

RECEIVED<sup>SM</sup>  
10 OCT 2009

BY: LACA.....

**SUBMISSION TO THE REFERENDUM INQUIRY CONDUCTED BY THE HOUSE OF  
REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

Submission No 026

Glenn Patmore  
Member of the Centre for Comparative Constitutional Law  
The Melbourne Law School (currently on parental leave)  
Email: g.patmore@unimelb.edu.au

**Executive Summary**

While the Yes and No cases may provide an adequate mechanism for political persuasion, they are less appropriate for informing the public about constitutional change. An innovation that was adopted in the 1999 referendum, of providing a dispassionate guide to the basic issues at referendum known as the *Know the Facts* document distributed with the Yes/No pamphlet, might be further improved to provide more effective information. However, given strong evidence of a widespread lack of public awareness of the Australian Constitution, as well as the workings of the referendum model proposed in 1999, there is a critical need for longer term voter education on constitutional matters.

Therefore, financial support from the federal government in referenda ought to be provided for a preliminary impartial process of voter education, which will enhance the prospects for informed decision making by minimizing potentially misleading scare tactics based on voter ignorance. In addition, the level of support required to run referendum advertising campaigns needs, in this age of saturated electronic media, a level of public funding that enables Yes and No cases advertisements appropriately similar to campaigns conducted during a general election.

**Introduction**

My submission addresses three questions regarding the effectiveness of the *Referendum (Machinery Provisions) Act 1984* (Cth) in providing an appropriate framework for the conduct of referendums:

1. Do the Yes and No cases effectively meet appropriate objectives?
2. Should a referendum be accompanied by a Commonwealth funded educational campaign?
3. Should Commonwealth monies be spent on an advertising campaign supporting the Yes and No cases?

My presentation addresses the committee's terms of reference 1 (a) and (c).

In preparing this submission, I have drawn on my research for, and text, of my forthcoming book *Choosing the Republic* (2009, UNSW Press). I also draw upon my own interviews with members of Yes and No case committees from the 1999 referendum, conducted late in 2008 and early 2009.

My submission focuses on the 1999 Republican Referendum and assumes that similarly complex referendum questions will be proposed in the future.

## **Questions and Answers**

### *Question 1: Do the Yes and No Cases Effectively Meet Appropriate Objectives?*

For the *Referendum (Machinery Provisions) Act 1984* (Cth) to provide an effective framework for the conduct of referendums the Yes and No cases should fulfil appropriate objectives. Two appropriate objectives for the Yes and No cases are to inform and persuade the voters.

#### *Background*

The Yes/No pamphlet was introduced in 1912 to ensure each case was presented 'in an impersonal, reasonable and judicial way ... rather than [appealing] to the emotions and party sentiments'.<sup>1</sup> The sentiment behind the proposal is captured in the words of then Labor Prime Minister, Mr Fisher. He remarked, 'the case will be put from both sides impersonally ... Let it be a document that the Parliament will be proud of, from which Australia will benefit.'<sup>2</sup>

Unfortunately, the pamphlet has not lived up to its lofty goals. Commentators have been critical of the pamphlet as being increasingly unsatisfactory. In 1984, Professor Saunders remarked that '[t]he aim of ... the cases [are] no longer to inform, rather, each side prepares its case with a view to winning, apparently on any ground'.<sup>3</sup>

Unlike the typical Yes/No case pamphlets of the past, the 1999 Yes case did not attempt to score points through derision. Rather, it proclaimed an ideal vision. As Jason

Yat-Sen Li, member of the Yes Case Committee commented, it expressed a desire for ‘an aspirational, positive change’.<sup>4</sup> In contrast, the 1999 No Case conformed more closely to the criticism provided by Professor Saunders, insofar as the No case was a strongly argued rhetorical case that intended to make every point necessary to defeat the Yes Case.

#### Effectiveness of the Objective of Persuasion

The Yes and No cases permit Members of Parliament the freedom to persuade the voters in the most effective way they see fit. The current preparation of the cases is supported by the value of freedom of expression, an inherent virtue.

However, the Yes and No cases are ineffective in that they are not necessarily presented in ‘an impersonal, reasonable and judicial way’.<sup>5</sup> Given the pressures of Australian partisan politics the original goal of judicious persuasion is unlikely to be met by cases prepared by Members of Parliament or a partisan community committee.

#### *Appropriateness of the Objective of Persuasion*

Is it appropriate that a Yes and No case may seek to persuade voters on any ground? The obvious answer is no, and while latitude is typically extended to political debate, there must be some limit – especially regarding Constitutional change. However, minds will differ over what are appropriate limits. Moreover, any limit should be carefully formulated, as this political latitude is vital to maintaining a healthy public discourse.

The cases might be prepared in accordance with their original purpose if they were to be drafted by an impartial body or group with Constitutional expertise. Perhaps more attention would be paid to the argument rather than the art of persuasion. For example, those not subject to partisan influence would be capable of drafting such a case. For instance, we trust judges, law reform commissioners, and scholars to act in impartial ways.

Adopting this proposal would not remove the vitality of politics, since advocates of the Yes and No cases in the media would certainly weigh in on the debate. The dispassionate presentation of arguments in the Yes and No cases would provide impartial advice to the general public.

### *Effectiveness of the Object of Informing the Public*

There is convincing evidence indicating that the 1999 Yes and No cases pamphlet was ineffective at informing voters of the proposed change. For instance, voters generally had insufficient knowledge regarding the Australian Constitution and the workings of the proposed 1999 republican model.

To find out the views of voters about the issues surrounding the 1999 republic referendum, researchers Gow, Bean and McAllister surveyed thousands of Australians and their results were published in the *Australian Constitutional Referendum Study 1999* (the '1999 survey').<sup>6</sup>

The 1999 referendum survey indicated that there were various misunderstandings about the proposed changes to the Constitution. Many respondents were mistaken about how the change would affect ties between Britain and Australia. While over 88 per cent of people supported an Australian head of state, there was a fairly even split (40 per cent in favour and 40 per cent against) over keeping constitutional ties with Britain.<sup>7</sup> Under the republic proposal it would be impossible to keep the Queen as the principal constitutional tie yet have an Australian head of state.

Respondents also exhibited a lack of knowledge about the model itself. Nearly 70 per cent of respondents either didn't know or misunderstood how the president could be dismissed under the bipartisan model.<sup>8</sup> We should not be surprised by some of these misunderstandings since in the Yes case the working of the model was not comprehensively described. A lay person may have been able to divine the workings of the model from the constitutional amendments also distributed, but for most this would have been a daunting task. As Ian McAllister remarked, the referendum did involve a 'highly technical choice'.<sup>9</sup>

In another sense, these misunderstandings are surprising. In the introduction to the 1999 pamphlet, a document was included titled, *Make Sure You Know the Facts before You Have Your Say*. The *Know the Facts* document outlined the dismissal procedure of the President.

The *Know the Facts* document was a welcome innovation in 1999. It was succinctly written and a similar document ought to be retained in future referendums. However, the *Know the Facts* document and the cases themselves failed to properly inform many voters.

#### *The Object of Informing the Voters Appropriately*

Is it appropriate that immediately after a referendum campaign the vast majority of citizens remain ill-informed about the proposed change? The obvious answer is no and as a consequence more needs to be done by the government to ensure that the Australian people understand the basic principles of the Australian Constitution and how proposed changes affect the fundamentals of Australian government. One solution might be to improve the *Know the Facts* document in two ways:

- The title could be changed to alert the voters to the significance of the document e.g. *The Proposed Amendments Explained*; and
- The introductory document could go beyond an explanation of the mere facts to provide an impartial and informed opinion including further analysis, comparing the proposal with the current constitution, and explaining the intent and the likely operation of the proposed change.

Perhaps the provision of an impartial and informed opinion with an executive summary could take the form of a short brief, setting out a simple statement of what the issues are and why they have come to be in issue. An appropriate length for such a document may be the same as one of the Yes or No cases, namely up to 2000 words.

Criticism of an informed opinion ought to be expected by proponents of both the Yes and No cases. However, criticism could be minimized if the document was drafted

by a panel of experts; or members of the cases were permitted to provide feedback on the draft opinion.

While the 1999 Yes and No cases arguably fulfilled a purpose to persuade they did not fulfil their purpose to inform. Each objective could be fulfilled more effectively if the committee is willing to change the 1999 format.

Even if the suggested changes were adopted much more needs to be done to inform voters of the change and educate them about the Australian Constitution. Merely providing the Yes and No case document is simply not enough to ensure that people are fully informed.

### **Question 2: Should a Referendum be Accompanied by a Commonwealth Funded Educational Campaign?**

If the *Referendum (Machinery Provisions) Act 1984* (Cth) aims to provide an effective and appropriate framework for the conduct of referendums, it must be premised on voters' capacity to make an informed decision. Yet there is a legislative limit on the ways Commonwealth monies can be spent in referendum campaigns to provide voter education. Funds may only be spent on the preparation and dissemination of the Yes and No cases and related information. This limit should be relaxed and public funding should be provided for a dispassionate and longer term educational programme.

The *Referendum (Machinery Provisions) Act 1984* (Cth) requires that no other public monies (apart from funding supporting the Yes and No case pamphlets and related information) may be spent by the Commonwealth Government advocating either case.<sup>10</sup> This requirement was designed to prevent additional Commonwealth funds from being used in a partisan fashion by the government of the day to promote one side of the debate (usually the 'yes' case). However, the States are not prevented from spending funds to run their own campaigns in a federal referendum.

In 1999 important changes to legislation were introduced, temporarily providing public funding for an information campaign.<sup>11</sup>

The federal government spent \$4.5 million<sup>12</sup> on an education program which sought to:

- Outline Australia's current constitutional system;
- Explain the proposed republican model put forward by the Constitutional Convention in February 1998; and
- Explain the process for making any change to Australia's Constitution and State constitutions.

The education campaign was developed after consultation with an impartial panel of experts.<sup>13</sup> For instance, the *Know the Facts* document included within the 1999 Yes/No pamphlet formed part of this education programme.

This public funding was important as a means of educating and engaging the public and without this funding it is unlikely that any political party would have spent money on an education campaign. After all, the art of politics is persuasion, not necessarily the provision of information

Reflecting on the campaign, members of the Yes and No case committees provided a variety of criticisms of the government's education program.

#### *General Criticisms*

Sir David Smith saw the education campaign as workable but imperfect because it was tainted by a republican bias. 'The education campaign was not perfect... it was not totally honest and fair. At least we were given an opportunity to point out our objections to some of its content and while we didn't get everything we wanted change[d] we were able to make some improvements'.<sup>14</sup>

Professor Greg Craven recalled that he 'hardly noticed it'. He contended that 'the idea you could educate your way to a referendum result is highly overrated'.<sup>15</sup>

Mr Jason Yat Sen-Li, thought the public education programme was 'grossly inadequate'.<sup>16</sup>

### *Lack of Understanding of the 99 Model*

Mrs Kerry Jones, Chairperson of the 1999 No case committee, believed that: '[a] related reason for defeat was that the people failed to understand the alternative model.'<sup>17</sup> Mr Malcolm Turnbull, Chairperson of the 99 Yes case committee also saw this as a significant problem: 'The simple fact is that the referendum was defeated in large measure because many people misapprehended the nature and consequences of the change.'<sup>18</sup>

### *Lack of Understanding of the Constitution*

Former Leader of the Opposition, Kim Beazley argued that:

The public education campaign was inadequate in terms of fulfilling the desire ... for real information on the issues. The lack of detailed public awareness of ... [the] Constitution paved the way for the success of a scare campaign.<sup>19</sup>

Malcolm Turnbull, believed the most influential argument against the republic was based on the voter's lack of understanding:

Ignorance was the Republic's greatest enemy, though we republicans have been branded sore losers for saying as much ... Anyone who understands the system of government we have is almost certainly a supporter of the bipartisan model. The problem is that hardly anyone understands our system of government.<sup>20</sup>

Kerry Jones, 99 No Committee Chairperson, believed that '[e]ducation is the key'.<sup>21</sup> She recalls the republican debate as a lost opportunity 'to understand actually how the system works'.<sup>22</sup> Her advice is that 'if you ever wanted to have it again then you want an informed community who actually understand the role of the Governor-General and the Governors and the Crown in the Constitution'.<sup>23</sup>

Some older survey data also indicates that the Australian people are ill-informed about the Australian constitutional system. For instance, a survey collected by the Constitutional Commission in 1987 found that just under half of those surveyed were not



aware that Australia even had a written Constitution.<sup>24</sup> Furthermore, the Civics Expert Group 1994 Survey found that ‘only 18 per cent [of Australians] know something about the content of the Constitution’.<sup>25</sup> People may be relatively uninformed about the Australian Constitution for a variety of reasons:

- The Constitution is a reasonably long and technical document.
- Many constitutional provisions regulate government and are not directly relevant to the lives of ordinary people.
- The Constitution does not feature in media reports on a daily basis.

Periodically, an issue may arise, like the 1975 Australian constitutional crisis, which makes the Constitution of interest to the general public. At most other times, the Australian Constitution’s accomplishment of its purpose to provide stable government means that the media has no need to be interested in our founding document at all.<sup>26</sup>

Professor Greg Craven, member of the Yes case committee, confronted some ‘extremely unflattering arguments’ against the proposal based on voter ignorance. ‘The two arguments that I constantly encountered were; [First] there are [67] amendments to the Constitution ... it must be a disaster ... [second] we were going to be thrown out of the Commonwealth Games.’<sup>27</sup>

Professor Craven remarked that if ‘these sceptics had read about the changes they would have recognised that ‘most of the changes to the Constitution were simply changing Governor-General to President’.<sup>28</sup> The concern over the Commonwealth Games is significant in that it reflects a misunderstanding about the ties between Australia, Britain and the Commonwealth. Although his comment is telling about the national attachment to sporting endeavours, it was also an issue specifically addressed by the Yes campaign in literature distributed to every household. That sort of anecdote speaks volumes about the efficacy of education. You can post out pamphlets, but people have to care enough to read them.

Overall, the 1999 government’s education campaign may be criticised in that it did not remedy the voters’ lack of understanding of the model and knowledge of the Constitution. While the *Know the Facts* document was thoughtful and considered, with hindsight much more needs to be done beyond merely expanding the document itself.

Committee members' criticisms and empirical evidence support the development of a renewed and longer lasting educational program.

A desirable approach to educating the public is to be found in the Senate report, the *Road to a Republic* (2004). The Senate committee recommended that a future republican referendum should be accompanied by an education campaign that would be a long term project of federal, state and local governments, providing impartial and accessible information to all sections of the community in multiple formats (print, radio, TV and through adult education providers).<sup>29</sup>

For a referendum to be effective, education of the public will be vital to ensure voters make an informed decision. Moreover, educating voters about the constitution will also contribute to constitutional literacy, a strength in a democracy.

### **3. Should Commonwealth Monies be Spent on an Advertising Campaign Supporting the Yes and No Cases?**

As Professor Saunders noted in 1984, 'the emergence of the electronic media' means that less attention will be paid to 'the drab official referendum pamphlet'.<sup>30</sup> By 1999, the publication of only Yes and No cases did not fit the realities of modern media communications and there was pressure for public funding of information and advertising. Changes to legislation were introduced to provide for public funding to support advertising for the Yes and No cases.<sup>31</sup> Given modern media communications there is a strong case for public funding to support advertising and promotion of the Yes and No cases in future referendums. No political party, in an election, relies solely on the publication of policy documents rather they embark upon a comprehensive and sophisticated media campaign. There is no reason to suggest why constitutional politics is any less worthy of funding that would enable the promulgation of Yes and No case messages through the media.

---

1 Commonwealth, Parliamentary Debates, House of Representatives, 16 December 1912, p. 7154 (Hughes, Attorney-General).

- 
- 2 Commonwealth, Parliamentary Debates, House of Representatives, 16 December 1912, p. 7156 (Fischer, Prime Minister and Treasurer). See also Freeman (1999), 'Public Information Machinery', p. 243.
- 3 C Saunders, 'Referendum Procedures', Report to Standing Committee, Australian Constitutional Convention Constitutional Amendment Sub-Committee, 1984, December 1999, pp. 113–14; See also Freeman (1999) 'Public Information Machinery', p. 243.
- 4 G Patmore, Interview with Jason Yat Sen Li (Telephone interview 13 February 2009).
- 5 Commonwealth, Parliamentary Debates, House of Representatives, 16 December 1912, p. 7154 (Hughes, Attorney-General).
- 6 The '1999 survey' was a large scale survey of 1000 people from each of NSW, Vic., Qld, WA, SA and Tas., 100 from ACT and 50 from NT. Sample was taken from Commonwealth Electoral Roll (after the roll closed on 8 October 1999 for the referendum). The results were weighted for representativeness and precision. Only weighted results are referred to in the body of the text. D J Gow, C Bean & I McAllister (2000) *Australian Constitutional Referendum Study, 1999: User's Guide for the Machine-Readable Data File*, Social Science Data Archives, pp. vii–x.
- 7 Gow et al, *Australian Constitutional Referendum Study*, p. 27.
- 8 Gow et al, *Australian Constitutional Referendum Study*, p. 32.
- 9 I McAllister (2001) 'Elections Without Cues: The 1999 Australian Republic Referendum', *Australian Journal of Political Science*, vol. 36(2), pp. 247–69.
- 10 *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(4).
- 11 *Referendum Legislation Amendment Act 1999* (Cth) No. 22 s 4.
- 12 D Freeman (1999), 'Public Information Machinery and the 1999 Referenda' *Public Law Review*, vol. 10, pp. 223
- 13 Commonwealth, Parliamentary Debates, House of Representatives, 11 March 1999, p. 3761 (Williams, Attorney-General).
- 14 G Patmore, Interview with Sir David Smith (telephone interview 6 February 2009).
- 15 G Patmore, Interview with Greg Craven (telephone interview 9 February 2009).
- 16 Yat Sen Li (Telephone interview 13 February 2009).
- 17 G Patmore, Interview with Kerry Jones (telephone interview 18 December 2008).
- 18 M Turnbull, *Fighting for the Republic*, Hardie Grant, p. ix.
- 19 K Beazley (2000) 'Planning for a New Republic' (speech delivered to the Australian Association for Constitutional Law, Notre Dame University, Fremantle, 7 October).
- 20 Turnbull, *Fighting for the Republic*, p. 103.
- 21 Jones (telephone interview 18 December 2008).
- 22 Jones (telephone interview 18 December 2008).
- 23 Jones (telephone interview 18 December 2008).
- 24 Only a few studies have been conducted. See Constitutional Commission (1988) *Final Report of the Constitutional Commission: Volume One*, Australian Government Publishing Service, p.43; See G Williams, 'Sifting the Ashes', in

- 
- 25 *Constitutional Politics: The Republic Referendum and the Future* (eds) J Warhurst & M Mackerras (2002), University of Queensland Press, pp. 131, 139.
- 26 Civics Expert Group (1994) *Whereas the People...: Civics and Citizenship Education – Report of the Civics Experts Group*, Australian Government Publishing Service, pp. 19, 143.
- 27 I'd like to thank Professor Clive Bean for his helpful explanation of voters' lack of constitutional understanding.
- 28 Craven (telephone interview 9 February 2009).
- 29 Craven, (telephone interview 9 February 2009).
- 30 Legal and Constitutional References Committee (2004) *The Road to a Republic* (Report), Senate Printing Unit.
- 31 C Saunders 'Referendum Procedures', Report to Standing Committee, Australian Constitutional Convention Constitutional Amendment Sub-Committee, 1984, December 1999, pp. 113–14. See also Freeman, 'Public Information Machinery', p. 243.
- 31 See for instance, *Referendum Legislation Amendment Act 1999* (Cth) No. 22 s 4.