SUBMISSION from AUSTRALIANS FOR CONSTITUTIONAL MONARCHY TO THE STANDING COMMITTEE ON SOCIAL POLICY AND LEGAL AFFAIRS

INQUIRY INTO THE 2019-20 ANNUAL REPORT OF THE ATTORNEY-GENERAL'S DEPARTMENT, HAVING PARTICULAR REGARD TO CONSTITUTIONAL REFORM AND REFERENDUMS.

PART A: INTRODUCTION & SUMMARY

1.The House of Representatives Standing Committee on Social Policy and Legal Affairs has decided to examine the 2019-20 Annual Report of the Attorney-General's Department. In doing so, the Committee will inquire into and report on constitutional reform and referendums, having particular regard to:

1. opportunities to improve public awareness and education about the Australian Constitution.
2. suggestions for mechanisms to review the Australian Constitution and for community consultation on any proposed amendments before they are put to a referendum.
3. the effectiveness of the arrangements for the conduct of referendums set out in the *Referendum (Machinery Provisions) Act 1984* and the need for any amendments; and
4. any other related matters.

2. AUSTRALIANS FOR CONSTITUTIONAL MONARCHY (ACM) was the principal organisation conducting the VOTE NO case in the 1999 Republic referendum. On the basis of votes received

in the Constitutional Convention election, ACM was appointed to eight seats on VOTE NO COMMITTEE.

3. ACM made two submissions, submission 16 and 16 A, to the previous inquiry by Legal and Constitutional Affairs Committee, the ’s 2009 Machinery of Referendums Inquiry.

4. ACM proposes **(PART B — THE YES/NO BOOKLET — AN UNBRIDLED SUCCESS: EVERY ELECTOR SHOULD BE ENTITLED TO A PERSONAL COPY)** that the *Referendum (Machinery Provisions) Act 1984* (the “Act”) be amended to return to the requirement that a copy of the VOTE YES/NO booklet be posted to every registered voter.

5. ACM proposes **(PART C —EQUAL FUNDING FOR YES & NO CASES)** that to ensure that wealthy and powerful interests not enjoy too great an advantage, equal public funding based on a statutory ormula be provided for the Yes and No cases.

6. ACM proposes **(PART D— COUNTING REFERENDUM RESULTS SHOULD FOLLOW THE CLEAR WORDS OF THE CONSTITUTION)** that the Act be amended to provide that the total number of ‘electors voting ‘ in section 128 of the Constitution include those voting informally.

7. ACM proposes **(PART E— NO CIRCUMVENTING THE REFERENDUM)** that the Act be amended to provide that in seeking any vote by the electorate on the Constitution, the government be required to proceed only in accordance with and under the terms of section 128 so that proposed changes are on the table, that is, revealed, before and not after the vote.

8. ACM proposes **(PART F—TIME FOR A PEOPLE’S CONSTITUTIONAL CONVENTION UNDER A SECOND COROWA PLAN)**
that a Convention, the first in well over a century, be elected to review the Constitution with the final recommendations be put to the people in referendums following the process under which we federated, the Corowa Plan. This would be a second Corowa Plan

9. ACM **(PART G— ALLOW AUSTRALIANS TO INITIATE REFERENDUMS—LIKE THE SWISS)** that the people be allowed to initiate referendums to change the Constitution just as the Swiss people can. We also suggest a way for the states to initiate referendums too.

PART B: THE YES/NO BOOKLET AN UNBRIDLED SUCCESS — EVERY ELECTOR SHOULD BE ENTITLED TO A PERSONAL COPY

1.ACM submits the Act be amended to return to the requirement that a copy of the VOTE YES/NO booklet be posted to every registered voter. Material addressed to 'the householder' or some similar vague addressee is likely to be thrown out unopened, especially in shared households. We believe it is the democratic right of every Australian to see, read and if they wish, study their copy of the Yes and No cases.

2 ACM submits that the provisions of the Act in relation to the size and authorisation of the YES and NO arguments, which have worked so well, be retained, especially the maximum size, not more than 2,000 words.

3. The arguments should continue to be available in print, a portable and permanent form which best allows close study, understanding and consideration of the points made. This has been, for good reason. a feature of Australian political life for close on one century. As Prime Minister Rt Hon Andrew Fisher warned when speaking to the bill:

'' There can be nothing worse for a country than to expect the people in it to vote for or against the alteration of the constitution without knowing what they are doing."[i]

4. The Attorney General, the Hon. William Morris Hughes, said the measure was based

"…upon sound common sense. The people will naturally want

to know why the Constitutional Alteration Bills have been introduced… they will be quite unable to ascertain that by attending public meetings because on the platform the honourable member for Bathurst and I will say a number of most interesting things that have no relation whatever to those Bills. Under this measure it is proposed to tell them the plain facts of the case, as set forth by each side." [ii]

5. Since those days there has been disappointment in some circles as to the reluctance of Australians to approve proposals for constitutional change. Eight out of forty-four proposed laws to change the constitution have been approved. Some of those defeated would no longer be needed by those who would expand central power; changes in constitutional interpretation by the High Court have made them unnecessary.

But there is of course no objective rate at which referendums should be approved. As Mrs Sophie Mirabella MP observed in a question addressed to Professor Williams in the Roundtable which preceded the previous inquiry:

"You referred to statistics leading to a drought of constitutional referenda. What objective analysis says there is an ideal number of constitutional referenda? Farmers know what a drought is in an agricultural sense, but in a political-legal sense how do we know what the ideal number is? What is the formula? Is there an ideal number?"[iii]

6. It has been common to disparage the Australian Constitution as being a " horse and buggy " document. But few Americans would so disparage theirs, although theirs is twice as old. And the rate of constitutional change in the US is not vastly divergent from ours if we except the Bill of Rights. That our Constitution has lasted so long is not a criticism. Indeed, it is one of the few constitutions which has been so successful and lasted so long, surely an indication of quality rare in the world.

7. Anecdotal evidence is sometimes advanced that the Yes/No booklet is little read. At the Roundtable referred to above, Professor Williams said:

"I remember that when the republic referendum was put I asked my class of about 150 constitutional law students which of them had read the 71-page booklet. Not one of those students indicated that they had read the booklet from back to front. If you cannot get students who are studying the topic interested in reading the information, what hope is there that other electors will actually read it? It is a failed education process; it clearly needs reform."[iv]

8.The fact that students in a university law school had not read the 1999 Yes/No booklet may well reflect the students' other priorities and pressures especially when the referendum was held in or close to examinations with some polling indicating a level of disinterest among the young in republican change. In any event, a class of constitutional law students is not a sample representative of the Australian population and hardly a justification for the removal of a time-honoured democratic practice or any public policy measures.

9. Indeed anecdotal evidence from talk back radio suggests that the last Yes/No booklet was read by interested electors. The point surely is that in a democracy, the principal arguments should be easily accessible to all. In the absence of evidence of a better way to communicate, and of providing electors with a ready reference, it is difficult to understand calls for the abolition of the right of electors to see and retain a summary of the principal Yes and No arguments advanced and approved by their representatives.

10.The Australian Electoral Commission submission to the 2009 inquiry revealed that a survey on the eve of the 1999 referendum found that 80% of respondents said they had received the booklet with 51% reading some or all of it. Further Mr. Julian Leeser (now an MP) told the Roundtable referred to above about polling undertaken by the 1999 Vote NO Committee:

"We did some polling research in relation to this in May of 1999, and 45 per cent of people at that time indicated that they wanted more information. Interestingly, 78 per cent of people wanted information delivered in booklet form directly

addressed to them at their home, and another 78 per cent of people also wanted to see information on television."[v]

12. Some participants at the Roundtable attacked the republic referendum No case,[vi] in particular, as a "disgrace". One could allege the same about any political debate; much depends on the political views of the accuser. The point that the arguments in the Yes/No booklet have been approved by the very representatives who introduced, spoke and voted on the proposed law is too often overlooked by critics. 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. Above all it would be undemocratic if the people were not to have these in a concise form to which they may such recourse as they wish or if the Yes and No arguments were to be written by some allegedly independent commission.
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13. The fact is the truth is more likely to emerge from an adversarial process such as that encouraged by the Yes/No booklet. As Milton once observed:" "Let Truth and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter."[vii] In a democracy we should have confidence in the good sense of the Australian people, and their ability to discern which argument they find most persuasive.

14. There will be some who will say the electors will receive all of the political arguments on both sides through the media. This view was in fact put to the Parliament in 1912.[viii]
But Mr Charlton disagreed:

"We know from experience, however, that the press do not put the true position before the electors of Australia. I do not blame the press. They have a certain policy to support and they are entitled to do the best thing for their own side. But as representatives of the people we should not permit only one side - and in some cases no side at all- to be put before the people. The only way out of the difficult is, I think, to print as is

proposed, a statement for and against the proposed amendments."[ix]

16. In the 1999 republic referendum, the mainstream media failed to a significant degree to present the news objectively. That is before we look at comment and opinion, where the media were overwhelming oriented to one side. As the eminent former British editor Lord Deedes observed: "I have rarely attended elections in any country, certainly not a democratic one, in which the newspapers have displayed more shameless bias. One and all, they determined that Australians should have a republic and they used every device towards that end.[x]

17. Sir David Smith observed that while the media "occasionally published articles and letters to the editor contributed by supporters of a "No" vote… there was no attempt at anything approaching balance, and supporters of a "Yes" vote were given open slather, as also were the journalists themselves and their editors. For example, when former Governor-General Sir Zelman Cowen and former Chief Justice Sir Anthony Mason signed an open letter for the republic, it was published on page 1 of *The Australian*. The open letter in reply, signed by, amongst others, former Governor- General Bill Hayden and former Chief Justice Sir Harry Gibbs, was published on page 10…". He added "This media campaign was so insidious, even intimidating, that our research revealed that, out in the community, while "Yes" voters seemed always ready to declare their voting intentions, "No" voters did not want other people to know how they intended to vote."."[xi]

Dr Nancy Stone has provided a scientific analysis of two outlets -"serious newspapers" from which one would have expected better.[xii]

PART C: EQUAL FUNDING FOR YES & NO CASES

1. ACM proposes that to ensure that powerful wealthy interests not enjoy too great an advantage, equal public

funding be provided for the Yes and No cases.

2. ACM proposes that the total amount of such funding be be the equivalent of one third of the funds made available in election funding for the political parties by the Australian Electoral Commission for the federal election immediately prior to the referendum.

3. We estimate that this would be about $10 million for each side if a referendum were to be held now.

4. This would be for media advertising and polling research to be administered by a committee appointed by the Vote Yes and Vote No MPs but where a referendum is proposed by a convention (see below) then the convention would appoint the committees. Where a referendum follows an initiative (see below), the proponents of the initiative should appoint the Vote Yes Committee and those Senators who at the time the initiative is proposed register themselves with the AEC as opponents of the initiative should appoint the Vote No Committee. But is there are no such Senators the task should be fulfilled by the President of the Senate.

5. In the 1999 republican referendum, the Commonwealth funded the official campaigns for the Yes and No cases. Committees were appointed to manage the funding in accordance with strict accounting requirements. These campaigns could not begin until one month before the vote, and the blackout on electronic media advertising applied. Both requirements advantaged the better funded Australian Republican Movement. The constitutional monarchists cannot and do not complain about that. But at least both sides in 1999 had recourse to public funding. This is consistent with the public funding of elections.

6. There are good arguments against the public funding of elections. But while elections are publicly funded, it would be inconsistent not to fund referendum campaigns. As a result of the public funding of elections, the voters expect a certain level of advertising and the impact of each individual

advertisement tends to be less than when advertising was less frequent. To create the necessary impact over the natural resistance that viewers have developed as a defence to the onslaught of political advertising in elections, there is a need to similarly enlarge campaign advertising about a referendum

7. The solution is either to abandon the public funding of elections, or to extend this to referendums.

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8.We suggest one change from the process adopted in 1999. Both Committees were required to submit their advertising material and their strategies to the Ministerial Council on Government Communications for approval. To avoid any leak of material which should obviously be confidential, and which we are informed occurred in 1999[xiii], we suggest that the Auditor General should exercise appropriate surveillance over these matters rather than the Ministerial Council.

PART D— COUNTING REFERENDUM RESULTS SHOULD FOLLOW THE CLEAR WORDS OF THE CONSTITUTION

1. ACM argues that the method adopted hitherto in counting results in referendums, no doubt done in good faith, is nevertheless not consistent with the Constitution.

2.The relevant part of section 128 provides: "And if in the majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the *electors voting* also approve the proposed law, it shall be presented to the Governor-General for the Queen's Assent."

3. For the purposes of this submission, the key words then are "*electors voting*." The current practice is to treat only those voting Yes or voting No as "*electors voting*". We submit that the clear meaning of the section is that the number of "*electors voting* " includes those who voted, whether or not those votes are formal or informal, or indeed are deemed to be formal by the application of nothing more than administrative fiat.[xiv]

5.We submit that the Act should provide that in counting in the results of a referendum, the number of *electors voting* shall include those deemed to have cast informal as well as formal votes.

6.This conclusion is supported by the opinion of the distinguished judge, Hon Kenneth Handley QC, in a conference paper delivered in 2002.[xv]

7.Mr Handley refers in support to the Constitution of Switzerland at the time when our Founding Fathers drafted Section 128 based on the Swiss referendum. He also cites a precedent, apparently still the only one available, a decision of the Scottish Court of Session, *Latham* v. *Glasgow Corporation*.[xvi]

8.Sir David Smith argues that the error in declaring an elector who casts what is deemed to be an informal vote as not voting may have led the Australian Electoral Commission into a degree of artificiality in trying to declare questionable votes to be formal. He says:

"Shortly before the referendum, the Electoral Commission issued a booklet called *Guidelines to Scrutineers*. Amongst other things, it contained instructions as to what would constitute a formal vote. Examples of formal "Yes" votes, apart from the word "Yes", included the letter "Y" and the words "OK", "Sure", and "Definitely". Examples of formal "No" votes, apart from the word "No", included the Setter "N" and the words "Never" and "Definitely not". In addition, scrutineers were instructed that a tick would be accepted as a valid "Yes" vote but that a cross would not be treated as a valid "No" vote and would be treated as an informal vote. To compound this extraordinary ruling, the word "No" crossed out and "Yes" or a tick written above it would constitute a formal "Yes" vote, and the word "Yes" crossed out and "No" written above it would constitute a formal "No" vote. Of course, scrutineers would have no way of knowing whether the alteration had occurred while the ballot paper was still in the hands of the voter or afterwards."[xvii]

He adds: "Having identified seven ways of saying "Yes" without using the word, and only four ways of saying "No" without using the word, the Electoral Commission then gave the following instruction to scrutineers."

"In other words," Sir David continues, "the validity of a particular vote could be dependent upon the linguistic skills, or the imagination, of each individual electoral official. These instructions must surely represent the most adventurous administrative interpretation one could ever hope to see of the simple legislative requirement to write "Yes" or "No" on a ballot paper."

Before the referendum, ACM proposed to the Australian Electoral Commission that they change their practice of not including informal votes in calculating the number of electors voting . The AEC declined.

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PART E CIRCUMVENTING THE REFERENDUM

1.ACM proposes the Act be amended to provide that in seeking any vote by the electorate on the Constitution, the Commonwealth government be required to proceed only in accordance with and under the terms of section 128 so that proposed changes are always on the table, that is revealed, well before and not after the vote.

2. This is because the Constitution envisages one way and only one way for the Constitution to be amended. The Founders were well aware of the use, indeed the misuse, of "blank cheque" plebiscites by governments in the nineteenth century where a question only, designed by a regime’s "spin doctors", is presented to the people. This was a regular feature of various French regimes in the nineteenth and late eighteenth centuries, particularly by Napoleon 1 and Napoleon III. The Founders deliberately and carefully chose the Swiss style referendum te where the details of constitutional change are on the table before, and not after, the vote.

3. This provision would prevent a government from seeking a vote of no confidence in our Constitution while keeping secret the detail of any changes or not even agreeing on what the changes should be. The serious danger is that if a plebiscite question were passed on some fundamental issue, it could create years of constitutional instability with no guarantee that change would eventually be adopted.

5.It is difficult to conceive of a more irresponsible way to affect constitutional change. But it has been seriously and repeatedly proposed to circumvent the very clear rejection by the people in 1999 of the republican referendum.

6.This was said to be justified because of three myths, that John Howard manipulated the Convention, the referendum model and the referendum question.
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PART F— TIME FOR A PEOPLE'S CONSTITUTIONAL CONVENTION UNDER A SECOND COROWA PLAN

1.Bearing in mind that Australia only federated as a result of the Corowa Plan for an elected convention and referendums, and that the Constitution has not been reviewed by such a convention since its adoption, ACM proposes that a Convention of unpaid delegates (with none endorsed by a registered political party) from each state and territory be elected. We suggest this be in the proportions provided for a joint sitting in section 57 of the Constitution and the Convention have a brief to review the Constitution over a period of between one and two years to be effected under a new Corowa Plan.

There would be provision for official and nominated delegates as there were for the 1998 Constitutional Convention, but we propose they be non-voting.

As under the first Corowa Plan, draft recommendations would be released for public and parliamentary consultation before final recommendations were adopted. When the final recommendations were released, we propose there be a commitment by the government, opposition and cross bench

that those recommendations would be put within three months to the Australian people in the form of a referendum under section 128 of the constitution.

Such conventions should be elected periodically, say, every decade.

PART G— ALLOW AUSTRALIANS TO INITIATE REFERENDUMS—JUST LIKE THE SWISS. (THE STATES TOO)

1.ACM argues that experience indicates that granting a monopoly to the Federal Parliament, or one House thereof, explains why most referendums proposed have been to centralise even more power in Canberra.

2. Accordingly, ACM proposes an alternative path to a referendum. Under this section 128 of the Constitution would be amended to allow for a referendum in the form of a question and a bill to be initiated by a petition approved by 10 per cent of electors nationally and five percent in a majority of states. ACM proposes that the signatures be obtained over one year.

3. If defeated, we suggest that no question in identical or substantively similar terms could be put again until ten years had elapsed.

4. ACM also proposes that any four houses of any State Parliaments be also entitled by identical resolutions adopted over one year to initiate a referendum.

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[i] House of Representatives, 16 September, 1912, 7156

[ii] House of Representatives, 16 September, 1912, 7153
[iii] House of Representatives, Standing Committee on Legal and Constitutional Affairs (Roundtable)
Reference: Constitutional Reform, 1 May 2008
[iv] House of Representatives, Standing Committee on Legal and Constitutional Affairs (Roundtable)
Reference: Constitutional Reform, 1 May 2008
[v] Loc cit.
[vi] The first draft was written by ACM National Convenor Professor David Flint
[vii] John Milton, "Aeropagitica," 1644
[viii] House of Representatives, 16 September, 1912,7158

[ix] House of Representatives, 16 September, 1912,
[x] The Daily Telegraph (London), 8 November, 1999.

[xi] Sir David Smith, "The Referendum: A Post-Mortem", Proceedings of the Sir Samuel Griffith Society, 2000, Volume 12, Chapter 7
[xii] Dr Nancy Stone "The Referendum Debate: A Note on Press Coverage," Proceedings of the Sir Samuel Griffith Society, 2000, Volume 12, Chapter 9,
[xiii] Sir David Smith,op cit
[xiv] Sir David Smith, op cit
[xv] K.Handley, "When "Maybe" means 'No'", Proceedings of the Sir Samuel Griffith Society, 2002, Volume 14, Chapter 3
[xvi] [1921] SLR 501
[xvii] Sir David Smith, op cit