

Electoral Commissioner

The Hon Peter Dutton MP
Leader of the Opposition
Senator the Hon Michaelia Cash
Shadow Attorney-General

via email: Senator.Cash@aph.gov.au

Dear Mr Dutton and Senator Cash

Thank you for your letter regarding the formality of votes at the upcoming referendum. The electoral system is owned by all Australians, and public scrutiny and commentary enables us to demonstrate that Australian elections are amongst the most transparent, robust, fair, and secure in the world.

Fairness and transparency can only be achieved by a total focus on electoral integrity – a key measure for the AEC. Indeed, electoral integrity is a central part of the AEC's published values; underpinned by, and supported through, adherence to all relevant laws and regulations.

For the referendum, the AEC is taking great pains to ensure that every voter is provided with clear and correct advice about how to cast a formal vote. This includes, as you indicate in your letter, advice to write 'yes' or 'no' on the ballot paper. This advice, to vote by writing 'yes' or 'no', is provided through our advertising campaigns, all our education sessions and products, media interviews, social media work, website, parliamentary briefings, our public statements, and is included as a key part of the official guide that is currently being delivered to every household in Australia.

Marking the referendum ballot paper any other way than writing 'yes' or 'no' risks it being treated as informal – and the AEC has been consistently and explicitly clear on this issue. Accordingly, our advice on how to vote formally will continue to be a key message for all our material – and is also the basis for our 'practise voting tool' which is already available and being accessed on our website.

However, and as you know, a ballot paper will also be lawfully counted as a formal vote if the voter's intention is clear as per section 93(8) of the *Referendum (Machinery Provisions) Act 1984*. Similar provisions exist at election time. These provisions are outlined in the law, in various legal cases, and are long-standing legal principles designed to maximise the franchise.

The formality of ticks and crosses has been based on advice from the Attorney-General's Department since (at least) 1988. For over 30 years and six referendum questions the AEC has consistently applied this advice. Early this year, we sought and received updated legal advice on this specific issue. I provide an extract of the relevant legal advice for you below:

In 1988, Attorney-General's Department (what is now the Australian Government Solicitor) advised the AEC:

6. Deviations from what is prescribed by s.24 will not render the ballot-paper informal if the ballot- paper satisfies the requirements of s.93(8) by a clear indication of the voter's intention. In relation to analogous provisions concerning Senate elections, the High Court has said that

the voter's intention must be expressed or indicated in a way that leaves it indisputable; it must not be left to inference or conjecture (Kane v. McClelland (1962) 111 CLR 518 at p.527).

7. In the first place, I confirm your understanding that ballot-papers marked with ticks only would be formal, the ticks denoting approval in each case. However, ballot-papers marked with crosses only would be informal as there would be no clear indication of the voter's intention. A cross may be used, by itself, variously to denote approval or disapproval.

Earlier this year, in 2023, the Australian Government Solicitor confirmed the 1988 advice in advice to the AEC:

24. A referendum ballot paper posing only one question marked with a tick should be treated as formal. This is because it is equivalent to a ballot paper marked 'Yes'. However, a ballot paper posing only one question marked with a cross should be treated as informal because it provides no clear indication of the voter's intention. This is because a cross may be used, by itself, variously to denote approval or disapproval. We note that AGS has advised in the past that a cross will not be informal where used in juxtaposition to a tick on a multi-question ballot paper.

This advice is reflected in the Scrutineer's Handbook referred to in your letter. The Handbook (which for full transparency we published earlier this year) provides detailed advice, in line with the provision in the Referendum Act, that a ballot paper will also be counted as a formal vote if the voter's intention is clear. I and other AEC staff have also spoken about this issue in public forums, media briefings, and in our parliamentary education sessions to parliamentary staff and Members of Parliament and Senators in July. I also raised this in Senate Estimates and at a joint Parliamentary enquiry in July.

As an aside, it is my understanding that this matter was not dealt with during the Parliamentary debates on amendments to the Referendum Act earlier this year. Rather, the only point of clarification added was section 93(9), which makes clear that a 'Y' will count as a yes and a 'N' will be accepted as a no.

I note also that over 99% of all voters cast a formal vote in the 1999 referendum. In other words, there were 0.86% informal votes, many of which would also not have involved the use of ticks or crosses. We are doing everything possible to achieve the same high levels of formality at this referendum.

I understand and acknowledge your interest in this important issue, but I do not accept, at all, the suggestion that by transparently applying the law and long-standing legal advice that the AEC is undermining the 'impartiality and fairness of the referendum'. The AEC has always, and will always, deliver electoral events consistent with the laws made by the Parliament.

You raise the issue of transparency in your letter; a principle I endorse wholeheartedly as it is a fundamental tenet of democratic electoral systems. Accordingly, and in the interests of ensuring Australians have faith in their electoral system, I seek your permission to publish your letter along with my response on our website.

Yours sincerely



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Tom Rogers

25 August 2023