



the Practitioner's page

Anne Twomey of Australia Amending a constitution in Australia requires careful navigation.

Anne Twomey, a constitutional lawyer from Australia, worked for the High Court of Australia as a senior research officer and for the federal parliament as the Secretary of the Senate Legal and Constitutional Committee. She worked with the New South Wales Government running the legal branch at the cabinet office and providing advice on constitutional and legal matters to the Premier of New South Wales. In March 2003, she spoke at the Global Dialogue conference on constitutions held by the Forum of Federations and the International Association of Centers for Federal Studies in Philadelphia. Forum staff member Carl Stieren interviewed her there.

Forum:

Tell us about elections to the state parliaments in Australia. Do you have single member constituencies or proportional representation?

Twomey:

There are differences between the various state parliaments so it depends on which jurisdiction you're speaking of. Generally though in the lower house it's representation of electorates – each member represents a single constituency on the basis of population. There's a bit more diversity in upper houses. All the states' parliaments are bicameral except for Queensland. The upper houses in state parliaments tend to be elected by a form of proportional representation. So in New South Wales the entire state is the electorate. That can be contrasted with Victoria where there are larger electorates that elect a number of members.

Forum:

What was the so-called "tablecloth ballot" in New South Wales?

Twomey:

In New South Wales, the upper house was in fact a nominated house for a very long period of time. It wasn't until the 1970s that we started to directly elect the upper house. And at that time the electoral system introduced was one of proportional representation that required a very low quota to be elected. It was also done in such a way that voters could vote for a particular party, and the party chose how preferences were to be distributed. This meant that preference deals between minor parties could result in representatives from minor parties being elected. There's some value in being elected for an eight-year

term: after one such term you qualify for a pension for life. This has led to great attraction in getting a position in the upper house and led to a proliferation of small parties nominating for the election. The number of parties that nominated for the 1999 election was so large that the ballot paper became the size of a tablecloth. It was about 2 feet wide and 2 feet high, almost impossible to actually mark in a polling booth. After that election there was a great movement towards reform to try and eliminate the tablecloth ballot paper in the future and I was involved in doing the legislation to allow for that.

Forum:

How was that legislation worded? Did they raise the percentage of the vote that a party had to get in order to elect a member?

Twomey:

A number of different measures were proposed. One was that there had to be a fee paid for a party to nominate so as to discourage parties that weren't serious, that didn't have a serious membership base. There was also a requirement that in order for a party to be in the list, a party had to have a certain number of members. ... There also were measures that changed the method of election. It's now an optional preferential system using proportional representation. It's a bit complicated, but it means that you can give your first preference for Party A, and your vote transfers through all that Party's candidates. However, if you wish to distribute further preferences, you have to mark a second vote for Party B (or C or D etc), and the vote then transfers through all its candidates. Previously, if you voted for one party, your preferences were determined by that party

Forum:

So it was a list system in other words?

Twomey:

It was a list system, but now the list system is such that you can just vote for a particular party, but your subsequent preferences are no longer determined by that party. ... So that cut off the party deals that led to the proliferation of small parties attempting to be elected on the basis of preferential deals. We also proposed a more significant reform of the constitution that involved dealing with deadlocks between the

houses. But that would have required a referendum because some parts of the state constitution are entrenched ... Some parts can be changed by ordinary legislation and some require a referendum. Unfortunately, we were looking for bipartisan support for the referendum because that was the most likely way it would succeed. But the opposition parties later reneged on their support so the referendum was abandoned.

Forum:

When did the referendum proposal fall through?

Twomey:

1999 I think, just after the tablecloth ballot election. So we had to do a more limited form of reform. It also led to a strange and somewhat distorted system because there were some small provisions in the constitution we couldn't change and we had to accommodate into the voting system, so it led to a system of election that no one would ever conceive of if they were starting from scratch. But because of the fact that some parts of the constitution are entrenched, if you're not prepared to hold a referendum you have to work around them and that's how you get odd distortions in your voting system.

Forum:

So the end result was a ballot the size of a placemat?

Twomey:

That's about right. We've just yesterday (March 22) held the most recent state election and the ballot paper was far more manageable. There were still a reasonable number of parties – the problem in doing this is you don't want to discourage democracy. You don't want to discourage people from exercising their rights to (stand for) election.

Forum:

Were there more than just the two largest parties in Australia on the ballot?

Twomey:

Yes there were still about 10 or 15 parties. There were a number of parties represented in the upper house at the moment because of the system of proportional representation under which neither major party gets the majority. There's a "cross bench", as it's described, with a number of independent small parties. So at the moment we have a major party and a coalition of two parties who form the main opposition. And then on the cross bench there are a few minor parties and then micro parties, which were the people elected in the 1999 election. For example, there was a man from the Outdoor Recreation Party whose main policy was that one should be able to drive 4-wheel drive through national parks. He was elected at the 1999 election to an eight-year term.

Forum:

Tell us about how constitutions – the state constitutions and the federal constitution – are amended in Australia. Do you have to have a referendum in some cases?

Twomey:

Yes, the federal constitution is fully entrenched, it can only be amended by referendum. It also has a special majority requirement. You have to have a majority of the voters across

the nation, but you also have to have majorities in a majority of states. That means you have to have majorities in four out of the six states in order for a federal referendum to be passed, for a change to be made to the federal constitution. State constitutions are more flexible. In most cases, most provisions of the state constitution can be amended by ordinary legislation.

Forum:

Tell us a bit about the most famous Australian referendum that people elsewhere know about, the one on the republic. I understand that there were three options put forward. Is a referendum on changing to a republican form of government likely to come up again?

Twomey:

The republic referendum was held in 1999. There was some controversy about the choices on offer. The main links between Australia and the United Kingdom had already been cut. It was largely a symbolic change, but the Constitution still makes a number of important references to the Queen. The Queen appoints the governor general for example. And so to actually remove references to the Queen a republic was proposed, and a referendum was required. Opinion polls showed that a majority of Australians did support the idea of a republic in removing the Queen from the system. The difficulty was how to replace the Queen. How would the governor general — who was going to be renamed president — be chosen? The current system of course is that the Queen in appointing the governor general acts on the advice of the prime minister. Effectively, therefore the prime minister chooses the governor general and the prime minister also has the right to remove the governor general by advising the Queen to do so. Of course when people actually have to vote on such a proposal, people are not enthusiastic about the idea of giving this power to the prime minister solely. If you had a president who was elected by the nation as a whole, that president may consider that they have a mandate to act in a manner contrary to the advice of the prime minister, which would upset all the conventions that underpin the constitutional system. So on the one hand, you had the constitutional lawyers and the people who were concerned about maintaining the current system of government saying a directly elected president would be inappropriate. On the other hand you had the population saying, 'Well, we would like a say in how the president is chosen.' The consequence of all this was that the referendum failed because there wasn't agreement across Australia (on any one alternative).

Postscript:

After the March 22 elections in New South Wales, among the 42 members of the upper house, five parties each elected one member: the Australian Democrats, the Shooters Party, the Unity Party, the One Nation Party, and the Reform the Legal System Party. The representative elected from the Outdoor Recreation Party resigned after being found to have engaged in corrupt conduct and is likely to be replaced by a member of the same party soon. In addition, the Greens had three members and the Christian Democratic Party had two members. In the lower house, with 93 single-member electorates, the only parties represented were the Australian Labor Party, the Liberal Party, the National Party — plus six independents. ☺