

Alternatives and Suggestions for Change

4.1 The Committee received a wide range of evidence during this inquiry, some of it expressing support for the current arrangements provided by the *Referendum (Machinery Provisions) 1984 Act* ('Machinery of Referendums Act'), but much more of it identifying areas for change and suggesting alternative practices. Specifically, these areas relate to the drafting, content, format and dissemination of the Yes/No arguments. Two further issues relate to constitutional engagement and education more broadly and the limitation on Government expenditure. This chapter examines these areas of concern and the suggestions for change.

Drafting of the Yes/No arguments

- 4.2 The Machinery of Referendums Act does not stipulate who should be responsible for drafting the Yes/No arguments to be provided to voters prior to a referendum. Instead, section 11 of the Machinery of Referendums Act refers only to the responsibility of parliamentarians in authorising the Yes/No arguments. The legislation states that an argument for and against proposed laws, authorised by a majority of the members of Parliament who voted for or against the proposal is to be forwarded to the Electoral Commissioner for distribution to every elector.
- 4.3 The legislation does not preclude material drafted by an independent body or person, providing it is authorised by Parliamentarians. It should be noted that most submissions to the Committee's inquiry focused on who should be responsible for *drafting* the Yes/No arguments and not the role of parliamentarians in *authorising* the Yes/No arguments.

- 4.4 Historically, most of the Yes/No arguments have been prepared by parliamentarians and there remains support within the community for this to continue. The submission from Australians for Constitutional Monarchy describes why elected representatives should prepare the cases, indicating 'this is above all a political and not an academic process. The electors are entitled to hear the best arguments as perceived by their representatives.'¹
- 4.5 At the roundtable discussion Howard Nathan expressed his support for the current processes, stating:
- I would find it rather offensive to have delivered to me some argumentative propositions by people I do not know and for whom I have no responsibility and they have no accountability. Take advice where you may, but put the stamp of the parliamentarian on the document.²
- 4.6 However critics of the current process suggest it has changed the purpose of the Yes/No arguments from what was originally intended. As outlined in chapter 2, the Yes/No arguments were designed to inform. The then Prime Minister Fisher envisaged both sides making their case impersonally and free of bias.³ Submitters to the Committee's inquiry indicate that this original purpose has not been served in recent referendums.
- 4.7 In her submission Anne Twomey from the University of Sydney suggested that because the Yes/No arguments are drafted by advocates of a particular position, the goal is to *persuade* voters. She suggested that this is why the arguments are seen as inflammatory, inaccurate and misleading.⁴
- 4.8 Glenn Patmore pointed out that parliamentarians operate under the pressure of partisan politics and are unlikely to present arguments as impersonal, reasonable or judicial in this kind of environment.⁵
- 4.9 At the roundtable discussion George Williams argued that having credible, non-parliamentarians draft the case will result in a
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1 Australians for Constitutional Monarchy, *Submission 16*, para. 2.13.

2 Howard Nathan, *Transcript of Evidence*, 14 October 2009, p. 15. Further into the roundtable discussion Mr Nathan indicated he thought the use of a referendum commission as an intermediary body had some merit: *Transcript of Evidence*, 14 October 2009, p. 22.

3 Enid Campbell, Southey Memorial Lecture 1988 'Changing the Constitution- Past and Future' p. 11.

4 Anne Twomey, University of Sydney, *Submission 11*, p. 1.

5 Glenn Patmore, *Submission 26*, p.3.

[C]loser approximation of what the yes and no case was meant to be in the first place ... a reasoned articulated position that represents not a misleading case on either side but a good sense of the arguments that Australians can have.⁶

- 4.10 There have been exceptions to this process. During the 1999 referendum, Yes/No arguments were prepared by rival campaign committees who were appointed by the Government from the delegates at the 1998 Constitutional Convention.⁷ The 1999 referendum illustrates at least one option for alternative drafters of the arguments. However, evidence received by the Committee during this inquiry indicates that there are, broadly speaking, three proposed alternatives: parliamentarians to retain the role of drafting the arguments; an independent body to draft the arguments; and a combined process incorporating both parliamentarians and an independent body.

Drafted by parliamentarians

- 4.11 A number of submissions indicated support for the current process in which parliamentarians assume responsibility for drafting the Yes/No arguments. These submissions argued that it was appropriate that elected representatives, who are responsible to the people, provide their views on the proposed change. As mentioned earlier, some considered that the process was political and therefore it was fitting that electors hear the views of parliamentarians.⁸

Drafted by an independent body

- 4.12 A number of submitters suggested that an independent body should be responsible for drafting the Yes/No arguments. They argued that this would result in the arguments being perceived as more reliable. At the roundtable discussion, David Hetherington from Per Capita supported the creation of an independent body as part of a more transparent process, indicating that an independent body may assist in making the process more open and democratic.⁹

6 George Williams, *Transcript of Evidence*, 14 October 2009, p. 13.

7 Australian Electoral Commission, *Submission 24*, para 2.2.5, p. 8.

8 Australians for Constitutional Monarchy, *Submission 16*, para. 2.13; Howard Nathan, *Transcript of Evidence*, 14 October 2009, p. 15. Further into the roundtable discussion Mr Nathan indicated he thought the use of a referendum commission as an intermediary body had some merit: *Transcript of Evidence*, 14 October 2009, p. 22.

9 David Hetherington, Per Capita, *Transcript of Evidence*, 14 October 2009, p. 68.

- 4.13 The submission from the Gilbert + Tobin Centre of Public Law recommended establishing a referendum panel, constituted for each referendum, that would draft the documents and provide a plain English explanation of the proposed change, arguments for and against and a copy of the constitutional text.¹⁰
- 4.14 Information provided by Tim Gartrell from Auspoll, from a survey they conducted for the purpose of this inquiry, indicates members of the public were supportive of someone other than parliamentarians drafting the arguments. Only 29 per cent of respondents thought politicians should be responsible whereas 57 per cent of the 1 500 surveyed indicated they felt the AEC as a neutral body, should hold this responsibility.¹¹
- 4.15 The possibility of the AEC either constituting the independent body, or being the model upon which an independent body was based, was suggested by a number of participants and submissions.¹² However during the roundtable discussion, Paul Dacey from the AEC expressed concern at the proposed role for the AEC:
- [S]ince 1984 the AEC has indicated a reluctance to be involved directly in the development of these cases just because of that possible perception of bias. We might be in the position to be able to do it and be able to do it in an impartial way, but someone will or may always construe, 'Aha. The AEC has a particular bent towards one case or the other. Therefore, there is bias.' So, there would be a risk, certainly at this stage, but I think it is a risk too great for us to entertain being involved at that stage.¹³
- 4.16 Nevertheless, the AEC did signal support for the creation of an independent body to provide additional material to voters. In its submission, the AEC recommended that the Machinery of Referendums Act could be amended to require the Yes/No pamphlet to contain a statement prepared by officers from an independent statutory body relating to the legislative and fiscal impact of proposed amendments.¹⁴
- 4.17 Further, the AEC highlighted two options for enabling participation of independent parties in the preparation of the Yes/No arguments. These
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10 Professor George Williams, *Transcript of Evidence*, 14 October 2009, p. 13.

11 Auspoll, *Submission 32, Question 2*; Tim Gartrell, Auspoll, *Transcript of Evidence*, 14 October 2009, p. 53.

12 John Williams, Faculty of Law, University of Adelaide, *Transcript of Evidence*, 5 November 2009, p. 32.

13 Paul Dacey, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 65.

14 Australian Electoral Commission, *Submission 24*, para 2.3.2, p. 13.

options were originally provided in the AEC 1998 submission to the Joint Standing Committee on Electoral Matters (JSCEM) entitled Subject: Referendum 1988 - Yes/No Case Pamphlet - Content. The options were described as follows:

- create a statutory office of Legislative Analyst to prepare independent arguments for and against proposed constitutional changes. Such arguments could be included in the Yes/No Cases pamphlet or, indeed, replace those prepared by the proponents. In either case, production and distribution of the pamphlet would remain with the Commission because of its statutory inclusions; and
- legislate to require an ad hoc independent panel, perhaps selected by the proponents and opponents and the Commission, to prepare the 'third case' analysis.¹⁵

4.18 Other submitters suggested that the independent body be involved in drafting additional material to be sent to electors. Such proposals were loosely modelled on the 1999 example in which an independent expert panel, led by Sir Ninian Stephen, was created and mandated to direct a neutral public education campaign. John Williams, from the University of Adelaide, recommended expanding this model and having an independent body create an information document that contextualises the proposed change and explains the pros and cons of the proposal.¹⁶

4.19 Consideration was also given to providing the independent body with an oversight role of the material to be presented.¹⁷ This proposal was supported by the Gilbert + Tobin Centre of Public Law who provided an alternative recommendation for the creation of a Referendum Panel in their submission. They stated the panel could be responsible for preparing a voters' booklet and for overseeing the public statements and activities of the Yes/No committees. They recommended the panel should:

[R]eview 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.¹⁸

15 Australian Electoral Commission, *Submission 24*, para 2.3.4, p. 14.

16 John Williams, University of Adelaide, *Transcript of Evidence*, 5 November 2009, p. 32.

17 Women for an Australian Republic, *Submission 30*, para 3, p. 2 and Rethink Australia, *Submission 29*, p. 3.

18 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 6.

4.20 There was considerable discussion as to whether an independent body should vet the material, regardless of whether it is drafted by parliamentarians or a Yes/No Committee. At the roundtable discussion, Paul Kildea stated:

Whoever prepares information, whether it be parliamentarians or some sort of independent panel, the option would also be open ... to have that information then vetted by a panel of ordinary citizens and then perhaps looked at by a plain language expert.¹⁹

Combining parliamentarians and an independent body

4.21 A number of submissions proposed combining parliamentarians and an independent body to draft the arguments. Adrienne Stone from the Centre for Comparative Cultural Studies at the Melbourne Law School, supported the idea of an independent process, in the sense that it would be independent of the pressures that might attend parliamentarians. At the roundtable held in Sydney, Adrienne Stone stated:

The principles that govern the preparation of the yes and no case ought to be ones which, like the referendum procedure itself, seek to balance parliamentary and popular involvement. It might be helpful to think then about something like a body to which appointments are made by the parliament – perhaps the Prime Minister and Leader of the Opposition – that may include parliamentarians but also include others. That might be the sort of body that can best seek to have the popular and parliamentary balance that we see in the referendum procedure itself.²⁰

4.22 At the roundtable discussion George Williams offered an alternative process, based on the 1999 referendum where the material was drafted by Yes and No committees. The membership of the body would include a mixture of parliamentarians and non-parliamentarians.²¹

4.23 In its submission, the Law School at the University of Adelaide indicated that during the 1985 Constitutional Convention, it was voted 35:33 that Commonwealth funded material should be circulated to electors by an independent person nominated through the Parliamentary process and that the material be prepared in consultation with and subject to the

19 Paul Kildea, Gilbert + Tobin Centre of Public Law, *Transcript of Evidence*, 14 October 2009, p. 63.

20 Adrienne Stone, University of Sydney, *Transcript of Evidence*, 14 October 2009, p. 21.

21 George Williams, *Transcript of Evidence*, 14 October 2009, p. 13.

approval of parliamentarians.²² The AEC stated that Senator Michael Tate supported the proposal, indicating it was

[D]esigned to help voters be well informed in relation to proposals for changing the Constitution and tries to bring an element of objectivity into the presentation of the arguments for and against.²³

4.24 Further, a submission made to the Joint Standing Committee on Electoral Matters by the AEC in 1998 stated that an

additional option may be to legislate to enable public input to the Yes/No arguments along the lines of the provision made in Oregon's electoral legislation (which enables public hearings), or similar hearing and submissions processes currently used for electoral redistributions under Part IV of the Electoral Act.²⁴

4.25 This option presented by the AEC addresses the concept of deliberative democracy in framing the arguments. In their submission, Janette Hartz-Karp and Lyn Carson recommend the creation of a Citizens' Parliament on Referendum (CPoR) whereby randomly selected citizens, assisted by experts and facilitated by independent moderators, would be tasked with preparing a fair and balanced argument for and against the proposed question. It is proposed the implementation of a CPoR would minimise public distrust in the referendum process and avoid much of the party political nature of referenda.²⁵ This submission indicates British Columbia, Canada pioneered a similar process in 2004.

4.26 The submission from the Gilbert + Tobin Centre of Public Law details the experience of other jurisdictions to show that entrusting the preparation of referendum materials to an independent body is workable and effective.²⁶

Experience of other jurisdictions

4.27 A number of jurisdictions use an independent body or persons to draft referendum material. For example:

- In Ireland, a Referendum Commission is formed prior to a referendum. The Commission is required to prepare a general explanation of the issues involved in the referendum, arguments for and against the proposed change (acknowledging the submissions made by the

22 Faculty of Law, University of Adelaide, *Submission 25*, p. 4.

23 Australian Electoral Commission, *Submission 24*, para 2.2.7, p. 8.

24 Australian Electoral Commission, *Submission 24*, para 2.3.5, p. 14.

25 Janette Hartz-Karp and Lyn Carson, *Submission 2I*, pp. 1-2.

26 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 5.

supporters and opponents of the proposed change) and it is legally bound to present statements which are fair to both sides. The Commission is comprised of four individuals who are not elected members of Parliament and, by reference to independent officers, intended to avoid accusation of bias in the appointment of the Commission.²⁷

- In California an impartial analysis of the proposed change is prepared by the State Legislative Analyst, who is a public servant.²⁸
- In the United States, Oregon's Secretary of State has since 1903 produced a Voters' Pamphlet. A committee of five citizens is appointed to draft the explanatory statement concerning a proposal. Four committee members are appointed from among the chief proponents and opponents of the proposal. The statement is subject to public hearing and suggestions are received.²⁹
- In New South Wales, the Yes/No arguments are drafted by public servants and checked for accuracy and fairness by independent persons including constitutional lawyers.³⁰ Associate Professor Twomey notes that referendums in New South Wales have a higher success rate than the Commonwealth, but it is unclear if this success rate is attributable to the less inflammatory Yes/No arguments.³¹

Content of the Yes/No pamphlets

4.28 Section 11 of the Machinery of Referendums Act only provides for the authorisation and distribution of Yes/No arguments. There are no legislative requirements or guidelines as to content of the arguments. As discussed in chapter 2, the Yes/No arguments were originally intended to be put in a 'reasonably and judicial' way. However, one of the main criticisms of the Yes/No arguments today is that the content is unhelpful to voters as a source of reliable, factual information. This is because the Yes and No arguments are designed to persuade rather than inform, and as a result are highly adversarial and often directly contradict each other.

27 Anne Twomey, University of Sydney, *Submission 11*, p. 2.

28 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 5-6.

29 Australian Electoral Commission, *Submission 24*, para 2.2.17, pp 11-12.

30 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 5.

31 Anne Twomey, University of Sydney, *Submission 11*, p. 3.

4.29 For instance, Siobhán McCann had the following to say about the 1999 referendum proposal for a preamble:

The ... official referendum pamphlet's only clarification of the issue of the existing preamble is in its reproduction of the official arguments for 'yes' and 'no'. Predictably enough, the 'yes' case indicates that there is currently no preamble in our Constitution, and the official 'no' case indicates the opposite.

Of course I understand that there are unresolved political and legal arguments about the consequences of the addition of a preamble to the Constitution, and that the [Australian Electoral Commission] sought to inform voters of these arguments by setting them out side by side. Nevertheless, the question of whether or not there is a preamble is surely one of fact, and ought to have been explained separately and not in the midst of political rhetoric.³²

4.30 In her submission, Jennifer Williams made a number of points regarding the inadequacy of the content of the Yes/No arguments with particular reference to the 1999 pamphlet:

- The partisan, combative nature of several sections of the text renders the information unreliable as a whole.
- The 'No' case interweaves rhyming slogans and alliteration a total of 17 times across its argument, the sub-text being that ignorance is a valid position to take to the ballot box.
- Slogans are not information. There are seven different slogans in the 'No' case. They feed fear and marginalisation. Ironically, though the 'No' case presents reasons for rejecting both proposals, the 'Don't know' slogans assume the voter will still know nothing after reading them.
- There is no further engagement offered beyond the cases presented-no contact numbers or website are given should a voter have further questions.³³

4.31 Some of the criticism relating to the content of the Yes/No arguments focused on the adversarial nature of the arguments and the processes to prepare those arguments. For instance, the Faculty of Law at the University of Adelaide's submission suggests that the adversarial nature of the Yes/No arguments means that the debate is polarised:

32 Siobhán McCann, 'Referendum: Reflections on the Preamble', *Alternative Law Journal*, 2000, Vol. 8.

33 Some of the original text has not been included in the quote: Jennifer Williams, *Submission 31*, p. 3.

... 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.³⁴

4.32 The comments received by the Committee indicate dissatisfaction with the content of the Yes/No arguments, something which is compounded by the fact that the Yes/No pamphlet is the only official information provided to electors. It is apparent that many submitters consider the Yes/No pamphlet to be inadequate:

I think the pros and cons are important – and that will include partisan argument – but I also think that it is important to help people to understand a proposal, and that includes a whole lot of things including the way the system works now, how the proposal has been put forward, what the possible outcomes might be in the future and a whole range of different stuff.³⁵

4.33 A number of submitters suggested that additional material should be provided to ensure electors have access to the basic facts needed to understand the proposal in context.³⁶ This additional material would explain, in plain English, the proposal to change the Constitution in a fair and balanced way. The provision of clear and factual material would also balance, and provide a context in which to interpret, the adversarial nature of the Yes/No arguments.³⁷

4.34 The Gilbert +Tobin Centre of Public Law submitted that a *Voters' Booklet* be distributed to electors with the aim of providing basic, accurate and unbiased information about each proposal. The booklet would 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.³⁸

34 Faculty of Law, University of Adelaide, *Submission 25*, p. 3.

35 Cheryl Saunders, University of Melbourne, *Transcript of Evidence*, 5 November 2009, p. 6.

36 See for instance Gilbert + Tobin Centre of Public Law, *Submission 23*; Faculty of Law, University of Adelaide, *Submission 25*; Anne Twomey, *Submission 11*.

37 George Williams, *Transcript of Evidence*, 14 October 2009, p. 12.

38 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 5.

- 4.35 In the United States, the state of Oregon distributes a Voter's Pamphlet for a range of electoral events, including referendums. The Voter's Pamphlet for the 2008 Oregon General Election included information on the financial impact, prepared by a committee of state officials, arguments for and against the proposal and an impartial statement explaining the measure.³⁹
- 4.36 Similarly, in New South Wales, the content of the Yes/No arguments is drafted by public servants and then checked for accuracy and neutrality by independent persons.⁴⁰
- 4.37 The Australian Government Advertising Guidelines issued in June 2008 could be used a guide to the provision of neutral background material. The guidelines state in part that:
- The material communicated must be presented in an explanatory, fair, objective and accessible manner. Specifically, information in campaigns should be directed at the provision of objective, factual and explanatory information and enable the recipients of the information to reasonably and easily distinguish between facts, on the one hand, and comment, opinion and analysis on the other.⁴¹
- 4.38 A final issue in relation to the content of Yes/No arguments is the length of the arguments. The Machinery of Referendums Act limits each argument to a maximum of 2 000 words except where there is more than one proposal at the same referendum, in which case the average of the arguments must not exceed 2 000 words. There was some concern that the word limit was either arbitrary or too long.
- 4.39 For instance, Rod Cameron told the Committee that:
- I would have that as a very short, pithy 200- or 300-word document which is designed for the lowest common denominator. The details can then be gained by those who are interested either online or in a bigger printed document to be sent on request.⁴²

39 See the Australian Electoral Commission, Submission 24, p. 12; The 151-page Voter's Pamphlet regarding these measures is available at <http://oregonvotes.org/nov42008/guide/pdf/vol1.pdf>. A summary of the information provided regarding each measure is also available at <http://oregonvotes.org/nov42008/guide/geninfo.html>.

40 Anne Twomey, *Submission 11*, p. 3.

41 Australian Government, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, June 2008, available from: http://www.finance.gov.au/advertising/docs/guidelines_on_campaign_advertising.pdf

42 Rod Cameron, ANOP Research Services, *Transcript of Evidence*, 29 October 2009, p. 9.

- 4.40 George Williams suggested a shorter word length if the document is to be written by a partisan body but then questioned the usefulness of a word limit at all:

Personally, I would not even put a word limit on it. It is like when you set an essay. Immediately everybody writes to a word limit without actually writing to what the appropriate length is. In some cases 500 words might be appropriate and in other cases it might need to be significantly longer.⁴³

- 4.41 It was pointed out a number of times during the Committee's inquiry that the Yes/No arguments for the 1999 referendum were of unequal length. As the Yes case decided to use less than 2000 words and the Yes and No arguments required a different number of pages, the phrase 'this argument concluded on page 14' appeared on pages 15 through to 25, at which the point the No case also concluded.
- 4.42 The word limit is an attempt to ensure that one side is not favoured over the other. By setting a maximum limit, the legislation is, in theory, setting up an 'even playing field' because both sides will have the same constraints in which to make their case. However, whether this word limit is useful to electors has not been considered and the answer may vary depending on the referendum question.
- 4.43 It is clear that many submitters consider the content of the Yes/No pamphlet to be unhelpful at best and misleading at worst. Evidence to the Committee's inquiry indicates that either the content of the Yes/No arguments should be vetted to ensure relevance and accuracy or that factual and contextual material should be disseminated to electors to balance the partisan nature of the Yes/No argument.

Format of the Yes/No pamphlet

- 4.44 The Yes/No pamphlet is printed and posted to every elector in Australia. Although it is available on the internet, most people would access it primarily as a hard copy document. A handful of submitters commented on the format or style of presentation of the Yes/No pamphlet and how this impacts on the accessibility of the information.
- 4.45 The AEC's submission acknowledges that concerns have been raised in relation to the format of the Yes/No pamphlets. Following the criticism of
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43 George Williams, *Transcript of Evidence*, 14 October 2009, pp 13-14.

the 1988 referendums, where the Yes and No arguments were each allowed to have control of the presentation of their cases, the Electoral Commission issued 'Guidelines for Members of Parliament preparing the Arguments to be Sent to Electors':

The Guidelines contained definitive rules on font and point size for text, and advised that body copy text would be 'justified' (ie presented in the 'justified' text alignment), that each argument must contain only words, how words would be counted, and so forth. The format of the Yes/No Case Pamphlet was designed to ensure that no argument was seen to gain an advantage by virtue of different typeface or typestyle.⁴⁴

- 4.46 The AEC's submission notes that the only variation in format was the colour coding of the pages on which each case appeared: green for the Yes pages and red for the No pages. The submission concludes that:

Given the potential for controversy about the format of Yes/No cases, the AEC believes that the issue of the format of the Yes/No cases should be dealt with by the Referendum Act itself.⁴⁵

- 4.47 It is worth noting that the AEC's decisions relating to formatting are based on a desire not to advantage one side over the other, rather than to increase the accessibility of the information. Jennifer Williams has argued that the electorate's civic educational needs should be at the centre of the process.⁴⁶

- 4.48 The submission from Jennifer Williams provides a valuable assessment of the Yes/No Pamphlet from the perspective of effective information design.⁴⁷

The premise of information design is to enable the user to discover, reason, critique, understand, and act. Hierarchies allow the user to extract the level (or layer) of information they need at any one time. Easy navigation allows the reader to control the experience to a large extent and feel confident engaging with the material. This is not evident in the Referendum '99 booklet.⁴⁸

44 Australian Electoral Commission, *Submission 24*, para. 2.2.2.

45 Australian Electoral Commission, *Submission 24*, para. 2.2.2.

46 Jennifer Williams, *Submission 31*, p. 1.

47 Information design is an area of professional expertise devoted to clear and eloquent visual solutions of complex data; it employs systems such as hierarchy and navigation to maximise information, access and comprehension: Jennifer Williams, *Submission 31*, p.4, see footnote 7.

48 Jennifer Williams, *Submission 31*, p. 2.

- 4.49 In relation to the structure of the Yes/No pamphlet, she points out that it is unnecessarily long and overwhelming and that there is no overall physical architecture or consistent visual voice.⁴⁹ Similarly, with regard to the hierarchies of information, the submission argues that there is no unifying hierarchy for the Yes/No arguments to follow. The submission notes that the arguments 'set their own individual pace over 32 pages but have no relationship whatsoever to each other' either visually or with regard to content'.⁵⁰
- 4.50 It is apparent that the elector is not the centre of the process with regard to the design of the Yes/No Pamphlet. The current regulation of format and presentation does not to enhance the effectiveness of the document or accessibility of the information. Formatting and presentation are important features of the Yes/No pamphlet and it follows that they should be used to maximise the effectiveness in communicating to and engaging with electors.

Dissemination of the Yes/No pamphlet

- 4.51 The Machinery of Referendums Act limits the means by which the Government can communicate information concerning the proposed change to the public prior to a referendum. In their submission, the AEC indicate that, while the Act provides for the dissemination of material contained in the referendum pamphlet in various formats (including on the AEC's website, in languages other than English, Braille, cassette, ASCII disk and large print) the main method used to disseminate the material remains through a printed pamphlet posted to each elector.⁵¹
- 4.52 The printed pamphlet as the primary method of communication has been in place since 1912 and retains support from many within the community. At the roundtable discussion David Flint stated that every Australian is entitled to receive in the post a copy of the document containing the arguments for and against the proposed change, and detailing how the Constitution will be changed.⁵² In their submission, the Law Faculty of the University of Adelaide noted their support for the continuation of the pamphlet, indicating that postal communication is an important way of

49 Jennifer Williams, *Submission 31*, p. 2.

50 Jennifer Williams, *Submission 31*, p. 2.

51 Australian Electoral Commission, *Submission 24*, para 3.1.3, p. 15.

52 David Flint, Samuel Griffith Society, *Transcript of Evidence*, 14 October 2009, p. 36.

ensuring that material about the referendum is able to be accessed by all Australians.⁵³ Further, at the roundtable discussion Julian Leaser commented that having material disseminated through the post gives the information a formality that the document deserves.⁵⁴

- 4.53 The submission provided by the AEC highlighted the ability of posted material to reach the Australian population. Following the 1999 referendum, analysis undertaken by Eureka Strategic Research on 1 200 survey respondents in the lead up to the referendum, indicated that over 80 per cent of respondents reported having received the pamphlet, and 51 per cent noted they had at least read part, or all, of the document. The analysis noted that in comparison to commercial standards, the results are quite high, possibly because the pamphlets were individually addressed.⁵⁵
- 4.54 However, Peter Brent from the Democratic Audit of Australia proposed that the success rate of the 1999 Yes/No pamphlet was atypical and a result of the high media profile of 'the republic issue'. Mr Brent suggested people were more likely to read that particular pamphlet because they appreciated the importance of the proposal.⁵⁶
- 4.55 This requirement to post material to every elector has been the subject of much criticism. Critics have described the current processes as arcane, inadequate and insufficient in meeting the needs of Australians.⁵⁷ Further to this, in a submission to JSCEM in 1988, the AEC stated:

In an age of rapid electronic communication and recognition of the education power of television/video material, the distribution of arguments via a Yes/No Cases pamphlet may be regarded as antiquated.⁵⁸

53 Faculty of Law, University of Adelaide, *Submission 25*, p. 2.

54 Julian Leaser, *Transcript of Evidence*, 14 October 2009, p. 32.

55 Australian Electoral Commission, *Submission 24*, para 3.2.10, p. 19.

56 Peter Brent, Democratic Audit of Australia, *Transcript of Evidence*, 22 October 2009, p. 16.

57 Howard Nathan, *Transcript of Evidence*, 14 October 2009, p. 49 and Civil Liberties Australia, *Submission 22*, para 3.2, p. 6.

58 Australian Electoral Commission, cited at para. 10.3.29 in submission 147 to the Joint Standing Committee on Electoral Matters Inquiry, *The 2001 Federal Election*, see note 59 below. Original reference in submission 32(d) to the Joint Standing Committee on Economic Matters, *Inquiry into the conduct of the 1987 Federal election and 1988 referendums*.

- 4.56 The AEC reiterated these sentiments in a submission to JSCEM in 2001, where it suggested that the Government reconsider the requirement to post the Yes/No pamphlet to each elector.⁵⁹
- 4.57 The majority of criticisms directed towards the current processes focussed on the need to adapt to new technologies in communicating with the Australian public. During the roundtable discussion, George Williams stated, “for me the booklet resembles what you would do in 1912 and not what you would be doing in 2009”.⁶⁰
- 4.58 In support of this sentiment Michael Millet stated:
- I have a 21-year-old son and a 19-year-old daughter and they regard email as an outmoded form of communication, let alone pamphlets ... I think it is time to move into the 21st century.⁶¹
- 4.59 In support of this, the AEC advised that changes in the character and composition of Australia’s population suggest it would ‘make sense for the AEC to tailor its choice of communication media to meet the information needs of a diverse range of electors’.⁶² As this highlights, there appears to be an increasing requirement to adapt methods of communication to both advancing technologies, and a changing population. Many alternative proposals were presented during this inquiry and the overwhelming majority of participants favour making information available through a variety of techniques.⁶³
- 4.60 This was highlighted by polling results presented by Tim Gartrell at the roundtable discussion, undertaken in response to this inquiry and in relation to methods of communication. Results indicated that a mix of technologies will be most useful. Of the 1 500 respondents, 77 per cent of 65-74 year-olds indicated they would find the hardcopy pamphlet useful, whereas 47 per cent of 18-24 year-olds, and 43 per cent of 25-34 year-olds indicated they would find information available through social networking sites useful.⁶⁴

59 Australian Electoral Commission, Submission 147 to the Joint Standing Committee on Electoral Matters Inquiry, *The 2001 Federal Election*, available from: <www.aph.gov.au/house/committee/em/elect01/index.htm>

60 George Williams, *Transcript of Evidence*, 14 October 2009, p. 6.

61 Michael Millet, Australian Broadcasting Corporation, *Transcript of Evidence*, 14 October 2009, p. 49.

62 Australian Electoral Commission, *Submission 24*, para 3.2.13, p. 19.

63 Rod Cameron, *Transcript of Evidence*, 29 October 2009, p. 6, Cheryl Saunders, Centre for Comparative Constitutional Studies, *Transcript of Evidence*, 5 November 2009, p. 6.

64 Tim Gartrell, Auspoll, *Transcript of Evidence*, 14 October 2009, pp 52 and 72.

- 4.61 This concept of a multi-pronged approach was also addressed at a public hearing by Cheryl Saunders who stated the 'one size fits all' approach is not effective and if there is a real commitment to helping people understand then a number of different modes are needed.⁶⁵
- 4.62 There was considerable discussion concerning what particular methods for communicating should be utilised. The AEC submission noted that a JSCEM report on the conduct of the 2007 federal election noted a 'growing reluctance on the part of electors to interact with the AEC using the paper-based and physical mail system'.⁶⁶ In addition, the Government's Electoral Reform Green Paper noted that the internet is now the most preferred means for Australians in contacting the Government.⁶⁷ Other proposed communications methods include through television, radio, the internet and text messaging.⁶⁸ In their submission, Women for an Australian Republic highlighted that particular attention should be paid to presenting material in visual formats.⁶⁹
- 4.63 However, it was also contended that the old method of communication, through the pamphlet, should not be entirely abandoned.⁷⁰ At the roundtable discussion George Williams noted people should still have the option of receiving the document through the post if they wanted.⁷¹ Paul Dacey referred to a package approach, which could include a household leaflet drop that could be complemented by a 'fulfilment' service, whereby people could either go online or ring the call centre to request material be posted to them directly.⁷²
- 4.64 However, at the roundtable discussion, George Williams warned against being too prescriptive within the Act, advising he does not think the legislation should specify format, as that is what has led to the current situation.⁷³ In his submission Rodger Hills recommended the AEC be responsible for assessing the various communication options available at

65 Cheryl Saunders, Centre for Comparative Constitutional Studies, University of Melbourne, *Transcript of Evidence*, 5 November 2009, p. 6.

66 Australian Electoral Commission, *Submission 24*, para 3.2.6, p. 17.

67 Australian Government *Electoral Reform Green Paper- Strengthening Australia's Democracy*, September 2009, p. 2, available at <www.pmc.gov.au/consultation/elect_reform/strengthening_democracy/docs/strengthening_australias_democracy.pdf>

68 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 6.

69 Women for an Australian Republic, *Submission 30*, para 12, p. 3.

70 Faculty of Law, University of Adelaide, *Submission 25*, p. 2.

71 George Williams, *Transcript of Evidence*, 14 October 2009, p. 32.

72 Paul Dacey, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 81.

73 George Williams, *Transcript of Evidence*, 14 October 2009, p. 72.

the time and determining the most effective methods for reaching all voters.⁷⁴

- 4.65 During the roundtable discussion, Michael Maley of the AEC stated that one of the challenges facing the AEC is the rapid advancement of technologies in methods of communicating, in contrast to the slow movements of the relevant statutes.⁷⁵ In addition, Paul Dacey of the AEC recommended that the Electoral Commissioner could be involved in determining the most appropriate means for disseminating the information. He added:

We keep track now of what method people use to lodge enrolment forms with us. We have a fairly good indication of whether they go to a post office or online to pick up that material...so we can certainly provide advice.⁷⁶

- 4.66 In addressing the requirement to make printed material available to electors, the AEC highlighted the financial implications for providing individually addressed material. In their submission, they advised that for the 1999 referendum, the dissemination of a 72-page document to 12.9 million Australians through personally addressed mail was a major logistical exercise which cost \$16.858 million.⁷⁷ The AEC advised that, of this amount, 45 per cent comprised the cost for printing, while delivery costs comprised just over 54 per cent. A preliminary estimate provided by the AEC indicates the production and delivery costs for a similar exercise today would come to approximately \$25 million.⁷⁸ In comparison, for the 2007 federal election, the householder drop for materials was approximately \$2.5 million to \$3 million, representing a significantly cheaper alternative.⁷⁹

- 4.67 Material presented during the inquiry highlighted the need to reassess the current methods for communicating with the public in an environment of rapidly advancing technology and the changing preferences and demographics of the Australian population.

74 Rodger Hills, *Rethink Australia*, *Submission 29*, p. 3.

75 Michael Maley, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 51.

76 Paul Dacey, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 73.

77 Australian Electoral Commission, *Submission 24*, para 3.2.2, p. 16.

78 Australian Electoral Commission, *Submission 24*, para 3.2.3, p. 17.

79 Paul Dacey, Australian Electoral Commission, *Transcript of Evidence*, 14 October 2009, p. 82.

Constitutional engagement

- 4.68 According to research carried out by the Australian Local Government Association, only 76 per cent of Australians of voting age recognise that Australia has a Constitution.⁸⁰ This figure highlights the need for increased engagement and education on constitutional matters. Further, in his submission, Glenn Patmore noted that in order for a referendum to be effective, education for the public is vital to ensure voters make an informed decision.⁸¹
- 4.69 At the roundtable discussion Paul Kildea discussed the requirement for increasing engagement with the public, stating:
- Attention should be given to developing mechanisms to involve citizens in more active ways. That might mean, in looking at the referendum machinery, ensuring that it allows for a toolbox of mechanisms that can improve citizen understanding of constitutional issues and also give people a sense of ownership of that.⁸²
- 4.70 Increasing engagement and improving understanding of the Constitution could result in a sense of ownership of proposed changes to the Constitution. However, according to Kerry Jones, 80 per cent of people are totally disengaged from politics, meaning they:
- [T]urn off after the issues get a bit complicated, do not want to know ... do not want to read about issues, just do not want political processes as part of their life unless they have to turn up on polling day, which is when they will make up their mind. We do not think this is good for our democracy'.⁸³
- 4.71 At the roundtable discussion in Sydney, Lucas Walsh pointed out that although there has been a civic deficit in Australia over the past two years, volunteerism has actually been on the rise. He advised that 'if you give these people an opportunity ... they would take advantage of it'.⁸⁴

80 Australian Local Government Association, *Submission 21*, p. 6.

81 Glenn Patmore, *Submission 26*, p. 6.

82 Paul Kildea, Gilbert + Tobin Centre of Public Law, *Transcript of Evidence*, 14 October 2009, p. 9.

83 Kerry Jones, Constitution Education Fund- Australia, *Transcript of Evidence*, 14 October 2009, pp 50-51.

84 Lucas Walsh, Foundation for Young Australians, *Transcript of Evidence*, 14 October 2009, p. 70.

4.72 However, George Williams stated that at present there is 'no option for ownership and no option for real deliberation'.⁸⁵ In order to address the apparent lack of options for engagement available to the Australian public, suggestions presented to the Committee included: increasing education campaigns in the lead up to referendums, increasing methods for engaging in deliberative democracy, and providing a platform for a national conversation.

Public education campaigns

4.73 The Electoral Reform Green Paper *Strengthening Australia's Democracy* provides that developing active citizens should be a clear objective of civics education.⁸⁶ An active citizen is more likely to be interested in engaging in activities vital for a democratic nation, including participation in attempts to change the Constitution.

4.74 In their submission, the Australian Local Government Association model their recommendation for a public education campaign on the neutral panel convened in the lead up to the 1999 referendum. Their recommendation is for a national program run by the AEC which focuses on the role of the Constitution, the mechanism by which it can be changed, and the role of individual electors in the process. This proposal recommends the campaign be restricted to information about the Constitution and the referendum process itself, and not include information on the actual referendum question.⁸⁷ Glenn Patmore also supports utilising the 1999 model as a base upon which to expand a public education campaign.⁸⁸

4.75 Michael Millett from the Australian Broadcasting Corporation highlighted the need to engage in longer-term education campaigns stating

the best way to inform and educate the population is not to do it in one hit two weeks out ... [I]t is better if we can construct a base and run off issues a year out and then progressively over a period as well ... I think it is more effective.⁸⁹

85 George Williams, *Transcript of Evidence*, 14 October 2009, p. 69.

86 Australian Government, Electoral Reform Green Paper, *Strengthening Australia's Democracy*, para 9.3, p. 127.

87 Australian Local Government Association, *Submission 21*, p. 11.

88 Glenn Patmore, *Transcript of Evidence*, 5 November 2009, p 63.

89 Michael Millet, Australian Broadcasting Corporation, *Transcript of Evidence*, 14 October 2009, p. 73.

- 4.76 George Williams and Paul Kildea recommend an impartial public authority called the Referendum Panel be constituted prior to a referendum to oversee, among other aspects, public education initiatives.⁹⁰ In their submission they propose a role for this panel would be to prepare education material for voters. The submission also recommends extending beyond this to an education campaign which incorporates aspects of public deliberation.

Deliberative democracy

- 4.77 The submission from the Gilbert + Tobin Centre recommends the operation of deliberative forums and other methods of public engagement. It recommends amending the Act to permit Government to fund mechanisms of engagement including deliberative polls, citizens' assemblies, citizens' juries and local constitutional conventions.⁹¹

- 4.78 As mentioned earlier, Janette Hartz-Karp and Lyn Carson recommend the creation of a Citizens' Parliament on Referendum (CPoR), modelled on the Citizens' Assembly in Canada, and comprising randomly sampled citizens reflecting the make-up of the Australian population:

This would provide a model for citizen engagement and deliberation on public policy questions, and help to create an environment more conducive to informed, deliberative citizens' participation and collaborative governance.⁹²

- 4.79 In drawing upon the experiences of the Citizens' Assembly, they stated this shows while there were a significant number of voters who could not understand the complicated case presented during the referendum, they voted for the proposal 'because they trusted the process and the randomly selected participants as being fair and unbiased'.⁹³

- 4.80 Other methods for incorporating deliberative processes were also discussed. At the roundtable discussion, Lucas Walsh recommended providing sub processes whereby people get together through a variety of fora, which could be electronic or face-to-face. He added there is a strong case for face-to-face:

The research indicates that young people's engagement with the political through technology is mixed/varied ... Some of it is

90 Gilbert + Tobin Centre of Public Law, *Submission 23*, pp 5-6.

91 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 5.

92 Janette Hartz-Karp and Lyn Carson, *Submission 20*, pp. 1-2.

93 Janette Hartz-Karp and Lyn Carson, *Submission 20*, pp. 2-3.

telling us that they are looking more and more to alternative channels, fast becoming mainstream channels, through social networking and what have you. There is also research that indicates that they do not look for quality information via electronic channels.⁹⁴

Creating a national conversation

- 4.81 At the roundtable discussion, Paul Kildea highlighted a measure towards a national conversation which was implemented prior to the 1999 referendum. He noted over 2 000 Australians participated in local constitutional conventions jointly run by local governments and the Constitutional Centenary Foundation. In addition to this, on Australia Day thousands of Australians gathered to discuss a variety of issues in a program called Australia Consults: 'The feedback from that was very strong and it was both educative and ... gave people a real feeling of contribution into the process.'⁹⁵
- 4.82 Lyn Carson also addressed the concept of creating conversation amongst the wider community, as opposed to making them passive observers, adding 'we need to think creatively about how to put people back into politics'.⁹⁶ She provided an example of the model used in the World Wide Views on Global Warming, which involved 38 countries and over 4 000 people simultaneously tuning in to each other via Skype and online. Lyn Carson added 'there is certainly a model there that we could adapt for our national context that I think would work extremely well as a way of stimulating some excitement about this'.⁹⁷
- 4.83 Kerry Jones raised the notion of holding a constitutional convention every five years, as a way of engaging people and getting them together and involved in the community. She indicated that during the five year period, people would have the opportunity to table ideas and have meaningful constitutional conventions all over Australia to discuss the ideas.⁹⁸
- 4.84 During the roundtable discussion, George Williams highlighted the necessity of involving the Parliament in the engagement process,

94 Lucas Walsh, Foundation for Young Australians, *Transcript of Evidence*, 14 October 2009, p. 48.

95 Paul Kildea, Gilbert + Tobin Centre of Public Law, *Transcript of Evidence*, 14 October 2009, pp 58-59.

96 Lyn Carson, University of Sydney, *Transcript of Evidence*, 14 October 2009, p. 57.

97 Lyn Carson, University of Sydney, *Transcript of Evidence*, 14 October 2009, p. 57.

98 Kerry Jones, Constitution Education Fund- Australia, *Transcript of Evidence*, 14 October 2009, p. 94.

indicating ‘having a nice debate about constitutional reform without involving parliament is, I think, largely worthless, because you are not actually engaging the people who make the decisions.’⁹⁹

- 4.85 Many methods for engaging people about the Constitution and the referendum process were discussed and most of the evidence received during this inquiry highlighted the need for increased engagement and education on constitutional matters.

Limitation on Government expenditure

- 4.86 As discussed in chapter 3 of this report, section 11(4) of the Machinery of Referendums Act limits Government expenditure in relation to referendum proposals. In effect, section 11 allows money to be spent on the distribution of the Yes/No pamphlet and ‘other information relating to, or relating to the effect of, the proposed law’. Although there appears to be scope within section 11(4) to provide impartial information to voters on the proposed change to the Constitution, the High Court has suggested that the class of material permitted under the legislation is quite narrow (see *Reith v Morling* note in chapter 3).¹⁰⁰

- 4.87 The Committee received a handful of submissions in support of the limitation, arguing that:

[It] should be retained to ensure total transparency and also not to place a political imbalance on the referendum question using tax payers’ money.¹⁰¹

- 4.88 However, many more submitters pointed out that the restriction on Commonwealth expenditure is a barrier to the development of better and more effective referendum process.¹⁰² They argued that the limitation on expenditure should be lifted in order to allow advertising, information and education campaigns in addition the Yes/No pamphlet.

- 4.89 The Faculty of Law at the University of Adelaide adopted a slightly different argument, noting the inconsistency in restricting Commonwealth spending in this area where state and territory governments have no similar restriction. They pointed out that political parties extend beyond

99 George Williams, *Transcript of Evidence*, 14 October 2009, p. 93.

100 See *Reith v Morling* (1988) 83 ALR 667.

101 Nick Hobson, *Submission 1*, p. 1; see also Robert Vose, *Submission 12*, p. 3.

102 See for instance Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 4.

jurisdictions and States have a history of publicly funding one argument. As this is the case, they argued that the restriction on Commonwealth expenditure in section 11 should be lifted.¹⁰³

4.90 However, if the limitation on expenditure is lifted, the question of how funding should be determined needs to be examined. As one submitter pointed out:

The danger here is obviously that the Commonwealth may not be, or may not be seen to be, even-handed in expenditure on the arguments for and against the referendum question.¹⁰⁴

4.91 In general, suggestions for alternative methods of funding fell into two broad groups: the first group propose that equal funding is provided to both the Yes and the No case; the second group propose a formula to determine funding which may result in unequal money being given to the Yes and the No cases.

4.92 The Australian Local Government Association proposed that funding for the Yes and No cases be allocated on the basis of the proportion of Parliamentarians who voted for or against the proposed law. They reasoned that this would 'be an equitable distribution of Commonwealth funding reflecting the will of the Parliament.'¹⁰⁵

4.93 Alternatively, a number of submitters proposed that the Yes and No cases should receive equal funding. For instance, David Flint argued that: 'I think that as long as we have public funding for federal elections we should have equal funding of the yes and no case.'¹⁰⁶

4.94 In particular, a number of submissions expressed support for the funding arrangements devised for the 1999 referendum.¹⁰⁷ As discussed in chapter 3 of this report, this included equal funding for the Yes and No committees as well as separated funding for a neutral information campaign in addition to the official Yes/No pamphlet.

103 Faculty of Law, University of Adelaide, *Submission 25*, p. 5. Alternatively, the submission argued that the States should have an equivalent restriction on expenditure. A similar argument is made by Graeme Orr, *Submission 2*, p. 2. The question of whether the Commonwealth could restrict State funding in this way was discussed at the roundtable in Sydney on 14 October 2009 at page 39 of the transcript and at the public hearing in Melbourne on 5 November 2009 at page 44.

104 Family Voice Australia, *Submission 7*, p. 4.

105 Australian Local Government Association, *Submission 21*, p. 9.

106 David Flint, Samuel Griffiths Society, *Transcript of Evidence*, 14 October 2009, p. 4.

107 See for instance, Australians for Constitutional Monarchy, *Submission 16*, at para 3.2; Civil Liberties Australia, *Submission 22*, at para. 2.7. See also the comments of David Flint, *Transcript of Evidence*, 14 October 2009, p. 4.

- 4.95 In 1999, following the amending legislation which was introduced to temporarily override the limitation on expenditure, the Government allocated approximately \$19.5 million to the referendum campaign. If the limitation on Government expenditure is removed from the Machinery of Referendums Act, the question of how much money is provided arises, in addition to questions of allocation.
- 4.96 In terms of the determining the amount of funding that a referendum campaign should receive, Australians for Constitutional Monarchy suggested that the total amount be calculated on the basis of one dollar for each elector, indexed from this year.¹⁰⁸ Alternatively, the Australian Local Government Association suggested that the funding for referendum be equivalent to funding for elections because that is a tangible figure.¹⁰⁹
- 4.97 In contrast, at the roundtable in Sydney there was a degree of acceptance that the overall funding should be determined by the Government:
- I think there are enough constraints there that parliament must authorise the expenditure. That is a democratic constraint. The executive is ultimately responsible.¹¹⁰
- 4.98 The restriction of government expenditure is clearly limiting but is considered by many to be fair. At present, the Yes/No pamphlet is the only official argument provided for under the Machinery of Referendums Act and it provides both sides with equal opportunity to explain their reasoning and make their case. If the restriction is removed, it is important to ensure that the same principles of equity and fairness continue to apply.

108 Australians for Constitutional Monarchy, *Submission 16*, para. 3.7.

109 Adrian Beresford-Wylie, Australian Local Government Association, *Transcript of Evidence*, p. 2.

110 George Williams, *Transcript of Evidence*, 14 October 2009, p. 43.

