

**Submission**

**Constitution Transformation Network, Melbourne Law School**

**Introduction**

This submission to the Foreign Policy White Paper argues that Australia's national interest requires more effective use of Australian soft power, in the Indo-Pacific region and globally. Specifically, it argues that policies and practices across the whole of Australian government need to be based on and responsive to an understanding of the diversity of systems of government around the world, in both form and context, in order to provide assistance that works, in a way that is respected by other state parties. Such an understanding necessarily also must take account of the varying impacts of the multiple manifestations of globalisation on the national constitutional systems of the world. Equally importantly, in the face of growing resistance to many of the effects of globalisation, it should be informed by a consistent and carefully considered view about where the boundaries of authority and responsibility ideally should lie between national constitutional arrangements on the one hand and regional and international orders on the other.

Use of soft power (or, for that matter, hard power) in a way that takes adequate account of what might be described as the constitutional infrastructure of other states holds the key to a host of Australia's immediate foreign policy concerns including regional peace and stability, restriction of terrorism, reduction of corruption, and an international climate that is conducive to investment and trade. It would position Australia as a serious, informed and trusted player in tackling some of the most challenging problems of the world, including in the Indo-Pacific region. It would provide a basis for more focussed decisions on which Australian values to pursue and how, enhancing the prospects of successful outcomes. The advancement of the position of women is an example of an Australian value that we would expect to be achieved more effectively in this way.

A policy stance on the part of Australia that engages knowledgeably and perceptively with the attitudes to, and problems of governance facing the various states of the world has always been desirable but now is more necessary than ever, for at least two reasons.

The first is the diminution of the authority of the United States, generally and in consequence of the policy positions of the new administration, increasing the need for Australia to develop its own ways of achieving influence and securing the tangible benefits that flow from it, while at the same time making a positive difference in the world. There has long been competition in this regard from China,

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whose influence around the world has been enhanced by the perception that it is 'non-judgmental' on matters of governance. Australia needs to develop a niche of its own, that is neither universalist nor indifferent, but works with states to develop shared and workable solutions to problems, informed by Australia's own views about the international state system and how it should evolve.

The second reason why these matters require particular attention now is the confusion caused both by globalisation and by reactions against it. The complexity and pace of globalisation over recent decades has caused the extent of the continuing diversity of states to be underestimated, contributing to failures of governance 'reform' around the world. Rather than diminishing, diversity instead now takes different, often more subtle forms that outsiders may find difficult to understand. Globalisation itself contributes to this diversity, in the sense that it affects different states in different ways, attracting different responses. As a generalisation, there can be no doubt that the interdependence of the states of the world, in the ways compendiously described as globalisation, has affected all state constitutional systems. This has prompted a vast literature, which has struggled to come to grips with the reality of the phenomenon. The situation has now changed again, with the recent reaction against globalisation, creating new dynamics. The implications of these developments is to place new pressures on the performance of state institutions and to force new attention to the ways in which regional and international arrangements are designed and implemented.

Against this background, we respond as follows to the Terms of Reference.

### **Term of reference 1**

Australia's national interest in a changing world would be served by a better informed, more consistent and more nuanced use of its soft power. This would involve an understanding of the underlying as well as superficial diversity of state systems of government around the world and would also affect the manner in which Australian dealings are conducted. To say this is not to denigrate the work currently being done by Australia's representatives. An approach of the kind that we advocate here is difficult to achieve and maintain, particularly in a manner that is consistent across the whole of government and over time. As a generalisation, Australia has a reputation for being universalist and perhaps even patronising in matters of this kind, undermining its longer-term influence and eroding the effectiveness of its efforts to secure particular outcomes. Ultimately, key Australian values including, for example, the advancement of women, will be promoted more effectively by an approach built on understanding and mutual respect.

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## **Term of reference 2**

Australia's principal foreign policy priority over the next ten years must be the Indo-Pacific region in which Australia lies. On the other hand, Australia must continue a focus of attention on much of the rest of the world as well, on bases that respond to Australia's own interests, directly and indirectly. Australians have investments, or the prospects of investments, in many regions of the world, some of which are challenging for this purpose in various ways: Central Asia, Latin America, parts of Africa. Some of Australia's key allies are in Europe and North America. In an interconnected world, instability in one region of which the Middle East is a current example, affects the rest. Australia cannot fully understand how to engage more effectively with countries in its own region without being in a position to place these in a global context that incorporates both the diversity of governance arrangements around the world and the multiple implications of globalisation.

Australia's particular interests in the Indo-Pacific region face multiple challenges. Arguably, this is the most diverse region of the world, in all significant respects; governance, culture, language, religion, colonisation, legal system, economic development. States in this region are the least likely to commit to multinational and regional arrangements. Many of them have underlying cultural traditions with deep historical roots that already have an influence on systems of government that may be expected to increase. There is volatility across the region in terms of structures of government and more can be expected in the medium-term future. At the time of writing, significant constitutional change is under examination in, for example, Solomon Islands, Sri Lanka, Nepal, Thailand, Myanmar, the Philippines, the Marshall Islands, South Korea and Central Asia. In some cases, the constitutional challenge takes an unusual form: the pending secession referendums in Bougainville and New Caledonia are examples. Other states in the region are grappling with problems of a constitutional kind that may or may not lead to proposals for change, including Papua New Guinea, Indonesia, Japan and Fiji. The position that we advocate for Australia in this submission is needed to inform both Australian policy and practice in all these cases.

## **Term of reference 3**

As in response to term of reference 2, the regional organisations in which Australia should take a particular interest are those in the Indo-Pacific region, whether or not Australia is a partner or potential partner. As a generalisation, these are relatively undeveloped in comparison with the rest of the world, but continue to evolve, in response to the preferences and interests of their member states. Regional integration is still a relatively recent phenomenon and, while each region is distinctive, integration inevitably takes place in the light of arrangements that have been designed and implemented elsewhere. To contribute effectively to this process in the Indo-Pacific region,

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Australia needs a clear and consistent view, based on a comparative understanding, of how regional arrangements can be as effective as possible; the extent to which they are affected by context; and the appropriate relationship between states, regional institutions and international arrangements in current conditions. A long-sighted, well informed Australian position on these issues could deepen its influence within the region and internationally.

#### **Term of reference 4**

Our submission is directed to the manner in which Australia deals with other states on matters that affect and are affected by their constitutional arrangements and systems of government. These matters influence all other aspects of the operations of states. Over time, the enhanced effectiveness of Australian initiatives should improve the environments and diminish the risks for Australian businesses operating internationally. More generally, the extended influence that Australia could derive from this approach would increase the economic opportunities made available to it.

#### **Term of reference 5**

It is a paradox that the instability presently evident around the world, including in the Indo-Pacific region, is relatively unresponsive to international intervention except, perhaps, to make and hold negative peace. The most effective responses to internal instability or pending instability are those that are generated and owned internally, albeit with informed and measured regional or international support. Resolution of this paradox requires acceptance of the centrality of states and their peoples and understanding of the most effective means of providing assistance and support when, for myriad reasons, a state's own capacities fail. Australia could and should be at the forefront of developing and giving practical effect to an approach that fits this prescription, generally and in the Indo-Pacific region in particular.

#### **Term of reference 6**

Australia has many assets on which it can draw to pursue its international interests, some of which are presently underutilised.

One is the diversity of the Australian people themselves. This resource can be supplemented further by the diversity of those who have a fondness for Australia through previous connections with it in the form of, for example, study in Australian universities, often with Australian government assistance. Collectively, these groups provide a tremendous reservoir of knowledge and skills that could inform an Australian foreign policy based on deeper engagement with systems and cultures around the world.

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A second underutilised resources lies in Australian universities. At their best, Australian universities offer a rich body of knowledge and insight, with individuals who speak local languages and who frequently have large in-country networks, which are well-placed to inform new directions in Australian foreign policy approaches of the kinds that have been canvassed in this submission.

Our own group is, perhaps not surprisingly, a case in point. It was formed to grapple with many of the problems that have been identified in this submission, including the failure of policies based on assumptions about universality and convergence and the need to engage with new conceptions of relations between states and international orders at a time of fast-moving globalisation. It brings scholars with a global understanding of comparative constitutional law together with others in international law, international humanitarian law, international economic law and Indo-Pacific studies. Network members speak and read local languages and are very well-networked, across the Indo-Pacific region and globally. Members of the group have both significant practical experience as well as knowledge drawn from lengthy engagement in research and analysis. It would be willing to advise or assist in any way, in the further development of the White Paper or generally.

*The Constitution Transformation Network at the University of Melbourne brings together experts in comparative constitutional law, regional and international law and country specific studies to bring a new approach to understanding and supporting constitutional evolution and change across the world, with particular reference to the Asia-Pacific region. This submission is prepared on behalf of the Network by Cheryl Saunders, Will Partlett and Anna Dzedzic.*

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