



2 December 2022

Committee Secretary
Joint Standing Committee on Electoral Matters

Dear Secretary

Inquiry into Referendum (Machinery Provisions) Amendment Bill 2022

Thank you for the opportunity to make a submission.

I support the passage of this Bill, subject to the comments and reservations below. The Bill is not the set of reforms that Australia needs to hold the best possible modern and fair referendum process. Nonetheless, at this late hour as Australia approaches the campaigning period for the Voice referendum, a Bill of this kind is likely the best that Parliament can achieve.

Suspending the Yes/No Pamphlet

A hard copy Yes/No pamphlet was the best idea that Parliament could come up with in 1912 for informing people about a referendum proposal. It has failed repeatedly to live up to its promise and has not met the aspirations of Parliament by enabling Australians to cast an informed vote. The best that can be said of the pamphlet is that the 2,000 word statements are so unappealing that few people read them. It is time that this expensive and ineffective means of informing the community was dropped.

The official Yes/No pamphlet seems quaint by modern standards in requiring 2,000 word statements for each side to be printed and then posted to voters. It was introduced before the advent of radio and television in Australia, let alone the internet and social media. It was championed by the Fisher Labor government stung by the heavy defeat of its 1911 referendum proposals. The government believed it lost the referendum because of an exaggerated No campaign and hoped the pamphlet would inject rationality into the debate.

Attorney-General William Hughes envisaged the case for either side being put in an 'impersonal, reasonable and judicial way', and appealing to 'reason rather than to the emotions and party sentiments'. Prime Minister Andrew Fisher was optimistic about the Yes/No pamphlet, remarking: 'I have no doubt at all that the case will be put from both sides impersonally and free from any suggestion of bias or misleading on the one side or the other'.

Things have not worked out that way. In the absence of restrictions on what can be included, nor even a requirement for truth and accuracy, the pamphlet has been characterised by unrestrained language, exaggeration and misinformation. Cases have made wild claims lacking foundation in the hope of appealing to emotion rather

than reason. Hyperbole and falsehood have often proven the most effective techniques for influencing voters who have little knowledge of how the Constitution works.

The first referendum to use the pamphlet was in 1913 when the Fisher Labor government put six proposals to the people on a single day to increase Commonwealth power over trade and commerce, corporations, industrial matters, railways, trusts and monopolies. Government members drafted the Yes case in the pamphlet to appeal to reason and the responsibility of citizens to serve the common good.

The No case urged people to vote no ‘against the rash, reckless and unreasonable wrecking of the Federal Constitution’. It said a Yes vote would ‘pave the way for the introduction and adoption of ... Socialism’ and that a ‘Socialistic Government ... would pose and preside as our Dictator, while living upon the captured earnings and savings of the whole people, until finally the bubble project bursting plunges all concerned into inevitable disaster.’ The No case won the day, with all six proposals defeated.

Commonwealth expenditure

The bill seeks to suspend the operation of section 11 of the *Referendum (Machinery Provisions) Act 1984* to permit the Commonwealth to fund civics education and provide factual information to the community about the upcoming referendum. While it is not clear the suspension of section 11 is necessary for this, it is nonetheless a prudent move given the level of doubt. However, the suspension of the clause raises further issues.

This part of the Bill will suspend s 11(4) in providing that ‘the Commonwealth shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law’. Unlike when a similar approach was taken in 2013, the government has indicated in the second reading speech to the Bill that it ‘has no intention of funding “yes” and “no” campaigns’.

This is an odd way of going about things. If the intent is not to take advantage of the suspension of s 11(4), then it or its equivalent (leaving room for factual material) should be left in the legislation. If nothing else, the absence of such a clause means that there is no capacity to hold the government to its commitment not to fund yes or no case advocacy.

The suspension of section 11 also leaves a void in what sort of material might be provided by the government during the referendum. There is no precision around the sorts of factual material that might be provided to voters. This is a contentious and difficult area, and it needs to be thought through carefully. There is a high risk that what some people regard as factual material others will see as partisan advertising.

Such matters were the subject of analysis and recommendations in the December 2021 report by the House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into Constitutional Reform and Referendums*. It is not clear why this Bill has not taken advantage of the recommendations of that process about

civics and education programs (recommendation 3) and the creation of an independent expert panel to advise on matters such as the provision of neutral information (recommendation 9).

Truth in political advertising

Truth is one of the first casualties in any referendum campaign. The low level of knowledge in the community of Australia's system of government and the Australian Constitution makes people highly susceptible to misinformation and misleading arguments. Referendums are often characterised by a heavy reliance on material that is demonstrably false. When citizens cannot tell fact from fiction, and the proponents spread falsehoods for political advantage, the referendum process can be undermined.

The ongoing inquiry by this committee into the 2022 federal election could provide insights for how this matter should be dealt with for referendums. The Referendum Machinery Act should include a narrowly drawn provision for truth in political advertising. It should only target the spread of information that can be proven to be false. No attempt should be made to regulate opinion or ideas in contested areas.

There is a well tested model for achieving this. South Australia has prohibited electoral advertisements setting out statements of fact that are 'inaccurate and misleading to a material extent' since 1985. A person can be fined \$5000 and corporations \$25,000 for doing so. The South Australian Electoral Commission can request the withdrawal of advertisements that breach this standard and the publication of a retraction to correct the public record. Violations can also be taken to court.

There is room for improvement in a national truth in political advertising law. Much damage, and political advantage, will occur before an advertisement is withdrawn. This may not be remedied by a public correction, and a small fine may be accommodated by political parties as a cost of campaigning. The Federal Parliament should account for this with greater penalties, including criminal sanctions in extreme cases of flouting the law. This will provide the law that Australia needs to take a stand against the deliberate spread of political lies.

Political finance

A positive feature of the Bill is how it builds in greater transparency and controls around the financing of the campaigns. The same principles that support regulation for Commonwealth elections apply to referendums. Hence, it is just as apposite for referendums to restrict the influence of foreign campaigners and foreign donations.

The Bill takes a cautious and conservative approach in adopting a like set of regulations as are set out for Commonwealth elections. One example is the inclusion of a disclosure threshold for donations, currently at \$15,200. Disclosure is welcome, but the threshold is too high and will mean that the origin of large sums of money remains secret. Just as the threshold should be lowered substantially for federal elections, so too should it be for referendums.

It is also unfortunate that the government is not proposing the real-time disclosure of donations. Instead, the community will have to wait nearly 6 months after the referendum to find out who has financed the yes and no campaigns. This again replicates a like flaw in the regulation of Commonwealth elections.

A failure of lawmaking

This Bill, in representing the best that can be achieved in the months leading up to the Voice referendum, is the culmination of a significant failure of policy and lawmaking. It has been clear not only for years, but indeed for decades, that the Referendum Machinery Act is not in a fit state to conduct a free and fair referendum. Key elements of the legislation had not been updated or amended for over a century.

The Act was in poor shape for the 1999 referendum, let alone for a referendum held nearly a quarter of a century later after the advent of a digital revolution in communications and campaigning techniques. This has been made clear by a range of inquiries and in the expert literature such as my co-authored book *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

This Bill is the continuation of a cycle of changes to the Referendum Machinery Act on the eve of the community voting in a referendum. The same piecemeal, temporary amendment of the legislation was adopted in 1999 and for the shelved 2013 local government referendum. This has occurred despite it being widely recognised that the worst time to debate the rules were holding a referendum is in the lead up to such a poll. It leaves every aspect of change open to question and exploitation on the basis that it might advantage one side or the other of the looming poll.

The perils of this were evident in 2013 when Parliament voted to hold a referendum on recognising local government in the Constitution. The idea emerged after many years of grassroots work and won bipartisan support. All this unravelled only a few weeks out from the poll when Parliament came to set belatedly the rules for the referendum. Disagreement over these rules, and how funding should be allocated to the yes and no cases, lead to loss of bipartisan support and threatened the proposal's chances of success. The referendum was dropped.

With an uncertain period now available until a referendum on the Voice, changes must be made to the Referendum Machinery Act but there is not enough time to prepare a modern and fair referendum process. The result will be that Australia will go to its first referendum in nearly a quarter of a century without the best legal foundation for holding the vote. The vote will be conducted according to an out-of-date Act jerry-rigged for the 2023 poll.

After the referendum, Australia will still be left with legislation not fit for purpose for the following referendum which, if the cycle is again followed, will be underpinned by legislation hastily cobbled together for that poll.

One important recommendation of this inquiry should be to conduct a further inquiry into the Referendum Machinery Act after the Voice referendum with a view to putting the Act in a fit state for a future referendum. This would be consistent with

the regular cycle of this Committee holding an inquiry into the prior federal election with a view to preparing the *Commonwealth Electoral Act 1918* for the next poll.

This would be consistent with recommendation 10 of the December 2021 report by the House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into Constitutional Reform and Referendums*:

The Committee recommends that the Australian Government ensure that the Referendum (Machinery Provisions) Act 1984 and the referendum process more generally is modernised well in advance of any referendum on the question of constitutional recognition of Indigenous Australians, which is expected to occur in the next term of Parliament, or any other future referendum.

Yours sincerely

Professor George Williams AO