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FACULTY OF LAW

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Committee Secretary
House Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

By email: laca.reps@aph.gov.au

Dear Secretary

Inquiry into the Machinery of Referendums

Thank you for the opportunity to make a submission to this Inquiry.

We make the attached submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

Yours sincerely

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A *Goals of the Referendum (Machinery Provisions) Act 1984*

The Committee's inquiry represents an historic, long overdue opportunity to reassess Australian federal referendum machinery legislation. We believe that the current *Referendum (Machinery Provisions) Act 1984* ('the Act') and any changes to that Act should be assessed against the following goals:

- **Fair and efficient**

The Act should establish a fair and efficient process for the conduct of referendums. The process should build community confidence in the outcome. Australians must be given a fair opportunity to participate, and voting procedures should meet democratic principles at a reasonable cost to the taxpayer.

- **Deliberation**

The Act should open up space for community debate and deliberation about constitutional change. In so doing it should provide voters with the information they need to cast an informed vote by exposing citizens to a variety of viewpoints and perspectives.

- **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. Changes to the Constitution alter the very machinery of government, and have the potential to affect policy-making across all areas of government far into the future. Widespread participation also improves understanding, gives citizens a sense of ownership over the process and strengthens acceptance of the outcome.

- **Education**

The Act should seek to further constitutional education. Referendums provide an excellent opportunity for citizens to learn more about not only a specific reform proposal, but also their system of government as a whole. This should reinforce the learning that takes place in other forums, such as federal elections and civics education programs.

B *Effectiveness of the Referendum (Machinery Provisions) Act 1984*

The current Act fares poorly when assessed against the above four goals. The existing referendum machinery succeeds in establishing a fair and generally efficient process, but is underperforming in the areas of deliberation, popular participation and education.

It is not surprising that Australia's referendum machinery is in need of reform, as it has remained mostly unchanged since 1912. In that year Parliament passed an amendment to the *Referendum (Constitution Alteration) Act 1906* which, for the first time, authorised public funding of the Yes and No cases of up to 2000 words each. These were produced in a single pamphlet and sent out to all voters. This was a novel initiative at the time, and was seen as an effective way of providing voters with basic facts about the proposed constitutional change, as well as protecting them against the misapprehension, misrepresentation and partisanship that had characterised Australia's first three referendum campaigns in 1906, 1910 and 1911. Attorney-General William Hughes envisaged the cases for either side being put in an 'impersonal, reasonable and judicial way', and appealing to 'reason rather than to the emotions and party sentiments' (*Commonwealth Parliamentary Debates*, 16 December 1912,

7154). Prime Minister Andrew Fisher was optimistic about the Yes/No pamphlet, remarking: 'I have no doubt at all that the case will be put from both sides impersonally and free from any suggestion of bias or misleading on the one side or the other' (Fisher: *Commonwealth Parliamentary Debates*, 16 December 1912, 7156).

Despite the optimism surrounding its introduction, experience shows that the Yes/No case has failed to meet its objectives. First, it does not succeed in aiding voter understanding of reform proposals, nor in protecting them from misapprehension and misrepresentation. The pamphlet tends to obscure basic facts about the proposed change, is adversarial in nature and often leaves voters feeling confused (one of the first arguments in the No case for the 1999 referendum was even 'Don't know? – Vote "NO"'). Also, contrary to the vision of Fisher and Hughes, referendum campaigns are often marred by partisanship, deception and misrepresentation as both sides compete for tactical advantage. The failure of the pamphlets in communicating basic facts means that voters are vulnerable to being misled by both sides. It is also noteworthy that the existing framework gives Parliament the option of suspending the provision of the Yes/No cases to voters. Thus, in 1919, 1926 and 1928, Australians did not have access to a publicly funded information pamphlet. As flawed a document as it is, the prerogative of Parliament to suspend voter information is not ideal.

Secondly, the distribution of a printed information pamphlet is both out-of-date and ineffective as a communication strategy in contemporary Australia. Today, Australians access information from a huge variety of sources, including television, radio, the internet and text message. With the exception of radio, none of these media existed in 1912. Back then, sending educational material by post was the most effective way of conveying information to a large numbers of voters. That is no longer the case, and it has become commonplace to receive information via audio, audio-visual and interactive means. In the modern world, relying on a lengthy, printed pamphlet as the sole means of communicating information is counter-productive, as there is a high probability that many Australians will not read it.

Thirdly, under current arrangements, citizens have few opportunities for meaningful engagement in the process of constitutional reform. They have no role in framing the issue to be put to referendum, and few structured opportunities to participate in public debate about the proposed change. Their main contribution is at the very end of the process, when they cast a vote on the day of the referendum. As a result, few Australians feel like they have ownership over the proposed change, nor even of the Constitution as a whole.

Finally, the current approach to informing voters about referendum proposals does not provide value for money. The current framework for referendums allocates significant public resources to a process that leaves voters feeling confused and alienated. In 1999, the republic model considered by Australians was supported by a \$24.5 million government-funded advertising campaign, and a seventy-one-page 'yes' and 'no' book sent to every voter, not to mention saturation media coverage. Despite this, most Australians had little idea of what a republic would mean or how the proposed model would have worked. Australians have a right to expect more from a publicly funded process.

In summary, the existing referendum machinery sets up a fair process for the conduct of referendums, but it fails to provide a process that is deliberative, participatory or educative. It does not provide Australians with the information or the opportunities to make an informed vote or to engage actively in public debates about constitutional change. This need not be the case. As we outline in the next section, there are several reforms that will ensure that Australians have access to a referendum process that successfully meets all of these goals.

C Suggested reforms

Expenditure of Commonwealth money on referendums

The Act should be amended to remove the existing restrictions on Commonwealth expenditure on referendums. Section 11(4) of the Act currently limits Commonwealth spending on the presentation of arguments about a referendum proposal to several stated purposes. These include:

- the preparation, printing and posting of the Yes/No pamphlets;
- the preparation, by or on behalf of the Australian Electoral Commission (AEC), of translations into other languages of the material contained in those pamphlets;
- the preparation, by or on behalf of the AEC, of presentations of the material contained in those pamphlets in a form suitable for the visually impaired;
- the distribution or publication, by or on behalf of the AEC, of the above material, including publication on the Internet; and
- the provision by the AEC of other information relating to, or relating to the effect of, the referendum proposal.

These strict limitations on the purposes for which the Commonwealth can spend money are a barrier to Australia developing the referendum process proposed below that meets the goals of fairness and efficiency, deliberation, popular participation and education. Increased, or even just better targeted, public expenditure could support important reforms to Australia's referendum machinery, including more effective voter education, the creation of 'Yes' and 'No' committees, and the use of innovative mechanisms for engaging the general public in constitutional reform.

We accept that public money must be spent prudently and in a way that provides value for money. To this end, we support the creation of an impartial 'Referendum Panel' to supervise public expenditure on referendums and to ensure that it meets minimum standards of fairness, openness and accountability. We expand on this proposal below.

- **Recommendation 1: The *Referendum (Machinery Provisions) Act 1984* should be amended to remove limitations on the purposes for which Commonwealth money can be spent in relation to referendum questions.**

Referendum Panel

A Referendum Panel should be constituted for each referendum to oversee public education initiatives and to help ensure a fair and open public debate. This Panel would have a lifespan of a few months – for example, it might come into existence with the passage of referendum bills through Parliament, and be disbanded following the referendum poll. The roles and responsibilities of this body should include:

- preparation of information pamphlet and other educational materials for voters
- oversight of the Yes and No committees, including:
 - requiring that they meet standards of objectivity, accountability and fairness in their use of public funds, and
 - reviewing the accuracy of factual claims made by the Yes and No committees in advancing their cases for/against reform

- the planning and operation of deliberative forums and other methods of public engagement.

The Panel should be appointed by the Prime Minister in consultation with the Leader of the Opposition and other party leaders. It should include Australians from a variety of perspectives, including experts in constitutional law and public communication. One or more positions might be reserved for members of the general public.

With the exception of the preparation of the information pamphlet, the Panel should not assume any of the existing functions of the Australian Electoral Commission. Sole responsibility for administering the referendum should remain with the Commission.

- **Recommendation 2: An impartial public authority called the Referendum Panel should be constituted for each referendum to oversee public education and to ensure fair and open public debate.**

Information for voters

The practice of sending voters an information pamphlet in the lead-up to a referendum should continue. However, both the content of, and the approach to preparing, the Yes/No pamphlet are in need of a major overhaul. Any information pamphlet must also be supplemented by other methods of communicating information to voters.

Information pamphlet

The Yes/No pamphlet should be replaced by a Voters' Booklet. A short information pamphlet which sets out basic information in a fair and balanced way will be far more effective as an educational tool than the current Yes/No pamphlet. The aim of this Booklet would be to provide voters with basic, accurate and unbiased information about each reform proposal. The Booklet should 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.

While the Act should not impose a word limit on the Booklet, it should be excepted to be of a short length.

The Voters' Booklet should be prepared by the Referendum Panel. The experience of other jurisdictions shows that entrusting the preparation of referendum information to a neutral body is workable and effective:

- In New South Wales, an information pamphlet containing summaries of the Yes/No cases is prepared by public servants, and then vetted by constitutional lawyers and other experts to ensure its fairness. Although there is no legislative requirement that such a case be prepared for voters, it is common practice to do so where the issues involved are complex.
- In California, sections 9040-9044 to 9080-9096 of the *California Elections Code* provide for a 'ballot pamphlet' that is a mixture of neutral information and partisan argument. The ballot pamphlet contains a copy of the proposed measure, showing

how it alters the existing provisions; an official summary prepared by the Attorney General; a copy of arguments and rebuttals for and against the measure; and, an impartial analysis prepared by the Legislative Analyst, a public servant. At the beginning of the pamphlet there is also a short statement that summarises the general meaning and effect of ‘yes’ and ‘no’ votes. The impartial analysis contains background information, an assessment of the effect of the law, and any fiscal implications. To ensure that it is written in language that voters will understand, the Legislative Analyst may seek the help of educational specialists and other experts, and must subject it to vetting by a panel of ordinary citizens. The arguments for and against are prepared by parliamentarians who supported or opposed the measure in the legislature, and are limited to 500 words each. Once drafted, the entire ballot pamphlet is released for public examination and amendment for at least 20 days.

- **Recommendation 3: The Yes/No pamphlet should be replaced by a Voters’ Booklet prepared by the Referendum Panel.**

Other means of communicating information

Future efforts to educate voters about reform proposals will be far more effective if they take advantage of the full range of communications media. To this end, we suggest that, in addition to the Voters’ Booklet, information be disseminated through radio, television and the internet. As part of this, an effort should be made to distribute information through internet forums and social networking sites, in recognition of their increasing popularity among Australians of all ages. Any information that is disseminated should be based upon the material contained in the Voters’ Booklet.

Adopting a diversity of approaches of information delivery is critical if educational material about the referendum is to reach a maximum audience. It recognises that different people absorb information in different ways. Some people may ignore a pamphlet received in the mail, but read a message that is posted on Facebook. The proliferation of communications media, which is such a central part of the modern world, presents an excellent opportunity to give more Australians the information they need to cast an informed vote in a referendum.

- **Recommendation 4: The Voters’ Booklet should be supplemented by the dissemination of educational material through a wide range of other forms of communication, including radio, television and the internet.**

Creation of ‘Yes’ and ‘No’ committees

The Act should allow, but not mandate, the 1999 practice of providing public funding to separate ‘Yes’ and ‘No’ committees. Such committees – through their spokespersons, advertisements or other means – have the potential to enrich public debate by exposing citizens to arguments both for and against reform.

Given that the ‘Yes’ and ‘No’ committees may receive substantial sums of public money, it is reasonable to expect them to meet minimum standards of objectivity, accountability and fairness in the way they spend it. To this end, the public statements and activities of the committees should be subject to the oversight of the Referendum Panel. The Panel should be empowered to review 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. Some material, such as campaign pamphlets or advertising, would be subject to Panel scrutiny before being approved for release into the

public domain – in this regard, the Panel would play a preventative role. The Panel’s oversight role should be limited to statements of fact, and should not extend to expressions of opinion – these are properly understood as a feature of robust debate and disagreement, which would remain unfettered.

- **Recommendation 5: The *Referendum (Machinery Provisions) Act 1984* should be amended to allow for the public funding of ‘Yes’ and ‘No’ campaign committees subject to the oversight of the Referendum Panel.**

Initiating referendum proposals

The mechanisms by which referendum proposals are initiated should be broadened. Currently, change can only be initiated by the Commonwealth Parliament. This is not ideal, for three reasons: it places the authority to hold referendums in the hands of the government of the day alone, making it more likely that proposed changes will be partisan; it increases the likelihood that proposed reforms will only increase, or at least protect, central power; and, it excludes the general public from any direct role in framing a proposed change.

We suggest that a process be put in place which enables States, constitutional conventions and members of the general public to play a role in formulating proposals for constitutional reform. Rather than entrench this process by amendment of section 128 of the Constitution, we suggest that it be created by legislation as a precursor to the possible formal initiation of the change by Parliament.

With respect to the States, we suggest creating a mechanism by which State governments can present proposals for constitutional change to the Commonwealth Parliament and recommend that they be put to referendum. The House of Representatives’ Standing Committee on Legal and Constitutional Affairs could be given the task of considering the proposed reforms. Where four or more States were in agreement on a proposal, this would carry considerable recommending force. We note that the 1988 Constitutional Commission (*Final Report of the Constitutional Commission*, vol 2, Australian Government Publishing Service, Canberra, 1988, 851) recommended that constitutional referendums be initiated where, in addition to some other conditions being met, at least half of the State Parliaments supported it.

A mechanism should also be created for the holding of constitutional conventions to consider and propose ideas for constitutional change. Conventions – whether elected, appointed, or a combination of each – signal serious intent to address major questions and, by establishing an inclusive process that draws in voices and perspectives from across the nation, also indicate respect for the democratic nature of the Constitution itself. In some cases it will be appropriate to hold a Convention to consider a specific issue, as was the case with the 1998 Convention on the republic. However, a framework should also be put in place for the holding of regular constitutional conventions as part of a continuing cycle of engagement. A convention every decade, or half-generation, to consider options and to determine national priorities would provide the necessary structure, entrench an expectation of debate about change and a consultative mechanism. This has been done in similar ways with standing bodies including Reconciliation Australia and the Australian Law Reform Commission – innovation demands a supportive framework. Such an arrangement would help foster community participation, and would be ideal for giving careful consideration to constitutional issues without the pressure to meet short-term political needs. The recommendations of constitutional conventions could be issued to the Commonwealth Parliament, potentially to form the basis of future referendum proposals.

With respect to the general public, a mechanism should be created whereby citizens can petition the Commonwealth Parliament to consider their proposals for constitutional change. As part of this process, Parliament should be required to give a response within a certain period of time. Again, the House Standing Committee on Legal and Constitutional Affairs could be given a role in considering the proposal, perhaps as part of an annual report. It may be necessary to require that each proposal attract a certain number of signatures before it is examined by the Committee.

In all three cases, the final decision to initiate a referendum would remain with the Commonwealth Parliament. However, these new processes would improve significantly the opportunities available to the States and the general public to contribute ideas for constitutional reform.

- **Recommendation 6: The *Referendum (Machinery Provisions) Act 1984* should be amended to provide a mechanism for reform proposals to be submitted by State governments, constitutional conventions and citizens for consideration by the Commonwealth Parliament.**
- **Recommendation 7: The *Referendum (Machinery Provisions) Act 1984* should be amended to provide a framework for the holding of a constitutional convention each decade.**

Achieving greater public engagement in referendums

The Act should be amended to give the federal government, if desired via the Referendum Panel, the option of funding various methods of public engagement in the lead-up to a referendum. Such methods might include encouraging public submissions on a specific question of reform, and holding extensive public consultations. A recent example in this respect is the consultation process that preceded the adoption of the Victorian *Charter of Human Rights and Responsibilities*. A variety of consultation methods were used, including small community-based meetings, and citizens were given the option of making submission by email or through an online form. The consultation process was highly successful, attracting 2524 written submissions – at the time, the highest number of submissions ever received for a process looking at human rights in Australia. The recent consultation by the Brennan Committee on federal human rights protection adopted and expanded on these mechanisms.

The Act should also be amended to permit governments, if desired via the Referendum Panel, to fund mechanisms of engagement that make use of recent innovations in public deliberation. Such mechanisms include deliberative polls, citizens' assemblies, citizens' juries and local constitutional conventions. These mechanisms give ordinary citizens the opportunity to learn about a reform issue in-depth, ask questions of experts, and engage in face-to-face discussion. These methods of 'deliberative democracy' are being employed increasingly around the world, both on constitutional issues and on broader policy questions.

Some of these deliberative methods have already been used in the context of constitutional debate in Australia:

- Throughout the 1990s, the Constitutional Centenary Foundation and some local councils conducted day-long 'local constitutional conventions'. These conventions gave ordinary citizens the chance to engage in face-to-face learning and debate about such topical issues as the republic, the preamble and federalism. More than 3,000

people attended fifty-eight conventions around Australia, and many participants reported that they learnt a great deal and appreciated the opportunity to make a contribution.

- In October 1999, Issues Deliberation Australia conducted a deliberative poll on the republic. It was attended by a representative sample of 347 Australians. Participants were provided with background material; then, over the course of a weekend, they discussed various questions in small groups and had the chance to question panels of experts in plenary sessions. Polling conducted before and after the weekend indicated a vast improvement in participants' understanding of key issues, including the role of the President under the proposed republic model, and the existing mechanism for appointing the Governor-General.

The benefits for individual participants include increased knowledge and a feeling that they have made a meaningful contribution to public debate. For governments, these mechanisms give an indication of what citizens think about an issue if they had the time and the resources to study and discuss it in an in-depth fashion. Where media coverage accompanies these mechanisms, they can prompt debate in the broader community.

The Act should also be amended to provide for a basis for the holding of plebiscites as part of or separate to the process of constitutional reform. Where appropriate, plebiscites can be useful in clarifying public opinion on an issue, and in generating public interest.

These innovative methods of public engagement should be part of the 'toolbox' of referendum machinery in Australia. The Act should be amended to permit governments to make use of these methods without having to pass additional special legislation.

- **Recommendation 8: The *Referendum (Machinery Provisions) Act 1984* should be amended to permit governments to conduct various methods of public consultation and engagement in the lead-up to a referendum.**