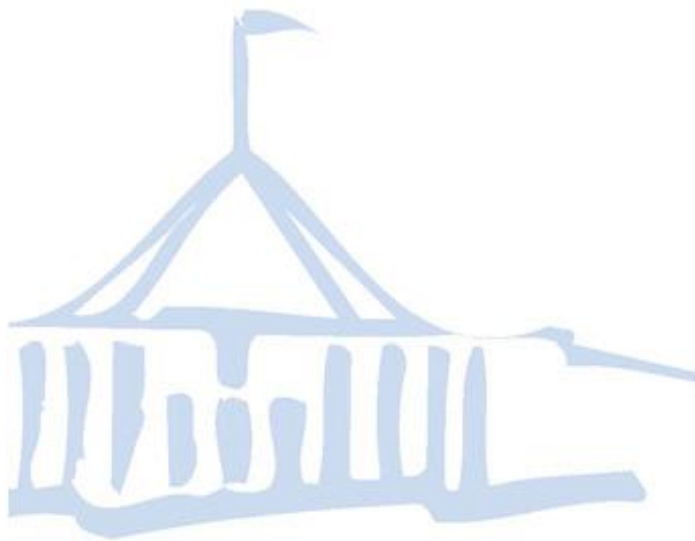

Communiqué

TOPIC -

Section 96 of the Constitution allows the Commonwealth to grant funds to areas that fall outside those prescribed in Section 51. Should Section 96 be amended to decentralise the power of the Commonwealth?

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

19 to 21 March 2024



29TH NATIONAL SCHOOLS
CONSTITUTIONAL CONVENTION

1. Introduction

The 29th National Schools Convention (NSCC) was held at the Museum of Australian Democracy at Old Parliament House from 19 - 21 March 2024.

94 students attended from Government, Independent and Catholic schools from across Australia, covering metropolitan and country areas. Victorian delegates were not able to attend the Convention because usual procedures for selecting and approving Victorian students were not available this year.

The Convention topic delegates were asked to investigate, discuss and come to a conclusion about was, ***Section 96 of the Constitution allows the Commonwealth to grant funds to areas that fall outside those prescribed in Section 51. Should Section 96 be amended to decentralise the power of the Commonwealth?***

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 51 and 96 of the Constitution.

The convention was facilitated by Emeritus Professor Clement Macintyre and Professor John Williams, University of Adelaide.

A welcome to country was offered by Selina Walker, Ngunnawal Emerging Elder, Co-Chair, ACT Reconciliation Council

Convention opening remarks:

- The delegates were officially welcomed to the convention by The Hon Jason Clare MP, Minister for Education. The Minister began by congratulating students for their election as delegates to the convention and reflecting on his own experience as a former delegate of a similar convention and the opportunity it offered to not only engage with important topics central to citizenship but also to create networks and meet other delegates from across the country.
- The Minister spoke about how financial relations between the Commonwealth and the States stems from the original framing of the constitution and the journey to Federation and encouraged delegates to pursue this topic with due consideration to the role and purpose of the original founding document.
- He encouraged delegates to consider citizenship to be more than the right to vote and that active participation and informed and engaged interaction with our political system is the way to ensure the survival and strengthening of our democracy.
- The Minister wished delegates an enjoyable conference and officially opened the convention.
- Ainsley Eastwood, Chester Hill High School of New South Wales thanked the Minister on behalf of all the NSCC delegates.

Convention speakers were:

Keynote 1

Professor Kim Rubenstein, University of Canberra - *The difference between state and federal law and how that impacts States and Territories.*

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

- Historically the original Constitution of the 1890s was drafted in a very different context and perhaps needs an update.
- It was written from the perspective of Australian citizens being British subjects and that modern Australian society is more multicultural.
- The Constitution was designed to create a Federation of States and the States were concerned to preserve their legislative independence.
- How the Constitution provides checks on this balance of power between the Commonwealth and the states was explored.
- Importantly the Constitution stipulates the Separation of Powers as a critical concept to hold the Commonwealth Government accountable.
- Members of the Executive are also members of the Legislature and so are accountable to Parliamentary scrutiny in the way Commonwealth laws are administered in the community.
- The structure of Parliament through the Senate ensures more equal representation of States rights and interests, however, has the role of the Senate moved beyond this today and is no longer serving this purpose?
- The Constitution ensures (Section 7 and Section 24) that all elected officials are bound by the rule of law and so the role of the Legislature in limiting the absolute power of the Parliament is important in keeping the Commonwealth government accountable.
- The Constitution also addresses the balance of power between State and Federal government through Section 51 stipulating the designated areas of Legislation e.g. currency, migration.
- However, Section 96 provides the power for Commonwealth to influence the activities of the States.
- Section 109 stipulates that any clash between the different levels of government will be decided in favour of the Commonwealth.
- The session concluded with a look at balancing the rights of individuals and government and whether a constitutional Bill of Rights is an important to redress imbalance between government and individuals.

Summary:

The structure of the Constitution provides checks on the power of the Commonwealth through the parliament's structure and adherence to rule of law and principle of responsible government.

In reality there is an imbalance in the division of powers that suggests that given changing circumstances of Australian society the original constitution may require an update.

Questions raised and discussed by the delegates focused on:

- Would the removal of specific purpose grants result in a better balance of power between State and Federal Governments?
- Is a legislated option to protect basic human rights a better option and more achievable than a constitutional Bill of Rights?

Keynote 2

Professor Emerita Anne Twomey, University of Sydney - *The difference between state and federal funding, linked to Section 51 of the Constitution.*

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

- Original Constitution faced a dilemma – some uniformity was required to ensure good government for the nation, but states wanted to limit the power of the Commonwealth government.
- A key area was free trade across the country. The ability of the states to impose customs duties and excise on goods resulted in exclusive powers of tax raising ceding to the Commonwealth.

- This has resulted in a fiscal imbalance where 75% of all tax revenue is done by the Commonwealth but the majority of spending is done by the States.
- The most effective and efficient way of ensuring accountability on government for both the money raised and spent is when there is the appropriate balance between raising revenue and the provision of quality goods and services.
- The current system of transferring funds from Commonwealth to States does not include any incentive to improve efficiency.
- In the current system the Federal Government shoulders political pain for raising taxes and overblows spending on politically attractive projects e.g. swimming pools and sports centres.
- Meanwhile the States tend to blame inefficient or ineffective spending on the adequacy of the transfer received from the Commonwealth.
- It was then explored how the Constitution can moderate this tension between the two levels of government.
- S94 states the Commonwealth MAY provide surplus revenue to the States but is silent on the process of the distribution leaving it to the discretion of the Parliament.
- S96 was inserted in the Constitution to facilitate financial transfers from the Commonwealth to the States under “exceptional circumstances” and that it will be “on terms and conditions Parliament sees fit”.
- In conclusion the Federal State financial relations have become dysfunctional and do not comply with the intended purpose of the Constitution.
- Commonwealth intervention may result in greater uniformity of service provision but may reduce the choice offered for services across the country e.g. education. Differences across States allows for comparisons to be made to improvements and innovation.
- There is also a danger that standards sink to their lowest level and funding becomes bloated with the centralisation of government funding.
- Conditions of tied grants are an inefficient use of taxpayer money.
- Changing S96 removes the process of “gaming” the system and sees funding based more on needs.

Summary:

While Section 96 was included to assist States with the transition to Federalism the wording of the clause has resulted in terms and conditions that make political ideology more important than need and see the Commonwealth government overreach their constitutional powers.

Questions raised and discussed by the delegates focused on:

- Would an independent body overseeing grants create more transparency in the allocation of grants.
- How can the system be altered to address funding that is more politically motivated and not based on the needs of the States?

Keynote 3

Dr Andrew Banfield, Parliamentary Library, Canberra - *Accountability of the states to the commonwealth for commonwealth funding and grants, and tensions that may or may not exist as a result.*

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

- Federation was defined as a system that has a shared role for some purposes, includes regional self-rule within a single political system.
- Based on this there should not exist any subordination between the Federal government and State governments.
- Federation exists as a function of society not as a result of writing the Constitution.

- The current Federal system has produced a Vertical Fiscal Gap where States cannot raise enough money to meet their spending requirements. This creates a tension between levels of government.
- Also, a horizontal imbalance exists between resources and opportunity across Australia. A centralised funding model addresses this better and creates greater equity.
- If the role of government is to redistribute money to address inequality and create opportunity what are the advantages and disadvantages of a centralised and decentralised funding arrangements?
- Centralised funding provides greater quality of service provision and enhances resource mobility across the country.
- As it requires transfer of money to the States it will inevitably involve 'buck passing' by both levels of government and avoid accountability.
- Conditional transfer of funds reduces state government decision-making.
- Federal money is being used to influence policy areas outside constitutional provisions.
- Conclusion, while fiscal Federation matters the vertical imbalance distorts the political reality as well as the provision of services.
- There exists a tension between revenue raising and the quality of services provided nationwide with a central government removed from local issues and the needs of the communities.

Summary:

The vertical fiscal imbalance is problematic because it creates a tension between the more uniform provision of quality services across Australia and more decentralised policy experimentation that could be developed at the State level.

While centralised funding can help address a horizontal fiscal imbalance and promote factor mobility across the nation, grants to States are not always seen to be addressing inequity but are driven by political considerations.

Questions raised and discussed by the delegates focused on:

- Does good policy come from tension or synergy of political ideology?
- Would the centralising of funding provide better solution to regional disparities in resources and service provision?
- Does a centralised or decentralised model provide better policy experimentation?

Keynote 4

Professor Alan Fenna, Curtin University - *Residual powers including health and education – What are they and how do they work? Should the power of the commonwealth be decentralized?*

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

- Proposed that federalism is fundamentally a messy arrangement where a partnership is based on the sharing of power. The Constitution sets the "contract" that sets out the obligations of each partner to this agreement.
- There is also a hierarchy in this arrangement with the Federal Government seen as the senior partner. In times of national emergency or crisis, citizens look to the National government.
- In the Australian context citizens have no special allegiance to States based on language or cultural differences and so this favours the perception of a National government being more important.
- Federalism is also fundamentally a system of negotiation. The division of powers is the basis of this negotiation but there is flexibility and leverage required to negotiate effectively.
- If there is a power imbalance how should this be addressed? Either using Constitutional change or sub constitutional means (legislation or agreements).

- To address the Vertical Fiscal Imbalance, it was argued constitutional change is the necessary mechanism as it binds both parties to the change. If relying on legislative change the Commonwealth would not vote to diminish its own power.
- Despite the Constitution listing Commonwealth powers (Sections 51) residual powers are silent and so difficult to prove if being contravened in a court.
- What powers could/should be explicitly State powers?
- It is difficult to judge what is local or a national policy area e.g. Health and Education such as a local GP is governed by Medicare whilst a hospital is governed by the State.
- There is an entanglement of government functions in major policy areas.
- Priorities for policy areas may change over time.
- There is little citizen interest in worrying about which government level provides a service.
- Financially the system is skewed in favour of the Commonwealth.
- Reliance on Income tax results in the Federal government raising revenue more efficiently and States have limited capacity to raise revenue.
- Australia has an acute Vertical Fiscal Imbalance, and this should be addressed.
- No other Constitution has a section similar to the Australian S96 offering grants to States, but the wording of the clause including “terms and conditions” maintains the power imbalance in favour of the Commonwealth.

Summary:

Constitutional change is a more binding option to address the Vertical Fiscal Imbalance.

However, it will be difficult to see the Commonwealth pass enabling legislation to bring on a referendum on the Division of Powers.

Comparative International federalism models do not experience such fiscal imbalance between States and Central government and do not include something like S96 that ties money transfers to terms and conditions.

Questions raised and discussed by the delegates focused on:

- Are some policy areas/issues too important to leave to legislative change?
- If a referendum is needed to bind the partners would the Federal government ever agree to enacting legalisation for a referendum on fiscal arrangements or division of powers to take place?

Address and Acceptance of the Communiqué 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. Giordan Kovacevic, Cabra Dominican College of South Australia thanked the Minister on behalf of all the NSCC delegates.

The Deputy President was presented with the convention communiqué by:

- Lily Azli, Concordia College of South Australia
- Rory McMahan, St Patricks College of Tasmania

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: As part of developing their arguments, students need to have a thorough understanding of the three levels of government, and how each of the levels of government receives income and funding from the Commonwealth. Students were advised to consider the following questions based on the content presented by the first two keynote speakers:

- 1) Discuss the difference between state and federal law.
- 2) Identify the most significant implications of the state and federal legal division.
- 3) Discuss the effects, including any advantages or disadvantages for States and Territories, of the impact from state and federal law.
- 4) Identify the red flags or areas of concern in state and federal funding that is linked to social justice and equity for all?
- 5) What are the important lessons you can take from the keynote as you prepare to hear about accountability and tensions that exist with funding? How do we use this key information to make informed decisions for the future?

Delegates saw Federal law as way of developing uniformity in outcomes across Australia. Federal law also has more of an outward looking focus than state laws that are more interested in local issues.

The division of power can result in greater efficiency if funding is administered more centrally, however there is a blurring and entanglement between State and Federal responsibilities.

This overlap creates a lack of accountability for both levels of government and the use of conditional grants to transfer money to the States are problematic as they are not transparent and often politically motivated.

Without a clear division of powers there are issues of equity and equality emerging particularly for regional and remote areas.

An advantage of this division of powers is that it allows for greater choice and flexibility in policy formation and development.

A disadvantage is that there is not a minimum standard of service guaranteed across States.

Concerns about current funding arrangements include:

- Tying conditions to grants builds in inefficiency and works against social justice outcomes.
- It creates undue influence for lobbyist and sees harmful products being taxed instead of banned as governments seek to raise additional revenue.
- Corruption and misappropriation of funds is more likely to occur due to a lack of accountability and the federal government being removed from the local issues that are receiving funds.

Reforms might include:

- Simplifying taxes and eliminating loopholes in re-distribution of monies.
- Create an independent body to review grants and make government more accountable.

Working Group Session 2: It is important to understand the accountability of the states to the Commonwealth for Commonwealth funding and grants, and the associated challenges. Students were advised to consider the following questions based on the content presented by the third keynote speaker:

- 1) Discuss Commonwealth funding and grants, including tensions that may or may not exist.
- 2) Examine the most significant implications of the accountability processes.
- 3) Discuss the effects, including advantages and disadvantages, of Commonwealth funding and grants for states and territories.
- 4) Are there any red flags or areas of concern you have identified about state and federal funding accountability linked to social justice and equity for all?

Delegates discussed the major issue of accountability as the biggest tension around government grants. Groups reported the current system being an interference of decision making of state and territory governments as money provided by the Commonwealth was often tied to conditions that were politically motivated.

There was a concern about the overreach of the Federal government funding special projects that were not part of its constitutional obligations.

Concerns were raised about possible corruption and a lack of checks and balances included in the provision of grants to the States.

One group raised a concern about the centralisation of funding and the lack of sensitivity to cultural and social perspectives of communities. While centralisation of power might make more sense economically and deliver more uniformity in outcomes, it fails to consider the local cultural and social sensitivities of communities.

Another group was also concerned about the interstate rivalry the current system encouraged where all States were competing for the same funds available from Federal government.

Working Group Session 3: Participants are asked to reflect on residual power examples in health and education, to consider whether the power of the Commonwealth should be decentralised. Questions considered based on the content presented by the fourth keynote speaker included:

- 1) Discuss the reality of residual powers.
- 2) Examine the way the Commonwealth supplies funds for state residual powers (e.g. health and education).
- 3) Describe any red flags or areas of concern from Question 2.
- 4) Develop alternatives to the current funding arrangements to assist residual powers.
- 5) Consider arguments for and against making a change to section 96 of the Constitution which currently allows the Commonwealth to dictate policy with regard to grants made to the states.
- 6) List aspects of the Convention which have been tabled over the last two days that have challenged thoughts and opinions.

Most groups agreed that the residual powers by being silent in the Constitution have seen an overreach of the Commonwealth power.

This has resulted in an undermining of democracy and States sovereignty with conditional grants subjugating the autonomy of the States to the Commonwealth government.

The overlap between different levels of Government has created difficulty in ensuring transparency and accountability of funds and distorts community needs with political motivations.

Alternatives to current arrangements included:

- Guidelines attached to grants not binding terms and conditions.
- Establish processes to review State spending to improve accountability and reduce corruption.
- Revisit s51 and include a specific list of residual powers of the States.
- Appoint an independent body to review grant applications and funding arrangements.
- Appoint a Senate estimates committee to oversee grant applications and remove decisions about grants from the Executive government.
- Introduce fixed terms of Parliament to increase scrutiny on Government spending.
- Appoint an integrity body to review expenditure to mitigate against corruption.
- Introduce legislation to remove tied grants.
- Give federal government power over all spending.
- Invert the tax system and allow states to collect tax and then pay a levy to the Commonwealth.

Most groups agreed that current funding arrangements were unfair and that changes to s96 should be considered. The clause imposing terms and conditions is problematic but there also needs to be a mechanism to see the transfer of money to the States.

The transfer of money to the States should be based on principles of equity and is desirable as Canberra is seen as too remote to understand local and regional issues.

4. The vote

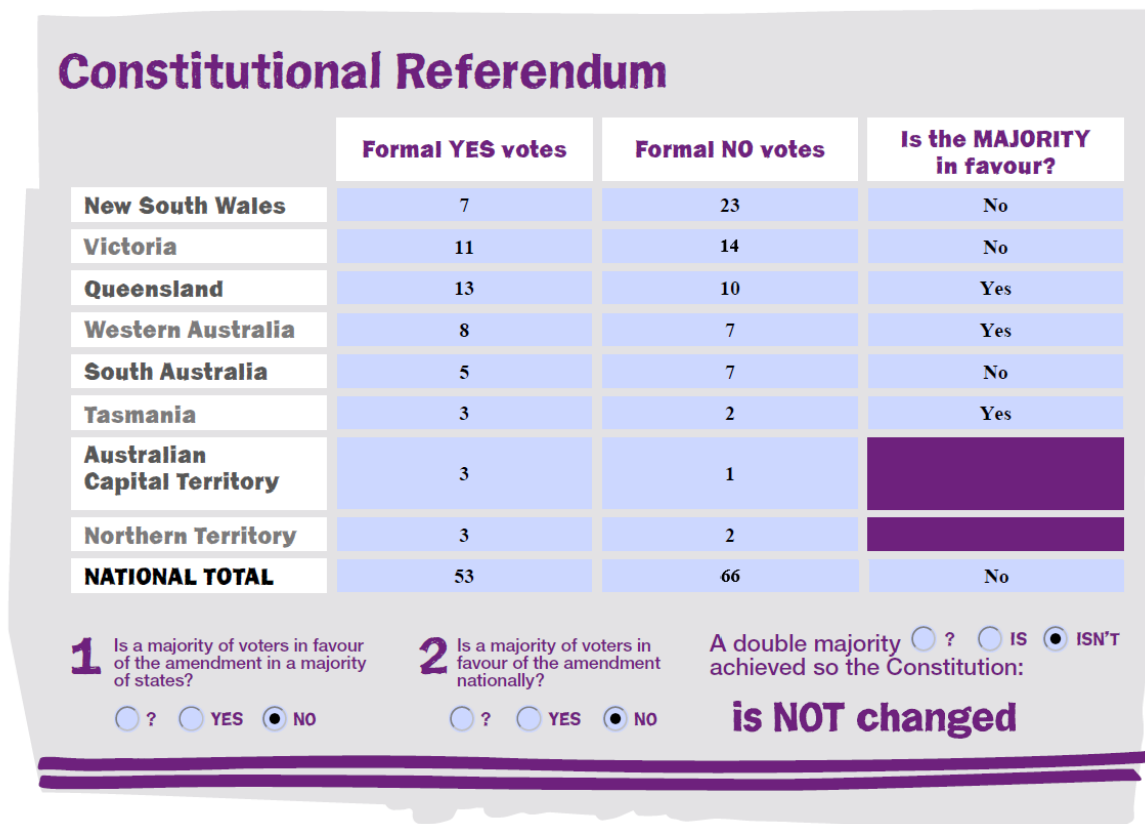
Georgia McInerney and the team from the National Electoral Education Centre, Australian Electoral Commission (AEC), provided an overview of the referendum process and oversaw the delegates voting on the topic. Delegates were briefed about the referendum process and invited to vote on the question. The topic of the Convention was re-phrased to pose a more direct and clear question for the vote.

The YES/NO vote question was:

A Proposed Law: To delete section 96 of the Australian Constitution and to replace it with the following words: “The Commonwealth shall return three quarters of all revenue received into the Consolidated Revenue Fund to the States, unless a majority of States agree otherwise”.

Delegates through soapbox and group feedback sessions appear committed to supporting a change of current funding arrangements between the Commonwealth and States. However, several delegates spoke to the convention expressing difficulties with the wording of the referendum question the convention has been asked to vote on.

Results of the Vote



In the absence of Victorian delegates at the Convention, a national average was calculated from the six States and Territories, and applied proportionally to Victoria.

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.