

**Submission to
Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022 (Cth)**

Thank you for the opportunity to provide a submission on the *Referendum (Machinery Provisions) Amendment Bill 2022 (Cth)* ('*Machinery Act*'). I raise two issues. First, the decision to suspend the Yes/No pamphlet warrants more careful analysis of pros and cons. Second, further work is required on the government's proposed referendum question, which at present does not comply with the *Machinery Act*.

The Yes/No Pamphlet

Along with various uncontroversial updates to Australia's referendum machinery, the Bill proposes to temporarily suspend s 11 of the *Machinery Act*. This means that, in the lead up to a referendum on a First Nations Voice:

- there will be no 'Yes/No pamphlet' containing arguments for and against the proposed constitutional amendment distributed to every registered address in Australia; and
- the restrictions on expenditure, which previously meant that Commonwealth spending for a referendum could only occur through the pamphlet system, will not apply.

Suspension of s 11 appears to serve two objectives. First, it abolishes the Yes/No pamphlet, which has been subject to criticism. Second, it enables Government spending on a neutral civics campaign instead.¹

Yes/No pamphlets contain arguments written by politicians voting for and against the proposed constitutional amendment.² These pamphlets have been criticised on the basis that they:

- do not provide sufficient information to allow electors to make an informed decision at a referendum;³
- are designed to persuade rather than inform, so lend themselves to misinformation and polarising arguments;⁴⁵
- do not proportionately reflect the support/opposition for an amendment among parliamentarians;⁶ and
- are no longer an appropriate means of communication in the digital age.⁷

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2022, (Patrick Gorman MP); Explanatory Memorandum, *Referendum (Machinery Provisions) Amendment Bill 2022 (Cth)* 12-13.

² s 11(1) *Machinery Act*.

³ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* (Report, 11 December 2009) 2009 vii; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, *Inquiry into constitutional reform and referendums* (Report, December 2021) 55.

⁴ *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* 34-35.

⁵ *Inquiry into constitutional reform and referendums* 55-56.

⁶ *Ibid* 56.

Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2022, (Patrick Gorman MP); *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* 15; *Inquiry into constitutional reform and*

These concerns are valid. However, other considerations may weigh in favour of keeping the pamphlet system in place for the upcoming referendum, with minor adjustments to improve its content.

For example, some parts of the population might need posted hard-copy information, because they do not have strong internet skills or access – like the elderly population or people in remote Australia who may not have easy access to computers or mobile phones. Posted material should be made available, so these sectors of the population can also be informed about the referendum. This might weigh in favour of retaining the Yes/No pamphlet, and/or ensuring that neutral civics information is distributed by post as well as digitally.

One option is to retain the Yes/No pamphlet, but update its form and content, while also enabling government spending on a neutral civics campaign. In the 1999 republic referendum, s 11 was not suspended in its entirety. Rather, s 11(4) was suspended to enable government spending flexibility,⁸ and the Yes/No pamphlet was retained. This more targeted approach could be emulated to enable government spending on a neutral civics campaign while retaining the Yes/No pamphlet.

To respond to concerns about the deficiencies of the Yes/No pamphlet, its content could be updated. Critics who say the pamphlet does not accurately convey the proportions of the Yes/No vote in Parliament raise a good point. This could be addressed by updating the pamphlet to include information on how many parliamentarians voted Yes and how many voted No, so the public can view the Yes/No cases in proper perspective.

Additionally, a very brief, plain English, neutral explanation of the proposed amendment could be included in the pamphlet, written by an apolitical independent entity like the Australian Electoral Commission or the appropriate bureaucratic department.⁹

These additions to the Yes/No pamphlet could be achieved via an amendment to s 11 of the *Machinery Act*, which stipulates the Electoral Commissioner's role in relation to the pamphlet. This section could additionally require the Electoral Commissioner to specify in the pamphlet the number of parliamentary votes corresponding to the Yes/No cases, and to contribute to the pamphlet a short and apolitical explanation of the proposed constitutional amendment.¹⁰

Section 11(2)(b) already requires the Electoral Commissioner to contribute to the pamphlet 'a statement showing the textual alterations and additions proposed to be made to the Constitution'. Similarly, s 11(4)(b) already envisages Commonwealth spending to enable 'the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law'.

referendums 58; Explanatory Memorandum, *Referendum (Machinery Provisions) Amendment Bill 2022* (Cth). 12-13.

⁸ Paul Kildea and Rodney Smith, 'The Challenge of Informed Voting at Constitutional Referendums' (2016) 39(1) *UNSW Law Journal* 386, 381.

⁹ *Ibid* 394.

¹⁰ This explanation could alternatively be provided by an appropriate bureaucratic department.

If it is thought that s 11(4) should not be suspended in order to retain the possibility of the Electoral Commissioner providing the additional information in the pamphlet as discussed here, an alternative way to enable Commonwealth spending on a neutral civics campaign could be to add this specific purpose to the list of allowable referendum expenditure provided in s 11(4). For example, a new s 11(4)(d) could allow the government to spend money on ‘a neutral civics education campaign to inform electors about the proposed law.’

Form of referendum ballot papers

It should also be noted that the government’s draft referendum question does not comply with the *Machinery Act*,¹¹ and the Bill does not fix this problem. Assuming no amendment to the prescribed ballot paper is being considered,¹² the referendum question will need to be revised to comply with the requirements of the *Machinery Act*.

The form of constitutional referendum ballot papers is stipulated under s 25,¹³ which requires they look like this:

<p style="text-align: center;">Commonwealth of Australia</p> <p style="text-align: center;">BALLOT-PAPER</p> <p style="text-align: center;"><i>[Here insert name of State or Territory]</i></p> <p style="text-align: center;">Referendum on proposed Constitution alteration</p> <p>DIRECTIONS TO VOTER</p> <p>WRITE “YES” or “NO” in the space provided opposite the question set out below.</p> <p><i>[Here set out the title of the proposed law]</i></p> <p>DO YOU APPROVE THIS PROPOSED ALTERATION?</p>
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For example, the preamble question in the 1999 republic referendum appeared on the ballot paper as follows, in compliance with the *Machinery Act*:

A proposed law: To alter the Constitution to insert a preamble.

¹¹ Anne Twomey, ‘Creating a constitutional Voice – the words that could change Australia’, *The Conversation*, (online, 30 July 2022) <<https://theconversation.com/creating-a-constitutional-voice-the-words-that-could-change-australia-187972>>.

¹² Any amendment must comply with the requirements of s 128 of the Constitution. This requires that ‘a proposed law’ for constitutional alteration must be submitted to the electors. Then a majority of electors in a majority of the States ‘must approve the proposed law’, plus a ‘majority of all the electors voting’ must ‘approve the proposed law’ for a referendum to be passed. This constrains how the referendum ballot paper can be altered.

¹³ And Schedule 1, Form B.

DO YOU APPROVE THIS PROPOSED ALTERATION?

By contrast, the Government's draft question is proposed as follows: '*Do you support an alteration to the constitution that establishes an Aboriginal and Torres Strait Islander Voice?*'¹⁴ This does not comply with the Act. It is also not an accurate description of the draft constitutional amendment, which does not of itself establish a Voice, but requires Parliament to establish a Voice. This is a crucial distinction. Another weakness may be that the question does not reflect the fact that a constitutionally guaranteed Voice is the mechanism for achieving recognition of Indigenous peoples in the Constitution.

The following referendum question would accurately explain the proposed constitutional amendment and would comply with the *Machinery Act*:

A proposed law: To amend the Constitution to require Parliament to establish an Aboriginal and Torres Strait Islander Voice.

DO YOU APPROVE THIS PROPOSED ALTERATION?

This is the simplest formulation. However, if reference to Indigenous constitutional recognition is desired, the question could be something like:

A proposed law: To amend the Constitution to recognise Aboriginal and Torres Strait Islander peoples through provisions requiring Parliament to establish an Aboriginal and Torres Strait Islander Voice.

DO YOU APPROVE THIS PROPOSED ALTERATION?

If more explanation of the function of a Voice is thought to be required, the question could be something like:

A proposed law: To amend the Constitution to require Parliament to establish an Aboriginal and Torres Strait Islander Voice to enable Aboriginal and Torres Strait Islander peoples to provide advice on laws and policies relating to Aboriginal and Torres Strait Islander affairs.

DO YOU APPROVE THIS PROPOSED ALTERATION?

I hope these comments are useful. Please let me know if I can be of further assistance.

Yours sincerely,

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¹⁴ Prime Minister Anthony Albanese, 'Address to Garma Festival' (Speech, Garma Festival, 30 July 2022) <<https://www.pm.gov.au/media/address-garma-festival>>.

¹⁵ The Radical Centre Reform Lab was established with generous support from Foundation Donors, Henry and Marcia Pinski. More information: <https://www.mq.edu.au/research/research-centres-groups-and-facilities/groups/radical-centre-reform-lab>.