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Submission

on

The Machinery of Referendums

to the

Standing Committee on Legal and Constitutional Affairs

House of Representatives

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by

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TABLE OF CONTENTS

1. Introduction

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 House of Representatives Standing Committee on Legal and Constitutional Affairs to inquire into and report into the machinery of referendums.

The terms of reference for the inquiry require the Committee 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:

    a) Processes for preparing the Yes and No cases for referendum questions;

    b) Provisions providing the public dissemination of the Yes and No cases; and

    c) 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.

3. Any other federal provisions relevant to terms 1 and 2 above, as the Committee considers appropriate.

The Committee has called for interested persons and organisations to make submissions addressing the terms of reference by Friday 9 October 2009.

2. Preparing the Yes and No cases

Section 11 of the *Referendum (Machinery Provisions) Act 1984* entrusts the authorisation of arguments, respectively for and against the proposed law, consisting of not more than 2,000 words each, to a majority of those members of the Parliament who voted respectively for and against the proposed law and who desire to forward such an argument.

Some criticisms of this provision have been made.

There are anecdotal claims that these arguments are not read by the voters. Professor George Williams reports that "*when the republic referendum was put*" he asked his "*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* [sic]."[1]

However, none of the participants in the House of Representatives Legal and Constitutional Affairs Committee's Roundtable on Constitutional Reform was able to direct the committee to "*any empirical data about the use of or effectiveness of the yes/no cases*".[2]

Professor Cheryl Saunders claims that "*The booklets are very, very difficult to understand and indeed very often the yes and no cases contradict each other. So you have to ask yourself, 'What is the purpose of those booklets?* "[3]

However, Professor David Flint points out that "*the yes/no case must be contradictory ... that is the whole point of it*"[4] and Professor Saunders admits that *"If you want to give both sides of the argument a fair chance to state their position then that is what the yes/no case does.*"[5]

Professor Lesley Zines thinks "*the yes and no cases have sometimes been an absolute disgrace. If you look back into the past, particularly the no but also the yes cases have often just been pretty scurrilous political tracts. That has often been the case where perhaps only a minority of people in the parliament are opposed to it. There have also been other occasions in which the public could not possibly get a clear, objective view as to what the issues were about. That is because it is left to those persons in the House who are opposed or in favour of it to draft them.*"[6]

Professor Anthony Blackshield agrees that "*the yes case is often equally disgraceful; it is written by some soap advertising agency and it totally fails to convey the point of the referendum.* He suggests that "*Ideally, it would be nice to take that process entirely out of the hands of the politicians and give it to some objective body to draft the yes and no cases.*"[7]

Dr Anne Twomey mentions that in New South Wales there are no legislative requirements for a Yes/No case to be presented to electors but that for referendums for constitutional reform the Yes/No "*case is prepared by public servants and usually vetted by relevant experts to ensure its fairness*"[8]

However, Professor Zines sees "*great difficulties in suggesting there should be some sort of objective tribunal because the issues can be highly political*"[9] and Professor David Flint points out that any body "*who would purport to be objective*" in fact "*would have the same prejudices as members of parliament*".[10]

Professor Flint concludes that *"the yes/no case should be written by those who are responsible for it—that is, the members of parliament. They are the ones we rely on in elections to put out their agendas and so on. I think it is perfectly proper and appropriate to have them write the yes/no case*".

None of the arguments against the current provisions for the preparation of the Yes and No cases are persuasive. Professor Flint's observation that any supposedly objective body or group of experts will have their own prejudices is surely correct. It is more in accord with democratic procedures to allow the proponents of each side of an argument to write their own case, possibly with the assistance of the parliamentary library and staff.

A referendum cannot be put to the people unless it has been duly passed by at least one house of parliament. Those members of the Parliament who voted for the passage of the bill are surely capable of putting the argument for the Yes case to the people. Likewise those members of the Parliament who voted against the passage of the bill are surely capable of putting the argument for the No case to the people. It is quite extraordinary to claim that the people's representatives are incapable of communicating to the people an argument in support of or against a proposed amendment to the Constitution.

Recommendation 1:

The provisions of Section 11 of the* Referendum (Machinery Provisions) Act 1984 *relating to the preparation of arguments in favour of and against a referendum proposal should be retained without change.

3. Statement of textual change to the Constitution

Section 11 of the Act also requires the Electoral Commissioner to "*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.*"

Professor Blackshield claims that "*the full text of the proposed alteration*" will be "*for many people ... unintelligible.*" He grudgingly admits "*I suppose it has to be in there, but it needs to be more clearly explained.*"[11]

The inclusion of the "*the textual alterations and additions proposed to be made to the Constitution*" is essential. It is insulting to the electors to assert that they are not capable of understanding this information. Of course, it may need further explanation, but it is surely part of the task for those composing the arguments for and against the proposition to explain from their perspective what the actual change is and what this means in the context of the Constitution.

Recommendation 2:

The requirement to include in a pamphlet to be printed and to be posted to each elector by the Electoral Commission "a statement showing the textual alterations and additions proposed to be made to the Constitution" should be retained.

4. Public dissemination of the Yes and No cases

As stated above, Section 11 of the Act also requires the Electoral Commissioner to "*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.*"

The requirement for the Electoral Commissioner to post such a pamphlet is an important provision to ensure that each elector has the opportunity to read the Yes and No cases and to see the textual changes to the Constitution that the referendum would bring about if successful. Of course, the onus is on each elector to take this opportunity. It may be true that many electors do not read the pamphlet "from back to front" as Professor George Williams reports of his constitutional law students.[12] However, some electors no doubt do at least read part of the pamphlet. Some may even read it in the more customary fashion – front to back. However, it is certainly true that if the pamphlet is not posted to every elector but, say, available only on request or on the internet, even fewer will read it.

If the Yes and No case, along with the textual alterations proposed to the Constitution are not widely distributed, there is more danger that a referendum will become more like a plebiscite, in the sense of a vote on a general idea rather than a vote on a specific proposal to textually alter the Constitution.

One of the strengths of the Constitution is the requirement for the people to vote on any proposed change to the actual text of the Constitution rather than give in-principle approval to some vague idea for change through a plebiscite and leave it to the parliamentary majority to determine the precise textual change.

Recommendation 3:

The requirement for the Electoral Commissioner to "cause 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" should be retained.

There is no doubt that Australians are increasingly using the internet and other means of electronic communication. It may be timely to amend the Act to specifically require the posting of the same text as required in the pamphlet – that is the Yes and No cases along with a statement showing the textual changes to be made to the Constitution – on the internet. This would usefully supplement the requirement to post a pamphlet to each elector and perhaps reach some electors who are less inclined to open and read mail than to look at material on the internet.

Recommendation 4:

Section 11 should be amended to add a requirement for the Electoral Commissioner to cause to be published on the internet the same matter as is required to be contained in the pamphlet to be posted to electors. The internet version should be in formats suitable for reading online, for downloading and for printing.

5. Expenditure on referendum questions

Section 11 (4) of the Act currently provides that:

> *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.

Section 11 (4) (aa) – (ac) allow expenditure on the preparation, distribution or publication by or on behalf of the Electoral Commissioner of translations and presentations in forms suitable for the visually impaired of the official pamphlet. These are appropriate provisions and allow the Electoral Commissioner wide discretion in this matter.

Section 11 (4) (b) is in very broad terms and allows the Electoral Commission considerable discretion in the provision of "*other information relating to, or relating to the effect of, the proposed law*". This would seem to allow, for example, abbreviated versions, or plain English versions, of the Yes and No cases to be prepared, distributed and published by the Electoral Commissioner as he saw fit.

There doesn't seem to be any need for any further extension of the provisions for allowable expenditure on the referendum arguments by the Electoral Commissioner.

Any further extension could allow expenditure by the Commonwealth on activities carried out by other persons or agencies than the Electoral Commissioner. 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.

In preparation for the 1999 referendums to alter the Constitution to establish the Commonwealth of Australia as a republic and to insert a preamble in the Constitution, Section 4 of the *Referendum Legislation Amendment Act 1999* provided that Section 11 (4) did not apply so as to prevent

Commonwealth expenditure "in respect of things done during 1999 (whether or not by the Commonwealth) in connection with either of" those proposed laws.

In his second reading speech on the *Referendum Legislation Amendment Bill 1999* the Hon Daryl Williams explained that the purpose of this temporary exclusion of the operation of Section 11 (4) of the Act was to allow the government to "*make available $15 million for national campaigns to promote the arguments for and against the republic model put at the referendum.*"

He said "*Two committees have been appointed by the government to manage the campaigns, both drawn from delegates to the 1998 Constitutional Convention. One includes delegates who support change in line with the convention's preferred model and the other delegates who oppose it. The government is conscious that the republic issue should not be one for politicians alone. The convention delegates are a broadly representative group with a high public standing on the republic issue.*

"Each committee will plan its own campaign and manage expenditure of up to $7.5 million. The committee will develop advertisements to be run through media outlets of their choice in the three to four weeks before the referendum, which is likely to be held in November. The advertisements will be placed through government processes, but the government's checks will be limited to ensuring that the proposed advertisements do not infringe statutory requirements or accepted standards for advertising.

"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."[13]

This approach was supported by the Labor opposition as well as the government. Mr McClelland said:

"*I am pleased to say that the opposition is fully supportive of the amendments to the Referendum Legislation Amendment Bill 1999. Essentially, the bill is to overcome a hurdle that exists in section 11(4) of the primary act which prevents the government from spending money on promoting anything other than a formal yes or no campaign in a referendum. In order to spend the amount of money which the government has indicated—some $15 million—for two committees to present arguments in favour of and opposed to the referendum questions that will take place later in the year, it is necessary to overcome that impediment. Similarly, the government has indicated its intention to spend some $4½ million to conduct an education campaign about our system of government generally to Australians. We think that expenditure is also appropriate and hence we support the bill.*"[14]

It seems preferable to adopt a similar approach to any future referendums where there is a bipartisan view that additional Commonwealth expenditure outside that permitted under Section 11 (4) of the Act is considered desirable. That is to make such provision by way of a specific and limited exemption from the operation of Section 11 (4) in relation to a specific referendum or referendums.

There is no justification for a more general expansion of how the Commonwealth may expend money "*in respect of the presentation of the argument in favour of, or the argument against, a proposed law*" to change the Constitution.

Recommendation 5;

There should be no change to Section 11 (4) of the Act but that for any future referendum on which there is bipartisan agreement in favour of additional Commonwealth expenditure in respect of the presentation of the argument in favour of, or the argument against, a proposed law to change the Constitution that specific and limited legislation be passed at that time.

6. Endnotes

1. *Official Committee Hansard*, House Of Representatives Standing Committee On Legal And Constitutional Affairs, (Roundtable), Reference: Constitutional Reform, Thursday, 1 May 2008, p 5; http://www.aph.gov.au/hansard/reps/commttee/R10761.pdf

2. *Ibid.*, p 16.

3. *Ibid.*, p 8.

4. *Ibid.*, p 9.

5. *Ibid.*, p 17.

6. *Ibid.*, p 8.

7. *Ibid.*, p 11.

8. Twomey, Anne, *The Constitution of New South Wales*, Federation Press, 2004.

9. *Ibid.*, p 8.

10. *Ibid.*, p 16.

11. *Ibid.*, p 12.

12. *Ibid.*, p 5.

13. Williams, Hon D., *House of Representatives : Referendum Legislation Amendment Bill 1999, Second Reading Speech, Thursday, 11 March 1999*; http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/1999-03-11/0069/hansard_frag.pdf;fileType%3Dapplication%2Fpdf

14. McClelland, M., *House of Representatives :Referendum Legislation Amendment Bill 1999, Second Reading Speech, Tuesday, 23 March 1999*; http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/1999-03-11/0069/hansard_frag.pdf;fileType%3Dapplication%2Fpdf