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Dear Ms Bryant

Re: Machinery of Referendums Inquiry

I have taken the opportunity to discuss the issues relating to the inquiry with a number of the constitutional lawyers at Adelaide Law School. This group comprises:

Gabrielle Appleby, Lecturer in Law
Professor Geoffrey Lindell
Professor Rosemary Owens
Associate Professor Alexander Reilly
Matthew Stubbs, Lecturer in Law
Professor John Williams

We have prepared a brief joint submission which is appended to this letter.

We would welcome the opportunity to discuss further matters relating to the Machinery of Referendums Inquiry if we are able to be of further assistance.

Yours faithfully

PROFESSOR ROSEMARY OWENS
DEAN OF LAW
on behalf of a group of six academic constitutional lawyers at Adelaide Law School

Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs

Machinery of Referendums Inquiry

Q1 The effectiveness of the *Referendum (Machinery Provisions) Act 1984* (Cth) in providing an appropriate framework for the conduct of referendums, with reference to

a. **Processes for preparing the Yes and No cases for referendum questions**
b. **Provisions providing for the public dissemination of the Yes and No cases**
c. **Limitations on the purposes for which money can be spent in relation to the referendum questions**

Guiding Principles

It is our submission that the guiding principle for any alterations to the procedure for the conduct of referendums should be that they increase 'deliberative democracy', that is that they 'maximize public deliberation' and 'minimise partisan deception.' The goal must be to bring greater transparency and contestability. (This is a point also made by John Uhr in 'After the Referendum: The Future of Constitutional Change' (2000) 11 *Public Law Review* 7, 7.)

To further the above guiding principle, we make three main points in this submission.

First, that the *Referendum (Machinery Provisions) Act 1984* (Cth) be amended so that full use is able to be made of new technologies in the dissemination of information regarding the proposed law to be put to the vote at a referendum. For instance, we would suggest that there be a web page in which can be posted all official information. It may be that other technologies, including SMS, facebook and twitter, can be of assistance in contacting individual voters. It may be that a televised presentation (by experts) would be of assistance. Because technologies develop with such great speed we submit that the form of words used in amending the legislation be as broad as possible to enable the adoption of new forms of technology as they are developed.

However, while suggesting that full use is made of new technologies we do not suggest that the old forms of communication should be abandoned. In particular, we continue to support strongly the posting of material to all electors. This postal communication is an important way of ensuring that material about the referendum can be accessed by all Australians. It enables all Australians to consider the material at a place and time convenient to them, and thereby enhances social inclusion.

Secondly, it is our submission that an independent panel of experts should be incorporated into the process for preparing the 'yes' and 'no' cases.

Thirdly, we think it is necessary to address the question that has been raised about the absence of a limitation on States' capacities to spend on campaigns even though such a limitation applies to the Commonwealth: see *Referendum Machinery of Provisions Act* sub-s 11(4) and Damien Freeman, 'Public Information Machinery and the 1999 Referenda' (1999) 10 *Public Law Review* 243.

The remainder of this submission is devoted to the elaboration of the last two issues.

Independent panel of experts

There are a number of reasons for giving a panel of independent experts a key role in the referendum process both in the preparation and dissemination of information relating the proposed law to be put at the referendum.

At present the way in which the 'yes' and 'no' cases are prepared adds an adversarial flavour to the whole process, 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 ensure that the Australian Constitution continues to serve all Australians in the best possible way.

The independent panel of experts should have the task of ensuring that all relevant information is presented in as objective way as possible. In the existing 'adversarial' process there is a risk that either side may over-state the implications of the passage of the proposed law. An independent panel would ensure that all relevant materials are included and presented in as objective a way as possible and, equally importantly, that no irrelevant materials are included and presented, and especially that no falsehoods are perpetuated.

The selection of the panel of experts will be very important. We suggest that the panel could be selected from the AEC together with other experts, including academics, or perhaps experts selected by the AEC. This would utilise the independent and impartial reputation of the Commission and avoid the necessity of partisan interests influencing the constitution of the panel.

However, it is not only content that is important for the objective presentation of the 'yes' and 'no' cases – the manner of presentation is also important in ensuring objectivity. When the pamphlets for the 'yes' and 'no' case in past referendums are examined it can be noted that the presentation of the two cases is often very different – not only in the way the arguments are presented, but also the length of the argument presented and even the typesetting selected. Were an independent panel to present the information for both the 'yes' and 'no' case many of these disparities could perhaps be eliminated and thus assist Australians to gain better access to the information and thereby to be better able to evaluate it for themselves.

The use of an independent panel to prepare both sides of the arguments relating to the proposed laws would also disengage the referendum process from the party political process to a greater extent than at present. Currently it is almost inevitable that the each of the 'yes' and 'no' cases are identified with support from one or other of the major political parties. The success of a referendum is likely to depend more on the view of one of the major political parties than anything else. While it is acknowledged that the various political parties will no doubt have a view in relation to any proposed referendum (evident especially in the passage of the proposed law through the Parliament), every effort should be made to ensure that Australians understand the difference between voting in a referendum which changes the Constitution governing everything (including the processes for selecting members of parliaments etc) and voting in an ordinary election, where the parties play a role in forming a Government for a limited term.

In our submission, political parties should have a minimal role to play in the dissemination of official referendum information. Political parties have ample opportunity to put a case for or against a referendum question, both in the Parliament in the passage of the referendum bill, and through various forms of public media outlets prior to the referendum. The Official yes and no cases serve a function, outside of partisan politics. Just as an independent body, the AEC, manages the electoral process independent of Parliament and political parties, so an independent body should manage official information regarding referenda.

While in most cases there will be arguments for and against a proposed law that may not always be the case. At present if there is no voice against the proposed law in Parliament then a 'no' case need not be prepared. However, as soon as there is one dissenting voice, the full operation of the existing provisions comes in to play. We submit that the legislation could be rephrased to reflect simply 'arguments' relating to the proposed law. An independent panel with responsibility for the preparation of the arguments could then also make an assessment of the appropriateness of the emphasis given to the various arguments. One suggestion that has been made previously by Enid Campbell in the 'Southey Memorial Lecture 1988: Changing the Constitution – Past and Future' (1989) 17 *University of Melbourne Law Review* 1, 16, is that the Government could put forward neutral information, in the form of an 'explanatory memorandum' to educate the voters. The suggestion in this paragraph in this submission presents a similar view. (Campbell also notes that if no MP votes 'No' against a proposed law, there can be no side put; however, if only one member voted 'No', the full operation of the provisions comes into play.)

The fact that a minority, perhaps single dissenting voice, in opposition to a constitutional change is given equal status as those proposing the change is itself an argument for moving beyond the simple 'yes' – 'no' approach. In other words the testing of quality and strength of the argument rather then the mere fact there is opposition should be the overall objective when formulating information for the public.

We acknowledge that the suggestion for incorporating an independent panel into the process for preparing and presenting the 'yes' and 'no' cases is not entirely new.

Colin Howard in *Australian Federal Constitutional Law* (3rd ed, LBC, 1985), 582, advocated for a panel of experts to either (1) eliminate grosser inaccuracies and irrelevancies in the cases prepared by the parliamentarians; or (2) to actually prepare the reports.

It is our submission that the independent panel should take on both roles. If the independent panel is restricted to eliminating grosser inaccuracies and irrelevancies, many of the advantages noted above will not be achieved. Furthermore, it is our submission that the independence of the panel must be paramount for the integrity of the process. If the independent panel only comments upon or 'vets' the draft cases prepared by parliamentarians who are advocates and opponents of the proposed legislation then it would be likely that the panel would be seen as engaged in party political controversy. For this reason it is desirable that the panel have primary responsibility for preparing the 'yes' and 'no' cases.

In 1985, the Constitutional Convention voted by 35:33 that Commonwealth funded material be circulated to all electors presented by an independent person nominated through Parliamentary process. Material would be developed in consultation with and subject to approval of parliamentarians for both cases. It is our submission that such a process could be made to work well without compromising the independence of the panel.

In 1999, a different process was trialed, which included amendments that suspended the operation of s 11 of the Act to allow for the Government to fund:

(1) two committees (one 'Yes' and one 'No') who were appointed from the Constitutional Commission

(2) an independent expert panel, chaired by Sir Ninian Stephen, which was mandated to direct a neutral public education campaign.

However, these amendments did not produce the educative campaign that had been hoped. The experience of the 1999 experiment should be noted, and because it did not fulfil the desired

outcome, different measures ought to be considered. It is our submission that the preparation of the cases for and against the proposed law and responsibility for preparing the educative materials should be incorporated in the one body.

We note that Damien Freeman, 'Public Information Machinery and the 1999 Referenda' (1999) 10 Public Law Review 243, suggested that the expert panel established in the 1999 referenda could have been utilised in a better manner. For instance, he suggested there could have been questions posed which then each 'case' had to answer. This would have the benefit of providing congruence between the two cases and so is important in relation to our point regarding the disparity between the two cases is something we have already noted. While we consider there may be some merit in this in relation to the preparation of material for some referendum, that may not always be the case and so we submit that some flexibility should be allowed to the panel in determining what is appropriate in the circumstances.

Restriction on Commonwealth expenditure of money

As indicated before, we feel it is necessary to address the one sided nature of the restriction placed on the Commonwealth but not the States on expending money for the promotion or opposition to proposals for altering the Constitution except for the preparation of 'yes 'and 'no' cases

Substantially the same restriction originated in a provision which the Senate passed as an amendment to the *Referendum (Constitution Alteration) Amendment Bill* 1983 (Cth) which the Parliament ultimately failed to pass because the House of Representatives refused to accept the amendment: see eg Parliamentary Debates (*Senate*) 6 – 7 December 1983 at pp 3306, 3368, 3370, 3380 and 15 December 1983 at pp 3916 - 3928. This occurred when the Government of the day proposed to spend public funds to promote the 'yes' case for proposed constitutional amendments approved by the Parliament because of the intention of at least two States to use State public funds to oppose those amendments. The same restriction later found its way - again as a result of a Senate amendment which this time the Government accepted with some reluctance - in the current *Referendum (Machinery Provisions) Act* 1984: see Parliamentary Debates *(Senate)* 7 June 1984 at p 2736, 2764 – 6, and 2842. The stated aim of the proponents of the restriction was to prevent public funding by the Commonwealth Government for constitutional referendum campaigns so as to ensure that no money should be expended by it in respect of the presentation of the argument for and against a proposed constitutional alteration other than through the 'yes' and 'no' cases: Parliamentary Debates (*Senate*)15 December 1983 at pp 3918-9 (Senator Durack).

Doubtless the existence of the restriction may be thought to prevent the Commonwealth using its financial resources to engage in party political propaganda. Its non – application to the States may perhaps be linked to the unequal advantage given to the Commonwealth Parliament in initiating proposals to alter the Constitution. However, it has historically been the case that the States have actively engaged in publicly funded arguments of one case or another, see, eg, Lynette Lenaz-Hoare, 'The History of the "Yes/No" Case in Federal Referendums, and a Suggestion for the Future in *Report to Standing Committee* (Australian Constitutional Convention Amendment Sub-Committee, 1984), 85. Further, the influence of political parties beyond a single jurisdiction means it is likely federal politics will influence any State action.

Whatever the justification for the existing restriction, if such a restriction is to be retained even in a residual form, we feel it should either:

- also apply to the States; or

- at the very least, ensure that it should not restrict the Commonwealth from expending money in reply to publicly funded campaigns initiated by the States arguing against the adoption of proposals for altering the Constitution which have been duly initiated and supported by the Commonwealth Parliament

Apart from creating a level playing field, the adoption of such a suggestion would, we feel, 'maximize public deliberation' without promoting 'partisan deception.'

Concluding remarks

Because there has been limited time available to prepare this submission we have not been able to explore more fully the processes and procedures relating to the conduct of referendums in other jurisdictions. However, it is our submission that in order to ensure that Australia adopts the best possible process, the practices adopted in other jurisdictions might usefully be examined by the Committee. The Commonwealth Attorney General's Department, 'Survey of Referendum Campaign Funding and Publicity Outside Australia' in *Report to Standing Committee* (Australian Constitutional Convention Amendment Sub-Committee, 1984), 94, provides a good overview of the approach in other countries, including Denmark, Ireland, United Kingdom, Scotland, Quebec and California. We suggest that this presents a good starting point for further research.

We trust the above submission may be of some assistance to the Committee. We would welcome the opportunity to discuss further matters relating to the Machinery of Referendums Inquiry if we are able to be of further assistance

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