



Professor Anne Twomey
Professor of Constitutional Law

13 December 2022

Ms Kate Thwaites MP
Chair
Joint Standing Committee on Electoral Matters
Parliament House
CANBERRA, ACT, 2600

Dear Ms Thwaites,

Please accept this submission into your inquiry on the *Referendum (Machinery Provisions) Amendment Bill 2022* (Cth).

The Bill appears primarily directed at updating the machinery provisions for the holding of a referendum so that they match the existing machinery provisions for federal general elections. This is a sensible thing to do as it will avoid undue confusion and will aid the smooth operation of future referendums. I have not looked in detail at these provisions, but generally support the idea of consistency.

However, I do note that it would be desirable for the financial disclosure framework to go further in providing for a lower disclosure threshold and requiring real-time disclosure of donations so that voters are aware of the sources of funding for campaigns while those campaigns are underway. The referendum could operate as a pilot project for extending real-time disclosure to federal elections in the future. If voters are to be fully informed before they vote in either a referendum or an election, they need transparency about who is funding the relevant campaigns. Providing that information well after the referendum is held is really shutting the stable door after the horse has already bolted.

The Yes/No case

The most controversial aspect of the Bill is the disapplication of s 11 of the *Referendum (Machinery Provisions) Act 1984* until after the next general election. This will have two effects. First, it will mean that the Electoral Commission will not be obliged to distribute the 'official pamphlet' setting out the Yes and No cases, as prepared by Members of Parliament. The second effect is to remove the prohibition on using Commonwealth funding with respect to arguments for or against the proposed amendment.

Faculty of Law
New Law Building F10
Eastern Avenue
The University of Sydney
NSW, 2006
Australia

T +61 2 9351 0237
F +61 2 9351 0200
anne.twomey@sydney.edu.au
<http://sydney.edu.au/law>
<http://ssrn.com/author=808822>

ABN 15 211 513 464
CRICOS 00026A



In relation to the Yes/No case pamphlet, there is a good reason for eliminating it, at least in its current form. As I have noted in *The Conversation* (<https://theconversation.com/the-government-will-not-send-out-yes-and-no-case-pamphlets-ahead-of-the-voice-to-parliament-referendum-does-this-matter-195806>), such pamphlets have previously been used to provide the community with emotive, misleading and inaccurate statements, which do not aid voters in making a better informed choice.

An alternative approach, as has been taken in New South Wales, would be for an official pamphlet (or online version) to be prepared by public servants and vetted by independent experts so that it is an accurate factual statement and an objective analysis of the purpose and likely effect of the proposed amendment.

Care should be taken to ensure that there is an authoritative and trustworthy site that can be accessed by voters who wish to be better informed upon the issues. As Alfred Deakin stated when the Yes/No case was first proposed:

It is our duty, when we ask the electors to vote for or against momentous proposals of this kind, to give them the best material we have in order that they may form an independent judgment.

A vacuum should not be left by the removal of the Yes/No case, as this will be filled by those who seek to mislead and manipulate.

Funding campaigns

Section 11 currently prohibits the government from funding campaigns for either side in a referendum. In 1999, however, this prohibition was disapplied by the Howard Government for the republic referendum. It provided funding for a neutral public education campaign as well as equal funding for the Yes and No committee campaigns.

There was controversy in 2013 when under the Gillard Government, Parliament legislated to allocate funding to both sides in the proposed referendum on local government constitutional recognition in accordance with the level of support each side had in the Parliament. This would have resulted in \$10 million going to the Yes campaign and only \$500,000 to the No campaign. It was argued by some that this was unfair, particularly as the rule change was proposed after the votes for and against had already been taken in Parliament. As the referendum failed to proceed, a full campaign was not held.

This time, despite proposing to lift all legal constraints on its power to fund the campaigns, the Government asserts that it will only fund a 'neutral' campaign. The



Explanatory Memorandum to the Bill says that it will allow ‘the Commonwealth to fund educational campaigns to promote voters’ understanding of referendums and the referendum proposal’. The Attorney-General, Mark Dreyfus, stated in a [press release](#) that disapplying section 11 will ‘enable funding of educational initiatives to counter misinformation’.

The second reading speech by Mr Gorman on 1 December 2022 includes the following:

[T]he bill will temporarily suspend expenditure restrictions in section 11 of the referendum Act to ensure the government can provide Australians with factual information about the referendum.

This information will provide voters with a good understanding of Australia’s Constitution, the referendum process, and factual information about the referendum proposal.

The Government has no intention of funding ‘yes’ and ‘no’ campaigns.

One might well ask why s 11 needs to be disappplied if the Government is only proposing to provide factual information. Section 11(4)(b) permits the Electoral Commission to provide ‘other information relating to, or relating to the effect of, the proposed law’. However, in *Reith v Morling* in 1988, Justice Dawson in the High Court held that two advertisements that were proposed to be run during the 1988 referendum would breach s 11 because they included material that presented arguments in favour of the proposed laws. One advertisement set out a statement of fact that the Constitutional Commission had held public meetings and accepted submissions in undertaking a review of the Constitution and that its recommendations formed the basis for three of the four proposed constitutional amendments. The second advertisement stated that ‘you have the opportunity on September 3 to review our Constitution’. While on their face, both would seem to be innocuous, they were held by Justice Dawson to reinforce some arguments made in the Yes case and therefore to breach the spending prohibition in s 11. It is therefore understandable, in light of this case, that the Government seeks to disapply s 11, even though it only intends to run a neutral educative campaign.

However, this case also shows the sensitivity of anything put in a neutral campaign and how difficult it will be to maintain trust and not be accused of partisanship or lack of fairness. This kind of campaign will be very difficult to run and considerable care will need to be taken about who runs it, the content used and how it is managed.



If you would like any further information, please contact me at:
anne.twomey@sydney.edu.au.

Yours sincerely,



Anne Twomey
Professor of Constitutional Law