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Ms Sharon Bryant
Acting Committee Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
Canberra, ACT, 2600

Dear Ms Bryant,

Please accept the following comments as my submission to the Committee's inquiry into the "Machinery of Referendums".

My comments are directed at three issues:

1. The formation of the Yes/No case.
2. The formation of the question asked on the referendum ballot.
3. The method of voting for referenda.

1. The formation of the Yes/No case

There has been significant debate about the effectiveness of the 'Yes/No case' pamphlet sent to all voters. It has been argued that it is ineffective because few people read it in its entirety. It has also been argued that the Yes/No case is usually inflammatory, often inaccurate and generally misleading. This is partly because those who draft the Yes/No cases are advocates of a particular position who are seeking to persuade voters to adopt that position, rather than persons who are attempting to inform voters about their choices.

Studies of voter behaviour in referenda show that while some voters are well informed about the issue and make the effort to become informed (being the ones who actually read the whole of the Yes/No cases), most voters take 'short-cuts' in deciding how to vote. These short-cuts usually involve reliance upon the views of trusted persons who (a) have knowledge about the issues (b) have common interests to the voter and (c) have an incentive to tell the truth (eg because of penalties for deceptive conduct or the risk of loss of reputation). These studies of voter behaviour also reveal that in taking these short-

cuts, voters usually end up making the same decision as they would have made if they were fully informed.¹

To be more effective, the ‘Yes/No case’ needs to cater for both groups of voters. It needs to provide the information and educational material that any voter would require in order to be able to make an informed choice – and it needs to do so in a clear and neutral manner. This should be the core of the information sent to voters.

In addition, the material sent to voters also needs to support those who seek a short-cut. It could do this by setting out short statements with respect to each case, which inform the voters of who is supporting the case and why. This could be based upon submissions made by the supporters of each case (be they Members of Parliament, organisations or others), but inaccurate and misleading statements should be excluded and the presentation of the arguments should be done in a neutral manner (eg same font, presentation and length). The point should be to ensure that voters who take short-cuts can rely upon the views of those who they trust, with confidence that they are not being misled.

In order to achieve this outcome, it would be preferable if the ‘Yes/No case’ (which might better be renamed as the ‘Referendum Explanation Guide’) were prepared by an independent body, established for that purpose, with a legal obligation to perform this function in a manner that is fair and neutral. Such an approach is taken in some other jurisdictions, such as British Columbia which established an independent Referendum Information Office to provide neutral information to voters with respect to its referendum on its voting system in March 2009 and Ireland which establishes a Referendum Commission to support referenda, such as the recently held referendum on the Lisbon Treaty.

The Irish example is a good one. The *Referendum Act 1998* (Ireland) provides for the establishment of a Referendum Commission prior to the holding of a referendum. It is to be comprised of a chairperson, who is a judge or former judge, nominated by the Chief Justice of the Supreme Court, and four ordinary members who are the ‘Comptroller and Auditor-General’, the Ombudsman and the Clerks of the two Houses of the Parliament. This body is required to prepare statements giving a general explanation of the issues involved in the referendum. It must also include the arguments for and against the referendum, and in doing so is to have regard to submissions made to it by the supporters and opponents of the referendum. It is a legal requirement that the statements ‘be fair to all interests concerned’. The determination of the composition of the Commission by reference to independent offices is intended to avoid accusations of bias in the appointment of the Commission. In Australia, an equivalent body could perhaps include the Electoral Commissioner, the Solicitor-General, the Ombudsman and the Auditor-General as well as a judge nominated by the Chief Justice of the High Court. The point is to ensure that voters may become genuinely informed, but that even if they choose to take short-cuts the information that they receive is still accurate and not misleading.

¹ For a full discussion of the various studies and experiments and their conclusions, see: A Lupia and R Johnston, ‘Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums’ in M Mendelsohn and A Pakin, *Referendum Democracy*, (Palgrave Macmillan, 2001), pp 191-230.

It should also be noted that Members of Parliament do not have a monopoly in Australia on the preparation of the ‘Yes/No case’. In New South Wales, for example, if there is a ‘Yes/No case’ it is prepared by public servants and then checked for accuracy and neutrality by independent persons. For example, from memory (and I no longer have access to the files about this), the ‘Yes/No case’ for the 1995 NSW referendum was vetted by Professor Pat Lane, amongst others. I do not recollect any allegations that the ‘Yes/No case’ was in any way biased or unfair. It should also be noted that referenda in New South Wales have a far higher success rate (approximately 85%) than those of the Commonwealth.² Whether this is in part a reflection of the less inflammatory ‘Yes/No case’ remains unclear.

2. The formation of the question asked on the referendum ballot

There has sometimes been controversy concerning the form in which the referendum question is asked on the ballot paper. The form of the question may be confusing³ or may be slanted to achieve a particular end. For example, there was controversy about the form of the question in the republic referendum in 1999, with a Joint Select Committee recommending that it be changed, and the Parliament changing it, but in a different manner to that recommended by the Committee.⁴ Another example occurred in New South Wales where voters were asked in 1995 to vote for a ‘Bill to require the Parliament of NSW to serve full four year terms and to prevent politicians calling early general elections or changing these new constitutional rules without a further referendum’. Pitched in those terms, it is no wonder that it passed (perhaps to the regret of some in NSW today). Note in particular the use of the slightly pejorative term ‘politicians’ rather than the formal term ‘Members of Parliament’ which is more commonly found in legislation.

The ballot question, at the Commonwealth level, is derived from the long title of the Bill (see Schedule 1, *Referendum (Machinery Provisions) Act* 1984). While it is only legislation that requires the question to be asked by reference to the long title of the amending Bill, section 128 of the Constitution requires that the ‘proposed law’ be submitted to the electors in a referendum. Accordingly, the question must in some way identify the proposed law and ensure that the electors are asked to ‘approve the proposed law’. It cannot be a general question that does not involve the voter in approving the ‘proposed law’ that has already been passed by both Houses of the Parliament (or one House only, under certain conditions). Hence, although it would be preferable for an independent body to determine the question to be asked, this must realistically be left to the Parliament to determine when it gives an identifying title (be it the short title or the long title) to a proposed law for the amendment of the Constitution.

² See further: A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) pp 320-321.

³ See, for example, the question asked in the Northern Territory Statehood Referendum in 1998 which was multi-faceted and left voters unclear as to whether they were voting only in relation to statehood or to approve a Constitution drafted in a particular form.

⁴ Joint Select Committee on the Republic Referendum, *Advisory report on: Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999*, (August 1999), pp 9-12.

3. The method of voting for referenda

From time to time the suggestion is raised that voting in referenda should be voluntary. The intention behind the suggestion is to leave voting to the informed (or at least those that have a view), rather than having the results of the referendum affected by those who simply vote 'no' because they do not know or care.

While I can see the point behind the argument, I do not support voluntary voting for referenda. It would run a high risk that referenda could be hijacked or manipulated by those who have the money to advertise and 'get out the vote', resulting potentially in outcomes that would be unacceptable to the majority of Australians. (This risk would be greater where a referendum was held separately from any election, but reduced if voters were required to attend polling places to vote in an election at the same time.)

There should be a duty imposed upon qualified citizens over 18 to submit a ballot paper and make an active choice. However, it should be made clear that a valid choice includes voting informally if a voter does not have a preference.

Yours sincerely,

Anne Twomey