



6 August 2021

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Submission by email: spla.reps@aph.gov.au

Dear Secretary

Inquiry into the constitutional reform and referendums

This submission is written by constitutional law experts from the Indigenous Law Centre (ILC), UNSW (Sydney). The ILC has been integral to the development of constitutional reform proposals for the meaningful recognition of First Nations people over the past decade under the stewardship of Professor Megan Davis. The ILC supports the work of the Aboriginal and Torres Strait Islander representatives who issued the Uluru Statement from the Heart. The work of the ILC has predominantly focused on educating the Australian public and upholding the legal, social, and cultural aspirations of the Statement. The ILC makes this submission in the context of its work towards building support, in the public, Parliament and Government, for the constitutional enshrinement of a First Nations Voice, as called for in the Uluru Statement.

For this reform to succeed, it is important that the “rule book” for conducting a future referendum (that is, those rules contained in the *Referendum (Machinery Provisions) Act 1984* (Cth)) is in a fit state for a modern referendum, remembering that the last attempted referendum was 1999 (and even then, special provision was made for the conduct of the referendum).

The criteria against which we argue the referendum rule book should be assessed are twofold:

1. The government meets its responsibility to provide objective and fair information to the public on the content of the proposed referendum, and the likely implications of voting YES or NO.
2. The Australian people are able to communicate freely with each other about the referendum proposal, and the likely implications of voting YES or NO, and that there is transparency as to who is making significant financial contributions to referendum campaign organisations.

Against these criteria, we submit that there is a need to address the following issues in the current *Referendum (Machinery Provisions) Act*:

1. question setting;
2. the official government pamphlet / information; and
3. transparency, but not restriction, of private funding of campaigns.

In preparing this submission, we acknowledge the benefit of contributions from a range of Australian and overseas experts on elections and referendums who participated in a recent workshop hosted by The Referendums Project at the Gilbert + Tobin Centre of Public Law (UNSW).

Question setting:

It is imperative that the question that is put on the ballot paper is easily understood, and captures the essential nature of the reform. It must be clear, simple and neutral. For some voters, the referendum question will be the first time that they have engaged with the issue at the level of decision-making seriousness.

The Constitution in s 128 specifies for a successful Yes vote that the electors 'approve the proposed law'. This sets a minimum requirement for any referendum question, that the

voters are directed to the proposed law that they are approving. This is currently achieved in s 25 and the schedule of the *Referendum (Machinery Provisions) Act* by requiring the referendum question to state the long title of the proposed law, followed by the question: 'Do you approve this proposed alteration?'.

The long title of the proposed law is determined by the Parliament, and must be sufficiently accurate to cover the scope of all clauses in the Bill.¹

We believe it is necessary to reform the current process for question setting. It is our recommendation that the *Referendum (Machinery Provisions) Act* be amended to:

1. Allow the referendum question to be put in accordance with the following formulation: 'Are you in favour of [short description of proposed reform], as provided in the [short title of Act]?' This approach would comply with section 128, while also being easier to understand for voters.
2. The short description of the proposed reform should be developed by a joint parliamentary committee, whose responsibility is to recommend proposed wording for approval by the Parliament. The Committee should be assisted by an 'Independent Referendum Panel', a body appointed by the Prime Minister, in consultation with the Opposition Leader and other parliamentary party leaders, that must include experts in constitutional law, public communication, a representative from the Australian Electoral Commission, and community representatives. The Panel's role would be to conduct public research, including surveys and focus groups, to ascertain public responses to different question formulations. The Panel would be responsible for advising the Committee on the clarity and neutrality of proposed descriptions. This model is similar to that adopted in the UK, where the Electoral Commission has a role in ensuring clear and balanced referendum questions, while the final say rests with Parliament.

¹ Standing Order 140, House of Representatives Standing Orders.

The official government pamphlet / information

In addition to the referendum question, the most important piece of information that is provided to the electors by the government in the lead up to a referendum is the 'official pamphlet'. Section 11 of the *Referendum (Machinery Provisions) Act* currently authorises the government to spend money to inform voters about the referendum through the production and distribution of a YES/NO pamphlet. The document contains arguments for and against the constitutional amendment, authorised by a majority of those parliamentarians who voted in favour, or against, the proposed Bill. Each argument can be up to 2000 words. The pamphlet also contains the text of the proposed amendments. The Electoral Commission is responsible for printing and sending the pamphlet to each household a minimum of 14 days before polling day. The Commissioner *may* also send the information to email addresses that the Commissioner considers appropriate, and may publish the pamphlet on the internet, but this is not required. The provision authorises, but again does not require, translations of the pamphlet into other languages and forms suitable for the visually impaired.

The problems with the current process are:

1. There is no independent, neutral explanation of the referendum proposal.
2. There is no independent input or oversight of the arguments for or against the proposal, and so misleading and exaggerated claims can be included.
3. The specifications encourage a pamphlet that is unnecessarily long (up to 2000 words) and devoid of potentially useful explanatory material such as images.
4. The information in the pamphlet will not necessarily be provided to voters with enough time before polling day (particularly with the availability of pre-polling), and in the variety of forms needed to reach as many voters as possible.

In light of these problems, our recommendations are that:

1. A Referendum Panel (see above) be established, that, in addition to working with the Parliament in setting the referendum question, would oversee the development of the official pamphlet.

2. The official pamphlet should include not just the text of the proposed amendments but a clear and neutral explanation of the parts of the Constitution affected by the amendments, and the anticipated effect of the amendment, as far as this is agreed between constitutional experts. The aim of this statement should be to provide the average elector with clear, simple and impartial information so as to understand the measures that they are voting on.
3. The official pamphlet should include a brief, objective summary of the arguments that have been made for and against the proposal (maximum of 1000 words, which can be supplemented with images). These arguments can be sourced from parliamentary debate over the proposed law, media and other public debate that has occurred during the passage of the proposed law.
4. In addition to the Referendum Panel's explanation of the proposed amendments and arguments for and against, the official pamphlet should include a 'citizens' statement' section. This is an explanation of the proposal and the arguments for and against it that have been generated through a small, formalised citizens deliberative process. This is known as a 'Citizen Initiative Review', and is used frequently in some states of the US. This section allows the voters to hear about the reform from 'ordinary people', which can increase understanding as well as trust in the information provided.
5. The official pamphlet must be made available on the internet, and published in print, broadcast and social media. It must be posted to households further in advance of the referendum, at a minimum 30 days before polling day, or 14 days before pre-polling opens. It must (not may) be translated into key voter languages and also made available in a form for the visually impaired.
6. The official pamphlet should include a list of the members of parliament who voted for and against the proposed bill. This will allow voters to have a sense of the balance of opinion among the parliamentarians, in the parties and across the country.

Beyond this, it is our recommendation that the *Referendum (Machinery Provisions) Act* should support debate and discussion of referendum proposals by the people of Australia.

This will facilitate the exercise of genuine popular sovereignty under s 128 of the Constitution.

Facilitating, not limiting, the peoples' voices

(a) Spending and donation caps

We do not consider at this time it is appropriate to introduce caps on referendum campaign expenditure.

Under the system of representative government in Australia, the people of the Commonwealth play a role as electors on a regular basis, voting for candidates who will exercise law-making power in the national Parliament as their elected representatives. A referendum held under section 128 of the Constitution, however, accords a far more significant role to the people than an ordinary election, and a far greater share of direct law-making authority. A referendum is the most striking example of 'the political sovereignty of the people of the Commonwealth'² in action. Popular sovereignty is the basis for the freedom of political communication that is recognised under our Constitution. The High Court acknowledges that that freedom extends well beyond the speechifying of candidates and politicians to 'communications from the represented to the representatives and between the represented'.³ The exercise of popular sovereignty involved in a referendum depends on the free flow of communication by and to citizens in the run up to a referendum vote at the ballot box.

The referendum machinery legislation should support and facilitate the grassroots political engagement that characterises the voting process to change Australia's Constitution. A referendum de-centres the political parties that dominate elections and focuses on the active involvement of the people in metropolitan, regional, rural and remote communities, as illustrated by the 1967 'Aborigines' Referendum. The process involves a much less predictable dynamic than conventional elections, with much greater scope for horizontal

² *Unions NSW v NSW (No 2)* (2019) 264 CLR 595, [40] (Kiefel CJ, Bell and Keane JJ).

³ *ACTV v Commonwealth* (1992) 177 CLR 106, 174 (Deane and Toohey) quoted in *Unions NSW v NSW (No 2)* (2019) 264 CLR 595, [40] (Kiefel CJ, Bell and Keane JJ).

alliances between citizens, civil society organisations, faith groups, businesses, professional associations, sporting organisations and so on. The risk of spending caps is that they will impede or discourage this protean capacity for a referendum proposal to galvanise civic engagement and unite diverse groups within the Australian community.

The proposal in the Uluru Statement from the Heart to enshrine a First Nations Voice in the Australian Constitution illustrates the point. The invitation to walk together in a movement for a better future through constitutional change and structural reform was issued by First Nations delegates at Uluru in 2017 *to the Australian people* rather than to political parties in Canberra. A remarkable coalition of supporters across Australian social, economic and cultural life has assembled in the years since, eager to promote the reforms in the Uluru Statement and see a First Nations Voice enshrined in the Constitution. In a climate where political parties experience no federal spending limits at election time, it would be invidious if the enthusiastic advocacy of supporters for a constitutionalised Voice was quelled by different treatment under the referendum machinery legislation.

(b) Transparency of significant donations to campaign organisations

While individuals and civil society organisations should be able to freely campaign during referendums, it is important that there is public transparency about donations to campaign organisations during a referendum.

We recommend that organisations who receive donations for the purpose of referendum campaigning should be required to disclose to the Australian Electoral Commission (AEC) the source and amount of those donations. The disclosure obligation would be triggered for donations above a certain monetary threshold, such as \$1000, as under the NSW and Queensland electoral funding disclosure rules. Like Queensland's regime for the disclosure of electoral donations, organisations should be required to disclose relevant donations within seven days of receiving them, which should then be made publicly available in real time on the AEC's website. Once the referendum campaign officially commences, any organisations undertaking referendum campaigning could also be required to disclose

donations they have received within the preceding two years for the purpose of campaigning.

Yours sincerely

Professor Gabrielle Appleby

Associate Professor Sean Brennan

Professor Megan Davis

Dr Dylan Lino