematic for the proposed Voice referendum.
- Exclusion of territories further discriminates against indigenous population who are largely represented especially in the Northern Territory.
- The current process makes constitutional change difficult, and this should be retained to keep Parliament accountable.
- s.128 should be altered to a simple majority of the national population or a super-majority requirement as this better reflects democratic representation.
- There remain some special state-based issues that support the maintenance of a double majority in referendums.
- For referendums to be successful they need to have bipartisan support, a level of community literacy and education about the issues involved.
- Overall, there was support for the Voice referendum though some issues remain.

Delegates also debated on the upcoming Voice referendum:

- **Advantages:**

- A process for continuing reconciliation.
- Enshrines Indigenous decision making prior to, rather than after, legislation.
- Difficult to ignore by Parliament and government.
- More effective than current advisory groups.
- Increases Indigenous representation.
- Seen as catalyst for further constitutional change.
- **Disadvantages:**
  - Lack of information about the proposal.
  - May cause greater division among Indigenous and non-Indigenous Australians.
  - Already division among Indigenous groups may increase tension and result in potential conflict.
  - If voice referendum is not passed it will slow down progress in Indigenous rights and outcomes.

**Working Group Session 2:** *Are the majority of voters and the majority of States just too hard to achieve or is this a necessary requirement to change such an important document? Do people living in NT and ACT have just as much of a voice as those living in the States? How would having a body to be called the Aboriginal and Torres Strait Islander Voice impact the outcome of Australian voting.*

After considering these questions and the content presented by keynote speakers 2 & 3, delegates discussed:

- Several groups support maintaining s128 and double majority because of the 'rigidity' of the system and that the Constitution should be hard to change.
- One group argued the issue was not the voting process but rather the gap between politician's view and the view of the people that rendered so many referenda unsuccessful.
- Other groups feel for sake of modernity and inclusion the double majority clause should be replaced with a straight majority or indeed a super-majority.
- Many groups support including ACT and NT in double majority especially to improve representation of Indigenous people.
- Some groups argued for making territories the same as states for referendums.
- One group argued ACT should remain neutral under the constitution.
- Some groups supported the view of States and citizens initiating constitutional change.
- Several group's highlighted the s.128 clause about the number of months required to educate people to be informed when voting in referendum.
- The Voice was seen as having little impact on voting outcomes and many groups again felt the Voice was a positive change as Indigenous concerns would be considered by Parliament.
- Several groups raised concerns about the possible conflict and division the Voice referendum may have especially racism and negativity towards Indigenous people.
- One group suggested it would be political dynamite to reject the Voice and another group forecast that if Voice was unsuccessful, the current Labour governmentt would be replaced by a more conservative leaning future Government.
- There was concern that if the Voice referendum was unsuccessful, it would diminish the influence of Indigenous affairs.
- While adopting the Voice would be a positive change, more work is needed to ensure more Indigenous representation in Parliament as this will deliver more sustainable change.

**Working Group Session 3:** *How effective and fair is the Australian Constitutional Referendum law compared to other countries? Is there any learning we can take from overseas countries? What things have been tabled over the last three days that have challenged you?*

Delegates were asked to consider how other countries have used and conducted referendums when compared to Australia. After considering this and the content presented by keynote speaker 4, delegates discussed:

- Many groups supported the view that the Australian system was good because constitutional reform was difficult, especially because of s.128 and the requirement of the double majority.
- Reference was made to the critical role of educating people about constitutional reforms and the importance of having a simple question for consideration.
- Several groups were supportive of the Canada 7/50 model as they believed it was more representative and also avoided smaller provinces exerting too much power.
- Many groups felt the New Zealand model was too flexible and questioned that governments did not take up successful referendums as decided by an absolute majority. However, some groups saw merit in the more flexible approach of the New Zealand system to make changes and reforms.
- A couple of groups thought it was interesting that NZ questions were not just YES/NO format but included visual choices (e.g. flags).
- In considering international models some groups voiced support for the codifying of indigenous rights (Canada and New Zealand) however some groups also rejected the need for a Bill of Rights to be included in the Australian Constitution arguing other safeguards were available.

Overall, challenges for delegates across the convention included:

- Considering opposing views and mindsets.
- Discussing complex topics and the level of conflict that flowed.
- Exclusion of Australian territories from double majority counting.
- Details of the Voice not being known to help with understanding of the issue.
- The ambiguity of the constitution required significant interpretation.
- The need to question our own opinions and accept the lack of knowledge on the topic.



## 4. The vote

Rae Joyce and the team from the National Electoral Education Centre, Australian Electoral Commission (AEC), provided an overview of the referendum process and oversaw the delegates voting on the topic. Delegates were briefed about the referendum process and invited to vote on the question. The topic of the Convention was re-phrased to pose a more direct and clear question for the vote. In interpreting the referendum question, delegates were reminded by the AEC that essential to their vote is whether the constitution should be difficult to change.

The YES/NO vote question was: **“A Proposed Law: To enable amendments to be made to the Constitution if approved by a majority of voters.”**

### Results of the Vote

Constitutional Referendum			
	Formal YES votes	Formal NO votes	Is the MAJORITY in favour?
New South Wales	8	22	No
Victoria	6	19	No
Queensland	7	11	No
Western Australia	2	13	No
South Australia	3	9	No
Tasmania	1	4	No
Australian Capital Territory	4	1	
Northern Territory	4	1	
<b>NATIONAL TOTAL</b>	<b>35</b>	<b>80</b>	<b>115</b>

**1** Is a majority of voters in favour of the amendment in a majority of states?  
☐ ? ☒ YES ☐ NO

**2** Is a majority of voters in favour of the amendment nationally?  
☐ ? ☒ YES ☐ NO

A double majority ☐ ? ☐ IS ☒ ISN'T achieved so the Constitution:  
**is NOT changed**

## 5. Convention Outcome

This Communiqué will be submitted to Senator Sue Lines, President of the Senate who will present the Convention Communiqué to the Parliament for incorporation into Hansard.