
The Parliament of the Commonwealth of Australia

A Time for Change: Yes/No?

Inquiry into the Machinery of Referendums

House of Representatives

Standing Committee on Legal and Constitutional Affairs

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Canberra

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Foreword

In 1911, two proposals to change the Constitution were put to Australian electors at the third referendum since federation. Both proposals were soundly defeated. The Government of the day felt that the proposals were sound and necessary changes to the Constitution and that their defeat could be explained, at least in part, by electors being misinformed on the issues and the Opposition's misrepresentation of the proposals to the Australian public.

It was for this reason that in 1912 the Government undertook to post to each elector a document which would provide the arguments for and against the proposed change and the text of the Constitution identifying the proposed changes. The Yes/No pamphlet, as it became known, was an innovative development in the way in which the Australian Government communicated with electors.

It has now been almost 100 years since the introduction of the Yes/No pamphlet. Its form has changed very little since 1912 and it is also the only official material provided to electors prior to a referendum. In 2009, it is appropriate to ask whether there is a more effective way to engage and inform the Australian public about the Constitution and proposed constitutional change.

Before the Government can amend the Constitution, section 128 of the Constitution requires that a majority of electors in a majority of states approve of the proposal. It is therefore as important today as it was in 1912 that electors understand the proposal being put to them so that they can make an informed decision at a referendum.

Constitutional change in Australia is not common. Since Federation, Australian electors have accepted only eight out of 44 proposals to change the Constitution. Since the introduction of the Yes/No pamphlet in 1912, the rate is six out of 39 proposals.

Although not every proposal to change the Constitution will have widespread support, it is also clear that a lack of understanding still plays a part in an elector's

decision to vote 'No'. Indeed, the 1999 republic referendum campaign showed this directly when the No Committee used the 'Don't know - Vote no' slogan.

Under the *Referendum (Machinery Provisions) Act 1984 (Cth)*, the Government is only able to provide electors with the Yes/No pamphlet prior to a referendum. In order for the Government to campaign more broadly, amending legislation would be required. During this inquiry, the Committee asked whether the Yes/No pamphlet provides sufficient information to allow electors to make an informed decision at a referendum. The answer appears to be no. Although the Yes/No pamphlet is a valuable document which provides electors with the views of their elected representatives, it is insufficient as the sole material provided to electors prior to a referendum.

This conclusion was supported by the weight of evidence received by the Committee during this inquiry. Although it is evident that many people still want to receive the Yes/No pamphlet, many other submitters argued that the Yes/No pamphlet is insufficient for many electors. For instance, polling and survey results indicate that young women aged 18-24 know the least about the Constitution. Young women are also increasingly the most prolific users of new technology, such as the internet and social networking sites. The Committee's view is that the Machinery of Referendums Act should be flexible enough to communicate appropriately and effectively with all electors.

The shortcomings of the Machinery of Referendums Act are also illustrated by the Parliament's response to the 1999 referendum on a republic and a preamble. Before that referendum, legislation was introduced to amend the Machinery of Referendums Act. The temporary amendments provided for additional information to be provided to electors by a neutral panel of experts who would provide factual material and Yes and No Committees who would advocate for a 'Yes' or 'No' vote.

After considering the framework provided for referendums and in particular, section 11 of the Machinery of Referendums Act, the Committee has determined that changes to the legislation are necessary to assist electors in making an informed vote at referendums. In this report, the Committee has recommended significant changes to section 11 of the Machinery of Referendums Act, including removing some of the more restrictive provisions and introducing measures which are intended to provide a flexible and adaptable approach to referendum campaign information.

With regard to amending some of the current restrictive provisions, the Committee has recommended removing the limitation on government expenditure, removing the word limit for the Yes/No arguments and changing the delivery requirement to every household rather than every elector. The

Committee is of the view that some provisions should remain unchanged, including the continued authorisation of the Yes and No arguments by members of Parliament.

In looking to provide a more flexible and adaptable approach, the Committee has recommended that the Government establish a Referendum Panel for each referendum. The Referendum Panel would be responsible for developing an overarching communications strategy relevant to that referendum. This would include determining the word limit of the Yes/No pamphlet, as well as providing background and contextual material to electors on the referendum proposal. The Committee envisages that specific 'Yes' and 'No' campaigns, similar to those established in 1999, would contribute to the debate.

The changes recommended by the Committee mean that there will be more than one way to communicate with electors before a referendum. The Yes/No pamphlet will continue to be provided to electors and this will serve as a guaranteed minimum for referendum material. However, additional material, targeted more effectively to different groups of electors, can now also be provided. Above all, the Committee's recommendations are intended to provide flexibility and adaptability so that the specific requirements of each referendum can be met.

Mr Mark Dreyfus QC MP
Chair



Membership of the Committee

Chair Mr Mark Dreyfus QC MP

Deputy Chair The Hon. Peter Slipper MP

Members The Hon. Kevin Andrews MP

Mrs Sophie Mirabella MP

The Hon Bob Debus MP

Ms Belinda Neal MP

Mr Petro Georgiou MP

Mr Shayne Neumann MP

Mr Daryl Melham MP

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Committee Secretariat

Secretary Dr Anna Dacre (from 23/9/09)

Ms Sharon Bryant (to 22/9/09)

Inquiry Secretary Serica Mackay

Research Officers Angela Arundell

Administrative Officers Claire Young

Ozi Kosemehmetoglu



Terms of reference

The Committee is to consider and report on:

1. The effectiveness of the *Referendum (Machinery Provisions) Act 1984* in providing an appropriate framework for the conduct of referendums, with specific reference to:
 - Processes for preparing the Yes and No cases for referendum questions;
 - Provisions providing for the public dissemination of the Yes and No cases; and
 - Limitations on the purposes for which money can be spent in relation to referendum questions.
2. Any amendments to the *Referendum (Machinery Provisions) Act 1984* the Committee believes are required to provide an appropriate framework for the conduct of referendums; and
3. Any other federal provisions relevant to terms 1 and 2 above, as the Committee considers appropriate.



List of acronyms and abbreviations

AEC	Australian Electoral Commission
ASCII disk	American Standard Code for Information Interchange disk
Cth	Commonwealth
CPoR	Citizens' Parliament on Referendum
JSCEM	Joint Standing Committee on Electoral Matters



List of recommendations

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The Committee recommends that the Australian Government introduce amendments to section 11 of the <i>Referendum (Machinery Provisions) Act 1984</i> (Cth) to improve the referendum process.	
Recommendation 2	57
The Committee recommends amendments to the <i>Referendum (Machinery Provisions) Act 1984</i> (Cth) to remove the current restrictions on the word limit of the Yes/No arguments.	
Recommendation 3	57
The Committee recommends that the Australian Government introduce amendments to the <i>Referendum (Machinery Provisions) Act 1984</i> (Cth) to require a Yes/No pamphlet to be delivered to every household, not every elector.	
Recommendation 4	58
The Committee recommends that, consistent with section 11 of the <i>Referendum (Machinery Provisions) Act 1984</i> (Cth), the respective Yes/No arguments should continue to be authorised by those members of Parliament who voted for or against the proposed law.	
Recommendation 5	59
The Committee recommends that if a constitution amendment bill is passed unanimously by both Houses of Parliament, then <i>all</i> members of Parliament be responsible for authorising <i>both</i> the Yes and No arguments.	

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- Recommendation 6** 60
- The Committee recommends that the Australian Government develop and implement a national civics education program to enhance the engagement of the Australian public in democratic processes and to improve knowledge and understanding of the Australian Constitution.
- Recommendation 7** 62
- The Committee recommends that amendments to the *Referendum (Machinery Provisions) Act 1984* (Cth) provide for the establishment of a Referendum Panel using a method of appointment which ensures independence and bipartisanship. The Panel would be specifically appointed for each referendum for the purposes of promoting that referendum and educating voters about the referendum arguments.
- Recommendation 8** 63
- The Committee recommends that membership of the proposed Referendum Panel should be a maximum of eight persons, and should include a representative of the Australian Electoral Commission.
- Recommendation 9** 64
- The Committee recommends that the proposed Referendum Panel be responsible for determining an appropriate and relevant information and communications strategy for the referendum, including identifying what education material should be distributed and the methods of distribution.
- Recommendation 10** 64
- The Committee recommends that the proposed Referendum Panel be responsible for determining the maximum word length which is to be the same for the Yes and No arguments.
- Recommendation 11** 65
- The Committee recommends the Australian Government introduce amendments to remove the current limitation on spending imposed by section 11(4) of the *Referendum (Machinery Provisions) Act 1984* (Cth) and to include provisions to ensure that spending is directed to referendum education and to equal promotion of the Yes/No arguments.
- Recommendation 12** 67
- The Committee recommends that amendments to the *Referendum (Machinery Provisions) Act 1984* (Cth) establish that the Australian Government be responsible for determining the budget available to the Referendum Panel for referendum education and campaign activities.

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- Recommendation 13**..... 67
- The Committee recommends that the proposed Referendum Panel have the power to make recommendations to the Australian Government concerning the budget to be provided for a referendum campaign.
- Recommendation 14**..... 67
- The Committee recommends that the Referendum Panel be responsible for establishing and determining the budget available to the Yes and No campaigns which should be funded equally.
- Recommendation 15**..... 67
- The Committee recommends that the Australian Government introduce amendments to the *Referendum (Machinery Provisions) Act 1984 (Cth)* to require the proposed Referendum Panel to provide to Parliament a report of its activities and expenditure at the conclusion of the referendum.
- Recommendation 16**..... 68
- The Committee recommends that, consistent with the current provisions of the *Referendum (Machinery Provisions) Act 1984 (Cth)*, the Australian Electoral Commission continue to be responsible for the conduct of referendums.
- Recommendation 17**..... 69
- The Committee recommends that the Australian Government consolidate and harmonise the machinery of referendums provisions with the *Commonwealth Electoral Act 1918 (Cth)*.

Introduction

- 1.1 The Australian Constitution has been described as ‘the birth certificate’ of the nation. While it was required to be passed as a British Act of Parliament, it brought into being an Australian system of governance that preserved the integrity of the states and established a federal structure of government. The Constitution took effect on 1 January 1901.
- 1.2 The Constitution sets out the distribution of powers between the Commonwealth and the states, and the responsibilities of each. It establishes the separation of powers between the legislative, executive and the judiciary, and establishes the principle of ‘representative government’ whereby citizens of Australia vote to elect their Commonwealth representatives.
- 1.3 The Constitution also sets out the mechanism by which it can be altered, in section 128. It provides that a constitution amendment bill must first be passed by both Houses of Parliament before it is submitted to electors. A majority of electors in a majority of states must then vote in favour of the change before the Constitution can be amended. In this aspect, Australia’s Constitution is unusual and differs from the constitution of many other countries in that an amendment to the Australian Constitution requires a direct vote of electors. This establishes a particularly high requirement of voter support and it is perhaps unsurprising that constitutional change is rare in Australia.
- 1.4 This requirement for majority citizen support across Australia for constitutional change has been described as preserving ‘the sovereignty of the Australian people’ over their Constitution.¹ However the requirement also calls into question how citizens are informed of the issues when a referendum is held seeking constitutional change.

¹ Australia’s Constitution, Overview, Australian Government Solicitor and Parliamentary Education Office, Canberra June 2007, p.v

- 1.5 In a system which requires the consent of the people to change the Constitution, it is appropriate to consider *how* we ask the public to change the Constitution. Specifically, what happens between the passing of legislation to change the Constitution and the point of voting? What are the responsibilities or obligations of parliamentarians? What information is provided to electors? How much does the average Australian know about the Constitution?
- 1.6 The primary way to inform the electorate on the proposed constitutional change is through the Yes/No pamphlet – a document containing arguments for and against the proposal and text showing the proposed changes to be made to the Constitution. The legislative provision for the distribution of Yes/No pamphlets dates back to 1912, when it was introduced as an amendment to the *Referendum (Constitution Alteration) Act 1906*. The *Referendum (Machinery Provisions) Act 1984* (the ‘Machinery of Referendums Act’) replaced the 1906 Act but continues to provide for the distribution of Yes/No pamphlets in section 11.²
- 1.7 Section 11 of the Machinery of Referendums Act provides for the distribution of a Yes/No pamphlet prior to a referendum. The legislation has a number of important features, including the stipulation that the pamphlet be *posted* to *every* elector at least 14 days prior to the day of the referendum. The arguments themselves must not be longer than 2 000 words, except where there is more than one proposal being considered at the same referendum. Finally, those members of Parliament who voted for and against the proposed law to change the Constitution are responsible for authorising the respective Yes/No arguments.
- 1.8 At the time of their introduction, the pamphlets were innovative and necessary to inform the electorate about the proposal submitted to referendum. In 2009, it is appropriate to ask whether there is a more effective way to engage and inform people about the Constitution and proposed constitutional change.

Referral of the inquiry

- 1.9 On 10 September 2009, the Attorney-General, The Hon Robert McClelland MP, on behalf of the Special Minister and Cabinet Secretary, Senator the Hon Joe Ludwig, asked the Committee to inquire into and report on the machinery of referendums.

2 This report uses the term ‘referendums’ for consistency with the *Referendum (Machinery Provisions) Act 1984 (Cth)*.

- 1.10 The Committee was asked to inquire into and report on the effectiveness of the *Referendum (Machinery Provisions) Act 1984* (Cth) in providing an appropriate framework for the conduct of referendums, with specific reference to:
- processes for preparing the Yes and No cases for referendum questions;
 - provisions providing the public dissemination of the Yes and No cases; and
 - limitations on the purposes for which money can be spent in relation to referendum questions.
- 1.11 The Committee was also asked to consider any amendments to the *Referendum (Machinery Provisions) Act 1984* that the Committee believes are required to provide an appropriate framework for the conduct of referendums. Finally, the Committee also considered any other federal provisions relevant to the above terms of reference.
- 1.12 To gather evidence for the inquiry, the Committee held one roundtable and three public hearings. These were located in Canberra, Sydney and Melbourne. The public hearings and attendees are listed at Appendix B.
- 1.13 The Committee sought submissions from a range of academics, organisations, think-tanks, interested individuals and State and Territory governments. A total of 33 submissions were received and these are listed at Appendix A.
- 1.14 Two more documents which might assist in considering the issues in this report are included as appendices. Section 11 of the Machinery of Referendums Act is extracted in full in Appendix D and a complete list of referendums is included in Appendix E.
- 1.15 This report considers the evidence that was raised during the inquiry in relation to the terms of reference. Chapter 2 provides a history of the Yes/No pamphlet since its inception in 1912. Chapter 3 examines the current provisions and considers some of the issues that are raised in practice. Chapter 4 discusses the bulk of the evidence received during the inquiry that identifies areas and suggestions for change. Finally, chapter 5 includes the Committee's findings and recommendations.

Context of the inquiry

- 1.16 There have been a number of Government-led reports recently issued that are relevant to the processes associated with the Machinery of Referendums Act. The Government Advertising Guidelines report may affect the ability of the Government to advertise the Yes and No arguments in the lead up to a referendum. In addition, the recently released Green Paper on Electoral Reform examines the conduct of elections in Australia and the processes for educating the public on electoral matters and matters relating to Australia's democratic institutions.
- 1.17 The Committee's recent report, *Reforming our Constitution*, which was tabled in June 2008, identifies and examines key areas of constitutional reform. Adjusting the machinery of referendums and specifically, the usefulness or otherwise, of the Yes/No pamphlet, was discussed and the Committee noted that consideration should be given to how arguments are framed and debated in the lead up to a referendum.

Government Advertising Guidelines

- 1.18 In June 2008, the Department of Finance and Deregulation issued a report titled *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*. These Guidelines set out the principles applying to Australian Government departments and agencies undertaking information and advertising campaigns. The underlying principles governing the use of public funds for government information and advertising campaigns identified in the report are as follows:
- all members of the public have equal rights to access comprehensive information about government policies, programs and services which affect their entitlements, rights and obligations;
 - governments may legitimately use public funds for information programs or education campaigns to explain government policies, programs or services and to inform members of the public of their obligation, rights and entitlements; and
 - government campaigns shall not be conducted for party political purposes.³

³ Australian Government, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, available from: <www.finance.gov.au/advertising/guidelines-on-campaign-advertising.html>

1.19 These values reflected in the Government Advertising Guidelines are identified as follows:

- material should be relevant to government responsibilities;
- material should be presented in an objective, fair and accessible manner;
- material should not be directed at promoting party political interests;
- material should be produced and distributed in an efficient, effective and relevant manner, with due regard to accountability; and
- advertising must comply with legal requirements.⁴

1.20 The concerns addressed by the Government Advertising Guidelines are reflected in many of the submissions to this inquiry that focus on the need for material to be presented as relevant, fair and factual.

Green Paper on Electoral Reform

1.21 The Australian Government's second electoral reform green paper, *Strengthening Australia's Democracy*, was released on 23 September 2009 by the Cabinet Secretary and Special Minister of State, Senator the Hon Joe Ludwig.

1.22 The purpose of the Green Paper process is to encourage public debate about options for improving and modernising Australia's electoral system. Of particular relevance to this inquiry are the civics education measures designed to maximise effective participation in elections, and by extension, similar democratic processes, such as referendums.⁵ Further, the observations of the Australian Electoral Commission (AEC) outlined in this paper highlight the changing methods citizens use to engage with the Government at the time of an election, referring to an increasing trend towards electronic interaction.⁶

⁴ Australian Government, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, available from < www.finance.gov.au/advertising/guidelines-on-campaign-advertising.html >

⁵ Australian Government, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, September 2009, p. 5; available from: < www.pmc.gov.au/consultation/elect_reform/ >

⁶ Australian Government, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, September 2009, p. 2; available from: < www.pmc.gov.au/consultation/elect_reform/ >

History of the Yes/No pamphlet

- 2.1 The *Referendum (Constitution Alteration) Act* (Cth) ('Referendum Act') was enacted in 1906 and provided the mechanism through which a proposed amendment to the Constitution was submitted to the electors. However, this original Act did not provide for the submission of arguments for and against the proposed change. This provision was not incorporated in the Act until 1912.¹
- 2.2 During the three preceding referendums (1906, 1910 and 1911), and prior to the additional legislation in 1912, there had been no provision for government funding of the official Yes/No arguments. The 1912 amendment was introduced by the Fisher Government, which believed their proposals for change had been rejected by voters who were inadequately informed of the issues, and who had been misled by those who opposed the changes.²
- 2.3 The Government inserted section 6A into the Referendum Act which authorised public funding of the 2 000 word arguments.³ At the time the arguments were seen as an effective way of providing voters with basic facts about proposed changes to the Constitution. Prime Minister Andrew Fisher assured the House of Representatives that he had 'no doubt that the

1 Lynette Lenaz-Hoare 'The History of the "Yes/No" Case in Federal Referendums, and a Suggestion for the Future', *Australian Constitutional Convention 1984, Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, p. 86.

2 Enid Campbell, Southey Memorial Lecture 1988, 'Changing the Constitution - Past and Future', *University of Melbourne Law Review*, Vol. 17, June 1989, p. 11.

3 Lynette Lenaz-Hoare 'The History of the "Yes/No" Case in Federal Referendums, and a Suggestion for the Future', Appendix 5, *Australian Constitutional Convention 1984, Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, p. 87.

case will be put from both sides impersonally and free from any suggestions of bias or misleading'.⁴

- 2.4 Attorney-General of the day, the Hon William Hughes MP, envisaged that the arguments would be put in an 'impersonal, reasonable and judicial way', and would appeal to 'reason rather than to the emotions and party sentiment'.⁵

The use of the Yes/No pamphlet since 1912

- 2.5 While the legislation sets out the procedures for the Yes/No arguments, there is no obligation for parliamentarians to actually prepare them. There have been three instances where Yes/No arguments were not prepared: 1919, 1926 and 1928.

- 2.6 One these three occasions, the reasons given for not providing the arguments were respectively:

- it was determined there was insufficient time to write, prepare and post the pamphlets as the Government wished to hold the referendum in conjunction with an early election. The Parliamentarians argued their case in conjunction with the election campaigns;⁶
- a provision rendering section 6A inoperative for the referendum was introduced as the supporters of the proposal were so divided that the provision of a Yes case was deemed impracticable; and⁷
- bipartisan support for the proposal, and support from the states resulted in an agreement that no Yes/No arguments were required.⁸

- 2.7 The Yes/No pamphlets were distributed for the referendum in 1937 and in every subsequent referendum.⁹ However, there have been occasions where

4 Enid Campbell, Southey Memorial Lecture 1988, 'Changing the Constitution- Past and Future', *University of Melbourne Law Review*, Vol. 17, June 1989, p. 11.

5 William Hughes, Commonwealth Attorney-General, House of Representatives Hansard, 16 December 1912, p. 7154

6 Lynette Lenaz-Hoare 'The History of the "Yes/No" Case in Federal Referendums, and a Suggestion for the Future', in *Australian Constitutional Convention 1984, Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, p. 90

7 Cheryl Saunders, 'Referendum Procedures,' in *Australian Constitutional Convention 1984: Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, Appendix 7, pp 111-117.

8 Cheryl Saunders, 'Referendum Procedures,' in *Australian Constitutional Convention 1984: Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, Appendix 7, pp 111-117.

only a Yes argument was distributed to electors. This has occurred when a proposed amendment received unanimous support by both Houses, as was the case in one of the two proposals put to referendum in 1967, and three of the four proposals put in 1977. (The substance of these proposals is outlined in chapter 3.) The machinery of referendums legislation specifies that an argument against the proposed change is to be authorised by a majority of members of the Parliament who vote against the proposed law. Where no member votes against the proposed law, there can be no official No case.

2.8 The processes outlined in the 1912 amendment to the Referendum Act have remained largely unchanged, despite the opportunity being presented when the legislation was revisited in 1984. Except for the limitation on Government expenditure, the *Referendums (Machinery Provisions) Act 1984* ('Machinery of Referendums Act') did not significantly change the substance of section 6A, which was reintroduced into the new Act as section 11.

2.9 However discussion surrounding the introduction of the Machinery of Referendums Act did address the sufficiency of the material provided to electors prior to a referendum. In 1984, Attorney-General the Hon Senator Gareth Evans stated:

It should be squarely acknowledged that the official Yes/No pamphlet is no longer adequate - if indeed it ever was-as a means of conveying information ... The last occasion on which the Yes/No pamphlet appears to have been relatively informative and moderate in its presentation was back in 1913.¹⁰

2.10 When the Machinery of Referendums Act was introduced in 1984, section 11(4)(b) was included to provide for the distribution of impartial information relating to the proposed change. The Attorney-General stated that the function for conveying such information should rest with an impartial body, and identified the AEC as the obvious choice. The Attorney-General intended that there should be some capacity to present 'neutralised' information to attempt to redress some of the 'strident propaganda which has traditionally made constitutional referendums so irrational a feature of Australian political life'.¹¹ The adoption of this

9 Lynette Lenaz- Hoare, 'The History of the "Yes/No" Case in Federal Referendums, and a Suggestion for the Future', in *Australian Constitutional Convention 1984, Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, p. 90

10 Senator Gareth Evans, Commonwealth Attorney-General, Senate Hansard, Thursday 7 June 1984, p. 2765

11 Senator Gareth Evans, Commonwealth Attorney-General, Senate Hansard, Thursday 7 June 1984, p. 2765.

proposal resulted in section 11(4)(b), which enables the Commonwealth to spend money in relation to 'the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law'.

- 2.11 Although this provision would allow the AEC to produce material in addition to the Yes/No pamphlet, it has rarely been used to distribute impartial contextual material to electors. This is largely because of the uncertainty associated with the term 'impartial'. For example, the High Court ruled that a series of government advertisements scheduled to run prior to the 1988 referendum were in breach of section 11(4) of the Machinery of Referendums Act as the advertisements were considered to be an argument *for* the constitutional amendment.¹² (Further discussion of *Reith v Morling* is provided in chapter 3.)
- 2.12 The absence of additional background material was again addressed by Attorney-General, the Hon Daryl Williams MP, in the second reading speech for the 1999 amendment to the Machinery of Referendums Act:
- In order to make an informed decision, the Australian people must have access to relevant information about our system of government and the proposal for change. The government believes that public funding should be made available to support a vigorous and engaging public presentation of the arguments for and against change.¹³
- 2.13 As highlighted in 1984 and 1999, there have been several criticisms directed at the processes associated with the Yes/No arguments and the absence of sufficient material to enable the Australian people to make an informed decision. As well, a number of parliamentary inquiries have considered or touched on the current processes and their adequacy in changing the Constitution. (For an overview of previous inquiries, refer to Appendix F.)

12 *Reith v Morling* (1988) 83 ALR 667.

13 Mr Daryl Williams MP, Attorney-General, House of Representatives Hansard, Thursday 11 March 1999, p. 3761

Current provisions

Introduction

- 3.1 The *Referendum (Machinery Provisions) Act 1984 (Cth)* ('Machinery of Referendums Act') provides the framework for the conduct of referendums. Section 11 of the Machinery of Referendums Act sets out how the Australian Government can engage with electors prior to a referendum. At present, section 11 effectively limits the Australian Government to the distribution to electors of arguments for and against the proposed change to the Constitution. Known as the Yes/No pamphlet, this includes the arguments for and against the proposed change (the Yes/No arguments) and a statement showing the textual alterations and additions proposed to be made to the Constitution.
- 3.2 As specified in the Machinery of Referendums Act, the Yes/No arguments are authorised respectively by the majority of those members of Parliament who voted for and against the proposed amendment. These Members may send to the Electoral Commissioner their arguments for and against the proposal. Each argument must not exceed 2 000 words, however where there is more than one proposal at the same referendum, the average of the Yes/No arguments must not exceed 2 000 words.
- 3.3 The Electoral Commissioner must post to each elector a pamphlet containing the arguments as well as a statement showing the textual alterations and additions proposed to be made to the Constitution no later than 14 days before the voting day for the referendum.
- 3.4 Section 11(4) prohibits the expenditure by the Commonwealth of money in respect of arguments for or against a proposed alteration, except in relation to the printing and distribution of the official Yes/No cases.

- 3.5 This chapter considers the operation of section 11 in more detail, focusing on the unanimous passage of a constitution amendment bill, the optional nature of the Yes/No pamphlet, the equal status of the Yes/No arguments and the limitation on Government expenditure. The chapter also considers the effectiveness of the provisions and compares the processes used for the 1999 referendum.

Unanimous passage of the amendment bill

- 3.6 Section 128 of the Constitution requires that the law proposing to change the Constitution be passed by an absolute majority of each House of Parliament. The members of Parliament who voted for or against the Constitution amendment bill are responsible for the authorisation of the Yes/No arguments. However, this means that where the Constitution amendment bill is passed unanimously, that is where no member of Parliament voted against it, there will be no official No case distributed. This happened in referendums in 1967 and 1977.
- 3.7 The 1967 referendum put two proposals to the electorate. The first related to increasing the number of Members without necessarily increasing the number of Senators. The second related to Aboriginal people being counted in the reckoning of the population. As the Act relating to the Aboriginal proposal was passed unanimously by both Houses of Parliament, a No case was not submitted.
- 3.8 The 1977 referendum put four proposals to the electorate. The first again sought to amend the Constitution to ensure that Senate elections are held at the same time as House of Representative elections and both Yes and No cases were prepared. The second proposal related to filling casual vacancies in the Senate, the third proposal related to allowing electors in the territories to vote at referendums and the fourth proposal related to the retirement age of federal court judges. In relation to the last three proposals, a No case was not submitted.
- 3.9 Colin Howard, who has written widely on the Constitution, highlighted the democratic importance of having both a Yes and a No case:

It is also one of the fundamentals of democracy that more than one point of view is possible about anything. If the elector is to make a choice between alternatives by voting for the one preferred, it is reasonable that he or she should have an opportunity to hear and

consider what can be urged both for and against the proposed change.¹

- 3.10 Julian Leaser suggested that that giving parliamentarians a free vote on constitutional matters would enable electors, organisations and groups to lobby the Government for a No vote:

I would like to see a free vote in the parties on all constitutional questions because then, as a community organisation that was wanting to advocate a no vote, you would be able to put that case to parliamentarians. If parliamentarians were not going to be convinced of that then there is little point, I would have thought, if you could not convince any parliamentarians, of actually writing a no case.²

- 3.11 However Rod Cameron argued that as referendum proposals are unlikely to succeed without bipartisan support, there should be no official No case:

Ideally, it would be just selling a 'yes' case, because you are not going to have a referendum unless both sides agree. If you are selling both sides, your aim is to inform and educate the community as to the issues involved.³

- 3.12 The Yes/No argument is premised on the concept of a debate. Presumably, this is to allow both sides to make their case but also to provide the electors with a thorough consideration of the issues. If it is accepted that most proposals to change the Constitution will have supporters and detractors, both within and outside Parliament, then the importance of having both an official Yes and No argument is clear.

Yes/No case optional

- 3.13 The authorisation of Yes/No arguments is optional. Parliamentarians are not obliged to authorise a Yes/No argument in relation to a referendum and there have been three instances where no Yes/No pamphlet was distributed: in 1919, 1926 and 1928.

- 3.14 In 1919, the referendum was held at the same time as the federal election and legislation passed by Parliament expressly stated that section 6A of the *Referendum (Constitution Alteration) Act 1906*, which provided for the

1 Colin Howard, *Australia's Constitution*, Ringwood Victoria: Penguin, 1985, p. 132.

2 Julian Leaser, *Transcript of Evidence*, 14 October 2009, p. 9.

3 Rod Cameron, *Transcript of Evidence*, 29 October 2009, p. 1.

distribution of the Yes/No pamphlet, would not apply to a referendum held at the same time as the 1919 federal election. As a result, there was no Yes/No pamphlet distributed for the 1919 referendum.

- 3.15 For both the 1926 and 1928 referendums, legislation passed by Parliament expressly stated that section 6A of the *Referendum (Constitution Alteration) Act 1906* (Cth), which provided for the distribution of the Yes/No pamphlet, would not apply to these referendums.
- 3.16 Cheryl Saunders has noted the reasons for the decision not to distribute Yes/No pamphlets on these three occasions:

Section 6A remained in the Act but its operation was temporarily abrogated for each of the referendums of 1919, 1926 and 1928. The main reason given in 1919 was that there was no time to prepare the pamphlets. In 1926 the supporters of the proposals were so divided in the reasons for their support that it was considered impracticable to prepare a Yes case. In 1928, most significantly, it was accepted that the Yes/No cases were unnecessary because both major parties and the States had agreed to the proposals.⁴

- 3.17 Distribution of the proposed textual changes to the Constitution is dependent on the authorisation of Yes/No arguments. Where the Yes/No arguments are not authorised, electors miss out twice: they do not receive the arguments for and against the proposed change and they also do not receive the proposed textual alterations to the Constitution.
- 3.18 In practice, the Yes/No pamphlet has been the only official information available to electors prior to a referendum. Electors who rely on this material to make an informed decision at a referendum will be disadvantaged in situations in which it may be not be politically expedient or in which there may not be enough time for the Parliament to authorise the Yes/No pamphlet.

4 Cheryl Saunders, 'Referendum Procedures,' in *Australian Constitutional Convention 1984: Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, Appendix 7, pp 111-117. For a more detailed account, see Lynette Lenaz-Hoare, 'The History of the Yes/No Case in Federal Referendums, and a Suggestion for the Future', Appendix 5, *Report to Standing Committee*, Australian Constitutional Convention Sub-Committee 1984, p. 89.

‘Equal’ status of the Yes and No arguments

- 3.19 The Yes and No arguments are presented equally in the pamphlet sent to electors, regardless of the votes they received in Parliament. Cheryl Saunders states that:

The section authorizes equal treatment for the Yes and No cases whatever the size of the opposition to the proposal. The views of a single dissident thus receive the same weight in the official documentation as those of all the other members of the Parliament.⁵

- 3.20 This may be important as some commentators have suggested that given the double majority required for constitutional change, it might be helpful for electors to know exactly how many Parliamentarians support and oppose the proposal:

Since the majority required in Australia for a constitutional amendment is exceedingly high, in practical terms the task for the opponents is to convey the impression that opposition is much more widespread than is really the case and thereby to influence as many doubters as possible.⁶

- 3.21 The provision of relevant and factual information would be helpful to electors because the more useful information they receive, the more able they are to make an informed vote.

Limitation on Government expenditure

- 3.22 The current Machinery of Referendums Act restricts Commonwealth spending to the distribution of the Yes/No pamphlet and ‘other information relating to, or relating to the effect of, the proposed law’. Section 11(4) of the Machinery of Referendums Act is extracted here in full:

5 Cheryl Saunders, ‘Referendum Procedures,’ in *Australian Constitutional Convention 1984: Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, Appendix 7, p. 113

6 Colin Howard and Cheryl Saunders, ‘Constitutional Amendment and Constitutional Reform in Australia’ in R.L. Mathews (ed), *Public Policies in Two Federal Countries: Canada and Australia*, Centre for Research on Federal Financial relation, Australian National University, Canberra, 1982, p. 75.

(4) The Commonwealth shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law except in relation to:

(a) the preparation, printing and posting, in accordance with this section, of the pamphlets referred to in this section;

(aa) the preparation, by or on behalf of the Electoral Commission, of translations into other languages of material contained in those pamphlets;

(ab) the preparation, by or on behalf of the Electoral Commission, of presentations of material contained in those pamphlets in forms suitable for the visually impaired;

(ac) the distribution or publication, by or on behalf of the Electoral Commission, of those pamphlets, translations or presentations (including publication on the Internet);

(b) the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law; or

(c) the salaries and allowances of members of the Parliament, of members of the staff of members of the Parliament or of persons who are appointed or engaged under the *Public Service Act 1999*.

3.23 In the second reading speech for the *Referendum Legislation Amendment Bill 1999*, the Attorney-General said that the limit on expenditure in the Machinery of Referendums Act:

[A]rose out of a concern at the time to establish a statutory prohibition against the Government of the day funding partisan involvement in campaigns surrounding a referendum proposal. Specifically, the concern was that a Government might support one case only.⁷

3.24 In fact, the limitation on Government expenditure was a result of a 1983 proposal to spend, in addition to the \$5 million for the Yes/No pamphlet, a further \$1.25m on the promotion of the Yes case alone:

In the Senate, Senator Gareth Evans gave three reasons why the Government wanted extra money for the "Yes" case – they are briefly: –

7 Mr Daryl Williams MP, Attorney-General, House of Representatives Hansard, Thursday 11 March 1999, p. 3761.

1. The "No" case has the general advantage when the complexity of the proposals and the degree of voter apathy on matters which were seen as not having a direct effect, were taken into account.
 2. The Premiers of two States had indicated that they would use public funds to argue the "No" case, and the Federal Government would need the extra funds for the "Yes" case.
 3. The proposals have, the overall support of the Constitutional Convention and bi-partisan cross-party support in the Parliament.⁸
- 3.25 Section 11(4)(b), which permits the AEC to provide information relating to, or relating to the effect of the proposed law, may provide some scope for the distribution of material in addition to the Yes/No pamphlet. The subsection was originally inserted to ensure that the limitation on Government expenditure did not override the function the AEC would otherwise have in promoting public awareness of electoral matters, including referendums, under the *Commonwealth Electoral Act 1918*.⁹
- 3.26 When the current Machinery of Referendums Act was introduced in 1984, the Attorney-General, the Hon Senator Gareth Evans, pointed out that:
- ‘Impartial information’ of course means an explanation of what a particular proposal does. It does not mean arguments for or against a proposal.¹⁰
- 3.27 However, the decision of the High Court in *Reith v Morling* suggests that the class of material prohibited under the Machinery of Referendums Act is potentially quite broad (see text box following).¹¹ This is at least a partial explanation for the 1999 introduction of legislative amendments to the Machinery of Referendums Act. In the second reading speech, the Attorney-General, the Hon Daryl Williams MP, stated that:
- The Attorney-General's Department has indicated that subsection 11(4) of the referendum act, as it stands, may prevent public funding for the campaign phase of the information activities. The department has also said that the subsection arguably prevents Commonwealth expenditure on educational material which may

8 Lynette Lenaz-Hoare, ‘The History of the Yes/No Case in Federal Referendums, and a Suggestion for the Future’, Appendix 5, *Report to Standing Committee*, Australian Constitutional Convention Sub-Committee 1984, p. 85.

9 Senator Gareth Evans, Commonwealth Attorney-General, Senate Hansard, Thursday 7 June 1984, p. 2765

10 Senator Gareth Evans, Commonwealth Attorney-General, Senate Hansard, Thursday 7 June 1984, p. 2765

11 *Reith v Morling* (1988) 83 ALR 667.

be said to include any argument for or against the proposed law. Many kinds of educational material could conceivably come within the scope of such a prohibition. The class of educational material that may be regarded – in one sense or another – as an argument for or against change is potentially too broad.¹²

12 Mr Daryl Williams MP, Attorney-General, House of Representatives Hansard, Thursday 11 March 1999, p. 3761.

***Reith v Morling* (1988) 83 ALR 667**

In August 1988, approximately a month before Australian electors were due to vote on four proposals to change the Constitution, the High Court was asked to stop a series of Government advertisements from being broadcast. Peter Reith, the Shadow Attorney-General and a Member of the House of Representatives, argued that the advertisements contained arguments in favour of the questions soon to be posed to voters at the forthcoming referendum.

Under section 11(4) of the *Referendum (Machinery Provisions) Act 1984*, the Government must not spend money promoting arguments either for or against the proposed constitutional change except in relation to the Yes/No pamphlets, the salaries and allowances of Parliamentarians and other public servants, and the 'provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law.'

Peter Reith specifically objected to the following commentary in one advertisement:

Over two years ago, the Constitutional Commission representing a cross-section of Australians began a review.

They held public meetings in each State and accepted over 4000 submissions. Their recommendations form the basis for three of the four proposed amendments on which you'll be asked to say yes or no in the September 3 Referendum.

He also objected to the following commentary in the second advertisement:

Just as our Federal Parliament has outgrown its old home and moved to this magnificent new Parliament House, you have the opportunity on September 3 to review our Constitution.

Justice Dawson of the High Court found that Commonwealth expenditure on the two advertisements containing the above passages would be in breach of section 11(4) of the *Referendum (Machinery Provisions) Act 1984*.

- 3.28 More discussion on the suggestions for alternative funding can be found in chapter 4 of this report. It is important to note that there is support for the current limitation on expenditure 'to ensure total transparency and also not to place a political imbalance on the referendum question using taxpayers' money'.¹³ However, the effect of the limitation on expenditure is that the Government is not able to engage in further education or information campaigns other than the Yes/No pamphlet without legislative amendment, such as occurred with the 1999 referendum. The 1999 referendum campaign is discussed in more detail below.

1999 referendum

- 3.29 Australia's most recent referendum was held in 1999. Two proposals were put to voters: the first concerned the republic and the second proposed a preamble for the Constitution.
- 3.30 Prior to the 1999 referendum, the Parliament passed legislation to amend the Machinery of Referendums Act to allow the Commonwealth to spend additional money in connection with the two referendum proposals.¹⁴ The additional funds were required for an expanded public information program.
- 3.31 The first phase of the information program comprised a 'plain English' public education kit.¹⁵ A panel was chosen on the basis of their 'experience in the public presentation of civics issues as well as constitutional expertise' and allocated \$4.5 million to provide information needed by voters to understand the proposal. This included information on the current system of government, referendum processes, and background information on the referendum questions themselves.¹⁶
- 3.32 The second phase was the campaign phase for which \$15 million was available to be divided equally between two rival committees and to be expended on national advertising for their respective campaigns,
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13 Nick Hobson, *Submission 1*, p. 1.

14 The *Referendum Legislation Amendment Act 1999* made both temporary and permanent amendments to the Machinery of Referendums Act.

15 The panel was chaired by Sir Ninian Stephen and also included Professor Geoffrey Blainey, Dr Colin Howard QC, Professor Cheryl Saunders and Dr John Hirst.

16 Professor John Warhurst, 'From Constitutional Convention to Republic Referendum: A Guide to the Processes, the Issues and the Participants', *Research Paper 25 1998-99*, Parliament of Australia, Parliamentary Library, 29 June 1999.

including management of the Yes/No arguments. The two committees were appointed by the Government based on attendees at the 1998 Constitutional Convention and membership was intended to increase the participation of non-politicians. The Government's role was limited to ensuring that each committee's proposals meet the 'basic standards' set for 'the activities to be covered by the public funding', as well as accounting for the use of the funds.¹⁷ The Attorney-General, the Hon Daryl Williams MP, and Special Minister of State, the Hon Senator Chris Ellison, noted that:

Public funding for the committees will allow robust public debate on the arguments for and against change. As with the provision of public funding in election campaigns, the purpose is to ensure that the alternative views can be presented directly to the voters.¹⁸

- 3.33 The final phase was conducted by the AEC and included any advertising associated with the process of voting, including the distribution of the official Yes/No pamphlet to voters. As a result of the amendment to the legislation, wider distribution of the Yes/No pamphlet was available, including through the internet.
- 3.34 According to the AEC, the production and delivery of the individually addressed multi-page pamphlet to every Australian elector was one of the major logistical challenges of the 1999 referendum. The total cost of producing and distributing the pamphlets was \$16 858 million. The AEC estimates that the production and delivery cost today would be around \$25 million.¹⁹
- 3.35 The increased funding allocated to the 1999 referendum to provide for both educational material and further campaign advertising illustrates the significant difference between what is necessary for an effective referendum and what is provided for in the Machinery of Referendums Act. The processes and campaigns introduced for the 1999 referendum suggest that the current provisions are not working, and specifically, that the Yes/No pamphlet alone is insufficient to educate and engage the public.

17 Attorney-General, the Hon Daryl Williams MP, and Special Minister of State, the Hon Senator Chris Ellison, 'Guidelines for the YES and NO advertising campaign committees for the referendum on the republic', Joint News Release, 11 April 1999.

18 Attorney-General Daryl Williams, Referendum Legislation Amendment Bill 1999, Second Reading Speech, 11 March 1999, p. 3761

19 Australian Electoral Commission, *Submission 24*, p. 17.

Are the current provisions adequate?

- 3.36 Chapter 3 has discussed the operation of section 11 of the Machinery of Referendums Act with some consideration of the areas that warrant further discussion. Before moving on to the more detailed discussion of alternatives and suggestions for change in chapter 4, it is appropriate to ask if the current framework established under section 11 of the Machinery of Referendums Act is adequate.
- 3.37 A number of submitters addressed this issue and proposed that first, the purpose or intention of the provisions should be identified.²⁰ Most agreed that at its simplest, the purpose of the Yes/No pamphlet is to provide electors with enough information on the arguments for and against the proposed change to the Constitution to enable them to cast an informed vote.
- 3.38 The discussion in chapter 2 of this report indicates that this was the intention of the original drafters in 1912. Similarly, it was the intention of the drafters of the Machinery of Referendums Act in 1984 when they decided to carry over the provision into the new legislation and it is still the intention of the legislation today. Colin Howard, writing in 1985, described its role in the following terms:
- Its purpose is clearly to try to ensure that when people vote on an amendment they will know what they are voting about. This is important because most constitutional issues need to be interpreted to some extent to make them comprehensible to the great majority of people, who are neither lawyers nor politicians.²¹
- 3.39 Jennifer Williams similarly suggested that the purpose of the provision is clear: ‘clarifying complex and contested issues to critically inform a voter’s choice’.²²
- 3.40 The submission from Gilbert + Tobin Centre of Public Law at the University of New South Wales identified four goals against which the effectiveness and efficiency of the Machinery of Referendums Act provisions should be assessed. These are:
- fair and efficient: The Act should establish a fair and efficient process for the conduct of referendums...;

20 See for instance Jennifer Williams, *Submission 31*, p. 1; Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 2; Cheryl Saunders, *Transcript of Evidence*, 5 November 2009, p. 10.

21 Colin Howard, *Australia’s Constitution*, Ringwood Victoria: Penguin, 1985, p. 132.

22 Jennifer Williams, *Submission 31*, p. 1.

- deliberation: The Act should open up space for community debate and deliberation about constitutional change...;
- popular participation: The Act should enable an environment in which as many Australians as possible have an opportunity to make a meaningful contribution to debate about constitutional change...; and
- education: The Act should seek to further constitutional education.²³

3.41 The submissions received during the Committee's inquiry indicate that although many people think the provisions could be improved, some support the current arrangements. For instance, Reverend Robert Willson told the Committee that:

I am very happy with the present provisions for presenting the YES/NO case in a Referendum. I believe that it is valuable to those considering how to vote.²⁴

3.42 Similarly, Robert Vose's submission expressed his satisfaction with the current provisions:

I am writing to express my support for current provisions in the Referendum (Machinery Provisions) Act 1984 with regard to the terms of reference of this Inquiry. I am not convinced of the need for a radical change in the way that the Yes and No cases for a particular referendum question are communicated to the voting public. I think the legislation works well as it is.²⁵

3.43 However, discussion at the public hearings and many of the submissions received by the Committee focussed on the inadequacy of section 11 which, in effect, provides that the Yes/No arguments are the *sole* means by which the Government can communicate arguments to electors on a referendum proposal. Howard Nathan summarised the issue at the roundtable in Sydney on 14 October 2009:

I think the dilemma common to everybody can be stated thus: everybody has the same principle, namely, we want an informed vote on a constitutional process. The next issue is how to obtain that and whether the yes/no material process through the parliament is the way to do it. It seems to me that the objective is

23 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 2.

24 Robert Willson, *Submission 4*, p. 1.

25 Robert Vose, *Submission 12*, p. 1.

common to everybody, but the process of getting there is one which opens up some area of perhaps disputation.²⁶

- 3.44 Similarly, Cheryl Saunders pointed out that an informed vote is dependent on how much information or assistance is given to electors to help understand a complex document: the Constitution.²⁷ As to whether the Yes/No pamphlet provides sufficient information or assistance to help electors make an informed vote, many submitters argued that the Yes/No pamphlet is not enough.
- 3.45 The Gilbert + Tobin Centre of Public Law at the University of New South Wales identified a number of reasons why the Yes/No pamphlet is failing to meet its objective:
- First, it does not succeed in aiding voter understanding of reform proposals ... the pamphlet tends to obscure basic facts about the proposed change...
- Secondly, the distribution of a printed information pamphlet is both out-of-date and ineffective as a communication strategy in contemporary Australia.²⁸
- 3.46 It is apparent from the Committee's inquiry that many submitters were concerned with the quality of the argument provided in the Yes/No pamphlet, noting that this was compounded by the fact that the Yes/No pamphlet is generally the only official information provided to electors prior to a referendum.
- 3.47 James Emmerig noted that it is only on controversial referendum topics that electors have access to 'information that might effectively help [them] to evaluate the arguments for and against amendment' where this is provide by greater media coverage and more widespread community debate. However, he also pointed out that the quality of alternative information and discussion varies and depends on the nature of the proposal.²⁹
- 3.48 The Committee received considerable evidence on this issue. In particular, many of the submissions identified specific problems with the current arrangements, including the quality of the Yes/No arguments, the format and presentation of the Yes/No arguments and the limited means of dissemination provided for by the Machinery of Referendums Act. These

26 Howard Nathan, *Transcript of Evidence*, 14 October 2009, p. 6.

27 Cheryl Saunders, University of Melbourne, *Transcript of Evidence*, 5 November 2009, p. 10.

28 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 2

29 James Emmerig, *Submission 27*, pp 2-3.

critiques, and alternative practices, are discussed in more detail in chapter 4.

Alternatives and Suggestions for Change

4.1 The Committee received a wide range of evidence during this inquiry, some of it expressing support for the current arrangements provided by the *Referendum (Machinery Provisions) 1984 Act* ('Machinery of Referendums Act'), but much more of it identifying areas for change and suggesting alternative practices. Specifically, these areas relate to the drafting, content, format and dissemination of the Yes/No arguments. Two further issues relate to constitutional engagement and education more broadly and the limitation on Government expenditure. This chapter examines these areas of concern and the suggestions for change.

Drafting of the Yes/No arguments

- 4.2 The Machinery of Referendums Act does not stipulate who should be responsible for drafting the Yes/No arguments to be provided to voters prior to a referendum. Instead, section 11 of the Machinery of Referendums Act refers only to the responsibility of parliamentarians in authorising the Yes/No arguments. The legislation states that an argument for and against proposed laws, authorised by a majority of the members of Parliament who voted for or against the proposal is to be forwarded to the Electoral Commissioner for distribution to every elector.
- 4.3 The legislation does not preclude material drafted by an independent body or person, providing it is authorised by Parliamentarians. It should be noted that most submissions to the Committee's inquiry focused on who should be responsible for *drafting* the Yes/No arguments and not the role of parliamentarians in *authorising* the Yes/No arguments.
- 4.4 Historically, most of the Yes/No arguments have been prepared by parliamentarians and there remains support within the community for

this to continue. The submission from Australians for Constitutional Monarchy describes why elected representatives should prepare the cases, indicating 'this is above all a political and not an academic process. The electors are entitled to hear the best arguments as perceived by their representatives.'¹

- 4.5 At the roundtable discussion Howard Nathan expressed his support for the current processes, stating:

I would find it rather offensive to have delivered to me some argumentative propositions by people I do not know and for whom I have no responsibility and they have no accountability. Take advice where you may, but put the stamp of the parliamentarian on the document.²

- 4.6 However critics of the current process suggest it has changed the purpose of the Yes/No arguments from what was originally intended. As outlined in chapter 2, the Yes/No arguments were designed to inform. The then Prime Minister Fisher envisaged both sides making their case impersonally and free of bias.³ Submitters to the Committee's inquiry indicate that this original purpose has not been served in recent referendums.

- 4.7 In her submission Anne Twomey from the University of Sydney suggested that because the Yes/No arguments are drafted by advocates of a particular position, the goal is to *persuade* voters. She suggested that this is why the arguments are seen as inflammatory, inaccurate and misleading.⁴

- 4.8 Glenn Patmore pointed out that parliamentarians operate under the pressure of partisan politics and are unlikely to present arguments as impersonal, reasonable or judicial in this kind of environment.⁵

- 4.9 At the roundtable discussion George Williams argued that having credible, non-parliamentarians draft the case will result in a

[C]loser approximation of what the yes and no case was meant to be in the first place ... a reasoned articulated position that

1 Australians for Constitutional Monarchy, *Submission 16*, para. 2.13.

2 Howard Nathan, *Transcript of Evidence*, 14 October 2009, p. 15. Further into the roundtable discussion Mr Nathan indicated he thought the use of a referendum commission as an intermediary body had some merit: *Transcript of Evidence*, 14 October 2009, p. 22.

3 Enid Campbell, Southey Memorial Lecture 1988 'Changing the Constitution- Past and Future' p. 11.

4 Anne Twomey, University of Sydney, *Submission 11*, p. 1.

5 Glenn Patmore, *Submission 26*, p.3.

represents not a misleading case on either side but a good sense of the arguments that Australians can have.⁶

- 4.10 There have been exceptions to this process. During the 1999 referendum, Yes/No arguments were prepared by rival campaign committees who were appointed by the Government from the delegates at the 1998 Constitutional Convention.⁷ The 1999 referendum illustrates at least one option for alternative drafters of the arguments. However, evidence received by the Committee during this inquiry indicates that there are, broadly speaking, three proposed alternatives: parliamentarians to retain the role of drafting the arguments; an independent body to draft the arguments; and a combined process incorporating both parliamentarians and an independent body.

Drafted by parliamentarians

- 4.11 A number of submissions indicated support for the current process in which parliamentarians assume responsibility for drafting the Yes/No arguments. These submissions argued that it was appropriate that elected representatives, who are responsible to the people, provide their views on the proposed change. As mentioned earlier, some considered that the process was political and therefore it was fitting that electors hear the views of parliamentarians.⁸

Drafted by an independent body

- 4.12 A number of submitters suggested that an independent body should be responsible for drafting the Yes/No arguments. They argued that this would result in the arguments being perceived as more reliable. At the roundtable discussion, David Hetherington from Per Capita supported the creation of an independent body as part of a more transparent process, indicating that an independent body may assist in making the process more open and democratic.⁹
- 4.13 The submission from the Gilbert + Tobin Centre of Public Law recommended establishing a referendum panel, constituted for each

6 George Williams, *Transcript of Evidence*, 14 October 2009, p. 13.

7 Australian Electoral Commission, *Submission 24*, para 2.2.5, p. 8.

8 Australians for Constitutional Monarchy, *Submission 16*, para. 2.13; Howard Nathan, *Transcript of Evidence*, 14 October 2009, p. 15. Further into the roundtable discussion Mr Nathan indicated he thought the use of a referendum commission as an intermediary body had some merit: *Transcript of Evidence*, 14 October 2009, p. 22.

9 David Hetherington, Per Capita, *Transcript of Evidence*, 14 October 2009, p. 68.

referendum, that would draft the documents and provide a plain English explanation of the proposed change, arguments for and against and a copy of the constitutional text.¹⁰

4.14 Information provided by Tim Gartrell from Auspoll, from a survey they conducted for the purpose of this inquiry, indicates members of the public were supportive of someone other than parliamentarians drafting the arguments. Only 29 per cent of respondents thought politicians should be responsible whereas 57 per cent of the 1 500 surveyed indicated they felt the AEC as a neutral body, should hold this responsibility.¹¹

4.15 The possibility of the AEC either constituting the independent body, or being the model upon which an independent body was based, was suggested by a number of participants and submissions.¹² However during the roundtable discussion, Paul Dacey from the AEC expressed concern at the proposed role for the AEC:

[S]ince 1984 the AEC has indicated a reluctance to be involved directly in the development of these cases just because of that possible perception of bias. We might be in the position to be able to do it and be able to do it in an impartial way, but someone will or may always construe, 'Aha. The AEC has a particular bent towards one case or the other. Therefore, there is bias.' So, there would be a risk, certainly at this stage, but I think it is a risk too great for us to entertain being involved at that stage.¹³

4.16 Nevertheless, the AEC did signal support for the creation of an independent body to provide additional material to voters. In its submission, the AEC recommended that the Machinery of Referendums Act could be amended to require the Yes/No pamphlet to contain a statement prepared by officers from an independent statutory body relating to the legislative and fiscal impact of proposed amendments.¹⁴

4.17 Further, the AEC highlighted two options for enabling participation of independent parties in the preparation of the Yes/No arguments. These options were originally provided in the AEC 1998 submission to the Joint Standing Committee on Electoral Matters (JSCEM) entitled Subject:

10 Professor George Williams, *Transcript of Evidence*, 14 October 2009, p. 13.

11 Auspoll, *Submission 32, Question 2*; Tim Gartrell, Auspoll, *Transcript of Evidence*, 14 October 2009, p. 53.

12 John Williams, Faculty of Law, University of Adelaide, *Transcript of Evidence*, 5 November 2009, p. 32.

13 Paul Dacey, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 65.

14 Australian Electoral Commission, *Submission 24*, para 2.3.2, p. 13.

Referendum 1988 - Yes/No Case Pamphlet – Content. The options were described as follows:

- create a statutory office of Legislative Analyst to prepare independent arguments for and against proposed constitutional changes. Such arguments could be included in the Yes/No Cases pamphlet or, indeed, replace those prepared by the proponents. In either case, production and distribution of the pamphlet would remain with the Commission because of its statutory inclusions; and
- legislate to require an ad hoc independent panel, perhaps selected by the proponents and opponents and the Commission, to prepare the ‘third case’ analysis.¹⁵

4.18 Other submitters suggested that the independent body be involved in drafting additional material to be sent to electors. Such proposals were loosely modelled on the 1999 example in which an independent expert panel, led by Sir Ninian Stephen, was created and mandated to direct a neutral public education campaign. John Williams, from the University of Adelaide, recommended expanding this model and having an independent body create an information document that contextualises the proposed change and explains the pros and cons of the proposal.¹⁶

4.19 Consideration was also given to providing the independent body with an oversight role of the material to be presented.¹⁷ This proposal was supported by the Gilbert + Tobin Centre of Public Law who provided an alternative recommendation for the creation of a Referendum Panel in their submission. They stated the panel could be responsible for preparing a voters’ booklet and for overseeing the public statements and activities of the Yes/No committees. They recommended the panel should:

[R]eview the accuracy of factual statements made by the committees, and issue instructions to withdraw, amend or retract those statements where it found them to be inaccurate, deceptive or misleading.¹⁸

4.20 There was considerable discussion as to whether an independent body should vet the material, regardless of whether it is drafted by parliamentarians or a Yes/No Committee. At the roundtable discussion, Paul Kildea stated:

15 Australian Electoral Commission, *Submission 24*, para 2.3.4, p. 14.

16 John Williams, University of Adelaide, *Transcript of Evidence*, 5 November 2009, p. 32.

17 Women for an Australian Republic, *Submission 30*, para 3, p. 2 and Rethink Australia, *Submission 29*, p. 3.

18 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 6.

Whoever prepares information, whether it be parliamentarians or some sort of independent panel, the option would also be open ... to have that information then vetted by a panel of ordinary citizens and then perhaps looked at by a plain language expert.¹⁹

Combining parliamentarians and an independent body

4.21 A number of submissions proposed combining parliamentarians and an independent body to draft the arguments. Adrienne Stone from the Centre for Comparative Cultural Studies at the Melbourne Law School, supported the idea of an independent process, in the sense that it would be independent of the pressures that might attend parliamentarians. At the roundtable held in Sydney, Adrienne Stone stated:

The principles that govern the preparation of the yes and no case ought to be ones which, like the referendum procedure itself, seek to balance parliamentary and popular involvement. It might be helpful to think then about something like a body to which appointments are made by the parliament – perhaps the Prime Minister and Leader of the Opposition – that may include parliamentarians but also include others. That might be the sort of body that can best seek to have the popular and parliamentary balance that we see in the referendum procedure itself.²⁰

4.22 At the roundtable discussion George Williams offered an alternative process, based on the 1999 referendum where the material was drafted by Yes and No committees. The membership of the body would include a mixture of parliamentarians and non-parliamentarians.²¹

4.23 In its submission, the Law School at the University of Adelaide indicated that during the 1985 Constitutional Convention, it was voted 35:33 that Commonwealth funded material should be circulated to electors by an independent person nominated through the Parliamentary process and that the material be prepared in consultation with and subject to the approval of parliamentarians.²² The AEC stated that Senator Michael Tate supported the proposal, indicating it was

19 Paul Kildea, Gilbert + Tobin Centre of Public Law, *Transcript of Evidence*, 14 October 2009, p. 63.

20 Adrienne Stone, University of Sydney, *Transcript of Evidence*, 14 October 2009, p. 21.

21 George Williams, *Transcript of Evidence*, 14 October 2009, p. 13.

22 Faculty of Law, University of Adelaide, *Submission 25*, p. 4.

[D]esigned to help voters be well informed in relation to proposals for changing the Constitution and tries to bring an element of objectivity into the presentation of the arguments for and against.²³

4.24 Further, a submission made to the Joint Standing Committee on Electoral Matters by the AEC in 1998 stated that an

additional option may be to legislate to enable public input to the Yes/No arguments along the lines of the provision made in Oregon's electoral legislation (which enables public hearings), or similar hearing and submissions processes currently used for electoral redistributions under Part IV of the Electoral Act.²⁴

4.25 This option presented by the AEC addresses the concept of deliberative democracy in framing the arguments. In their submission, Janette Hartz-Karp and Lyn Carson recommend the creation of a Citizens' Parliament on Referendum (CPoR) whereby randomly selected citizens, assisted by experts and facilitated by independent moderators, would be tasked with preparing a fair and balanced argument for and against the proposed question. It is proposed the implementation of a CPoR would minimise public distrust in the referendum process and avoid much of the party political nature of referenda.²⁵ This submission indicates British Columbia, Canada pioneered a similar process in 2004.

4.26 The submission from the Gilbert + Tobin Centre of Public Law details the experience of other jurisdictions to show that entrusting the preparation of referendum materials to an independent body is workable and effective.²⁶

Experience of other jurisdictions

4.27 A number of jurisdictions use an independent body or persons to draft referendum material. For example:

- In Ireland, a Referendum Commission is formed prior to a referendum. The Commission is required to prepare a general explanation of the issues involved in the referendum, arguments for and against the proposed change (acknowledging the submissions made by the supporters and opponents of the proposed change) and it is legally bound to present statements which are fair to both sides. The Commission is comprised of four individuals who are not elected

23 Australian Electoral Commission, *Submission 24*, para 2.2.7, p. 8.

24 Australian Electoral Commission, *Submission 24*, para 2.3.5, p. 14.

25 Janette Hartz-Karp and Lyn Carson, *Submission 21*, pp. 1-2.

26 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 5.

members of Parliament and, by reference to independent officers, intended to avoid accusation of bias in the appointment of the Commission.²⁷

- In California an impartial analysis of the proposed change is prepared by the State Legislative Analyst, who is a public servant.²⁸
- In the United States, Oregon's Secretary of State has since 1903 produced a Voters' Pamphlet. A committee of five citizens is appointed to draft the explanatory statement concerning a proposal. Four committee members are appointed from among the chief proponents and opponents of the proposal. The statement is subject to public hearing and suggestions are received.²⁹
- In New South Wales, the Yes/No arguments are drafted by public servants and checked for accuracy and fairness by independent persons including constitutional lawyers.³⁰ Associate Professor Twomey notes that referendums in New South Wales have a higher success rate than the Commonwealth, but it is unclear if this success rate is attributable to the less inflammatory Yes/No arguments.³¹

Content of the Yes/No pamphlets

- 4.28 Section 11 of the Machinery of Referendums Act only provides for the authorisation and distribution of Yes/No arguments. There are no legislative requirements or guidelines as to content of the arguments. As discussed in chapter 2, the Yes/No arguments were originally intended to be put in a 'reasonably and judicial' way. However, one of the main criticisms of the Yes/No arguments today is that the content is unhelpful to voters as a source of reliable, factual information. This is because the Yes and No arguments are designed to persuade rather than inform, and as a result are highly adversarial and often directly contradict each other.
- 4.29 For instance, Siobhán McCann had the following to say about the 1999 referendum proposal for a preamble:

27 Anne Twomey, University of Sydney, *Submission 11*, p. 2.

28 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 5-6.

29 Australian Electoral Commission, *Submission 24*, para 2.2.17, pp 11-12.

30 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 5.

31 Anne Twomey, University of Sydney, *Submission 11*, p. 3.

The ... official referendum pamphlet's only clarification of the issue of the existing preamble is in its reproduction of the official arguments for 'yes' and 'no'. Predictably enough, the 'yes' case indicates that there is currently no preamble in our Constitution, and the official 'no' case indicates the opposite.

Of course I understand that there are unresolved political and legal arguments about the consequences of the addition of a preamble to the Constitution, and that the [Australian Electoral Commission] sought to inform voters of these arguments by setting them out side by side. Nevertheless, the question of whether or not there is a preamble is surely one of fact, and ought to have been explained separately and not in the midst of political rhetoric.³²

4.30 In her submission, Jennifer Williams made a number of points regarding the inadequacy of the content of the Yes/No arguments with particular reference to the 1999 pamphlet:

- The partisan, combative nature of several sections of the text renders the information unreliable as a whole.
- The 'No' case interweaves rhyming slogans and alliteration a total of 17 times across its argument, the sub-text being that ignorance is a valid position to take to the ballot box.
- Slogans are not information. There are seven different slogans in the 'No' case. They feed fear and marginalisation. Ironically, though the 'No' case presents reasons for rejecting both proposals, the 'Don't know' slogans assume the voter will still know nothing after reading them.
- There is no further engagement offered beyond the cases presented-no contact numbers or website are given should a voter have further questions.³³

4.31 Some of the criticism relating to the content of the Yes/No arguments focused on the adversarial nature of the arguments and the processes to prepare those arguments. For instance, the Faculty of Law at the University of Adelaide's submission suggests that the adversarial nature of the Yes/No arguments means that the debate is polarised:

... rather than emphasising that all Australians have a common interest in ensuring they have the best advice so that they can make the best decision in voting at a referendum and thereby

32 Siobhán McCann, 'Referendum: Reflections on the Preamble', *Alternative Law Journal*, 2000, Vol. 8.

33 Some of the original text has not been included in the quote: Jennifer Williams, *Submission 31*, p. 3.

ensure that the Australian Constitution continues to serve all Australians in the best possible way.³⁴

4.32 The comments received by the Committee indicate dissatisfaction with the content of the Yes/No arguments, something which is compounded by the fact that the Yes/No pamphlet is the only official information provided to electors. It is apparent that many submitters consider the Yes/No pamphlet to be inadequate:

I think the pros and cons are important – and that will include partisan argument – but I also think that it is important to help people to understand a proposal, and that includes a whole lot of things including the way the system works now, how the proposal has been put forward, what the possible outcomes might be in the future and a whole range of different stuff.³⁵

4.33 A number of submitters suggested that additional material should be provided to ensure electors have access to the basic facts needed to understand the proposal in context.³⁶ This additional material would explain, in plain English, the proposal to change the Constitution in a fair and balanced way. The provision of clear and factual material would also balance, and provide a context in which to interpret, the adversarial nature of the Yes/No arguments.³⁷

4.34 The Gilbert +Tobin Centre of Public Law submitted that a *Voters' Booklet* be distributed to electors with the aim of providing basic, accurate and unbiased information about each proposal. The booklet would contain:

- a 'plain English' explanation of the relevant parts of the Constitution and of the proposed change
- an outline of the arguments for and against the proposed change, and
- a copy of the relevant constitutional provisions, with a clear indication of how they would be altered by the proposed change.³⁸

4.35 In the United States, the state of Oregon distributes a Voter's Pamphlet for a range of electoral events, including referendums. The Voter's Pamphlet for the 2008 Oregon General Election included information on the financial impact, prepared by a committee of state officials, arguments for

34 Faculty of Law, University of Adelaide, *Submission 25*, p. 3.

35 Cheryl Saunders, University of Melbourne, *Transcript of Evidence*, 5 November 2009, p. 6.

36 See for instance Gilbert + Tobin Centre of Public Law, *Submission 23*; Faculty of Law, University of Adelaide, *Submission 25*; Anne Twomey, *Submission 11*.

37 George Williams, *Transcript of Evidence*, 14 October 2009, p. 12.

38 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 5.

and against the proposal and an impartial statement explaining the measure.³⁹

4.36 Similarly, in New South Wales, the content of the Yes/No arguments is drafted by public servants and then checked for accuracy and neutrality by independent persons.⁴⁰

4.37 The Australian Government Advertising Guidelines issued in June 2008 could be used a guide to the provision of neutral background material. The guidelines state in part that:

The material communicated must be presented in an explanatory, fair, objective and accessible manner. Specifically, information in campaigns should be directed at the provision of objective, factual and explanatory information and enable the recipients of the information to reasonably and easily distinguish between facts, on the one hand, and comment, opinion and analysis on the other.⁴¹

4.38 A final issue in relation to the content of Yes/No arguments is the length of the arguments. The Machinery of Referendums Act limits each argument to a maximum of 2 000 words except where there is more than one proposal at the same referendum, in which case the average of the arguments must not exceed 2 000 words. There was some concern that the word limit was either arbitrary or too long.

4.39 For instance, Rod Cameron told the Committee that:

I would have that as a very short, pithy 200- or 300-word document which is designed for the lowest common denominator. The details can then be gained by those who are interested either online or in a bigger printed document to be sent on request.⁴²

4.40 George Williams suggested a shorter word length if the document is to be written by a partisan body but then questioned the usefulness of a word limit at all:

39 See the Australian Electoral Commission, Submission 24, p. 12; The 151-page Voter's Pamphlet regarding these measures is available at <http://oregonvotes.org/nov42008/guide/pdf/vol1.pdf>. A summary of the information provided regarding each measure is also available at <http://oregonvotes.org/nov42008/guide/geninfo.html>.

40 Anne Twomey, *Submission 11*, p. 3.

41 Australian Government, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, June 2008, available from: www.finance.gov.au/advertising/docs/guidelines_on_campaign_advertising.pdf

42 Rod Cameron, ANOP Research Services, *Transcript of Evidence*, 29 October 2009, p. 9.

Personally, I would not even put a word limit on it. It is like when you set an essay. Immediately everybody writes to a word limit without actually writing to what the appropriate length is. In some cases 500 words might be appropriate and in other cases it might need to be significantly longer.⁴³

- 4.41 It was pointed out a number of times during the Committee's inquiry that the Yes/No arguments for the 1999 referendum were of unequal length. As the Yes case decided to use less than 2000 words and the Yes and No arguments required a different number of pages, the phrase 'this argument concluded on page 14' appeared on pages 15 through to 25, at which the point the No case also concluded.
- 4.42 The word limit is an attempt to ensure that one side is not favoured over the other. By setting a maximum limit, the legislation is, in theory, setting up an 'even playing field' because both sides will have the same constraints in which to make their case. However, whether this word limit is useful to electors has not been considered and the answer may vary depending on the referendum question.
- 4.43 It is clear that many submitters consider the content of the Yes/No pamphlet to be unhelpful at best and misleading at worst. Evidence to the Committee's inquiry indicates that either the content of the Yes/No arguments should be vetted to ensure relevance and accuracy or that factual and contextual material should be disseminated to electors to balance the partisan nature of the Yes/No argument.

Format of the Yes/No pamphlet

- 4.44 The Yes/No pamphlet is printed and posted to every elector in Australia. Although it is available on the internet, most people would access it primarily as a hard copy document. A handful of submitters commented on the format or style of presentation of the Yes/No pamphlet and how this impacts on the accessibility of the information.
- 4.45 The AEC's submission acknowledges that concerns have been raised in relation to the format of the Yes/No pamphlets. Following the criticism of the 1988 referendums, where the Yes and No arguments were each allowed to have control of the presentation of their cases, the Electoral Commission issued 'Guidelines for Members of Parliament preparing the Arguments to be Sent to Electors':
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43 George Williams, *Transcript of Evidence*, 14 October 2009, pp 13-14.

The Guidelines contained definitive rules on font and point size for text, and advised that body copy text would be 'justified' (ie presented in the 'justified' text alignment), that each argument must contain only words, how words would be counted, and so forth. The format of the Yes/No Case Pamphlet was designed to ensure that no argument was seen to gain an advantage by virtue of different typeface or typestyle.⁴⁴

- 4.46 The AEC's submission notes that the only variation in format was the colour coding of the pages on which each case appeared: green for the Yes pages and red for the No pages. The submission concludes that:

Given the potential for controversy about the format of Yes/No cases, the AEC believes that the issue of the format of the Yes/No cases should be dealt with by the Referendum Act itself.⁴⁵

- 4.47 It is worth noting that the AEC's decisions relating to formatting are based on a desire not to advantage one side over the other, rather than to increase the accessibility of the information. Jennifer Williams has argued that the electorate's civic educational needs should be at the centre of the process.⁴⁶

- 4.48 The submission from Jennifer Williams provides a valuable assessment of the Yes/No Pamphlet from the perspective of effective information design.⁴⁷

The premise of information design is to enable the user to discover, reason, critique, understand, and act. Hierarchies allow the user to extract the level (or layer) of information they need at any one time. Easy navigation allows the reader to control the experience to a large extent and feel confident engaging with the material. This is not evident in the Referendum '99 booklet.⁴⁸

- 4.49 In relation to the structure of the Yes/No pamphlet, she points out that it is unnecessarily long and overwhelming and that there is no overall physical architecture or consistent visual voice.⁴⁹ Similarly, with regard to the hierarchies of information, the submission argues that there is no

44 Australian Electoral Commission, *Submission 24*, para. 2.2.2.

45 Australian Electoral Commission, *Submission 24*, para. 2.2.2.

46 Jennifer Williams, *Submission 31*, p. 1.

47 Information design is an area of professional expertise devoted to clear and eloquent visual solutions of complex data; it employs systems such as hierarchy and navigation to maximise information, access and comprehension: Jennifer Williams, *Submission 31*, p.4, see footnote 7.

48 Jennifer Williams, *Submission 31*, p. 2.

49 Jennifer Williams, *Submission 31*, p. 2.

unifying hierarchy for the Yes/No arguments to follow. The submission notes that the arguments 'set their own individual pace over 32 pages but have no relationship whatsoever to each other' either visually or with regard to content'.⁵⁰

- 4.50 It is apparent that the elector is not the centre of the process with regard to the design of the Yes/No Pamphlet. The current regulation of format and presentation does not to enhance the effectiveness of the document or accessibility of the information. Formatting and presentation are important features of the Yes/No pamphlet and it follows that they should be used to maximise the effectiveness in communicating to and engaging with electors.

Dissemination of the Yes/No pamphlet

- 4.51 The Machinery of Referendums Act limits the means by which the Government can communicate information concerning the proposed change to the public prior to a referendum. In their submission, the AEC indicate that, while the Act provides for the dissemination of material contained in the referendum pamphlet in various formats (including on the AEC's website, in languages other than English, Braille, cassette, ASCII disk and large print) the main method used to disseminate the material remains through a printed pamphlet posted to each elector.⁵¹
- 4.52 The printed pamphlet as the primary method of communication has been in place since 1912 and retains support from many within the community. At the roundtable discussion David Flint stated that every Australian is entitled to receive in the post a copy of the document containing the arguments for and against the proposed change, and detailing how the Constitution will be changed.⁵² In their submission, the Law Faculty of the University of Adelaide noted their support for the continuation of the pamphlet, indicating that postal communication is an important way of ensuring that material about the referendum is able to be accessed by all Australians.⁵³ Further, at the roundtable discussion Julian Leeser commented that having material disseminated through the post gives the information a formality that the document deserves.⁵⁴

50 Jennifer Williams, *Submission 31*, p. 2.

51 Australian Electoral Commission, *Submission 24*, para 3.1.3, p. 15.

52 David Flint, Samuel Griffith Society, *Transcript of Evidence*, 14 October 2009, p. 36.

53 Faculty of Law, University of Adelaide, *Submission 25*, p. 2.

54 Julian Leeser, *Transcript of Evidence*, 14 October 2009, p. 32.

- 4.53 The submission provided by the AEC highlighted the ability of posted material to reach the Australian population. Following the 1999 referendum, analysis undertaken by Eureka Strategic Research on 1 200 survey respondents in the lead up to the referendum, indicated that over 80 per cent of respondents reported having received the pamphlet, and 51 per cent noted they had at least read part, or all, of the document. The analysis noted that in comparison to commercial standards, the results are quite high, possibly because the pamphlets were individually addressed.⁵⁵
- 4.54 However, Peter Brent from the Democratic Audit of Australia proposed that the success rate of the 1999 Yes/No pamphlet was atypical and a result of the high media profile of 'the republic issue'. Mr Brent suggested people were more likely to read that particular pamphlet because they appreciated the importance of the proposal.⁵⁶
- 4.55 This requirement to post material to every elector has been the subject of much criticism. Critics have described the current processes as arcane, inadequate and insufficient in meeting the needs of Australians.⁵⁷ Further to this, in a submission to JSCEM in 1988, the AEC stated:
- In an age of rapid electronic communication and recognition of the education power of television/video material, the distribution of arguments via a Yes/No Cases pamphlet may be regarded as antiquated.⁵⁸
- 4.56 The AEC reiterated these sentiments in a submission to JSCEM in 2001, where it suggested that the Government reconsider the requirement to post the Yes/No pamphlet to each elector.⁵⁹
- 4.57 The majority of criticisms directed towards the current processes focussed on the need to adapt to new technologies in communicating with the Australian public. During the roundtable discussion, George Williams

55 Australian Electoral Commission, *Submission 24*, para 3.2.10, p. 19.

56 Peter Brent, Democratic Audit of Australia, *Transcript of Evidence*, 22 October 2009, p. 16.

57 Howard Nathan, *Transcript of Evidence*, 14 October 2009, p. 49 and Civil Liberties Australia, *Submission 22*, para 3.2, p. 6.

58 Australian Electoral Commission, cited at para. 10.3.29 in submission 147 to the Joint Standing Committee on Electoral Matters Inquiry, *The 2001 Federal Election*, see note 59 below. Original reference in submission 32(d) to the Joint Standing Committee on Economic Matters, *Inquiry into the conduct of the 1987 Federal election and 1988 referendums*.

59 Australian Electoral Commission, Submission 147 to the Joint Standing Committee on Electoral Matters Inquiry, *The 2001 Federal Election*, available from: <www.aph.gov.au/house/committee/em/elect01/index.htm>

stated, “for me the booklet resembles what you would do in 1912 and not what you would be doing in 2009”.⁶⁰

4.58 In support of this sentiment Michael Millet stated:

I have a 21-year-old son and a 19-year-old daughter and they regard email as an outmoded form of communication, let alone pamphlets ... I think it is time to move into the 21st century.⁶¹

4.59 In support of this, the AEC advised that changes in the character and composition of Australia’s population suggest it would ‘make sense for the AEC to tailor its choice of communication media to meet the information needs of a diverse range of electors’.⁶² As this highlights, there appears to be an increasing requirement to adapt methods of communication to both advancing technologies, and a changing population. Many alternative proposals were presented during this inquiry and the overwhelming majority of participants favour making information available through a variety of techniques.⁶³

4.60 This was highlighted by polling results presented by Tim Gartrell at the roundtable discussion, undertaken in response to this inquiry and in relation to methods of communication. Results indicated that a mix of technologies will be most useful. Of the 1 500 respondents, 77 per cent of 65-74 year-olds indicated they would find the hardcopy pamphlet useful, whereas 47 per cent of 18-24 year-olds, and 43 per cent of 25-34 year-olds indicated they would find information available through social networking sites useful.⁶⁴

4.61 This concept of a multi-pronged approach was also addressed at a public hearing by Cheryl Saunders who stated the ‘one size fits all’ approach is not effective and if there is a real commitment to helping people understand then a number of different modes are needed.⁶⁵

4.62 There was considerable discussion concerning what particular methods for communicating should be utilised. The AEC submission noted that a JSCEM report on the conduct of the 2007 federal election noted a ‘growing

60 George Williams, *Transcript of Evidence*, 14 October 2009, p. 6.

61 Michael Millet, Australian Broadcasting Corporation, *Transcript of Evidence*, 14 October 2009, p. 49.

62 Australian Electoral Commission, *Submission 24*, para 3.2.13, p. 19.

63 Rod Cameron, *Transcript of Evidence*, 29 October 2009, p. 6, Cheryl Saunders, Centre for Comparative Constitutional Studies, *Transcript of Evidence*, 5 November 2009, p. 6.

64 Tim Gartrell, Auspoll, *Transcript of Evidence*, 14 October 2009, pp 52 and 72.

65 Cheryl Saunders, Centre for Comparative Constitutional Studies, University of Melbourne, *Transcript of Evidence*, 5 November 2009, p. 6.

reluctance on the part of electors to interact with the AEC using the paper-based and physical mail system'.⁶⁶ In addition, the Government's Electoral Reform Green Paper noted that the internet is now the most preferred means for Australians in contacting the Government.⁶⁷ Other proposed communications methods include through television, radio, the internet and text messaging.⁶⁸ In their submission, Women for an Australian Republic highlighted that particular attention should be paid to presenting material in visual formats.⁶⁹

- 4.63 However, it was also contended that the old method of communication, through the pamphlet, should not be entirely abandoned.⁷⁰ At the roundtable discussion George Williams noted people should still have the option of receiving the document through the post if they wanted.⁷¹ Paul Dacey referred to a package approach, which could include a household leaflet drop that could be complemented by a 'fulfilment' service, whereby people could either go online or ring the call centre to request material be posted to them directly.⁷²
- 4.64 However, at the roundtable discussion, George Williams warned against being too prescriptive within the Act, advising he does not think the legislation should specify format, as that is what has led to the current situation.⁷³ In his submission Rodger Hills recommended the AEC be responsible for assessing the various communication options available at the time and determining the most effective methods for reaching all voters.⁷⁴
- 4.65 During the roundtable discussion, Michael Maley of the AEC stated that one of the challenges facing the AEC is the rapid advancement of technologies in methods of communicating, in contrast to the slow movements of the relevant statutes.⁷⁵ In addition, Paul Dacey of the AEC recommended that the Electoral Commissioner could be involved in

66 Australian Electoral Commission, *Submission 24*, para 3.2.6, p. 17.

67 Australian Government *Electoral Reform Green Paper- Strengthening Australia's Democracy*, September 2009, p. 2, available at www.pmc.gov.au/consultation/elect_reform/strengthening_democracy/docs/strengthening_australias_democracy.pdf

68 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 6.

69 Women for an Australian Republic, *Submission 30*, para 12, p. 3.

70 Faculty of Law, University of Adelaide, *Submission 25*, p. 2.

71 George Williams, *Transcript of Evidence*, 14 October 2009, p. 32.

72 Paul Dacey, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 81.

73 George Williams, *Transcript of Evidence*, 14 October 2009, p. 72.

74 Rodger Hills, *Rethink Australia*, *Submission 29*, p. 3.

75 Michael Maley, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 51.

determining the most appropriate means for disseminating the information. He added:

We keep track now of what method people use to lodge enrolment forms with us. We have a fairly good indication of whether they go to a post office or online to pick up that material...so we can certainly provide advice.⁷⁶

- 4.66 In addressing the requirement to make printed material available to electors, the AEC highlighted the financial implications for providing individually addressed material. In their submission, they advised that for the 1999 referendum, the dissemination of a 72-page document to 12.9 million Australians through personally addressed mail was a major logistical exercise which cost \$16.858 million.⁷⁷ The AEC advised that, of this amount, 45 per cent comprised the cost for printing, while delivery costs comprised just over 54 per cent. A preliminary estimate provided by the AEC indicates the production and delivery costs for a similar exercise today would come to approximately \$25 million.⁷⁸ In comparison, for the 2007 federal election, the householder drop for materials was approximately \$2.5 million to \$3 million, representing a significantly cheaper alternative.⁷⁹
- 4.67 Material presented during the inquiry highlighted the need to reassess the current methods for communicating with the public in an environment of rapidly advancing technology and the changing preferences and demographics of the Australian population.

Constitutional engagement

- 4.68 According to research carried out by the Australian Local Government Association, only 76 per cent of Australians of voting age recognise that Australia has a Constitution.⁸⁰ This figure highlights the need for increased engagement and education on constitutional matters. Further, in his submission, Glenn Patmore noted that in order for a referendum to be

76 Paul Dacey, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 73.

77 Australian Electoral Commission, *Submission 24*, para 3.2.2, p. 16.

78 Australian Electoral Commission, *Submission 24*, para 3.2.3, p. 17.

79 Paul Dacey, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 82.

80 Australian Local Government Association, *Submission 21*, p. 6.

effective, education for the public is vital to ensure voters make an informed decision.⁸¹

- 4.69 At the roundtable discussion Paul Kildea discussed the requirement for increasing engagement with the public, stating:

Attention should be given to developing mechanisms to involve citizens in more active ways. That might mean, in looking at the referendum machinery, ensuring that it allows for a toolbox of mechanisms that can improve citizen understanding of constitutional issues and also give people a sense of ownership of that.⁸²

- 4.70 Increasing engagement and improving understanding of the Constitution could result in a sense of ownership of proposed changes to the Constitution. However, according to Kerry Jones, 80 per cent of people are totally disengaged from politics, meaning they:

[T]urn off after the issues get a bit complicated, do not want to know ... do not want to read about issues, just do not want political processes as part of their life unless they have to turn up on polling day, which is when they will make up their mind. We do not think this is good for our democracy'.⁸³

- 4.71 At the roundtable discussion in Sydney, Lucas Walsh pointed out that although there has been a civic deficit in Australia over the past two years, volunteerism has actually been on the rise. He advised that 'if you give these people an opportunity ... they would take advantage of it'.⁸⁴

- 4.72 However, George Williams stated that at present there is 'no option for ownership and no option for real deliberation'.⁸⁵ In order to address the apparent lack of options for engagement available to the Australian public, suggestions presented to the Committee included: increasing education campaigns in the lead up to referendums, increasing methods for engaging in deliberative democracy, and providing a platform for a national conversation.

81 Glenn Patmore, *Submission 26*, p. 6.

82 Paul Kildea, Gilbert + Tobin Centre of Public Law, *Transcript of Evidence*, 14 October 2009, p. 9.

83 Kerry Jones, Constitution Education Fund- Australia, *Transcript of Evidence*, 14 October 2009, pp 50-51.

84 Lucas Walsh, Foundation for Young Australians, *Transcript of Evidence*, 14 October 2009, p. 70.

85 George Williams, *Transcript of Evidence*, 14 October 2009, p. 69.

Public education campaigns

- 4.73 The Electoral Reform Green Paper *Strengthening Australia's Democracy* provides that developing active citizens should be a clear objective of civics education.⁸⁶ An active citizen is more likely to be interested in engaging in activities vital for a democratic nation, including participation in attempts to change the Constitution.
- 4.74 In their submission, the Australian Local Government Association model their recommendation for a public education campaign on the neutral panel convened in the lead up to the 1999 referendum. Their recommendation is for a national program run by the AEC which focuses on the role of the Constitution, the mechanism by which it can be changed, and the role of individual electors in the process. This proposal recommends the campaign be restricted to information about the Constitution and the referendum process itself, and not include information on the actual referendum question.⁸⁷ Glenn Patmore also supports utilising the 1999 model as a base upon which to expand a public education campaign.⁸⁸
- 4.75 Michael Millett from the Australian Broadcasting Corporation highlighted the need to engage in longer-term education campaigns stating
- the best way to inform and educate the population is not to do it in one hit two weeks out ... [I]t is better if we can construct a base and run off issues a year out and then progressively over a period as well ... I think it is more effective.⁸⁹
- 4.76 George Williams and Paul Kildea recommend an impartial public authority called the Referendum Panel be constituted prior to a referendum to oversee, among other aspects, public education initiatives.⁹⁰ In their submission they propose a role for this panel would be to prepare education material for voters. The submission also recommends extending beyond this to an education campaign which incorporates aspects of public deliberation.

86 Australian Government, Electoral Reform Green Paper, *Strengthening Australia's Democracy*, para 9.3, p. 127.

87 Australian Local Government Association, *Submission 21*, p. 11.

88 Glenn Patmore, *Transcript of Evidence*, 5 November 2009, p 63.

89 Michael Millett, Australian Broadcasting Corporation, *Transcript of Evidence*, 14 October 2009, p. 73.

90 Gilbert + Tobin Centre of Public Law, *Submission 23*, pp 5-6.

Deliberative democracy

4.77 The submission from the Gilbert + Tobin Centre recommends the operation of deliberative forums and other methods of public engagement. It recommends amending the Act to permit Government to fund mechanisms of engagement including deliberative polls, citizens' assemblies, citizens' juries and local constitutional conventions.⁹¹

4.78 As mentioned earlier, Janette Hartz-Karp and Lyn Carson recommend the creation of a Citizens' Parliament on Referendum (CPoR), modelled on the Citizens' Assembly in Canada, and comprising randomly sampled citizens reflecting the make-up of the Australian population:

This would provide a model for citizen engagement and deliberation on public policy questions, and help to create an environment more conducive to informed, deliberative citizens' participation and collaborative governance.⁹²

4.79 In drawing upon the experiences of the Citizens' Assembly, they stated this shows while there were a significant number of voters who could not understand the complicated case presented during the referendum, they voted for the proposal 'because they trusted the process and the randomly selected participants as being fair and unbiased'.⁹³

4.80 Other methods for incorporating deliberative processes were also discussed. At the roundtable discussion, Lucas Walsh recommended providing sub processes whereby people get together through a variety of fora, which could be electronic or face-to-face. He added there is a strong case for face-to-face:

The research indicates that young people's engagement with the political through technology is mixed/varied ... Some of it is telling us that they are looking more and more to alternative channels, fast becoming mainstream channels, through social networking and what have you. There is also research that indicates that they do not look for quality information via electronic channels.⁹⁴

91 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 5.

92 Janette Hartz-Karp and Lyn Carson, *Submission 20*, pp. 1-2.

93 Janette Hartz-Karp and Lyn Carson, *Submission 20*, pp. 2-3.

94 Lucas Walsh, Foundation for Young Australians, *Transcript of Evidence*, 14 October 2009, p. 48.

Creating a national conversation

- 4.81 At the roundtable discussion, Paul Kildea highlighted a measure towards a national conversation which was implemented prior to the 1999 referendum. He noted over 2 000 Australians participated in local constitutional conventions jointly run by local governments and the Constitutional Centenary Foundation. In addition to this, on Australia Day thousands of Australians gathered to discuss a variety of issues in a program called Australia Consults: 'The feedback from that was very strong and it was both educative and ... gave people a real feeling of contribution into the process.'⁹⁵
- 4.82 Lyn Carson also addressed the concept of creating conversation amongst the wider community, as opposed to making them passive observers, adding 'we need to think creatively about how to put people back into politics'.⁹⁶ She provided an example of the model used in the World Wide Views on Global Warming, which involved 38 countries and over 4 000 people simultaneously tuning in to each other via Skype and online. Lyn Carson added 'there is certainly a model there that we could adapt for our national context that I think would work extremely well as a way of stimulating some excitement about this'.⁹⁷
- 4.83 Kerry Jones raised the notion of holding a constitutional convention every five years, as a way of engaging people and getting them together and involved in the community. She indicated that during the five year period, people would have the opportunity to table ideas and have meaningful constitutional conventions all over Australia to discuss the ideas.⁹⁸
- 4.84 During the roundtable discussion, George Williams highlighted the necessity of involving the Parliament in the engagement process, indicating 'having a nice debate about constitutional reform without involving parliament is, I think, largely worthless, because you are not actually engaging the people who make the decisions.'⁹⁹
- 4.85 Many methods for engaging people about the Constitution and the referendum process were discussed and most of the evidence received

95 Paul Kildea, Gilbert + Tobin Centre of Public Law, *Transcript of Evidence*, 14 October 2009, pp 58-59.

96 Lyn Carson, University of Sydney, *Transcript of Evidence*, 14 October 2009, p. 57.

97 Lyn Carson, University of Sydney, *Transcript of Evidence*, 14 October 2009, p. 57.

98 Kerry Jones, Constitution Education Fund- Australia, *Transcript of Evidence*, 14 October 2009, p. 94.

99 George Williams, *Transcript of Evidence*, 14 October 2009, p. 93.

during this inquiry highlighted the need for increased engagement and education on constitutional matters.

Limitation on Government expenditure

- 4.86 As discussed in chapter 3 of this report, section 11(4) of the Machinery of Referendums Act limits Government expenditure in relation to referendum proposals. In effect, section 11 allows money to be spent on the distribution of the Yes/No pamphlet and 'other information relating to, or relating to the effect of, the proposed law'. Although there appears to be scope within section 11(4) to provide impartial information to voters on the proposed change to the Constitution, the High Court has suggested that the class of material permitted under the legislation is quite narrow (see *Reith v Morling* note in chapter 3).¹⁰⁰
- 4.87 The Committee received a handful of submissions in support of the limitation, arguing that:
- [It] should be retained to ensure total transparency and also not to place a political imbalance on the referendum question using tax payers' money.¹⁰¹
- 4.88 However, many more submitters pointed out that the restriction on Commonwealth expenditure is a barrier to the development of better and more effective referendum process.¹⁰² They argued that the limitation on expenditure should be lifted in order to allow advertising, information and education campaigns in addition the Yes/No pamphlet.
- 4.89 The Faculty of Law at the University of Adelaide adopted a slightly different argument, noting the inconsistency in restricting Commonwealth spending in this area where state and territory governments have no similar restriction. They pointed out that political parties extend beyond jurisdictions and States have a history of publicly funding one argument. As this is the case, they argued that the restriction on Commonwealth expenditure in section 11 should be lifted.¹⁰³

100 See *Reith v Morling* (1988) 83 ALR 667.

101 Nick Hobson, *Submission 1*, p. 1; see also Robert Vose, *Submission 12*, p. 3.

102 See for instance Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 4.

103 Faculty of Law, University of Adelaide, *Submission 25*, p. 5. Alternatively, the submission argued that the States should have an equivalent restriction on expenditure. A similar argument is made by Graeme Orr, *Submission 2*, p. 2. The question of whether the Commonwealth could restrict State funding in this way was discussed at the roundtable in

4.90 However, if the limitation on expenditure is lifted, the question of how funding should be determined needs to be examined. As one submitter pointed out:

The danger here is obviously that the Commonwealth may not be, or may not be seen to be, even-handed in expenditure on the arguments for and against the referendum question.¹⁰⁴

4.91 In general, suggestions for alternative methods of funding fell into two broad groups: the first group propose that equal funding is provided to both the Yes and the No case; the second group propose a formula to determine funding which may result in unequal money being given to the Yes and the No cases.

4.92 The Australian Local Government Association proposed that funding for the Yes and No cases be allocated on the basis of the proportion of Parliamentarians who voted for or against the proposed law. They reasoned that this would 'be an equitable distribution of Commonwealth funding reflecting the will of the Parliament.'¹⁰⁵

4.93 Alternatively, a number of submitters proposed that the Yes and No cases should receive equal funding. For instance, David Flint argued that: 'I think that as long as we have public funding for federal elections we should have equal funding of the yes and no case.'¹⁰⁶

4.94 In particular, a number of submissions expressed support for the funding arrangements devised for the 1999 referendum.¹⁰⁷ As discussed in chapter 3 of this report, this included equal funding for the Yes and No committees as well as separated funding for a neutral information campaign in addition to the official Yes/No pamphlet.

4.95 In 1999, following the amending legislation which was introduced to temporarily override the limitation on expenditure, the Government allocated approximately \$19.5 million to the referendum campaign. If the limitation on Government expenditure is removed from the Machinery of Referendums Act, the question of how much money is provided arises, in addition to questions of allocation.

Sydney on 14 October 2009 at page 39 of the transcript and at the public hearing in Melbourne on 5 November 2009 at page 44.

104 Family Voice Australia, *Submission 7*, p. 4.

105 Australian Local Government Association, *Submission 21*, p. 9.

106 David Flint, Samuel Griffiths Society, *Transcript of Evidence*, 14 October 2009, p. 4.

107 See for instance, Australians for Constitutional Monarchy, *Submission 16*, at para 3.2; Civil Liberties Australia, *Submission 22*, at para. 2.7. See also the comments of David Flint, *Transcript of Evidence*, 14 October 2009, p. 4.

- 4.96 In terms of the determining the amount of funding that a referendum campaign should receive, Australians for Constitutional Monarchy suggested that the total amount be calculated on the basis of one dollar for each elector, indexed from this year.¹⁰⁸ Alternatively, the Australian Local Government Association suggested that the funding for referendum be equivalent to funding for elections because that is a tangible figure.¹⁰⁹
- 4.97 In contrast, at the roundtable in Sydney there was a degree of acceptance that the overall funding should be determined by the Government:
- I think there are enough constraints there that parliament must authorise the expenditure. That is a democratic constraint. The executive is ultimately responsible.¹¹⁰
- 4.98 The restriction of government expenditure is clearly limiting but is considered by many to be fair. At present, the Yes/No pamphlet is the only official argument provided for under the Machinery of Referendums Act and it provides both sides with equal opportunity to explain their reasoning and make their case. If the restriction is removed, it is important to ensure that the same principles of equity and fairness continue to apply.

108 Australians for Constitutional Monarchy, *Submission 16*, para. 3.7.

109 Adrian Beresford-Wylie, Australian Local Government Association, *Transcript of Evidence*, p. 2.

110 George Williams, *Transcript of Evidence*, 14 October 2009, p. 43.

Committee Comment and Recommendations

Introduction

- 5.1 The terms of reference for this inquiry ask the Committee to consider the effectiveness of the *Referendum (Machinery Provisions) Act 1984* (the Machinery of Referendums Act) in providing an appropriate framework for the conduct of referendums. Specifically, the Committee examined the effectiveness of the processes for preparing the Yes/No arguments for referendum questions, the provisions providing for the public dissemination of the Yes/No arguments, and limitations on the purposes for which money can be spent in relation to referendum questions.
- 5.2 It is the view of the Committee that section 11 of the Machinery of Referendums Act provides a reasonably appropriate starting point for the conduct of a referendum. However, the Yes/No pamphlet provides electors with only the minimum of what might be needed to make an informed decision at a referendum. To assist electors in understanding the proposal for constitutional change and the arguments why it should or should not be supported, more contextual and background information is required, with more targeted campaigns. This chapter discusses the Committee's findings in relation to the terms of reference and details the Committee's recommendations for change.
- 5.3 In order to consider the effectiveness of the Machinery of Referendums Act in providing an appropriate framework for the conduct of referendums, the Committee has assessed the operation of these provisions against their objectives. Section 11 provides for a relatively simple process of distributing to electors the arguments for and against the proposed law to change the constitution. However, the intention of

these provisions must also be to ensure electors understand the purpose and ramifications of any proposed change to the constitution and have sufficient information to form an opinion when voting yes or no. This is particularly important because, if a proposal for change is not fully understood, it is more likely that a voter will vote 'no' and the defeat of a proposal may reflect voter misunderstanding or fear of change rather than a true assessment of the proposal.

- 5.4 It is apparent from the Committee's inquiry that many submitters and commentators agree that the purpose of section 11 is to ensure that electors are able to make an informed decision at referendums. This is consistent with the original purpose of the Yes/No pamphlets when they were introduced in 1912 and continued to be the purpose when the Yes/No pamphlet provision was re-introduced in 1984. The Committee considers it fundamentally important that material provided to electors clarify complex and contested issues so that electors are able to make an informed choice when voting at a referendum.¹
- 5.5 In assessing the purpose of the current Yes/No pamphlet provisions against practical outcomes, there is clearly a shortfall. The Committee considers that the provisions afford a generally appropriate framework for the conduct of a referendum. Although the Yes/No pamphlet is an important communication and democratic tool through which the government can provide electors with informed debate on the matter, significantly more is required to ensure that the often complex constitutional issues debated at referendums are understood by electors.
- 5.6 The process adopted for the 1999 referendum indicates the shortfall between the current machinery of referendums provisions and the degree of information and range of measures required to engage the electorate in democratic processes. In addition to the Yes/No pamphlet, the 1999 referendum campaign included a plain English public education kit with information needed by the voter to understand the proposal. This included information on the current system of government, referendum processes, and background information on the referendum questions themselves. The 1999 referendum also established Yes and No committees who, in addition to drafting the Yes/No pamphlets, were responsible for a broader advertising campaign.
- 5.7 The Committee is of the view that Section 11 of the *Referendum (Machinery Provisions) Act 1984* should be amended to ensure that the goal of

1 This is consistent with the purpose of the provision as articulated by Jennifer Williams, *Submission 31*, p. 1.

clarifying complex and contested issues to critically inform a voter's choice is more effectively met.

Recommendation 1

The Committee recommends that the Australian Government introduce amendments to section 11 of the *Referendum (Machinery Provisions) Act 1984* (Cth) to improve the referendum process.

Processes for preparing the Yes/No arguments

- 5.8 Under the current provisions, the Yes/No arguments are authorised by members of parliament. However, there is no legislative requirement that parliament draft the Yes/No arguments. Chapter 3 of this report considered the 1999 referendum processes where two separate Yes and No committees, appointed by the Government, were responsible for drafting the Yes/No arguments. Chapter 4 of this report examined both the appropriateness and effectiveness of the current processes. It also examined the alternatives and suggestions for change identified during the Committee's inquiry.
- 5.9 Submitters to the inquiry asked:
- whether parliamentarians are the right people to draft the Yes/No arguments;
 - what the content should be;
 - whether it is appropriate that preparation of Yes/No arguments is optional; and
 - whether it is appropriate that where a proposal to amend the constitution is passed unanimously by both Houses of Parliament then no official No argument can be prepared.
- 5.10 The Committee notes that a number of submitters consider it appropriate that responsibility for the Yes/No arguments lie with Parliament. However, the Committee is also aware that other submitters were critical of this arrangement, arguing that this process produces an adversarial and ultimately, less helpful, document.
- 5.11 The Committee acknowledges that the Yes/No arguments are rarely impersonal or free from bias, as was originally envisioned in 1912 when

they were introduced. However, the Committee does not necessarily consider this to be a deficiency of the current arrangements.

- 5.12 The Yes/No arguments are an important means for parliamentarians to explain to electors why they support or do not support the proposal for constitutional change. The oppositional nature of the Yes/No arguments also helps stimulate public debate and discussion. Further, they are appropriately directed to a providing a yes/no answer-which is what will be required of the elector on the day of referendum.
- 5.13 The Committee considers that there may be insufficient or inadequate information for many electors where Yes/No pamphlets are the only official material available to electors. However, in conjunction with other contextual material and education campaigns, the preparation of clear and concise Yes/No arguments are an important element of the referendum process and should be retained.
- 5.14 While the Committee is recommending that the Yes/No arguments should be retained, there are certain features of the current provisions which the Committee considers limit their effectiveness. The current restriction on word limit for the Yes/No arguments appears to be a result of a desire not to advantage one side over the other and does not enhance the accessibility of the information. Word length is an important feature of the Yes/No arguments and should be used to maximise its effectiveness in communicating to and engaging with electors.
- 5.15 It is the Committee's view that the 2 000 word limit for the Yes/No arguments should be removed from section 11 the Machinery of Referendums Act. Although it is likely that a word limit will need to be determined, it is important the Yes/No argument can be adapted to the requirements and issues of the specific referendum. As a result, the word limit should not be fixed in legislation.
- 5.16 The requirement for the Yes/No pamphlet to be distributed to every elector is an important aspect of the Machinery of Referendums Act. However, there are sound reasons to consider changing this requirement so that the Yes/No pamphlet is delivered to each *household* rather than each *elector*.
- 5.17 Posting to each household is arguably no less effective in delivering important information directly to the elector. It is also consistent with the practice in relation to federal elections and would result in a significant reduction of distribution costs. The AEC advised that the production and delivery of a referendum pamphlet posted to every elector today would cost approximately \$25 million. The cost of delivery accounts for

approximately 54 per cent of this total. In contrast, the householder mail-out for the 2007 federal election cost between \$2.5 million to \$3 million.

- 5.18 It is the view of the Committee that, while dissemination of the Yes/No pamphlet remains an essential component of the referendum process, the cost-effectiveness of posting to each elector cannot be demonstrated. Consequently, the Committee recommends that the Yes/No pamphlet is delivered to each household.

Recommendation 2

The Committee recommends amendments to the *Referendum (Machinery Provisions) Act 1984 (Cth)* to remove the current restrictions on the word limit of the Yes/No arguments.

Recommendation 3

The Committee recommends that the Australian Government introduce amendments to the *Referendum (Machinery Provisions) Act 1984 (Cth)* to require a Yes/No pamphlet to be delivered to every household, not every elector.

- 5.19 Section 128 of the Constitution specifies that proposals to alter the Constitution must be passed as a bill by both Houses of Parliament. In this way, parliamentarians play an essential role in any proposal to change the Constitution as they are required by the Constitution to vote on the proposed amendment before it is put to electors.
- 5.20 The Committee is aware that some submitters do not consider Parliamentarians to be the appropriate persons to prepare the Yes/No arguments. Critics suggest that the current processes emphasise 'winning' over informing voters of the proposed changes whereas proponents state that the Yes/No arguments are an important opportunity for elected representatives to explain why they voted for or against the proposal.
- 5.21 It should be noted that there is no reference in the legislation to the body or persons responsible for drafting of the Yes/No arguments. As outlined in chapter 4, section 11 of the Machinery of Referendums Act refers only to the responsibility of parliamentarians in authorising the Yes/No arguments. As such, the current legislation does not preclude another

body or person from being involved in the drafting of the arguments, providing members of Parliament authorise the final result.

- 5.22 The Committee notes that members of Parliament are elected representatives and are responsible and accountable to the Australian people. It is arguably the Parliament's responsibility to put the case to voters because it is the Parliament which is responsible for the amendment proposal. The Committee considers it important and appropriate that members of Parliament retain responsibility for authorising the official Yes/No arguments and supports the retention of this requirement.

Recommendation 4

The Committee recommends that, consistent with section 11 of the *Referendum (Machinery Provisions) Act 1984 (Cth)*, the respective Yes/No arguments should continue to be authorised by those members of Parliament who voted for or against the proposed law.

- 5.23 Currently, the members of Parliament who voted for or against the bill authorise the respective Yes and No arguments. The Committee has recommended that these arrangements continue. However, under the current provisions, where a constitutional amendment bill is passed unanimously, there can not be any authorisation of an official No case. As discussed in chapter 3, this occurred in 1967 and 1977.
- 5.24 The Committee does not agree with these arrangements and considers it important that a Yes and a No argument is always put to voters. Accordingly, the Committee recommends that if a constitution amendment bill is passed unanimously through both Houses of Parliament, then *all* members of Parliament should be responsible for authorising *both* the Yes and No arguments. As with the current arrangements, the legislation should not specify the drafters of either case.

Recommendation 5

The Committee recommends that if a constitution amendment bill is passed unanimously by both Houses of Parliament, then *all* members of Parliament be responsible for authorising *both* the Yes and No arguments.

Dissemination of the Yes/No arguments

- 5.25 The Australian Electoral Commissioner must post the Yes/No arguments, together with the proposed textual changes to the Constitution, to each elector at least 14 days before the referendum. Chapter 4 of this report outlined the support that submitters expressed for the provision of the Yes/No pamphlet to every elector prior to a referendum. However other submitters argued that, in practice, the Yes/No pamphlet is the only official information provided to voters under the Machinery of Referendums Act and that this is insufficient to inform the public prior to a referendum.
- 5.26 The Committee acknowledges the importance of the Yes/No arguments in communicating directly with each elector the case for and against the proposed constitutional change. However, the Committee also agrees that much more is needed by electors to make an informed choice at a referendum. Since electors are the decision-makers on changing the Constitution, there is a responsibility to ensure they are informed and by means appropriate to as wide a range of electors as possible.
- 5.27 In order to conduct an effective referendum, education of the public is vital to ensure voters have the capacity to make an informed decision. Chapter 4 of this report discussed the need for public education on matters concerning the Constitution and referred to referencing surveys which indicate that many Australians have little understanding of the Constitution.
- 5.28 The Committee considers that the Yes/No arguments are insufficient to adequately prepare voters to exercise their democratic right and responsibility in referendum. Many submitters stressed the importance not only of Yes/No campaigns but of broader constitutional education that would increase understanding of the Constitution itself, separate from the proposal for change that is being considered. The aim of an education program would be to raise awareness of the contents of Australia's Constitution and the rights, responsibilities and system of governance that it establishes. It should also aim to explain the processes required for constitutional change and encourage public engagement in governance issues.
- 5.29 The Committee acknowledges the extensive activities already performed by the Australian Electoral Commission (AEC) in providing civics education to the Australian public. Further, the Committee notes comments made by the Joint Standing Committee on Electoral Matters in 2007 in which they acknowledged the number of submissions they had

received during the course of their inquiry indicating that electoral education 'requires a more coordinated and coherent approach'.²

- 5.30 The Committee notes the work of a number of non-government organisations, such as the Centre for Comparative Constitutional Studies and the Constitutional Education Fund–Australia (CEF-A) in educating Australians on the Constitution. For instance, CEF-A, an independent, non-partisan and non-profit organisation, perform a very valuable role in educating Australians on the Constitution, parliamentary democracy and our system of government more broadly. The Committee agrees that a sound understanding of the Constitution is essential in an effective democracy. To this end, the Committee recommends the development a national civics education program. While schools-based education is likely to be effective the Committee is of the view that civics education should extend beyond schools.

Recommendation 6

The Committee recommends that the Australian Government develop and implement a national civics education program to enhance the engagement of the Australian public in democratic processes and to improve knowledge and understanding of the Australian Constitution.

- 5.31 An effective civics education program would provide Australians with a sound understanding of the Constitution in general. However, when a referendum is to be held, it is essential that specific explanatory information and background material to the process are provided to electors.
- 5.32 As outlined in Recommendation 4, the Committee endorses continuation of the current role of parliamentarians in authorising the content of the Yes/No arguments and so providing voters with the views of their elected representatives concerning the proposed changes. However, the Committee also acknowledges the myriad of submissions received during this inquiry concerning the need for the presentation of unbiased factual material that is separate from the arena of partisan politics.

2 Parliament of Australia, Joint Standing Committee on Electoral Matters, *Civics and Electoral Education*, May 2007, p. 60. Available at: www.aph.gov.au/house/committee/em/education/report.htm

- 5.33 The Committee notes that many submitters support the idea of an independent body or panel which would develop and disseminate plain english information and background material to electors. The material disseminated by an independent body or panel would more closely resemble the impersonal, reasonable and judicial arguments originally envisaged by the drafters of the Yes/No pamphlet provision in 1912.
- 5.34 Specifically, submitters proposed establishing a panel loosely modelled on the neutral education panel convened in the lead-up to the 1999 referendum. As discussed in chapter 3, that neutral education panel was comprised of constitutional and civics experts. It was given the task of providing information needed by voters to understand the proposal, including information on the current system of government, referendum processes, and background information on the referendum questions.
- 5.35 The Committee supports the concept of an independent Referendum Panel which is created for each referendum. The purpose of the Panel would be to promote the specific referendum and educate voters regarding the arguments for and against the referendum proposal. The Panel should be tasked with providing voters with background and contextual material to aid in understanding the nature of the proposed changes and the effect of its success or defeat
- 5.36 One of the advantages of an independent panel is that information is seen to originate from a non-partisan body. The Referendum Panel would be given the task of providing independent and balanced information to electors. The Committee notes that similar practices have been adopted in other countries.

Recommendation 7

The Committee recommends that amendments to the *Referendum (Machinery Provisions) Act 1984 (Cth)* provide for the establishment of a Referendum Panel using a method of appointment which ensures independence and bipartisanship. The Panel would be specifically appointed for each referendum for the purposes of promoting that referendum and educating voters about the referendum arguments.

- 5.37 Membership of the Referendum Panel will be an important factor in ensuring that it can effectively promote the referendum and educate voters regarding the referendum arguments. The Committee is of the view

that, consistent with the 1999 referendum, the Panel should have broad bipartisan support.

- 5.38 The reputation, experience and knowledge of the AEC would assist the Referendum Panel. The Referendum Panel would also be able to draw on the experience of the AEC and the work it has already conducted on election education. It is therefore appropriate that a representative of the AEC be included in the membership. However, to protect the integrity and reputation of the AEC and because of the overlapping role in the conduct of referendums, the AEC representative should not chair the Referendum Panel.
- 5.39 The Committee does not wish to be overly prescriptive with regard to the size of the Panel, or the manner of appointment or qualifications of its members as it is important that it be able to be adapted to the referendum at hand. Further these matters were not raised directly in the terms of reference nor by submissions to the inquiry.
- 5.40 History has demonstrated that the range and complexity of referendum questions vary considerably. For this reason, whatever manner of appointment is specified in legislation, the number of members should not be fixed but determined as appropriate to each referendum. However it would be preferable for membership of the Referendum Panel to be limited to a maximum of eight persons to ensure the workability of the group.

Recommendation 8

The Committee recommends that membership of the proposed Referendum Panel should be a maximum of eight persons, and should include a representative of the Australian Electoral Commission.

- 5.41 As outlined in chapter 4, the methods for disseminating referendum materials are currently limited by the legislation. A number of submissions voiced concern that such restrictions could be disadvantaging certain demographics of Australian electors.
- 5.42 The Committee notes the vast array of media forms and communication that did not exist 10 years ago, much less in 1912. Digital television, email, mobile telephones, instant messaging, the internet and the popularity of

social networking sites such as myspace, facebook and twitter, are only some examples of new forms of communication. The Committee also acknowledges that it is likely that another decade will bring further advances in communication technologies. Different technologies have been embraced to different degrees across sections of the Australian public. Age, location, literacy, disability and education can either enable or inhibit access to alternative forms of communication beyond the print medium

- 5.43 The Committee supports the proposed Referendum Panel using a range of technologies and communication forms to disseminate information and educate electors across all demographics. However, due to continuing advances in communication technologies, it would be inappropriate to apply a prescriptive approach. In addition, the effectiveness of particular approaches may vary according to the nature of the referendum. Accordingly, the Committee recommends that the methods of communication should not be specified in legislation.
- 5.44 Rather, the Committee recommends the Referendum Panel identify the most effective mix of communication methods to disseminate material to the public, across the range of demographics. In this regard, the Referendum Panel would be solely responsible for determining an appropriate and relevant communications strategy for the referendum, including identifying what education material should be distributed and the method of distribution.
- 5.45 As part of the communications strategy proposed to be undertaken by the Referendum Panel, the Committee recommends that the Panel be responsible for determining the most appropriate maximum word length which is to be the same for the Yes and No arguments. Authorisation of the content of the arguments will remain the responsibility of Parliamentarians, as previously discussed.

Recommendation 9

The Committee recommends that the proposed Referendum Panel be responsible for determining an appropriate and relevant information and communications strategy for the referendum, including identifying what education material should be distributed and the methods of distribution.

Recommendation 10

The Committee recommends that the proposed Referendum Panel be responsible for determining the maximum word length which is to be the same for the Yes and No arguments.

Limitations on Australian Government spending

- 5.46 One of the key features of section 11 of the Machinery of Referendums Act is the limitation on Government spending in relation to referendum proposals. Section 11(4) effectively restricts the Australian Government to the distribution of the Yes/No pamphlet by listing explicitly the activities for which spending is permitted. As mentioned in chapter 3, this provision was intended to prevent additional funding being provided for one side simply because it enjoyed Government support. However, by only allowing money to be spent on the Yes/No pamphlet, this provision severely restricts the way in which the Government can engage with electors on issues of constitutional change.
- 5.47 The limitation on Government expenditure in section 11 of the Machinery of Referendums Act significantly curtails the range of possible activities permitted to promote referendum campaigns. The High Court decision in *Reith v Morling* (discussed in chapter 3) indicates that a broad range of activities are prohibited under section 11. For instance, in 1999 in order for the Australian Government to spend money on a campaign in addition to the Yes/No pamphlet, additional legislation was required to be introduced to temporarily override the limitation on Government expenditure set out in Section 11(4).
- 5.48 Many submitters suggested that the restriction on Government expenditure is a barrier to the development of a more engaging referendum process. They argued that the limitation on expenditure should be lifted in order to allow advertising, information and education campaigns in addition to the Yes/No pamphlet. Other submitters pointed out that the current limitation on Government expenditure only applies to the Australian Government and that state governments are not similarly constrained. This places the Australian Government at a significant disadvantage if a state government campaigns against the referendum proposal. These restrictions also fail to recognise that political parties exist and campaign at both Commonwealth and state level.

- 5.49 If the limitation on Australian Government expenditure is not removed from the Machinery of Referendums Act altogether, then the Government would have to introduce specific legislation each time it considers that more than the Yes/No pamphlet is required for a specific referendum. The Committee considers this to be inappropriate, inefficient and unnecessary.
- 5.50 The Committee is of the view that the current limitation on Australian Government expenditure set out in section 11(4) should be removed and provisions ensuring that all spending is directed to both referendum education and equal promotion of the Yes/No arguments be included.

Recommendation 11

The Committee recommends the Australian Government introduce amendments to remove the current limitation on spending imposed by section 11(4) of the *Referendum (Machinery Provisions) Act 1984 (Cth)* and to include provisions to ensure that spending is directed to referendum education and to equal promotion of the Yes/No arguments.

- 5.51 The restriction on Australian Government expenditure is clearly limiting but is considered by many to be fair because the Yes/No pamphlet is the only official argument provided for under the Machinery of Referendums Act, and so it provides both sides with equal opportunity to make their cases.
- 5.52 Chapter 3 of this report considered how funding could be determined if the limitation on spending was removed. The Committee notes that some submitters proposed a system of proportional funding based on the votes in Parliament. However there could be issues with this proposal as, where only a small number of members vote against the proposal, it would very difficult to launch an effective No campaign. In addition, the number of Parliamentarians who voted for or against a proposal is not necessarily an accurate indication of the community's views on a proposal. The overwhelming defeat of the preamble in 1999, despite widespread Parliamentary support, is a good example of this.
- 5.53 The Committee considers it important to ensure that the same principles of equality and fairness continue to apply once the limitation on Australian Government expenditure is removed. The Committee therefore supports equal funding of the Yes and No cases, irrespective of their Parliamentary support. This is in line with the original intention of the

Yes/No pamphlet as well as consistent with democratic ideals of informed debate.

- 5.54 With regard to the total amount of funding to be provided to the referendum campaign, the Committee considers this an appropriate decision for the Government of the day. It is apparent that referendums require a flexible and adaptable approach—some referendums may require more funding and others less. The Committee is of the view that the funding level for referendum campaigns should be determined on a case-by-case basis and that decision should be taken by the Australian Government.
- 5.55 Although the Referendum Panel will be responsible for determining a communications strategy for the referendum and for determining the format, presentation and word length of the Yes/No arguments, it will not be responsible for drafting any partisan material. The Committee is of the view that the Referendum Panel should be responsible for overseeing the referendum campaign, perhaps based on a mechanism similar to that used in the 1999 referendum. In 1999, Yes and No committees were established and given the task of producing campaign material for and against (respectively) the proposed change to the Constitution.
- 5.56 It is envisaged that there will be Yes and No campaigns for and against any proposed constitutional change. These campaigns would be guided by the communications strategy determined by the Referendum Panel. The Referendum Panel would also determine the equal budget to be provided to the Yes and No campaigns.
- 5.57 As noted in Recommendation 4, members of Parliament would continue to authorise the Yes/No arguments and the legislation should not specify who drafts the arguments.

Recommendation 12

The Committee recommends that amendments to the *Referendum (Machinery Provisions) Act 1984 (Cth)* establish that the Australian Government be responsible for determining the budget available to the Referendum Panel for referendum education and campaign activities.

Recommendation 13

The Committee recommends that the proposed Referendum Panel have the power to make recommendations to the Australian Government concerning the budget to be provided for a referendum campaign.

Recommendation 14

The Committee recommends that the Referendum Panel be responsible for establishing and determining the budget available to the Yes and No campaigns which should be funded equally.

Recommendation 15

The Committee recommends that the Australian Government introduce amendments to the *Referendum (Machinery Provisions) Act 1984 (Cth)* to require the proposed Referendum Panel to provide to Parliament a report of its activities and expenditure at the conclusion of the referendum.

- 5.58 The AEC is responsible for the conduct of elections under the *Commonwealth Electoral Act 1918 (Cth)*. The AEC is also responsible for the conduct of referendums under the Machinery of Referendums Act. The AEC's reputation for integrity and independence reflects the exemplary manner in which it fulfils its responsibilities under the Commonwealth Electoral Act and the Machinery of Referendums Act.
- 5.59 The AEC currently has responsibility for the postage of the Yes/No pamphlet and the conduct of the referendum proper. The Committee does not propose any change to the conduct of the referendum itself or the AEC's responsibilities.

Recommendation 16

The Committee recommends that, consistent with the current provisions of the *Referendum (Machinery Provisions) Act 1984 (Cth)*, the Australian Electoral Commission continue to be responsible for the conduct of referendums.

Additional issue

- 5.60 During the inquiry, attention was drawn to the pitfalls of having separate legislation for the conduct of elections and the conduct of referendums (the *Commonwealth Electoral Act 1918* and the *Machinery of Referendums Act*). For instance, the AEC acknowledged that because there are different dates for the closing of electoral rolls under each Act, if an election and a referendum were to be held at the same time, it could result in two separate and possibly different electoral rolls.
- 5.61 The Committee agrees with suggestions made by submitters as to the desirability of combining the *Machinery of Referendums Act* and the *Commonwealth Electoral Act*.³ This would help ensure consistency between the two Acts, particularly in regard to administrative measures such as the closing dates of electoral roles.
- 5.62 Given the AEC's dual role in the conduct of both referendums and elections, the Committee considers it appropriate for the *Machinery of Referendum* provisions to be incorporated in the *Commonwealth Electoral Act*.

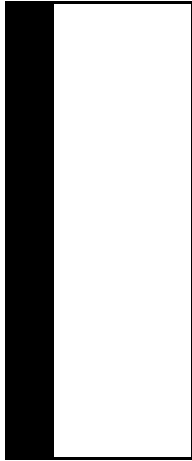
3 Michael Maley, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 26.

Recommendation 17

The Committee recommends that the Australian Government consolidate and harmonise the machinery of referendums provisions with the *Commonwealth Electoral Act 1918* (Cth).

Mark Dreyfus QC MP

December 2009



Dissenting Report

1.1 In dissenting from the Report, we make the following comments:

- Recommendation 1: The generality of this recommendation calling for the amendment of the *Referendum (Machinery Provisions) Act 1984* (Cth) to 'improve the process' is unhelpful. It does not detail any amendments and as such can be interpreted to mean any number of things. We therefore cannot support this recommendation.
- Recommendation 2: In calling for the removal of current word restrictions of the Yes/No case, this recommendation does not preclude a **decrease** in the word limit. Any decrease in the word limits may be detrimental to comprehensive arguments being presented for the Yes and No cases for any particular referendum.
- Recommendation 3: If adopted this recommendation would result in the Yes/No booklet be delivered to every household instead of every elector. We strongly disagree with this recommendation. Household distribution would reduce the number of people who had access to the Yes/No case.

Referenda to change the Australian Constitution are significant events and require the engagement of as many Australians as possible. All politicians know that communicating with their constituents via direct, personalised mail is far more effective than a letter delivered 'To the Household'. It therefore seems rather odd that the Australian Government would reduce the direct delivery of official information regarding referenda.

Even constitutional expert, Cheryl Saunders whose view of the Yes/No case via the mail was that 'I would be doubtful that it is very useful even for older people', went on to say '...but you may have research

that shows differently, and you are the members of parliament, so you know what your constituents do.’¹

- Recommendation 6: Whilst we generally agree with this recommendation for the development and implementation of a national civics education program, we believe the recommendation would be enhanced if it included provision for such a program to be developed in conjunction with non-government organisations currently promoting and operating education programs about the Australian Constitution. Such organisations could include CEF-A and the Centre for Comparative Constitutional Studies.
- Recommendations 7, 8 and 9: These recommendations propose that a Referendum Panel be established. This panel would amongst other things be responsible:

For determining an appropriate and relevant information and communications strategy for the referendum, including what education material should be distributed and the methods of distribution.²

We strongly disagree with this recommendation. It should not be an unelected, unaccountable panel that is responsible for the matters described above. Members of Parliament are elected and accountable to the Australian public and are more appropriately placed to make these decisions. It has been suggested that a panel would be more objective in providing information about a referendum. Experts in any area are not immune from subjectivity. As we have seen from previous referenda, experts quite freely and frequently support one side or the other. In fact some experts are rather extreme in their views. Mr Rod Cameron went so far as to say:

Thus, in my world there would not be a no case except perhaps one championed and funded by private interest groups.³

- Recommendations 10, 12, 13, 14, 15. These recommendations relate directly to the Referendum Panel. Following from paragraph 5 above, we do not agree with these recommendations.
- Recommendations 4, 5, 11, 16 and 17 are supported.

1 Cheryl Saunders, *Transcript of Evidence*, 5 November 2009, p. 5.

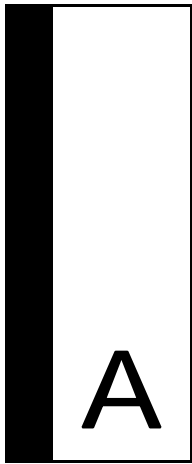
2 House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Report into the Machinery of Referendums*, Recommendation 9, p. 64, December 2009.

3 Rod Cameron, *Transcript of Evidence*, 29 October 2009, p. 1.

The Hon Peter Slipper MP, Deputy Chairman

The Hon Kevin Andrews MP

Mrs Sophie Mirabella MP



Appendix A: List of submissions

- 1 Mr Nick Hobson
- 2 Dr Graeme Orr
- 3 Mr Graham Macafee
- 4 Mr Robert Willson
- 5 Mr Sidney Reynolds
- 6 Mr Frank Bibby
- 7 Family Voice Australia
- 7a Family Voice Australia SUPPLEMENTARY (to Submission No. 7)
- 8 Ian & Beth Yeates
- 9 Mr Peter Young
- 10 Mr Andrew Robertson
- 11 Dr Anne Twomey
- 12 Mr Robert Vose
- 13 Sir David Smith
- 14 Mr Rodger Hills
- 15 Mr Geoffrey Goode
- 16 Australian for Constitutional Monarchy
- 16a Australian for Constitutional Monarchy SUPPLEMENTARY (to Submission No. 16)
- 17 Mrs Barbara Horkan

- 18 Mr David Horkan
- 19 Ms Gillian Lord
- 20 Professor Janette Hartz-Karp and Associate Professor Lyn Carson
- 21 Australian Local Government Association
- 22 Civil Liberties Australia
- 23 Gilbert and Tobin Centre of Public Law and The University of
New South Wales
- 24 Australian Electoral Commission
- 24a Australian Electoral Commission SUPPLEMENTARY (to
Submission No. 24)
- 25 Law School, the University of Adelaide
- 26 Mr Glenn Patmore
- 27 Mr James Emmerig
- 28 Mr David Hull
- 29 Rethink Australia
- 30 Women for an Australian Republic
- 31 Ms Jennifer Williams
- 31a Ms Jennifer Williams SUPPLEMENTARY (to Submission No. 31)
- 32 Auspoll PTY LTD
- 33 Mr Rodney Cameron



Appendix B – List of Hearings and Witnesses

Wednesday, 14 October 2009 - Sydney

Individuals

Mr Julian Leaser

The Hon Howard Nathan

Professor Adrienne Stone, Professor and Director of the Centre for Comparative Constitutional Studies, Melbourne Law School

Auspoll PTY LTD

Mr Tim Gartrell, Chief Executive Officer

Australian Broadcasting Corporation

Mr Michael Millett, Director Communications

Australian Electoral Commission

Mr Paul Dacey, Deputy Electoral Commissioner

Mr Michael Maley, Acting Assistant Commissioner

Australian for Constitutional Monarchy

Professor David Flint

Gilbert and Tobin Centre of Public Law

Mr Paul Kildea, Director, Federalism Project

Per Capita

Mr David Hetherington, Executive Director

The Constitution Education Fund Australia

Mrs Kerry Jones, Executive Director

The Foundation for Young Australians

Dr Lucas Walsh, Director of Research

The University of New South Wales

Professor George Williams, Foundation Director, Faculty of Law

University of Queensland

Dr Graeme Orr, Associate Professor

University of Sydney

Associate Professor Lyn Carson, Academic Program Director, United States Study Centre

Thursday, 22 October 2009 - Canberra

Australian Local Government Association

Mr Adrian Beresford-Wylie, Chief Executive Officer

Mr John A Pritchard, Executive Director, Policy and Research

Democratic Audit of Australia, Australian National University

Mr Peter Brent

Thursday, 29 October 2009 - Canberra

ANOP Research Service Pty Ltd

Mr Rodney Cameron, Chair

Australians for Constitutional Monarchy

Professor David Flint

Thursday, 5 November 2009 - Melbourne

Individuals

Professor Brian John Galligan

Mr Glenn Patmore

Professor Cheryl Saunders

Ms Jennifer Williams

Family Voice Australia

Dr David Phillips, National Position

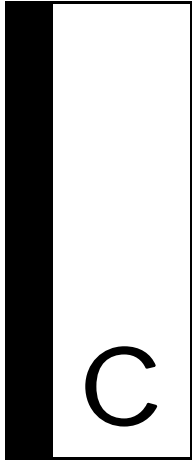
Rethink Australia

Mr Rodger Hills

Faculty of Law, University of Adelaide

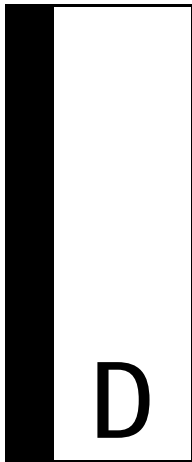
Ms Gabrielle Appleby, Lecturer, Law School

Prof John Williams, Professor of Law, Law School



Appendix C – List of Exhibits

- 1 Office of Intergovernmental Relations
South Australian Referenda (Research Series)
- 2 Jennifer Williams
Oregon Voter's Pamphlet
- 3 Jennifer Williams
Good Magazine Information Design



Appendix D: Section 11 of the Referendum (Machinery Provisions) Act 1984 (Cth)

Distribution to electors of arguments for and against proposed law

(1) Where:

- (a) a proposed law for the alteration of the Constitution, being a proposed law passed by an absolute majority of both Houses of the Parliament, is to be submitted to the electors; and
- (b) within 4 weeks after the passage of that proposed law through both Houses of the Parliament, there is forwarded to the Electoral Commissioner:
 - (i) an argument in favour of the proposed law, consisting of not more than 2,000 words, authorized by a majority of those members of the Parliament who voted for the proposed law and desire to forward such an argument; or
 - (ii) an argument against the proposed law, consisting of not more than 2,000 words, authorized by a majority of those members of the Parliament who voted against the proposed law and desire to forward such an argument;

the Electoral Commissioner shall, unless the Minister informs the Electoral Commissioner that the referendum is not to be held, not later than 14 days before the voting day for the referendum, cause to be printed and to be posted to each elector, as nearly as practicable, a pamphlet containing the arguments together with a statement showing the textual alterations and additions proposed to be made to the Constitution.

(2) Where:

- (a) a proposed law for the alteration of the Constitution, being a proposed law passed by an absolute majority of one House of the Parliament only, is to be submitted to the electors; and

- (b) within 4 weeks after the second passage of that proposed law through that House of the Parliament, there is forwarded to the Electoral Commissioner:
- (i) an argument in favour of the proposed law, consisting of not more than 2,000 words, authorized by a majority of those members of the Parliament who voted for the proposed law and desire to forward such an argument; or
 - (ii) an argument against the proposed law, consisting of not more than 2,000 words, authorized by a majority of those members of the Parliament who voted against the proposed law and desire to forward such an argument;

the Electoral Commissioner shall, unless the Minister informs the Electoral Commissioner that the referendum is not to be held, not later than 14 days before the voting day for the referendum, cause to be printed and to be posted to each elector, as nearly as practicable, a pamphlet containing the arguments together with a statement showing the textual alterations and additions proposed to be made to the Constitution.

- (3) When there are to be referendums upon more than one proposed law on the same day:
- (a) the arguments in relation to all the proposed laws shall be printed in one pamphlet;
 - (b) the argument in favour of any proposed law may exceed 2,000 words if the arguments in favour of all the proposed laws do not average more than 2,000 words each and the argument against any proposed law may exceed 2,000 words if the arguments against all the proposed laws do not average more than 2,000 words each; and
 - (c) there may be one statement setting out all the alterations and additions proposed to be made to the Constitution by all the proposed laws, with marginal notes identifying the proposed law by which each alteration or addition is proposed to be made.
- (4) The Commonwealth shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law except in relation to:
- (a) the preparation, printing and posting, in accordance with this section, of the pamphlets referred to in this section;
 - (aa) the preparation, by or on behalf of the Electoral Commission, of translations into other languages of material contained in those pamphlets;
 - (ab) the preparation, by or on behalf of the Electoral Commission, of presentations of material contained in those pamphlets in forms suitable for the visually impaired;
 - (ac) the distribution or publication, by or on behalf of the Electoral Commission, of those pamphlets, translations or presentations (including publication on the Internet);
 - (b) the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law; or

- (c) the salaries and allowances of members of the Parliament, of members of the staff of members of the Parliament or of persons who are appointed or engaged under the *Public Service Act 1999*.



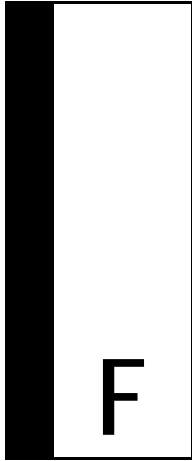
Appendix E: Table of Australian Referendum Results

	Subject	Government	Date	Carried (% in favour)	Yes/No
1.	Senate elections	Deakin	12 December 1906	Carried (82.65%)	
2.	Finance	Deakin	13 April 1910	Not carried (49.04%)	
3.	State debts	Deakin	13 April 1910	Carried (54.95%)	
4.	Legislative powers	Fisher	26 April 1911	Not carried (39.42%)	
5.	Monopolies	Fisher	26 April 1911	Not carried (39.89%)	
6.	Trade and commerce	Fisher	31 May 1913	Not carried (49.38%)	Arguments distributed
7.	Corporations	Fisher	31 May 1913	Not carried (49.33%)	Arguments distributed
8.	Industrial relations	Fisher	31 May 1913	Not carried (49.33%)	Arguments distributed
9.	Trusts	Fisher	31 May 1913	Not carried (49.78%)	Arguments distributed
10.	Nationalisation of monopolies	Fisher	31 May 1913	Not carried (49.33%)	Arguments distributed
11.	Railway disputes	Fisher	31 May 1913	Not carried (49.13%)	Arguments distributed
12.	Legislative powers	Hughes	13 December 1919	Not carried (49.65%)	No arguments distributed
13.	Nationalisation of Monopolies	Hughes	13 December 1919	Not carried (48.64%)	No arguments distributed

14.	Industry and commerce	Bruce	4 September 1926	Not carried (43.50%)	No arguments distributed
15.	Essential services	Bruce	4 September 1926	Not carried (42.80%)	No arguments distributed
16.	State debts	Bruce	17 November 1928	Carried (74.30%)	No arguments distributed
17.	Aviation	Lyons	6 March 1937	Not carried (53.56%)	Arguments distributed
18.	Marketing	Lyons	6 March 1937	Not carried (36.26%)	Arguments distributed
19.	Post-war reconstruction and democratic rights	Curtin	19 August 1944	Not carried (45.99%)	Arguments distributed
20.	Social services	Chifley	28 September 1946	Carried (54.39%)	Arguments distributed
21.	Organised marketing of primary products	Chifley	28 September 1946	Not carried (50.57%)	Arguments distributed
22.	Industrial employment	Chifley	28 September 1946	Not carried (50.30%)	Arguments distributed
23.	Rents and prices	Chifley	29 May 1948	Not carried (40.66%)	Arguments distributed
24.	Powers to deal with communists and communism	Menzies	22 September 1951	Not carried (49.44%)	Arguments distributed
25.	Parliament	Holt	27 May 1967	Not carried (40.25%)	Arguments distributed
26.	Aboriginals	Holt	27 May 1967	Carried 90.77	Only a Yes case
27.	Prices	Whitlam	8 December 1973	Not carried (43.81%)	Arguments distributed
28.	Incomes	Whitlam	8 December 1973	Not carried (34.42%)	Arguments distributed
29.	Simultaneous elections	Whitlam	18 May 1974	Not carried (48.30%)	Arguments distributed
30.	Mode of altering the Constitution	Whitlam	18 May 1974	Not carried (47.99%)	Arguments distributed
31.	Democratic elections	Whitlam	18 May 1974	Not carried (47.20%)	Arguments distributed
32.	Local government bodies	Whitlam	18 May 1974	Not carried (46.85%)	Arguments distributed
33.	Simultaneous elections	Fraser	21 May 1977	Not carried (62.22%)	Arguments distributed
34.	Senate casual vacancies	Fraser	21 May 1977	Carried (73.32%)	Only a Yes case
35.	Referendums-Territories	Fraser	21 May 1977	Carried (77.72%)	Only a Yes case
36.	Retirement of judges	Fraser	21 May 1977	Carried (80.10%)	Only a Yes case
37.	Terms of Senators	Hawke	1 December 1984	Not carried (50.76%)	Arguments distributed
38.	Interchange of powers	Hawke	1 December	Not carried	Arguments

			1984	(47.20%)	distributed
39.	Parliamentary terms	Hawke	3 September 1988	Not carried (32.92%)	Arguments distributed
40.	Fair elections	Hawke	3 September 1988	Not carried (37.60%)	Arguments distributed
41.	Local government	Hawke	3 September 1988	Not carried (33.62%)	Arguments distributed
42.	Rights and freedoms	Hawke	3 September 1988	Not carried (30.79%)	Arguments distributed
43.	Republic	Howard	6 November 1999	Not carried (45.13%)	Arguments distributed
44.	Preamble	Howard	6 November 1999	Not carried (39.34%)	Arguments distributed

Those in bold were successfully passed.



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