

Introduction

- 1.1 The Australian Constitution has been described as ‘the birth certificate’ of the nation. While it was required to be passed as a British Act of Parliament, it brought into being an Australian system of governance that preserved the integrity of the states and established a federal structure of government. The Constitution took effect on 1 January 1901.
- 1.2 The Constitution sets out the distribution of powers between the Commonwealth and the states, and the responsibilities of each. It establishes the separation of powers between the legislative, executive and the judiciary, and establishes the principle of ‘representative government’ whereby citizens of Australia vote to elect their Commonwealth representatives.
- 1.3 The Constitution also sets out the mechanism by which it can be altered, in section 128. It provides that a constitution amendment bill must first be passed by both Houses of Parliament before it is submitted to electors. A majority of electors in a majority of states must then vote in favour of the change before the Constitution can be amended. In this aspect, Australia’s Constitution is unusual and differs from the constitution of many other countries in that an amendment to the Australian Constitution requires a direct vote of electors. This establishes a particularly high requirement of voter support and it is perhaps unsurprising that constitutional change is rare in Australia.
- 1.4 This requirement for majority citizen support across Australia for constitutional change has been described as preserving ‘the sovereignty of the Australian people’ over their Constitution.¹ However the requirement also calls into question how citizens are informed of the issues when a referendum is held seeking constitutional change.

¹ Australia’s Constitution, Overview, Australian Government Solicitor and Parliamentary Education Office, Canberra June 2007, p.v

- 1.5 In a system which requires the consent of the people to change the Constitution, it is appropriate to consider *how* we ask the public to change the Constitution. Specifically, what happens between the passing of legislation to change the Constitution and the point of voting? What are the responsibilities or obligations of parliamentarians? What information is provided to electors? How much does the average Australian know about the Constitution?
- 1.6 The primary way to inform the electorate on the proposed constitutional change is through the Yes/No pamphlet – a document containing arguments for and against the proposal and text showing the proposed changes to be made to the Constitution. The legislative provision for the distribution of Yes/No pamphlets dates back to 1912, when it was introduced as an amendment to the *Referendum (Constitution Alteration) Act 1906*. The *Referendum (Machinery Provisions) Act 1984* (the ‘Machinery of Referendums Act’) replaced the 1906 Act but continues to provide for the distribution of Yes/No pamphlets in section 11.²
- 1.7 Section 11 of the Machinery of Referendums Act provides for the distribution of a Yes/No pamphlet prior to a referendum. The legislation has a number of important features, including the stipulation that the pamphlet be *posted* to *every* elector at least 14 days prior to the day of the referendum. The arguments themselves must not be longer than 2 000 words, except where there is more than one proposal being considered at the same referendum. Finally, those members of Parliament who voted for and against the proposed law to change the Constitution are responsible for authorising the respective Yes/No arguments.
- 1.8 At the time of their introduction, the pamphlets were innovative and necessary to inform the electorate about the proposal submitted to referendum. In 2009, it is appropriate to ask whether there is a more effective way to engage and inform people about the Constitution and proposed constitutional change.

Referral of the inquiry

- 1.9 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 Committee to inquire into and report on the machinery of referendums.

2 This report uses the term ‘referendums’ for consistency with the *Referendum (Machinery Provisions) Act 1984 (Cth)*.

- 1.10 The Committee was asked to inquire into and report on the effectiveness of the *Referendum (Machinery Provisions) Act 1984* (Cth) in providing an appropriate framework for the conduct of referendums, with specific reference to:
- processes for preparing the Yes and No cases for referendum questions;
 - provisions providing the public dissemination of the Yes and No cases; and
 - limitations on the purposes for which money can be spent in relation to referendum questions.
- 1.11 The Committee was also asked to consider any amendments to the *Referendum (Machinery Provisions) Act 1984* that the Committee believes are required to provide an appropriate framework for the conduct of referendums. Finally, the Committee also considered any other federal provisions relevant to the above terms of reference.
- 1.12 To gather evidence for the inquiry, the Committee held one roundtable and three public hearings. These were located in Canberra, Sydney and Melbourne. The public hearings and attendees are listed at Appendix B.
- 1.13 The Committee sought submissions from a range of academics, organisations, think-tanks, interested individuals and State and Territory governments. A total of 33 submissions were received and these are listed at Appendix A.
- 1.14 Two more documents which might assist in considering the issues in this report are included as appendices. Section 11 of the Machinery of Referendums Act is extracted in full in Appendix D and a complete list of referendums is included in Appendix E.
- 1.15 This report considers the evidence that was raised during the inquiry in relation to the terms of reference. Chapter 2 provides a history of the Yes/No pamphlet since its inception in 1912. Chapter 3 examines the current provisions and considers some of the issues that are raised in practice. Chapter 4 discusses the bulk of the evidence received during the inquiry that identifies areas and suggestions for change. Finally, chapter 5 includes the Committee's findings and recommendations.

Context of the inquiry

- 1.16 There have been a number of Government-led reports recently issued that are relevant to the processes associated with the Machinery of Referendums Act. The Government Advertising Guidelines report may affect the ability of the Government to advertise the Yes and No arguments in the lead up to a referendum. In addition, the recently released Green Paper on Electoral Reform examines the conduct of elections in Australia and the processes for educating the public on electoral matters and matters relating to Australia's democratic institutions.
- 1.17 The Committee's recent report, *Reforming our Constitution*, which was tabled in June 2008, identifies and examines key areas of constitutional reform. Adjusting the machinery of referendums and specifically, the usefulness or otherwise, of the Yes/No pamphlet, was discussed and the Committee noted that consideration should be given to how arguments are framed and debated in the lead up to a referendum.

Government Advertising Guidelines

- 1.18 In June 2008, the Department of Finance and Deregulation issued a report titled *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*. These Guidelines set out the principles applying to Australian Government departments and agencies undertaking information and advertising campaigns. The underlying principles governing the use of public funds for government information and advertising campaigns identified in the report are as follows:
- all members of the public have equal rights to access comprehensive information about government policies, programs and services which affect their entitlements, rights and obligations;
 - governments may legitimately use public funds for information programs or education campaigns to explain government policies, programs or services and to inform members of the public of their obligation, rights and entitlements; and
 - government campaigns shall not be conducted for party political purposes.³

³ Australian Government, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, available from: <www.finance.gov.au/advertising/guidelines-on-campaign-advertising.html>

1.19 These values reflected in the Government Advertising Guidelines are identified as follows:

- material should be relevant to government responsibilities;
- material should be presented in an objective, fair and accessible manner;
- material should not be directed at promoting party political interests;
- material should be produced and distributed in an efficient, effective and relevant manner, with due regard to accountability; and
- advertising must comply with legal requirements.⁴

1.20 The concerns addressed by the Government Advertising Guidelines are reflected in many of the submissions to this inquiry that focus on the need for material to be presented as relevant, fair and factual.

Green Paper on Electoral Reform

1.21 The Australian Government's second electoral reform green paper, *Strengthening Australia's Democracy*, was released on 23 September 2009 by the Cabinet Secretary and Special Minister of State, Senator the Hon Joe Ludwig.

1.22 The purpose of the Green Paper process is to encourage public debate about options for improving and modernising Australia's electoral system. Of particular relevance to this inquiry are the civics education measures designed to maximise effective participation in elections, and by extension, similar democratic processes, such as referendums.⁵ Further, the observations of the Australian Electoral Commission (AEC) outlined in this paper highlight the changing methods citizens use to engage with the Government at the time of an election, referring to an increasing trend towards electronic interaction.⁶

⁴ Australian Government, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, available from < www.finance.gov.au/advertising/guidelines-on-campaign-advertising.html >

⁵ Australian Government, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, September 2009, p. 5; available from: < www.pmc.gov.au/consultation/elect_reform/ >

⁶ Australian Government, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, September 2009, p. 2; available from: < www.pmc.gov.au/consultation/elect_reform/ >

